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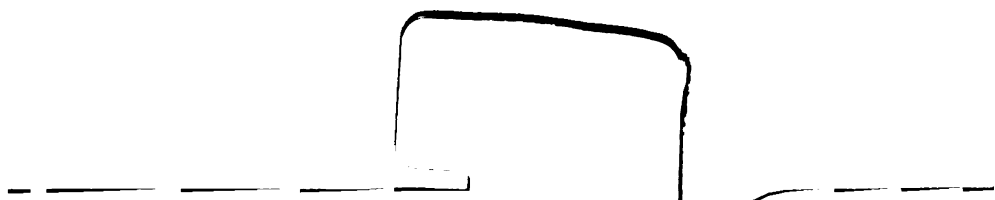
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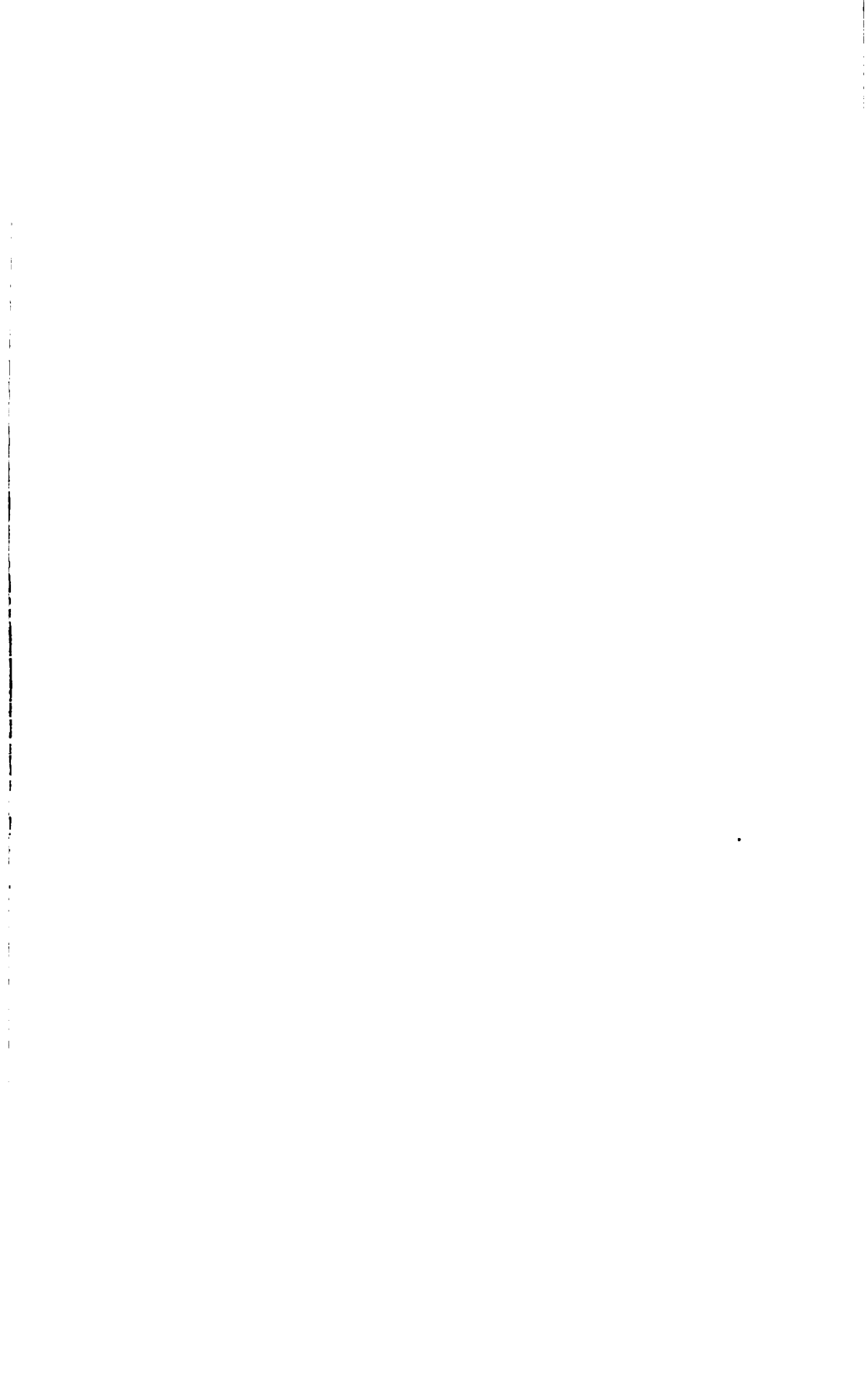
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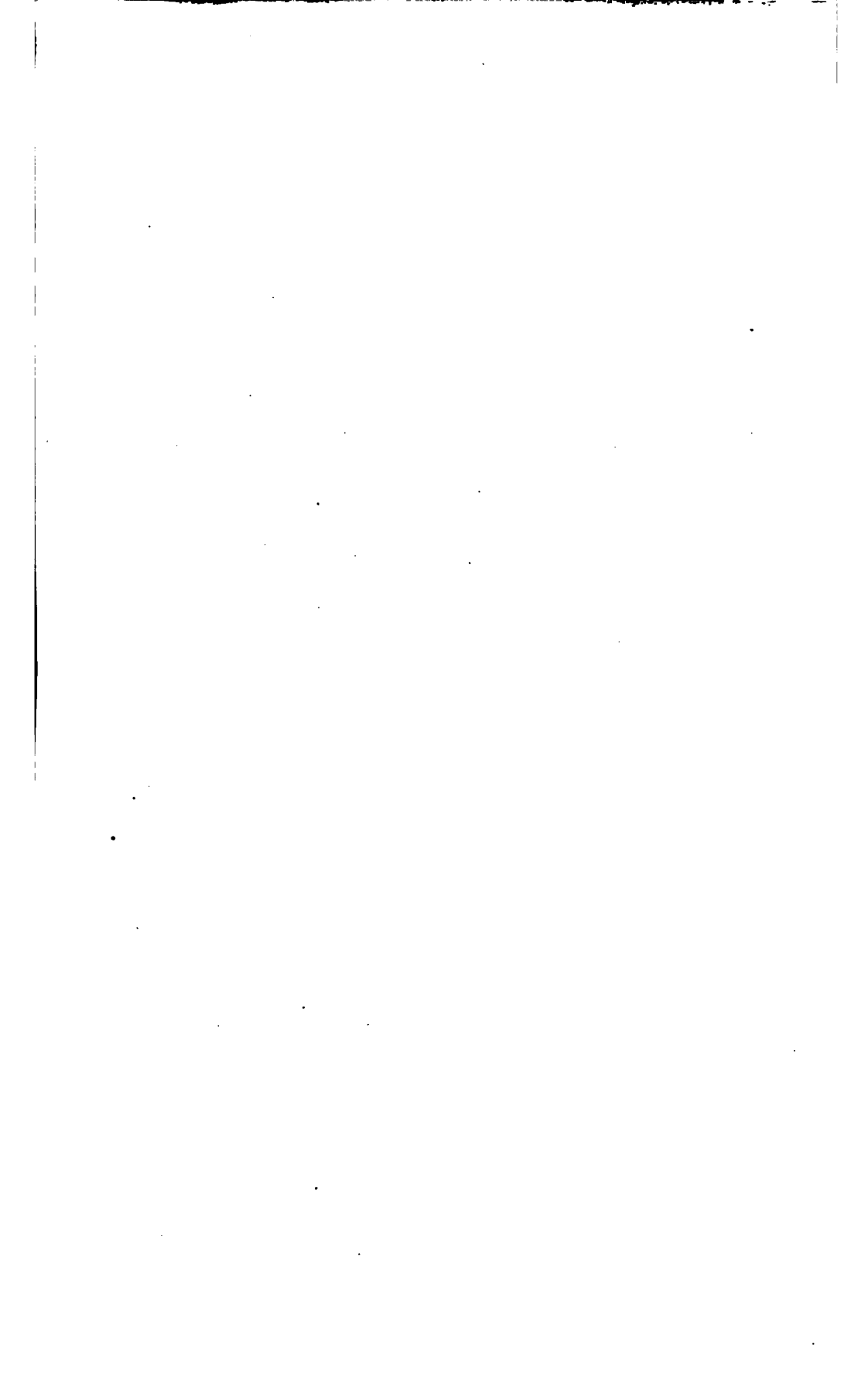
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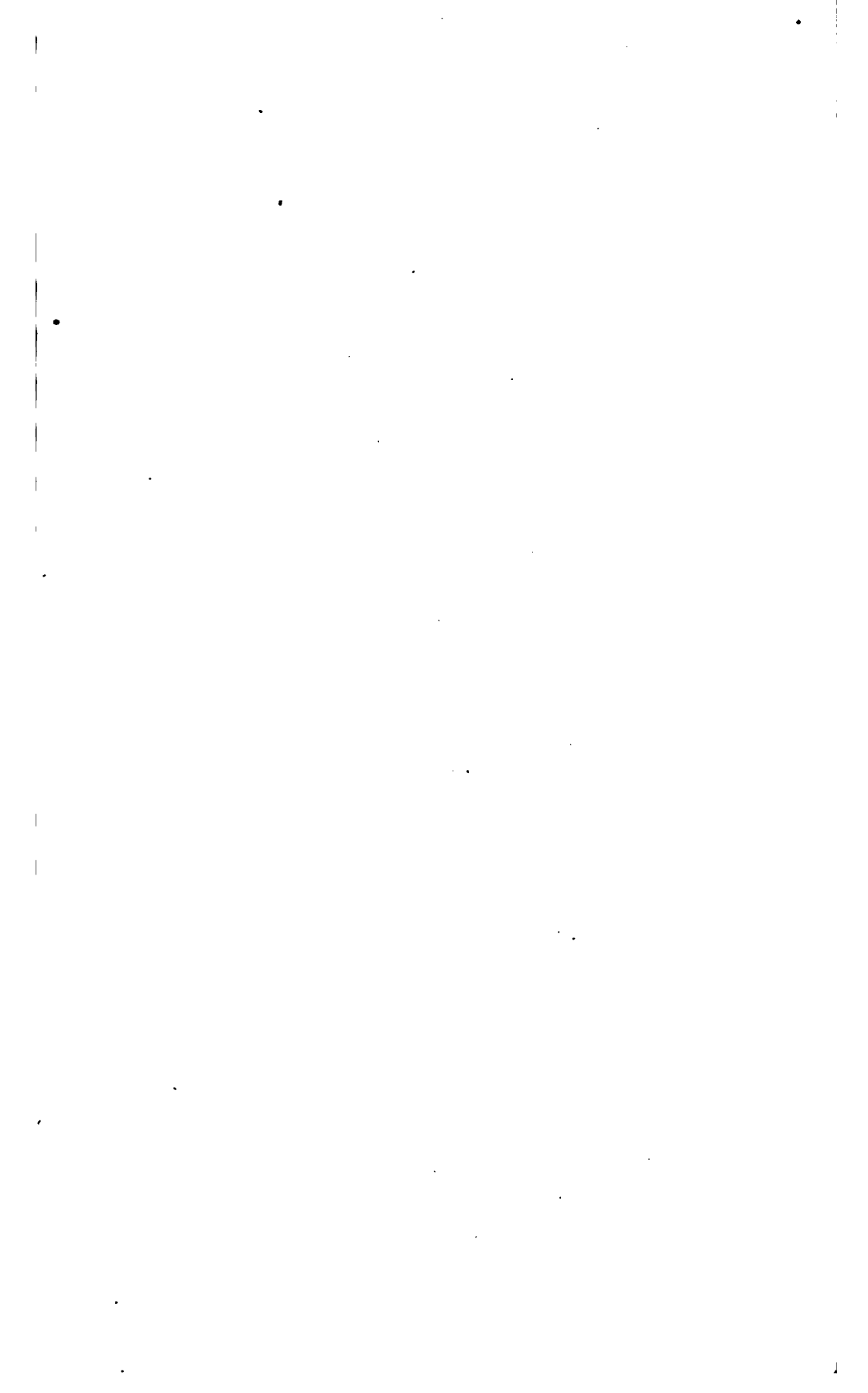
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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

IOWA SUPREME COURT.

W. B. QUARTON

v.

AMERICAN LAW BOOK COMPANY,
Appt.

(143 Iowa, 517, 121 N. W. 1009.)

Sale — instalments — rescission — rights.

1. A purchaser of a set of books to be delivered one at a time and paid for as delivered is estopped to insist on continued performance by the seller, where, after he has failed to pay for several books delivered, and has been notified that the contract has been rescinded, he pays no attention to demands for payment for the volumes received, and makes no demand for

future deliveries for more than two years, until the price of the books has been advanced; and it is immaterial that payment for the volumes received is subsequently paid by one to whom the contract had been assigned.

Same — specific performance — rights of assignee.

2. The assignee of a contract for the purchase of books will not be granted specific performance where they were to be delivered one at a time and paid for as delivered, and his assignor, after neglecting to pay for several volumes, was notified that the contract was rescinded, and took no steps to enforce performance of it for more than two years, until the price of the books had advanced.

(July 2, 1909.)

Note. — Rescission of sale for failure to pay for instalment as delivered.

- I. Introduction, 1.
- II. Breaches held to justify rescission, 2.
- III. Breaches held not to justify rescission, 9.

I. Introduction.

This note is, as its title indicates, limited to a discussion of the question of the right of the seller to rescind for buyer's refusal to pay instalment, and does not include cases on the right to rescind for any other breach. The word "rescind" is here used in the sense of abrogate, that is, the right to declare the contract at an end. Cases on the question of the effect of insolvency of a buyer on the right of the seller to rescind, such as *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531, and *Mess v. Duffus* [1901] 6 Com. Cas. 165, cited in 3 *Butterworths' Dig.* p. 341, or on the effect of waiver of right to insist on payment of instalments, like *Harris Lumber Co. v. Wheeler Lumber Co.* 88 Ark. 491, 115 S. W. 168; *Goff-Kirby Coal Co. v. Marine Coal Co.* 31 Pa. Super. Ct. 60; *Portland Ice Co. v. Connor*, 32 Pa. Super. Ct. 428, and *Gardner v. Clark*, 21 N. Y. 399, are excluded. Nor are cases included in which there is a special provision in the contract giving the right to re-

scind, such as *Winchell v. Scott*, 114 N. Y. 640, 21 N. E. 1065, and *Ebbw Vale Steel, Iron, & Coal Co. v. Blaina Iron & Tinplate Co.* [1901] 6 Com. Cas. 33, cited in 3 *Butterworths' Dig.* p. 325. For right to rescind generally, see note to *Lake Shore & M. S. R. Co. v. Richards*, 30 L.R.A. 33, on "Right to rescind or abandon contract because of other party's default."

The general rule in regard to the seller's right to abandon the contract in cases of this kind is, as stated in the opinion in *QUARTON v. AMERICAN LAW BOOK Co.*, that the seller cannot rescind unless the buyer's default is made under such circumstances as justifies an inference that he repudiates the entire contract.

When the seller has agreed to deliver goods sold in instalments, and the buyer has agreed to pay the price in instalments which are proportioned to and payable on the delivery of each instalment of goods, then the default by either party with reference to any one instalment will not ordinarily entitle the other party to abrogate the contract. *Empire Rubber Mfg. Co. v. Morris*, 77 N. J. L. 498, 72 Atl. 1009.

The conduct of the party in default must be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. *Gerli v. Poidebard Silk Mfg. Co.* 57 N. J. L. 432, 30 L.R.A.

APPEAL by defendant from a judgment of the District Court for Kossuth County in complainant's favor in a suit to compel specific performance of a contract for the sale of books and for damages caused by defendant's refusal to consider the contract in force. Reversed.

Statement by Deemer, J.:

Suit in equity for the specific performance of a contract for the sale of books and for damages due to delay in filling the order. The trial court granted the prayer for specific performance, and gave plaintiff judgment for the sum of \$50. Conditions were also made in the decree, which need not be noticed at this time. Defendant appeals.

61, 51 Am. St. Rep. 611, 31 Atl. 401; Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Hibernian Bkg. Asso. v. Eckhart & S. Mill. Co. 140 Ill. App. 479.

This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain. Blackburn v. Reilly, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27.

In *Peters Grocery Co. v. Collins Bag Co.* 142 N. C. 174, 55 S. E. 90, it is said that it seems to follow as a result of the decisions, that if the purchaser fails to pay for goods already delivered, and further evinces a purpose either not to pay for any future deliveries, or not to abide by the terms of the existing agreement, but to insist upon new or different terms, whether in respect to price, or to any other material stipulation, the vendor may rescind and maintain an action to recover for the goods delivered, and is consequently not liable in damages for any breach if he has otherwise performed his part of the contract.

What constitutes such a breach as will under the general rule indicate the buyer's intention to abandon, depends largely upon the facts in the individual cases. The decisions are not in harmony on the question whether mere failure to pay is enough, but if there is failure to pay when it is apparent that no general credit was intended, or if there is a refusal to pay, or if the buyer withholds payment and attempts to impose terms on the seller not found in the contract, it has usually been held that the seller may refuse to make further deliveries.

II. Breaches held to justify rescission.

Mere failure to pay.

While the general rule, so far as it has been stated, is, as before indicated, that the seller cannot rescind unless the buyer's default is made under such circumstances as to justify the inference that he repu-

Messrs. Harrington & Dickinson and E. V. Swetting, for appellant:

The assignment of the contract was subject to any defense or counterclaim which the defendant had against the assignor.

Steele v. Mills, 68 Iowa, 406, 27 N. W. 294; *Fred Miller Brewing Co. v. Hansen*, 104 Iowa, 307, 73 N. W. 827.

The defendant had a right to cancel the contract, when Clarke neglected and refused to pay the instalments due.

Hull Coal & Coke Co. v. Empire Coal & Coke Co. 51 C. C. A. 213, 113 Fed. 256; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666; *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *Johnson Forge Co. v. Leonard*, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305; *Town v. Jepson*, 133 Mich.

dictates the entire contract, in a considerable number of the cases nothing but mere failure to pay appears. These cases do not necessarily form an exception to the rule, but, in the absence of a declaration on the part of the courts that the general rule is repudiated, must be taken to fall within the rule, the failure to pay being deemed in itself a sufficient indication of the buyer's intention to repudiate; this class of cases differing from those in which it plainly appears from the facts, that the buyer's refusal to pay is not on the ground that he repudiates the contract.

Where the vendor in a contract for the delivery of a quantity of cotton in different lots had the right to draw on the buyer for the amount delivered, and the draft was not paid, it was held that the seller was not bound to make further delivery. *Branch v. Palmer*, 65 Ga. 210.

So, a refusal to pay for a delivery of coke as agreed was held sufficient cause for the vendor's cancellation of the contract as to future deliveries. *Hull Coal & Coke Co. v. Empire Coal & Coke Co.* 51 C. C. A. 213, 113 Fed. 256.

Failure to pay notes given for certain instalments of strawboard delivered, and failure to give other notes or acceptances for other board delivered, was held to give the seller the right to stop further deliveries. *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248.

Neglect of the buyer to furnish notes, as agreed, for certain instalments of iron delivered, was held to discharge the seller from his obligation to deliver the rest of the iron until the buyer should furnish the notes, and to entitle the seller to commence suit on the notes that were given, without tendering a delivery of the rest of the iron, although the time for the delivery of all was past before suit was brought. *Bailey v. Western Vermont R. Co.* 18 Barb. 112.

In *Stockdale v. Schuyler*, 55 Hun, 610, 29 N. Y. S. R. 380, 8 N. Y. Supp. 813, affirmed in 130 N. Y. 674, 29 N. E. 1034, it was held that the seller may rescind for refusal of the buyer to pay or give notes for past deliveries of lumber as agreed, and

673, 95 N. W. 742; 24 Am. & Eng. Enc. Law, 2d ed. p. 1124; Hale v. Trout, 35 Cal. 229; Kokomo Straw Board Co. v. Inman, 33 N. Y. S. R. 1008, 11 N. Y. Supp. 329, 134 N. Y. 92, 31 N. E. 248.

The purchaser of the books, by neglecting to act for over two years after the defendant notified him of its rescission of the contract, is estopped from trying to enforce the contract.

McDermid v. McGregor, 21 Minn. 111; McCabe v. Matthews, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190; Wolf v. Great Falls Water Power & Townsite Co. 15 Mont. 49, 38 Pac. 115; Harrigan v. Smith, 57 N. J. Eq. 635, 40 Atl. 13, 42 Atl. 579; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Thoenke v. Fiedler, 91 Wis.

386, 64 N. W. 1030; Hogan v. Kyle, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 399; Gish v. Jamison, 96 Va. 312, 31 S. E. 521; Simpson v. Atkinson, 39 Minn. 238, 39 N. W. 323; Giltner v. Rayl, 93 Iowa, 20, 61 N. W. 225.

Messrs. J. L. Bonar, for appellee, and W. B. Quarton, *in propria persona*:

The alleged breach for which the defendant claims the right to rescind the contract did not go to the whole consideration of the contract; the plaintiff's assignor having failed to pay for three volumes delivered, therefore the defendant company did not have the right or power to rescind the contract.

Myer v. Wheeler, 65 Iowa, 395, 21 N. W. 692; Hansen v. Consumers' Steam Heating

that he may demand money for goods sold and delivered.

Failure of a peach dealer to pay the weekly instalments for fruit delivered was held to give the grower a right to rescind, and the fact that the dealer, a day or two afterwards, was willing to pay, was held not to restore the contract. Reybold v. Voorhees, 30 Pa. 116. The court said that promptness was of essential importance in the execution of the contract for the sale and delivery of a ripening crop of peaches; and when the parties had contracted for times of delivery and payment, they were entitled to be tried by their contract. If the buyer did not pay according to contract, the seller was not bound to keep peaches for him at the risk of their rotting, nor to deliver them at the risk of not being paid, any more than the buyer would be bound to accept the delivery weekly instead of daily. Neither party had any time to be wasted by the unpunctuality of the other, and neither was required to endure the anxiety of having his summer success dependent upon the one who was not careful of his engagement.

On a contract for the sale of bricks, construed to call for payment by instalments on delivery, it was held that the seller had the right to demand payment for each delivery before he would deliver any more, and that he was not, under such circumstances, liable for not furnishing more. Miller v. Blessing, 41 Phila. Leg. Int. 253.

Failure to make payments for articles delivered, under a contract for the manufacture of the same, to be delivered in instalments when ordered, and to be paid for as delivered, entitles the manufacturer to declare the contract rescinded and to decline further deliveries under it. Ross-Meehan Foundry Co. v. Royer Wheel Co. 113 Tenn. 370, 68 L.R.A. 829, 83 S. W. 167, 3 A. & E. Ann. Cas. 898.

Upon a failure of the buyer to pay for a monthly instalment of castings as agreed, it was held that the seller might abandon his contract for future deliveries and sue for the value of the property already delivered. George H. Hess Co. v. Dawson, 149 32 L.R.A. (N.S.)

Ill. 138, 36 N. E. 557, affirming 51 Ill. App. 146.

In Beatty v. Howe Lumber Co. 77 Minn. 272, 79 N. W. 1013, in holding that the mere fact that the purchaser of logs to be paid for in instalments as delivered, failed to pay the first instalment, was not such a breach of the contract as to entitle the seller to recover anticipated profits on the unperformed part of the contract, the court said that it was doubtless true that a failure to pay the instalment due was a breach of the contract, and that the seller was not bound to wait for the buyer to make payment, but had the right to abandon the contract, or to continue and bring suits for the instalments due.

In Palm v. Ohio & M. R. Co. 18 Ill. 217, in holding that where the contract was to construct and deliver a number of locomotives to be paid for at specified prices, each upon delivery, the failure to pay for one of them was not such a breach as authorized the manufacturer to abandon the agreement and recover for loss of profits, in the absence of a stipulation providing for it, the court said that the contract provided for no other penalty or liability, and that the law imposed no other, except, perhaps, that the violation of the contract in failing to make the payment might justify the manufacturer in treating the contract as rescinded, and in suing for the amount due in an action for goods sold and delivered.

A purchaser of goods to be delivered in instalments and to be paid for as delivered cannot claim further deliveries under the contract without paying for the part which has been delivered, and therefore he cannot require the vendor to tender the balance, without paying for the part which he has received. Walton v. Black, 5 Houst. (Del.) 149.

A manufacturer of cement has the right to refuse further shipments where the buyer has failed to pay for instalments delivered as agreed, and the fact that the buyer offers to make new terms as to the payment for further deliveries is not material where the offer is made after the seller has exercised his option to rescind. Contractors' & B.

Co. 73 Iowa, 77, 34 N. W. 495; Osgood v. Bauder, 75 Iowa, 550, 1 L.R.A. 655, 37 N. W. 887.

The contract is not a divisible contract, and rescission will not be allowed unless the breach complained of goes to the whole of the consideration.

Myer v. Wheeler, 65 Iowa, 395, 21 N. W. 692.

Where performance is due in instalments, and default has been made in one instalment, so that a right of forfeiture has accrued to the other party, and the latter then accepts performance of the instalment in arrears, this will be deemed to be a waiver of that default, unless he then give notice that he does not thereby intend to waive his right to terminate the contract.

Supply Co. v. Alta Portland Cement Co. 26 Ohio C. C. 49. The court said that if the seller ready to perform is not released at his option from further performance upon failure of the buyer to make his payments as agreed, an equal injustice will be done the former and an unexpected hardship visited upon him without any fault whatever upon his part. The seller had stipulated for payments within ten days of each delivery. It was not bound by any contract duty to extend a further time of credit and assume the risks incident thereto. It had the right to rely upon prompt payment of the instalments to supply the necessary funds to maintain its manufacture. Having thus arranged for its funds, it was not bound to look elsewhere for its supply.

It would seem that where one contracts to furnish woodwork for a number of houses, payments to be made in instalments on the delivery of the material at the buildings, he may, upon the neglect of the buyer to pay, refuse to deliver any more. Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516.

A buyer cannot recover damages occasioned by the seller's refusal to deliver barley contracted for, where he has failed to pay for an instalment delivered, as required by contract. Metz v. Albrecht, 52 Ill. 491.

Upon a lumber contract, the buyer, who has failed to advance the amount agreed for logs delivered, cannot recover damages for the nondelivery of logs the seller thereafter withholds. Chapman v. Dease, 34 Mich. 375.

So, in an action to recover for certain car loads of lumber delivered which were to have been paid for on delivery, it was held that the buyer could not recoup damages for failure of the seller to deliver the remaining instalments. W. K. Henderson Lumber Co. v. Stilwell & Co. 130 Mich. 124, 89 N. W. 718.

And where the buyer has failed to pay for an instalment of coal thirty days after delivery, as he agreed, he cannot, in an action by the seller to recover for the coal 32 L.R.A. (N.S.)

2 Mechem, Sales, §§ 909, 1080; Titus v. Glens Falls Ins. Co. 81 N. Y. 410; People v. Manhattan Co. 9 Wend. 381.

A mere default in payment of an instalment does not operate as a discharge of the adverse party or give him a right to rescind.

Osgood v. Bauder, 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887; 3 Page, Contr. § 1490; Dibol v. Minott, 9 Iowa, 403; Burge v. Cedar Rapids & M. River R. Co. 32 Iowa, 101.

The defendant cannot treat the contract as in full force and effect as to the plaintiff, by demanding payment thereunder for the books, and at the same time insist that the contract is not binding upon itself be-

delivered, lay claim to damages for the non-delivery of the remaining instalments. Bright v. Dean, 2 N. Y. City Ct. Rep. 433, affirmed in 18 N. Y. S. R. 1019, 2 N. Y. Supp. 658.

And on a contract providing for payment to be made thirty days from each delivery of cloth sold, failure to ship the balance was held not a defense to an action to recover for goods delivered but not paid for as agreed, since failure to pay gave the right to the seller to bring the contract to an end. Granite Mills v. Keystone Oil Cloth Co. 15 Montg. Co. L. Rep. 36.

Where the agreement was to deliver ice during a considerable period by instalments as required, with no limit as to quantity, prices designated to be payable monthly, it was held that time was of the essence of the contract, and that failure to pay gave the seller the right to rescind. Savannah Ice Delivery Co. v. American Refrigerator Transit Co. 110 Ga. 142, 35 S. E. 280.

Under a contract for the sale of at least 200,000 bushels of shells to be delivered daily during a period of eight months, payment for each week's delivery to be made on the first day of the next week, failure of the buyer to pay was held to give the seller the right to put an end to the contract, since the weekly payments were of the essence of the agreement. McGrath v. Gegner, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

Unjustifiable failure.

In Union Pressed Brick Co. v. Fultonham Brick & Drain Tile Co. 50 C. C. A. 615, 112 Fed. 920, it was said that unjustifiable failure of the buyer to pay, as agreed, for instalments of brick delivered, would absolve the manufacturer from proceeding with the contract.

In United States use of Hudson River Stone Supply Co. v. Molloy, 62 C. C. A. 585, 127 Fed. 953, wrongful failure of the buyer to pay for instalments of stone delivered was held to discharge the seller from further performance.

cause of the forfeiture, or because of the failure to pay.

3 Page, Contr. § 1494; *Hollis v. State Ins. Co.* 65 Iowa, 454, 21 N. W. 774; *Keenan v. Missouri State Mut. Ins. Co.* 12 Iowa, 126; *Mershon v. National Ins. Co.* 34 Iowa, 87; *Corson v. Anchor Mut. F. Ins. Co.* 113 Iowa, 641, 85 N. W. 806; *Wilkinson v. Blount Mfg. Co.* 169 Mass. 374, 47 N. E. 1020; *Kidder v. Knights Templars' & M. Life Indemnity Co.* 94 Wis. 538, 69 N. W. 367; *Bloom v. State Ins. Co.* 94 Iowa, 364, 62 N. W. 810.

Mere silence does not constitute a waiver.

Mechem, Sales, § 1072; *Collins v. Canty*, 6 Cush. 415; *Kimball v. Rowland*, 6 Gray, 224; *Tuttle v. Bean*, 13 Met. 275; *Mille v. Prescott*, 163 Mass. 12, 47 Am. St. Rep.

Intentional failure to pay for an instalment of lumber prevents the buyer from standing on the contract and insisting on further shipment. *Harris Lumber Co. v. Wheeler Lumber Co.* 88 Ark. 491, 115 S. W. 168.

A clear intention on the part of the buyers to violate a custom as to payment of instalments of freight as delivered, which formed a part of the contract, was held to authorize the sellers to treat the contract as broken and rescinded. *Minaker v. California Canneries Co.* 138 Cal. 239, 71 Pac. 110.

Refusal to accept and pay for an instalment of apples as agreed was held to be such a breach of the contract by the buyer as precluded him from recovering damages because of the refusal of the seller to make any further deliveries. *Wood, C. & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51.

Where the contract was to sell timber at so much per thousand, and to deliver at the buyer's mill in instalments to be paid for weekly, and the buyer failed to pay as agreed, and the seller stopped delivering after being unable to collect overdue payments, it was held that the buyer could not recover damages for the seller's refusal further to perform, since under Civil Code, § 1913, a party cannot claim damages for the nonperformance of the contract as to which he himself is in default. *Sitman v. Lindsey*, 123 La. 53, 48 So. 646.

Failure to pay bills for instalments of goods delivered, until long after the maturity therefor, although frequently pressed by the seller, was held to prevent the buyer from maintaining an action for damages resulting from the seller's rescinding of the contract. *Ohio Valley Buggy Co. v. Anderson Forging Co.* 168 Ind. 593, 81 N. E. 574, 11 A. & E. Ann. Cas. 1045.

Failure of the buyers of clothing clip-pings to be delivered weekly and payment to be made in semi-monthly instalments, to pay after demand for a lot delivered, was held to release the sellers from liability for not making further deliveries. *Liebel v. Light*, 30 Misc. 434, 62 N. Y. Supp. 535.

And the withholding of payment for an

434, 39 N. E. 409; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L.R.A. 317; *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 272, 30 N. E. 918.

Deemer, J., delivered the opinion of the court:

On or about March 17, 1901, one George E. Clarke entered into a written contract with the defendant, a law publishing house, which contract reads as follows:

Algona, Iowa, 3—17—1901.

The American Law Book Company,
120 Broadway, New York.

Please send me C. O. D., carriage paid, as published, the *Cyclopedia of Law and Procedure*, in (law sheep) binding, for

instalment after repeated demands for it is such an indication of the buyer's intention not to be bound by the contract as to warrant the seller in refusing further delivery. *Genesee Fruit Co. v. Barrett*, 67 Ill. App. 673.

Refusal to pay.

Refusal of the purchaser to pay for lumber on delivery, as agreed, was held to excuse the vendor from further delivery. *Bradley v. King*, 44 Ill. 339.

And where the purchaser refused to pay for an instalment of hay delivered, and the seller sued therefor, it was held that the buyer could not set up in defense of the action the seller's refusal to deliver the residue. *Southwestern Stage Co. v. Peck*, 17 Kan. 271.

A contract of sale of a quantity of timber at so much per foot, to be delivered in instalments, payment cash on handling specifications, was held broken by the buyer's failure to pay the full amount due for deliveries made, so as to entitle the seller to refuse further deliveries. *Stokes v. Baars*, 18 Fla. 656. The court said that all the cases hold that a refusal to pay for the part delivered, as required by the terms of the contract, is an abandonment on the part of the party refusing to pay, and is such an absolute unqualified refusal to perform that the seller may also treat the contract as rescinded, and consider himself as under no obligation to perform further.

Where the purchaser agreed that when the seller should deliver a car of corn on the tracks at a certain place, and the proper certificates of weights and grade were obtained and presented with a bill of lading, it would receive the car and pay for the same on demand, it was held that refusal to accept the car when tendered, and pay on that day a draft for the value of corn, was such a violation of the contract as to relieve the seller from further obligations under it, and to prevent an action by the buyer for damages for nondelivery. *Bennett v. Taylor*, 72 Kan. 598, 84 Pac. 533.

which I agree to pay you \$6 per volume upon delivery. The publishers guarantee to complete said work in not to exceed thirty-two Royal Octavo volumes, or to furnish free of charge any volumes in excess of that number necessary to complete the same. The publishers further agree to publish annual annotations to said work, which will keep the same up with the current decisions of the courts of last resort, and to furnish the said annotations to subscribers at the annual rate of twenty cents for each published volume of the *Cyclopedia of Law and Procedure*, and subscriber agrees to take said annotations at said price. All representations by agents, to be binding, must be written on the face of the contract. Subscribers may have

either binding mentioned above. Erase the one not desired.

[Signed] Geo. E. Clarke,
Agent, J. A. Yeager.

Shortly thereafter the first volume of the work was published, and, pursuant to order, delivered to the purchaser, who paid for the same upon delivery. In the same year another volume was issued and delivered to Clarke, and in the year 1902 volumes 3 and 4 were issued and delivered. Payments were not made for these last three volumes, and defendant about July 18, 1902, wrote Clarke asking him to remit therefor, and advising him that from four to six volumes would be published each year. Hearing nothing from Clarke, de-

And where, upon the refusal of the buyer to pay for articles delivered, the seller refused to furnish any more, and no offer to pay was afterwards made by the buyer, it was held that the seller was not in default. *Landeche v. Sarpy*, 37 La. Ann. 835.

And where the buyer refused to pay for a car load of canned tomatoes, on the ground that the goods received were of inferior quality, it was held that the seller could rescind, and that in an action by him to recover the price of goods delivered the buyer was held not entitled to recoup damages for failure of the seller to make further deliveries. *Webster v. Moore*, 108 Md. 572, 71 Atl. 466.

Likewise where goods sold were to be delivered in two lots, the first to be paid for at a specified time, and the vendee insisted that no payment would be made at that time, and retained the goods, it was held that the vendor was absolved from the duty as to further performance. *Soltau v. Good-year Vulcanite Co.* 12 Misc. 131, 33 N. Y. Supp. 77.

Refusal to accept or pay as agreed for any steel ingots delivered was held to give the seller a right of action for resulting loss, without continuing future deliveries. *Pittsburg Steel Foundry v. Pittsburg Steel Co.* 223 Pa. 430, 72 Atl. 813.

So, where no time was specified for making payments, the law therefore implying a contract to pay for goods upon delivery, it was held that if the buyers refused to pay for an instalment of coal delivered upon demand by the seller, the latter, not being in default first, was authorized to treat the contract as abandoned and recover for the amount delivered. *Dwyer v. Duquid*, 70 Ill. 307.

Refusal to pay for an instalment of lumber as agreed justifies the seller in refusing to deliver further instalments, although there had been a waiver as to payment of previous instalments. *Demarest v. Duntun Lumber Co.* 151 Fed. 508.

Nonpayment and other acts in general.

Where, besides the refusal to pay for an 32 L.R.A. (N.S.)

instalment of manufactured goods, there is a flat denial of indebtedness, the buying of similar goods to cover the deliveries not yet demandable, and the charging of the seller with the difference between the price paid and the contract price, the buyer thereby evinces such an intention not to be bound by the terms of the contract as will justify the seller in rescinding. *Scully Steel & I. Co. v. Old Meadow Rolling-Mill Co.* 47 C. C. A. 646, 108 Fed. 732.

The returning, without acceptance, of a draft for an instalment, amounting to one third of the whole order, with no information as to the buyer's whereabouts, payment being made a condition of the transfer of the property, was held to be sufficient evidence of the buyer's intention to repudiate the contract, and to justify the seller in refusing further deliveries. *Town v. Jepson*, 133 Mich. 673, 95 N. W. 742.

Where in a mercantile contract to sell and deliver goods covering a period of a year, the time of payment of the instalments was strongly insisted upon, the continued failure of the buyer to pay for instalments delivered, under circumstances from which the seller might reasonably conclude that the failure to pay was chronic and would continue to be so, was held to be such a material breach of the contract as would justify the seller in refusing further deliveries. *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419.

Under an agreement to furnish curbing, for which payments were to be made monthly, or as often as estimates were made for the curb delivered, it was held that failure to pay as agreed would give the seller the right of refusing further deliveries, upon a specific demand for payment and an indication of the purpose to insist upon payment as a condition of further delivery. *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 322.

Where the buyer's refusal to pay for a delivery of lumber was put on the ground that there had been a failure to deliver a portion of the lumber paid for on previous deliveries, it was held that the seller was justified in treating this as a general re-

defendant again wrote him about February 11, 1903, saying that if he could not pay for volume 2 they would accept his note for thirty days for the amount, and they inclosed note for him to sign. No response was received to this, and again on March 16, 1903, defendant wrote, saying that Mr. Clarke was owing \$18 for volumes 2, 3, and 4, calling his attention to some promises he had made their representative, stating that they had paid a large advance commission on his order, and had themselves to that date received nothing. Receiving no response to this or to former letters, defendant on November 11, 1904, again wrote Clarke, stating that as they had had no responses to their former letters, and as he had failed to meet his pay-

ments as provided in his contract, they, from that date, considered his contract null and void. On the same day they wrote upon the face of the contract in red ink, "Canceled November 11, 1904," and made the same notation upon their subscription registers after Clarke's name. Nothing was ever heard from Clarke in response to any of these demands, notifications, or requests.

In the later part of the year 1904, defendant enlarged the number of volumes which it proposed to issue from 32 to 36, and in January of the year 1906 again raised the number from 36 to 40 and advanced the price from \$6 to \$6.50 per volume, and on June 1, 1907, it increased the price from \$6.50 to \$7 per volume. About

fusal to carry out the contract on the part of the buyer, entitling the seller to rescind and stop further deliveries. *Strother v. McMullen Lumber Co.* 200 Mo. 647, 98 S. W. 34.

Where the contract for the sale of lumber called for delivery at one place, and the buyers insisted that it called for delivery at another, and stated that when such lumber was delivered at the latter place it would be paid for, this was held to be a sufficient declaration that the buyers declined to carry out the contract, and to warrant the seller in stopping further deliveries. *Murphy v. Sagola Lumber Co.* 125 Wis. 363, 103 N. W. 1113.

And where there had been a dispute over the terms of the contract for the sale and delivery of iron, and the buyer refused to pay the full contract price for instalments delivered, and stated that there would be no more remittances until the seller would come to some sort of an agreement, it was held that this was such a repudiation of the contract as to release the seller from tendering further deliveries. *Nichols v. Scranton Steel Co.* 137 N. Y. 471, 33 N. E. 661.

A letter by a purchaser of scrap iron to be paid for as each 100 tons were delivered, stating that he would not remit until he had enough of the balance of the contract in his hands to know that he would receive the amount purchased, and that as soon as he had two or three cars above the 100 tons he would remit, was held to show an intention to repudiate on the part of the buyer, justifying the seller in rescinding the contract. The question whether such intent was shown was held for the court. *Johnson Forge Co. v. Leonard*, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305.

A vendee of castings to be paid for by instalments on delivery, by giving the vendors to understand that they would have to wait for their money until the end, confers upon the latter the right to cease deliveries. *State, Skillman Hardware Mfg. Co., Prosecutor, v. Davis*, 53 N. J. L. 144, 20 Atl. 1080.
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In *Bloomer v. Bernstein*, L. R. 9 C. P. 588, 43 L. J. C. P. N. S. 375, 31 L. T. N. S. 306, 23 Week. Rep. 238, where the buyer failed to take up a bill of lading for an instalment of iron rails delivered, the jury having found that the buyer had thereby intended to abandon the contract, and had led the seller to believe that he had abandoned the contract, the court held that such findings were conclusive of the seller's right to put an end to the contract.

Where percentage payments on a contract to deliver coal to a city were paid on monthly estimates of the amount delivered, it was held that the failure to pay for monthly deliveries as agreed, because of delayed estimates, was such a breach of the contract as entitled the dealer to put an end to it. *Price v. New York*, 104 App. Div. 198, 93 N. Y. Supp. 967.

In *Baltimore v. Schaub Bros.* 96 Md. 534, 54 Atl. 106, coal dealers agreed to supply departments of the city government with coal to be delivered at certain times and in a certain manner, payments on deliveries to be made monthly. It was held that failure of the city to pay on demand the amount due for deliveries gave the dealers the right to stop further delivery, although the contract called for coal of a certain standard and the city had not paid because its chemist had not prepared his analysis.

Imposition of new conditions.

In *Withers v. Reynolds*, 2 Barn. & Ad. 882, 1 L. J. K. B. N. S. 30, under a contract to supply straw, the buyer to pay for it on delivery, refusal to pay for the last delivery on the ground that the buyer intended always to keep one load on hand, was held to release the seller from supplying any further straw under the contract, this declaration of the buyer being considered to be equivalent to saying, "I will not pay for the goods on delivery."

Where the buyer withholds payments for instalments of goods delivered, in order to protect himself from anticipated breaches of the contract by the seller, the latter may refuse further deliveries. *National Con-*

January 1, 1907, Clarke orally assigned his contract to the plaintiff herein. Some time in December of the year 1906, defendant placed its claim for the \$18 against Clarke in the hands of a mercantile agency for collection, and a local attorney for said agency at Algona, Iowa, presented the same to Clarke. We now quote from the agreed statement of facts upon which the case was tried, as follows: That said Swetting [the local attorney] made demand upon Geo. E. Clarke for the payment of said \$18 on account of volumes 2, 3, and 4 of Cyc., and on or about January 5, 1907, the plaintiff herein paid said bill to E. V. Swetting, and took a receipt therefor, showing the payment by Geo. E. Clarke of volumes 2, 3, and 4 of Cyc., and the

plaintiff herein, at the time of paying the \$18 to the said E. V. Swetting, demanded of the said E. V. Swetting that he furnish the balance of the volumes of the Cyc. then published, and offered to pay therefor in cash under the terms of the Clarke contract. That the said E. V. Swetting conveyed said request and demand to Wilber Mercantile Agency, and said Wilber Mercantile Agency conveyed said demand and request to the defendant herein, and the defendant refused to furnish any additional volumes to the plaintiff herein, or to Geo. E. Clarke under said contract with the said Geo. E. Clarke entered into in 1901. That on January 5, 1907, W. B. Quarton, for himself and Geo. E. Clarke, paid to E. V. Swetting for and

tracting Co. v. Vulcanite Portland Cement Co. 192 Mass. 247, 78 N. E. 414.

Refusal to pay for an instalment of scrap iron until the buyer should receive enough of the balance of the contract to know that he would get the amount purchased was held, as a matter of law, to relieve the seller from any further duty to deliver. *Leonard v. Johnson Forge Co.* 3 Penn. (Del.) 104, 50 Atl. 541.

Rescission of a contract for the sale of coal was held justified where the seller was not in default, and the buyer would not pay for certain monthly instalments delivered until more coal was sent. *W. H. Purcell Co. v. Sage*, 200 Ill. 342, 65 N. E. 723, affirming 90 Ill. App. 160.

Refusal of the buyer to pay the amount due for cement, because he wanted to cover loss due to alleged delay in sending instalments, was held to give the seller a right to stop deliveries. *Burt v. Garden City Sand Co.* 237 Ill. 473, 86 N. E. 1055.

A refusal of the buyer to settle for instalments of iron because he wanted a settlement of some other alleged claim justifies the seller in abandoning the contract and suing for the iron delivered under it. *Patton v. Iroquois Furnace Co.* 124 Ill. App. 1.

Upon the refusal of the buyer to pay, as agreed, drafts of the seller upon delivery of instalments of flour, until the seller would make good any claims of the buyer on account of the quality of the flour delivered, it was held that the seller had the right to rescind, this being a notice of the buyer's intention not to perform. *King v. Faist*, 181 Mass. 449, 37 N. E. 456.

In *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409, it is intimated that if a contract calls for the payment of instalments on delivery, refusal of the buyer to pay unless he can have a credit of sixty days would justify the seller in refusing to continue shipments.

In *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320, it was said that if a contract required payment on delivery for corn sold, and the buyer refused to pay an instalment due, because he wanted to see whether the seller had shipped or would ship all the corn, the 32 L.R.A. (N.S.)

latter was thereby authorized to rescind at his option.

So, where there was more than one contract for the sale of yarn to be paid for in cash upon delivery by instalments, and deliveries under the second contract were to commence when the quantity required by the first had been shipped, it was held that the refusal of the buyer to pay for an instalment delivered under the first contract, unless the seller would give security for the entire fulfilment of the contract, was sufficient to justify the seller in treating the contract as at an end. *Stephenson v. Cady*, 117 Mass. 6. The court said it was a refusal to execute a substantial part of the agreement; an attempt, by holding on to the property without payment, to impose an onerous condition not contemplated by the original contract, and to which the seller was not required to submit so long as he was without default. It was something more than a refusal to pay for a single delivery; it was broad enough to be treated as a general refusal to make any further payments. It was prospective in its character, and was made with notice that such refusal would be regarded as releasing the seller from all obligation to fulfil. Conduct less decisive has been held to justify nonperformance by the other party to the contract.

Insignificance of breach.

The fact that a buyer withholds only \$7.94 of a bill of about \$500 is a sufficiently material breach of the contract to justify the seller in refusing further delivery, since it is not a question of amount, but of the breach of the contract. *Genesee Fruit Co. v. Barrett*, 67 Ill. App. 673.

Failure of the buyer to pay an instalment of \$90 for goods delivered, on a contract of over \$12,000, was held to be a breach important enough to warrant the seller in rescinding, although there was no repudiation of the contract by the buyer, where the circumstances were such that the seller had the right to be sensitive at any appearance of uncertainty as to the stipulated pay-

on behalf of the defendant \$18 for volumes 2, 3, and 4 of said *Cyclopedia of Law and Procedure*. Defendant at all times refused to deal with plaintiff as an assignee of the contract, claiming that it had been canceled and annulled, and that in no event was it assignable by Clarke to any other person. This action was commenced December 5, 1907, and upon trial plaintiff was granted the relief prayed. For a reversal appellant contends: That the contract was not assignable; that it was canceled and forfeited before the attempted assignment was made; that Clarke, the assignor, by reason of his conduct after notification from defendants of the cancellation of the contract, is barred and estopped from enforcing the said contract; and that plaintiff

is not entitled to damages for defendant's failure to deliver subsequent volumes.

Upon some of these propositions there is a decided conflict in the authorities. We shall assume that under our statute (Code, § 3044) the contract in suit was assignable; but the assignee of such contract has no greater rights under the assignment than his assignor would have had, had he brought the action in his own name and right. *Steele v. Mills*, 68 Iowa, 408, 27 N. W. 294; *Fred Miller Brewing Co. v. Hansen*, 104 Iowa, 307, 73 N. W. 827. What, then, would have been the situation of Clarke had he attempted to enforce the contract in view of the facts above recited? Plaintiff claims: That the contract was never forfeited; that it could not have been for-

meants being made. *National Mach. & Tool Co. v. Standard Shoe Machinery Co.* 181 Mass. 275, 63 N. E. 900.

But on this point see *Taussig v. Southern Mill & Land Co.* 124 Mo. App. 209, 101 S. W. 602, *infra*, III.

III. Breaches held not to justify rescission.

In *Freeth v. Burr*, L. R. 9 C. P. 208, 43 L. J. C. P. N. S. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370, the buyers' refusal to pay as agreed for the first instalment of iron received, claiming a right to withhold to cover loss due to delay in delivery, was held not to be such a refusal on their part to comply with the contract as to set the seller free.

And the postponement of payment for an instalment of steel under the erroneous advice of counsel that it could not then be made with safety as the seller was in process of liquidation was held not to show an intention to abandon the contract sufficient to relieve the seller from further deliveries. *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, 23 Eng. Rul. Cas. 516.

In *Monarch Cycle Mfg. Co. v. Royer Wheel Co.* 44 C. C. A. 523, 105 Fed. 324, it was held that mere failure to pay for a number of bicycles delivered under a contract of sale for a large number thereof, payments to be made within a certain time from each delivery, would not necessarily amount to a renunciation of the agreement which would absolve the seller from the obligation of the contract.

Failure to pay for coal delivered under a contract by which the purchaser was to take the entire output of the seller's mine, and pay for each month's shipment on the tenth of the following month, was held not to be such a breach of the contract as relieved the seller from further performance, since this did not go to the entire consideration. *Tuttle-Chapman Coal Co. v. Coaldale Fuel Co.* 136 Iowa, 382, 113 N. W. 827.

And a vendor was held not released from

his obligation to make further deliveries of brick, by reason of the buyer's refusal to pay as agreed for instalments already received, on the ground of the inferior quality of the brick. *Iowa Brick Mfg. Co. v. Herrick*, 126 Iowa, 721, 102 N. W. 787.

Where the seller undertook to deliver as much coal as the buyer might require in his business during a certain time, the coal to be delivered from time to time as would be required, the buyer to pay a stipulated price per ton on the tenth of each month, it was held that the failure or refusal of the buyer to pay at the time stipulated for the coal which had been delivered did not authorize the seller to terminate the contract, as the breach did not go to the whole consideration. *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77, 34 N. W. 495.

The refusal of a purchaser of wood to keep his agreement to pay for each shipment as received, and his declaration that he would not pay for a shipment until the next shipment was received, while he insisted on a complete delivery of the wood, was held not to constitute such an abandonment of the contract on his part as would justify the seller in refusing further shipments. *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69.

In *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692, it was held that the buyer did not, by refusing to pay for a car load of barley as agreed, rescind the contract so as to relieve the seller from delivering the remaining instalments, where the buyer expressed a willingness to pay for the rest of the barley when delivered, and did not absolutely refuse to pay for the car load delivered, but claimed the right to retain the price until the other deliveries should be made, as security for the performance by the seller; the court saying that the rule established by the decided weight of authority, both in England and in this country, being that rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole consideration.

And it was held that a dispute over the terms of a contract and a refusal to perform in a particular manner, or in some

feited, although Clarke had failed, neglected, and refused to pay for the books already delivered to him; that, in receiving pay for the books already delivered, the contract was restored; and that, after such restoration, Clarke might have enforced the same by a suit either at law or in equity. The exact point here is that, where there is a contract for the sale of goods to be delivered in instalments which are to be separately paid, and the buyer neglects or refuses to pay for one or more instalments, there is no such renunciation or repudiation of the whole contract as justifies the seller in canceling or avoiding it. Upon this proposition the English decisions are in conflict, and the courts of our own country are not agreed. See *Withers v. Reynolds*, 2 Barn. & Ad. 882, 1 L. J. K. B. N. S. 30; *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73, 8 Week. Rep. 80; *Honck v. Muller*, L. R. 7 Q. B. Div. 92, 50 L. J. Q. B. N. S. 529, 45 L. T. N. S. 202, 29 Week. Rep. 830. *Contra*: *Jonassohn v. Young*, 4 Best & S. 296, 32 L. J. Q. B. N. S. 385, 11 Week. Rep. 962; *Simpson v. Crippin*, L. R. 8 Q. B. 14, 42 L. J. Q. B. N. S. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141. Also *Norington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Rugg v. Moore*, 110 Pa. 236, 1 Atl.

320; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Providence Coal Co. v. Cox Bros.* 19 R. I. 380, 35 Atl. 210. Opposed: *Bollman v. Burt*, 61 Md. 415; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27; *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69. See also a valuable review of the subject in *Williston on Sales*, § 467. Our own cases seem to hold that a failure to pay an instalment or instalments does not give the seller the right to treat the whole contract as repudiated. *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77, 34 N. W. 495.

In view of the full discussion contained in the authorities cited, it is useless to review all of them; for, after a careful examination of the different opinions, we are constrained to hold that the following section of what is known as the "sales act" adopted by Great Britain in the year 1893 (Stat. 56 & 57, Vict. chap. 71, § 31), and by several states of our own country since, announces the true weight of American authority. It depends in each case on the terms of the contract whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not a right to treat the

special feature, as where upon a delivery of an instalment of cotton sold the buyer declined to honor future drafts unless accompanied by an insurance certificate for each shipment, would not show an abandonment of the contract by the buyer so as to justify refusal of the seller to deliver the remainder of the cotton under the contract, where the buyer, upon receipt of the seller's letter requesting cancellation of the order, refused to cancel and withdraw request as to insurance. *Steinlein v. S. Blaisdell Jr. Co.* — Tex Civ. App. —, 44 S. W. 200.

The failure of a buyer of lumber to pay instalments promptly under a contract by which a certain amount was to be delivered each week, each shipment to be paid for a certain number of days from the date of invoice, was held not to release the seller from his obligation as to future deliveries, there being nothing to indicate that the buyer intended to abandon the contract, or to authorize the seller to act upon such belief. *Welsh v. Michigan Maple Co.* 161 Mich. 16, 125 N. W. 692.

Refusal to pay for timber delivered, by reason of a misconstruction of a contract, was held not to discharge the seller from his promise as to further delivery, where the buyers did not deny their liability or affirm their purpose not to pay promptly and fulfill to the letter their agreement as to the second delivery. *Winchester v. Newton*, 2 Allen, 492.

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Default in payment of instalments due for ore delivered will not release a mine owner from his obligation as to future deliveries, and from the consequences he has agreed shall follow upon his failure to do so, where the default is due to mistake, and therefore does not show a purpose to abandon. *Trotter v. Heckacher*, 40 N. J. Eq. 612, 4 Atl. 83.

Refusal of the buyers to honor a draft for an instalment of iron delivered, under a mistaken belief that a portion of the iron charged had not been received by them, was held not to be such an absolute refusal to carry out the contract on the part of the buyers as to justify the seller in stopping further deliveries. *Midland R. Co. v. Ontario Rolling Mills Co.* 10 Ont. App. Rep. 677.

Where there was a shortage of weight of some of the portions of barley delivered, and the buyer refused to pay for any more unless a reduction was allowed for the price of the deficiency, it was held by the majority of the court that this did not, as a matter of law, amount to such conduct on the part of the buyer as authorized the seller to rescind. *Corcoran v. Proser*, 22 Week. Rep. 222.

In *Empire Rubber Mfg. Co. v. Morris*, 77 N. J. L. 498, 72 Atl. 1009, it was held that repeated defaults in the payment of instalments of goods delivered would not justify a jury in finding that the buyer there-

whole contract as broken. See also sales act prepared by the American commission of which Honorable Amasa Eaton is president.

Story, in his work on Sales, 2d ed. said with reference to this subject:

"Sec. 244. So, also, where an indefinite quantity or mass is sold at a certain price per measure, upon a warranty that it is of a certain quality, it would seem that the contract would be entire for each measure only, and severable in respect to the whole quantity, so that the vendee would be obliged to take so much as corresponded to the warranty; that is, it would seem to be an agreement to pay so much per measure for as much as satisfied the whole terms of the contract. If, indeed, in such a case, there be a special agreement to take the whole quantity or nothing, it constitutes an essential consideration of the purchase, and the parties would be bound to abide by such agreement. So, also, if the agreement were absolutely and unconditionally to take the whole of an indefinite quantity, without any warranty of quality, at a certain price per measure, the contract would be considered as an entirety; the measure being considered as a mere means of estimating the gross sum which should be paid. And the distinction between the cases where an indefinite quantity is act-

ually bargained for, upon a warranty, and where the whole is bargained for absolutely and without condition, is that in the latter case the taking of the whole is absolute, and makes a necessary part of the contract; while, in the former case, the taking of the whole depends upon a condition, namely, that the whole shall comply with the warranty. If it do comply with the warranty, the contract is entire. But, in case of a failure of warranty, the contract would be several, inasmuch as its very terms import a merely conditional sale of the whole, so that, if the condition be not performed, the contract is modified and altered, and, also, because its terms afford a means of exactly estimating the value of the portion taken. But if there be no warranty, and no condition broken, the contract must be considered as entire and indivisible. Analogous to these cases is the case where a horse dealer sold two horses for one entire price, and warranted both to be sound; and it was held that, as respected the warranty, the contract was several, and that the vendee was not obliged to keep the horse which did not answer to the warranty.

"Sec. 244a. In the diversity of the cases upon this subject, it is difficult to lay down any clear rule. The distinctions adverted to are the only means that suggest them-

by evinced an intention no longer to be bound by the terms of the contract, so as to release the seller from further performance.

And where the contract did not make payment for the preceding instalment a condition precedent to a delivery of the succeeding instalment, it was held that the seller could not, before a demand for the sum due and a refusal to pay, abrogate the contract. *Hime v. Klasey*, 9 Ill. App. 166, rehearing in 9 Ill. App. 190.

And on a contract for the sale of a large quantity of lumber, percentage payments to be made upon the delivery of specified quantities, it was held that the neglect or refusal of the buyer to pay for an instalment due was not a legal justification for the seller not to make deliveries thereafter, payment of an instalment not having been made a condition precedent to future delivery. *Tucker v. Billing*, 3 Utah, 82, 5 Pac. 554.

Where the contract was for the sale and delivery of an entire season's product of hemlock bark, the terms of payment being cash within ten days from receipt of same in car load lots, the court said that the buyer's default of payment for any shipment at times agreed upon gave the seller the right to enforce payment for the quantity delivered regardless of his intention to perform his obligations to deliver the remainder of the brick. That the buyers were likewise entitled to insist upon full performance of the contract in having the quantity purchased delivered,—though they

were in default in the payment of the quantity delivered,—upon the ground that the payment for such delivery was not a condition precedent to the complete performance of the contract. *Campbell & C. Co. v. Weiss*, 121 Wis. 491, 99 N. W. 340.

In *Otis v. Adams*, 56 N. J. L. 38, 27 Atl. 1092, it was held that failure to pay in full for goods delivered under a continuing contract of sale which does not expressly, or by implication, make payment for each lot delivered a condition precedent to the continuing obligation to sell and deliver, will not justify the vendor in rescinding it, it being shown that the vendee did not intend to abandon the contract.

Of course where the payment for logs delivered is a condition precedent to further performance by the seller, the buyer, by refusal to pay as agreed, necessarily loses the right to require further fulfilment of the contract. *Jenness v. Shaw*, 35 Mich. 20.

Wrongfully claiming right to deduct 2 per cent from the purchase price of a car load of lumber as discount was held not such a refusal of the buyer to perform as would authorize the seller to cancel the contract for future deliveries, since the amount was small and the breach of the contract insignificant, and the seller could easily have been compensated in damages for the breach. *Taussig v. Southern Mill & Land Co.* 124 Mo. App. 209, 101 S. W. 602. H. C. S.

selves to reconcile the cases; but, upon the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles, at different prices, at the same time, the contract would be several as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter, or by the act of the parties. Where a bill of parcels is taken, and includes the articles bought, under one whole price, it would, if accepted, afford evidence of an intention by both parties to treat the contract as entire. And wherever the failure as to a part would materially defeat the objects of the contract, and would have affected the sale, had such failure been anticipated, the contract would be entire. This rule would found the interpretation of the contract on the intention of the parties, as manifested by their acts, and by the circumstances of the case. Of course, if two articles be bought at the same time, under the agreement that one may be returned if it do not prove satisfactory, there would be no entirety of contract."

The true rule, as we understand it, was announced by Lord Selborne in *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 438, 23 Eng. Rul. Cas. 516, as follows: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

In the American notes to Benjamin on Sales, 7th ed. p. 605, it is said: "On the other hand, there is abundant authority in America, as in England, that, if the buyer not only refuses to pay for one instalment, but puts his refusal on such ground as justifies the inference that he repudiates the entire contract, or insists upon new terms different from the original agreement, the vendor may be released from any subsequent delivery. Thus in *Stephenson v. Cady*, 117 Mass. 6, C. sold S. two lots of yarn, by two successive agreements, payable on delivery, and by the terms of the contracts the delivery under the second was to commence when all had been shipped under the first. The whole of the first having been delivered and payment demanded, S. refused to pay 'unless C. would give security for the entire fulfilment of the contracts,' which C. declined

to do, and did not ship any under the second agreement. Held, that S.'s refusal to pay for the yarns on the ground stated would justify the inference that he did not himself intend to be bound by the original contract, and so he could not hold the other liable for noncompletion of it. *Curtis v. Gibney*, 59 Md. 131, is much like it. . . . So a refusal to pay for one instalment because of an alleged counterclaim for damages, for some previous default of the vendors in another matter, may justify the vendor in rescinding. *Bradley v. King*, 44 Ill. 339. In *Rugg v. Moore* (1885) 110 Pa. 236, 1 Atl. 320, the buyer of six car loads of corn refused to pay for the second car load (as he was bound to do), 'because he wanted to see if the vendor would ship all the corn purchased.' As he did not ship any more after receiving this word, the buyer sued for nondelivery; but it was held that the vendor was justified in refusing to send any more corn, and many cases were cited. A continued refusal or neglect to pay, by one who is pecuniarily irresponsible, and where evidently payment is of the essence of the contract, might well excuse the other party from continuing to send and so increase the indebtedness of the buyer. *Stewart v. Many*, 7 Ill. App. 508, furnishes an excellent illustration. See also *Reybold v. Voorhees*, 30 Pa. 116; . . . *Branch v. Palmer*, 65 Ga. 210; *Landeche v. Sarpy*, 37 La. Ann. 835; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531, where the buyer became insolvent, and unable to pay for the prior instalment. A refusal to pay, accompanied by a refusal to receive and accept any more goods, even if tendered according to the contract, would be still more satisfactory evidence of a repudiation or abandonment of a contract, and authorize the vendor to treat it as no longer binding on him. See *Fletcher v. Cole*, 23 Vt. 114; *Haines v. Tucker*, 50 N. H. 309."

In *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27, it is said: "The other question discussed on the argument was whether the defendant had the right to refuse to receive any more bark in case he could satisfy the jury that the five loads of bark delivered were not equal in quality to the requirements of the contract. The contract provided that the plaintiff should deliver, and the defendant should receive, one car load of bark weekly for a year at \$18 a ton, payable on delivery. It belongs to a class of agreements sometimes called 'continuing contracts of sale,' because they are to be completely performed not by single acts of delivery

and payment, but by a series of such acts at stated intervals. The rule to be applied in determining whether the express obligations of such contracts remain after one or more breaches by either party has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion the rule established in England by the judgment of the House of Lords in *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, 23 Eng. Rul. Cas. 516, affirming the judgment of the Court of Appeal in s. c. L. R. 9 Q. B. Div. 648, 51 L. J. Q. B. N. S. 576, 584, 47 L. T. N. S. 369, 31 Week. Rep. 83, 23 Eng. Rul. Cas. 504, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Sergeant Williams in his notes to *Pordage v. Cole*, 1 Wms' Saund. 320b, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It, of course, is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself,—cases in which the courts would see that the partial stipulation was so important, so went to the root of the matter (to use a phrase of Blackburn, J., in *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410, 45 L. J. Q. B. N. S. 621, 34 L. T. N. S. 572, 24 Week. Rep. 819), as to make its

performance a condition of the obligation to proceed in the contract."

Let us see how this rule squares with our own cases. It will be observed that our decisions follow those of Michigan and New Jersey, and, in the late cases from each of those states, the rule stated in the English sales act has been held to be the true one. For instance, in *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69, it is said: "The supreme court of New Jersey takes the same view of this question. *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27. In the latter case the English and American authorities were considered, and the rule adopted in the *Mersey Case* was approved." In the same case it is said, referring to our own case of *Myer v. Wheeler*: "The case of *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692, is closely analogous to the present case. Plaintiffs sold defendants ten car loads of barley. Defendants were to pay 70 cents per bushel for each car load, when delivered. On receipt of the first car load, the defendants refused to pay, upon the ground that the barley was not equal to the sample, but stated that they had given plaintiffs credit for 65 cents per bushel, and would withhold payment until the ten car loads were delivered, and urged shipment of the remainder. It was held that this did not entitle plaintiffs to rescind the contract, and that they were liable for damages resulting from nondelivery of the remainder. See also *Burge v. Cedar Rapids & M. River R. Co.* 32 Iowa, 101. A valuable note upon this subject will be found in *Lake Shore & M. S. R. Co. v. Richards*, 30 L.R.A. 33."

It would be intolerable to hold that, if one party repudiates, renounces, or abandons his contract, the other may not treat the renunciation or repudiation as putting an end to it. Of course, the seller is not bound to treat the buyer's repudiation or renunciation as an end of the contract, for neither may as a general rule rescind without the assent, express or implied, from the other; but, if the renunciation is treated as a breach, the party renouncing is not at liberty to withdraw his renunciation and offer to perform the contract, although the time appointed for actual performance has not arrived. *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981. As applied to ordinary executory contracts of sale, the rule of this court is that, if one party renounces the contract, the other may elect to treat it as broken and commence action at once. *Anderson v. Haskell*, 45 Iowa, 45; *Crabtree v. Messersmith*, 19 Iowa, 179; *Hollo-*

way v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; McCormick v. Basal, 46 Iowa, 235.

Appellee insists, however, that we are committed to the doctrine that, when goods are to be delivered and paid for in instalments, the seller has no right to repudiate the contract, because of the buyer's failure to pay for those already delivered. Generally speaking this is true. See *Myer v. Wheeler*, 65 Iowa, 395, 21 N. W. 692; *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77, 34 N. W. 495; *Osgood v. Bauder*, 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887; *Pacific Timber Co. v. Iowa Windmill & Pump Co.* 135 Iowa, 308, 112 N. W. 771. And it may safely be said that mere failure to pay, not evincing a purpose to renounce, is insufficient to justify the seller in treating the contract as abandoned; but if, from all the circumstances, it appears that the buyer intended to renounce and abandon the contract, the seller may then repudiate the same because of its breach by the buyer. See *Monarch Cycle Mfg. Co. v. Royer Wheel Co.* 44 C. C. A. 523, 105 Fed. 324, and *West v. Bechtel*, supra.

Turning now to the cases upon which appellee relies, we find nothing running counter to what we believe to be the correct rule. In *Hayden v. Reynolds*, 54 Iowa, 157, 6 N. W. 180, plaintiff entered into a contract whereby he, in consideration of certain notes, agreed to sell and deliver two horses and nine and one half tons of hay. He delivered one horse and received the notes with the understanding that the same were to be indorsed by defendant. Defendant refused to indorse. Plaintiff then offered to deliver the other horse and hay upon defendant's indorsing the notes. Defendant refused to indorse, and plaintiff rescinded and brought action to recover the value of the horse delivered. It was held that plaintiff was justified in rescinding, and that he was entitled to recover. In *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692, plaintiffs sold defendants ten car loads of barley, by sample, to be delivered in instalments; defendants to pay 70 cents per bushel for each car load when delivered. Upon receipt of the first car load, defendants refused to pay because not answering to sample, but informed plaintiffs they would give credit at 65 cents per bushel, and would withhold payment until the other nine car loads were delivered. They also urged plaintiffs to ship the remainder of the barley, and promised to honor their drafts for future shipments. Plaintiffs refused to ship any more barley on the terms proposed, but offered to continue if the first car load was paid for. Action was brought for the price of the first car load. Plaintiffs were held entitled to the 32 L.R.A. (N.S.)

value of the first car load, and defendants to damages for plaintiffs' failure to deliver the other nine cars. As a basis for this decision the court said: "Defendants were not in default as to the unexecuted portions of the contract. Nor did it appear that they ever would be in default as to them. They expressed a willingness to pay for the other nine car loads as they should be delivered, and there is no claim that they were not able to perform their undertaking in that regard. They did not refuse absolutely to pay for the car load which was delivered, but claimed the right to retain the price until the others should be delivered, and as security for the performance of the contract by plaintiffs. It was not understood when the parties entered into the contract that plaintiffs were dependent for the means to purchase the subsequent car loads on the money which they would obtain for those first delivered. Nor is it shown that they were so dependent. We think, therefore, that the circuit court rightly held that plaintiffs were liable for the damages occasioned by their failure to deliver the remaining car loads. The rule established by the decided weight of authority, both in England and in this country, is that rescission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the whole of the consideration. *Freeth v. Burr*, L. R. 9 C. P. 208, 43 L. J. C. P. N. S. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648, 51 L. J. Q. B. N. S. 576, 584, 47 L. T. N. S. 369, 31 Week. Rep. 83, 23 Eng. Rul. Cas. 504; *Simpson v. Crippin*, L. R. 8 Q. B. 14, 42 L. J. Q. B. N. S. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141; *Newton v. Winchester*, 16 Gray, 208; *Winchester v. Newton*, 2 Allen, 492; *Sawyer v. Chicago & N. W. R. Co.* 22 Wis. 403, 99 Am. Dec. 49; *Burge v. Cedar Rapids & M. River R. Co.* 32 Iowa, 101; *Hayden v. Reynolds*, 54 Iowa, 157, 6 N. W. 180. See also the collection of authorities on the subject in the note of Mr. Lucius S. Landreth to the case of *Norrington v. Wright*, 21 Am. L. Reg. N. S. 395." It will be noted, first, that this case indorses the English rule announced in *Freeth v. Burr*, supra, and also the rule of the Supreme Court of the United States as found in *Norrington v. Wright* (C. C.) 5 Fed. 768. It also approves of the rule in *Wisconsin and Massachusetts*.

The English rule as announced in *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73, 8 Week. Rep. 80, is the one prevailing in Massachusetts. See *Stephenson v. Cady*, 117 Mass. 6. In this case it is said: "This is followed in the very recent case of *Bloomer v. Bernstein*, L. R. 9 C.

P. 588, 43 L. J. C. P. N. S. 375, 31 L. T. N. S. 306, 23 Week. Rep. 238, in which it is held that, where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one delivery under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the future deliveries, and that he does not intend to go on with the contract, the seller is justified in repudiating it. See also *Fletcher v. Cole*, 23 Vt. 114; *Webb v. Stone*, 24 N. H. 282; *Winchester v. Newton*, 2 Allen, 492; *Star Glass Co. v. Morey*, 108 Mass. 570, 574." And, as we understand it, the Wisconsin rule is the same. See *Sawyer v. Chicago & N. W. R. Co.* 22 Wis. 403, 99 Am. Dec. 49.

Going back to *Myer v. Wheeler*, it will be noted that defendants had not refused to pay for the car load which had been delivered, that they expressed a willingness to pay for the other nine loads, and that they were at all times demanding the performance of the contract. This clearly brought the case within the English rule, for there was nothing to indicate a renunciation or abandonment of the contract by the defendants in that case. In *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77, 34 N. W. 495, plaintiff agreed to furnish defendant at a certain price all the coal it would need for the season; the coal furnished during any month to be paid for on the 10th of the month following. It was held that plaintiffs could not declare the contract at an end upon a failure of the defendant to pay at the time agreed, and recover the market value, instead of the contract price for coal delivered, after notifying defendant that they regarded the contract as rescinded. *Myer v. Wheeler* was followed. In that case there was no evidence of any abandonment or renunciation of the contract by the defendants, and plaintiffs shipped the coal as promised. This does not run counter to the modern English rule. In *Osgood v. Bauder*, 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887, there was a contract for the shipment of coal to be delivered and paid for in instalments. It was there said: "The plaintiff alleged in his petition that the coal company was released from all obligation to ship more cars of coal than it did, for the reason that defendants failed to pay for the coal shipped within the time and in the manner provided by the contract. He now complains of rulings of the court which excluded evidence offered to sustain that issue. We discover no error in these rulings. The agreement provided for the payment for each shipment thirty days after it was

made. The alleged breach did not go to the whole consideration of the contract, and the coal company did not therefore have the power to rescind the contract. *Hansen v. Consumers' Steam Heating Co.* supra; *Myer v. Wheeler*, 65 Iowa, 395, 21 N. W. 692." The general principle there announced is sound. The facts are not very clearly set out; but there was no intent to depart from the rule of the cases cited. *Pacific Timber Co. v. Iowa Windmill & Pump Co.* 135 Iowa, 308, 112 N. W. 771, is not in point; but we may with profit quote from that opinion the following: "As a general rule, it may be said that a contract is entire when, by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and 'inter-dependent.' On the other hand, it is the general rule that a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or separable is very largely one of intention, which intention is to be determined from the language the parties have used and the subject-matter of the agreement. The divisibility of the subject-matter or the consideration is not necessarily conclusive, though of aid, in arriving at the intention. . . . Where it reasonably appears from the language of the contract or from its terms that the parties intended that a full and complete performance should be made with reference to the subject-matter of the contract by one party, in consideration of the obligation of the other party, to the contract, it is said to be entire. It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved."

Looking back now to the contract in this case and to the conduct of the parties, we think it clearly appears that the parties regarded the contract at an end, that Clarke renounced the same, and that defendant rescinded it because of this renunciation and abandonment, as it had a right to do. No demand was ever made by Clarke that defendant furnish the subsequent volumes, and he never paid, or offered to pay, the amount due on his contract, although frequent demands were made upon him to do so. We do not know what better evidence could be produced to show an abandonment and renunciation of the contract, than here appears. The case is ruled by *Hoare v. Rennie*, *Norrington v. Wright*, and other like decisions. Moreover, it appears that on November 11, 1904, defendants notified Clarke that they considered his contract

null and void because of his failure to pay or to make any response to their letters, and on that day wrote upon the contract that it was canceled. Clarke made no objection to this, made no demand for the books then due him had he performed his contract, or that any be sent him in the future. In fact, nothing was done by him until more than two years thereafter, when Clarke assigned the contract to plaintiff, and plaintiff paid for the volumes already delivered, in Clarke's name. We do not regard the payment for books already received by Clarke as a material circumstance in the case. Conceding that the contract was rescinded in so far as it related to future deliveries, Clarke still had the books which he had ordered, and he was indebted for the purchase price thereof, whether the contract was continued or not. We are constrained to hold that Clarke, by reason of his conduct after notice of the cancellation, is estopped from insisting upon the validity of continuance of the contract. See, as sustaining this view, *McDermid v. McGregor*, 21 Minn. 111, wherein it is said: "The facts clearly establish gross negligence on the side of the plaintiff, both in executing his part of the contract, and in applying for relief. Save so far as the possession of the premises might, during its continuance, operate to qualify the effect of the long default in making payment of the purchase price, this negligence is unexplained by any equitable circumstance. As to the long continued failure to make payment, the case is one in which (although time may not have been of the essence of the contract) it is eminently proper for a court of equity to have regard to time as it respects the good faith and diligence of the plaintiff. . . . As to the failure to apply sooner for relief, the rule is that where, as in this instance, one party to the contract gives notice to the other that he will not perform it, acquiescence in this by the other party (not being in possession), by a comparatively brief delay in enforcing his right by an appeal to the courts, will be a bar." See also *McCabe v. Matthews*, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190; *Wolf v. Great Falls Water Power & Townsite Co.* 15 Mont. 49, 38 Pac. 115; *Harrigan v. Smith*, 57 N. J. Eq. 635, 40 Atl. 13, 42 Atl. 579; *Mahon v. Leech*, 11 N. D. 181, 90 N. W. 807; *Gish v. Jamison*, 96 Va. 312, 31 S. E. 521; *Simpson v. Atkinson*, 39 Minn. 238, 39 N. W. 323.

It must be remembered at all times that this is a suit in equity for specific performance, and that such relief is not granted as a matter of right. If Clarke were here asking for specific performance, he 32 L.R.A. (N.S.)

would not be granted relief without paying the instalments due, and showing some excuse for nonperformance of his part of the agreement. His conduct was such as to cause a chancellor to deny him specific performance. He did not pay for what he had, he accepted without protest defendant's notice of cancelation, and neither he nor his assignee demanded performance until defendant had increased the price of its books. It appears that some profit would result if performance were granted. Plaintiff can still obtain the property, but he must pay a higher price. If he and his assignee had met the terms of the contract as promised, they might have obtained them for less; but for five years they held some of defendant's property without paying for it, and are now insisting upon the performance of a contract which defendant had good reason to believe was abandoned, when it rescinded and canceled it. The acts and conduct of all the parties indicated an intent no longer to be bound by the contract, and we think it was rescinded.

For the reasons pointed out, the judgment must be, and is, reversed.

Petition for rehearing denied.

CALIFORNIA SUPREME COURT.

B. P. CHENEY, Appt.,
v.

C. A. CANFIELD et al., Respts.

(158 Cal. 342, 111 Pac. 92.)

Corporation — assessment — regular meeting.

1. An assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board, or at a special meeting thereof, regularly called.

Same — holiday — adjournment.

2. A statute providing that whenever any act of a secular nature is appointed by law or contract to be performed on a particular day which falls on a holiday, it may be performed on the next business day, does

Note. — The well-considered case of *CHENEY v. CANFIELD*, passing on the right of the directors of a corporation to meet on the day following that assigned them by the by-laws for meeting, when the particular day designated happens to be a holiday, appears to be one of first impression, since an extended search has failed to disclose any other case involving that precise question, nor does there seem to be any case passing upon the right of the stockholders of a corporation to meet on the succeeding day, where the circumstances are the same.

not justify the holding of a corporation meeting on such succeeding day when the day appointed by the by-laws falls on a holiday, and no provision is made for such contingency by the by-laws.

Same — minority action.

3. Less than a quorum of a corporation has no power to adjourn a regularly called meeting to another date, so as to make transactions at a meeting on such date valid.

Same — void assessment — statutory cure.

4. A statute limiting the time for bringing actions to recover corporate stock sold for a delinquent assessment upon the ground of irregularity of the assessment has no application to void assessments.

(Beatty, Ch. J., dissents.)

(September 6, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendants' favor and from an order denying a new trial in an action brought to set aside a sale of certain corporate stock which had been made for delinquent assessments which were alleged to be invalid. Reversed.

The facts are stated in the opinion.

Messrs. Hunsaker & Britt, for appellant:

The vote of the board of directors by which they assumed to levy the assessment in question was illegal for the reason that the meeting was but the fortuitous concurrence of seven directors without notice to the other two, and was not held at the time provided in the by-laws.

People ex rel. Russell v. Loyaltan, 147 Cal. 775, 82 Pac. 620; Baxter v. Vineland Irrig. Dist. 136 Cal. 186, 68 Pac. 601; Re Long Island R. Co. 19 Wend. 37, 32 Am. Dec. 429.

An assessment voted at a meeting of directors held on a day to which less than a quorum of the board had attempted to adjourn a previous meeting is invalid.

Raisch v. M. K. & T. Oil Co. 7 Cal. App. 667, 95 Pac. 662; 1 Morawetz, Priv. Corp. § 531, 532; Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; 10 Cyc. Law & Proc. pp. 782, 786; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Harding v. Vandewater, 40 Cal. 77; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co. 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Porter v. Lassen County Land & Cattle Co. 127 Cal. 261, 29 Pac. 563; Brown v. Valley View Min. Co. 127 Cal. 630, 60 Pac. 424; Pennsylvania Co. v. Cole, 132 Fed. 668; McLaren v. Fisk-en, 28 Grant, Ch. (U. C.) 352; Rackliffe v. Duncan, 130 Mo. App. 695, 108 S. W. 1111.
2 L.R.A. (N.S.)

The right to forfeit the shares of the stockholders must come from the law, and can only be exercised in the manner provided by law.

Westcott v. Minnesota Min. Co. 23 Mich. 145, 6 Mor. Min. Rep. 336; Johnson v. Lytle's Iron Agency, L. R. 5 Ch. Div. 687, 46 L. J. Ch. N. S. 786, 36 L. T. N. S. 528, 25 Week. Rep. 548; Ruck v. Caledonia Silver Min. Co. 6 Cal. App. 359, 92 Pac. 194; 1 Cook, Corp. 6th ed. § 129; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 66, 65 Pac. 143; San Bernardino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Raish v. M. K. & T. Oil Co. 7 Cal. App. 667, 95 Pac. 662.

Messrs. J. S. Chapman, Ward Chapman, and O'Melveny, Stevens, & Milliken for respondents.

Lorigan, J., delivered the opinion of the court:

This action was brought by plaintiff to have a sale by the defendant corporation of 41,666 shares of defendant's corporate stock of which he claimed to be the owner declared void. The sale was made for a delinquent assessment, and defendant Canfield is the purchaser and holder of the stock. The defendants had judgment, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

One of the main points presented for consideration here is the validity of the assessment upon which the sale of the stock was based. All the proceedings eventuating in the sale of the stock in question are based upon an assessment levied by defendant's board of directors on September 6, 1904.

It is insisted by appellant that the levy of this assessment was void for several reasons, but principally on the ground that the board of directors, he asserts, had no authority to levy it because the meeting at which they did so was neither a regular meeting of the board nor a special meeting regularly called. It is the settled law that an assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board, or at a special meeting thereof, regularly called. Harding v. Vandewater, 40 Cal. 78; Thompson v. Williams, 76 Cal. 155, 9 Am. St. Rep. 187, 18 Pac. 153. As all proceedings whereby an assessment is levied upon the stock of a corporation, and under which a forfeiture of the stock of the stockholders may be had, are *in invitum*, it is elementary law that they must be strictly followed. The levy of such an assessment can only be accomplished legally by a strict compliance

with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 85 Pac. 143; *Ruck v. Caledonia Silver Min. Co.* 6 Cal. App. 356, 92 Pac. 194.

The by-laws of the defendant corporation provide that regular meetings of its board of directors shall be held on the first Monday of each month, and special meetings may be called at any time, notice thereof to be given the directors personally or by mail. It was averred in the complaint that the meeting of the board of directors of September 6, 1904, at which the assessment was levied, was held at a time and on a day other than the time provided by the by-laws of the corporation, and without previous or any notice to the members of the board; in effect, that the meeting at which the levy was made was neither a regular meeting of the board nor a special meeting regularly convened. This was denied in the answer, and the court found that the board of directors of the corporation consisted of nine members, and that "the meeting of the board of directors on September 6, 1904, was held without any specific notice to the other two members of the said board, there being at said meeting but seven present, but it is provided by the by-laws of the Mexican Petroleum Company that regular monthly meetings of the said directors . . . shall be held on the first Monday of each month, and that no notice of said meeting is required, and the first Monday of September of the year 1904 was the 5th day of September, and was, under the laws of the state of California, a legal holiday. And when the board met on the said first Monday of September, 1904, no business was transacted because of its being a holiday, and the board met on the following day, and said assessment was levied and other business transacted. Prior to the said 6th day of September, 1904, said board of directors, at a meeting adjourned from the regular monthly meeting in August, met, and there being no quorum present, adjourned said meeting to the 6th day of September, 1904." On this finding the trial court based its conclusion that the meeting of the board of directors on September 6, 1904, was a valid one and the assessment legally levied, being of the opinion, first, that although the by-laws of the corporation provided for a regular meeting of the board on September 5, 1904, which was the first Monday of the month, yet, as that date fell on a legal holiday, the board might meet on the following day with equal regularity and legal effect under § 11 of the Civil Code; secondly, that, whether it could or not, still the meeting

on September 6th, 1904, was a regular and valid meeting of the board because it was then held on the date to which the regular monthly meeting of the board in the August previous had been adjourned.

We do not think either of these conclusions correct. The fact that the first Monday of the month, fixed by the by-laws for the regular monthly meeting of the board of directors, fell on a holiday, did not warrant the board in meeting on the following Tuesday, on the theory that, under the section of the Code, it could then hold the regular monthly meeting. The by-laws did not so provide, and § 11 of the Civil Code, which is invoked to uphold the validity of the meeting on that day, has no application. That section provides that "whenever any act of a secular nature . . . is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." It will be observed that there is nothing mandatory about the provision. Even as applied to an act appointed by "law or contract" to be performed upon a given day, it is merely permissive. It may or may not be done on the appointed day, as the party to perform it chooses or an opportunity presents. The section, however, even in its permissibility, only applies to an act appointed by "law or contract" to be performed. While the by-laws of the corporation under discussion fix the first Monday of each month for holding the regular meetings of the board of directors, still a by-law is not a "law or contract" within the meaning of the Code section.

In speaking of an act provided by "law or contract" to be performed, the section, in as far as it refers to "law," means such an act as is required to be performed within a given time by authority of some statutory provision or rule of law. A provision similar to the one in the Civil Code is found in both the Code of Civil Procedure (§ 13) and the Political Code (§ 13). When the section of the Code relied on speaks of an act to be performed by "contract," it means contracts such as are defined by §§ 1549 and 1550 of the Civil Code itself,—actual contracts entered into between all the parties; contracts which are definitely such, and by the terms of which conditions or provisions are to be complied with by the parties within a specified time, with a possible forfeiture of rights thereunder for noncompliance. The term "by-law" has a well-known but limited and peculiar meaning. It is used to designate those regulations which, as one

of its legal incidents, a corporation is empowered to make, affecting the management of its business, the control of its officers and agents, and the rights and duties of the members of the corporation between themselves and between the corporation. To pass and make effective such by-laws, the consent of all parties, as in actual and ordinary contracts, is not necessary, as a bare majority of the stockholders of the corporation may do so. Civil Code, § 301. While in a general sense the by-laws, with the articles of incorporation, constitute a contract under which the reciprocal rights and duties of the corporation and its stockholders are measured, the by-laws of themselves do not constitute such a contract so as to make the provision with reference to directors' meetings an act to be performed under a contract within the contemplation of the Code section.

The duty of the board of directors to hold its regular meetings at stated times did not spring from any contract between them and the corporation, but arose from a provision of the by-laws, passed for the purpose of properly conducting the business of the corporation. To whatever extent the by-laws may for certain purposes be considered as part of a contract between the corporation and its stockholders, defining their respective duties and rights as far as a provision therein declares when and how directors' meetings shall be held, it is simply what it purports to be,—a by-law; a regulation pertaining to the administration of the business of the corporation, and in no sense a contract. The extent and purpose of the Code provision is quite apparent. It is to extend the time for the performance of some act which is expressly enjoined by law to be performed by a given time which would fall upon a holiday; or to protect, relieve, or save one contracting party from a forfeiture or deprivation of a right by the other contracting party on account of noncompliance with the terms of a contract when noncompliance might be impracticable or impossible by reason of the required date of performance falling on a holiday. The purpose of the section was in aid of the preservation of rights, either under a law or contract, which might, by the intervention of a holiday, be imperiled; and was not intended and cannot be construed to mean, as is claimed in the present instance, to apply to the time for holding meetings of the board of directors, so as to authorize stated meetings to be held at a date other than fixed in the by-laws, simply because that date falls on a holiday.

It was entirely permissible for the board of directors to meet on the date fixed for 32 L.R.A.(N.S.)

its regular meeting, and the by-laws required it to do so. There was nothing in the general law or in the by-laws prohibiting such meeting because the date fixed fell on a holiday. It was a matter of their own volition whether the members of the board should meet or not on the date stated, although their duty was to do so. The regular meeting of the board was not an act required to be performed by contract, and the board had no authority to meet at any other time than that fixed by the by-laws unless upon notice to all the directors; and, as the meeting here in question was not held on the date fixed, and was subsequently held without notice to two of the directors, such meeting was not legally held, the board so assembled was without authority to act at all, and the assessment here in question, levied at that meeting, was void unless the meeting can be held valid on other grounds. It will be observed that the court, in addition to the finding we have just discussed, found also that "when the board met on the said first Monday of September, 1904, no business was transacted because of its being a holiday; and the board met on the following day, and said assessment was levied and other business transacted." As to this finding, there is no evidence that the board or any members of it met on the first Monday of September. In fact, in a note made in the minutes of the board by the secretary of the corporation, it is evident that they did not meet at all. This is immaterial, however, as it is not pretended that, if they did hold a meeting on that day, they adjourned it over until the next day,—September 6th,—when the assessment was levied. If they met on the first Monday, as there was no adjournment over, the meeting on the next day without notice to all the directors was invalid.

Now, as to the position that the meeting of September 6th can be sustained as an adjourned meeting of an adjourned meeting of the regular monthly meeting of the August previous. It might be an interesting question whether even a quorum of a board can make successive adjournments of a previous regular meeting, so that the last adjournment would be to a date beyond that fixed for the next regular meeting of the board by the by-laws, as appears to have been attempted here, but by less than a quorum of the board. Discussion of that proposition, however, is unnecessary because at the meeting in August, when it is claimed that an adjournment was made until September 6th, there was no quorum of the board present. The by-laws of the corporation provided that a quorum should consist of five members, while in fact there

were but two members of the board present when the adjournment was attempted to be made, and they alone assumed to order it. There can be no question but that less than a quorum of a board of directors have no authority to adjourn a meeting to any date whatever. It was so held in *Raisch v. M. K. & T. Oil Co.* 7 Cal. App. 667, 95 Pac. 662, by our district court of appeal. The question there, as here, involved the validity of an assessment upon corporate stock. In the case referred to, the board levied it on a day to which less than a quorum thereof had at a previous meeting adjourned such meeting. It was held by the district court of appeal that less than a quorum of the board could not effect a valid adjournment. The court, after discussing the reasons why such power may not rest with less than a quorum, says: "The Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors; that a majority of the directors is a sufficient number to form a board for the transaction of business; and that every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act. Civil Code, § 308. It is provided that 'unless a quorum is present and acting, no business performed or act done is valid as against the corporation.' Civil Code, § 305. The adjournment was an act done, and hence, under the express provisions of the Code, it was not a valid act. It is significant in this connection that there is no provision of the Code to which our attention has been called authorizing a meeting of the directors of a corporation to be adjourned by a minority. . . . Counsel have been unable to cite us to any authority, either in this state or elsewhere, directly in point. We have examined the cases cited, but find nothing to aid us in the solution of the question involved here. We therefore conclude there was no power in the minority of the board of directors to adjourn the time of holding the regular meeting, and that the assessment was levied without authority, and is therefore void."

We think there can be no question but that the rule as announced by the district court of appeal is the correct one, and in harmony with it the attempt of less than a quorum of the board of directors of the defendant corporation to adjourn the August meeting over to September 8th was ineffectual for any purpose, and the meeting on this latter date was invalid. The court found that the plaintiff was guilty of laches in bringing his action, and also that his right of action was barred by 32 L.R.A.(N.S.)

§ 347 of the Civil Code and § 341 of the Code of Civil Procedure. Both these Code sections referred to make the same provision; namely, that "no action must be sustained to recover stock sold for delinquent assessments upon the ground of irregularity in the assessment, . . ." unless the tender of the amount for which the stock was sold at said time, and unless such action is commenced within six months after the sale of the stock. The sale of the stock in question here was made December 20, 1904. This action was commenced January 4, 1906. The sections referred to only apply where there has been some irregularity in the assessment, or irregularity or defect in the notice of sale, or the sale itself. The assessment in question here, as we have seen, was not merely an irregular assessment. It was absolutely void. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 66, 65 Pac. 143. Hence these sections have no application. There is nothing in the evidence upon which the finding of laches can be sustained.

The judgment and order appealed from are reversed.

We concur: Henshaw, J.; Melvin, J.

I dissent: Beatty, Ch. J.

Petition for rehearing denied October 6, 1910.

GEORGIA SUPREME COURT.

ATLANTIC COAST LINE RAILROAD
COMPANY, Plff. in Err.,
v.

STATE OF GEORGIA.

(135 Ga. 545, 69 S. E. 725.)

Statute — enrolment — contradiction
by journals.

1. A duly enrolled act, properly authenticated by the regular presiding officers of both houses of the general assembly, approved by the governor, and deposited with the secretary of state as an existing law, will be conclusively presumed to have been enacted in accordance with the constitutional requirements; and it is not permissible to show, by the legislative journals or

Headnotes by HOLDEN, J.

Note. — State regulation of equipment of railroad rolling stock as interference with interstate commerce.

The few cases passing directly upon the question as stated, in the main sustain the principles upon which the decision in *ATLANTIC COAST LINE R. CO. v. STATE* was

other records, that it did not receive on its passage a majority vote of all the members elected to each house, or that there was any irregularity in its enactment.

Railroad — electric headlight — right to require.

2. An act provided "that all railroad companies are hereby required to equip and maintain each and every locomotive used by such company to run on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, with a reflector of not less than 23 inches in diameter, and to keep the same in good condition." It also provided that "any railroad company violating this act in any respect" should be liable to indictment and a prescribed punishment, and that "this act shall not apply to tram roads, mill roads, and roads engaged

principally in lumber or logging transportation in connection with mills." Laws 1908, p. 50. Held:

(a) The term "railroad company," employed in the act, includes natural persons as well as corporations.

(b) The act is not void, as being violative of the equal "protection" clauses of the state and Federal Constitutions, because it exempts from its operation tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills.

(c) Even if receivers of railroads are not within the operation of the act, it would not, for this reason, be violative of the equal protection clauses referred to in the preceding note.

Same — constitutionality — due process.

3. The act does not violate the "due

based, although no other case appears to have involved the question of the validity of an attempted regulation of locomotive headlights. Statutes regulating other closely related subjects have been under discussion, however, and seem to establish as fundamental propositions that state legislation does not necessarily regulate interstate commerce because incidentally or remotely affecting it; or, in other words, state legislation is not deemed a regulation, strictly speaking, simply because it may to some extent, or under some circumstances, affect such commerce; that the state may, in the reasonable exercise of its police power, impose burdens upon interstate commerce which occasion both inconvenience and hardship on the railroad, provided Congress has not directly regulated the same subject; but that when Congress has acted with reference to a particular subject, its statutes displace, or, at least, suspend, all state regulations touching that matter; and finally, that laws not so unreasonable as to be declared arbitrary, passed under the police power of the state, which regulate the equipment of railroad rolling stock with reference to the safety of employees and passengers, are not regulations of interstate commerce, in the objectionable sense, under the Constitution.

Thus, in *People v. New York*, N. H. & H. R. Co. 55 Hun, 409, 8 N. Y. Supp. 672, affirming 5 N. Y. Supp. 945, and affirmed without opinion in 123 N. Y. 635, 25 N. E. 953, a state statute forbidding any steam road over 50 miles in length, doing business in the state, to heat its passenger cars by any stove or furnace kept inside the car or suspended therefrom, except in certain specified instances, was held, although applicable to interstate roads doing business within the state, not unlawfully to interfere with the right of Congress to regulate interstate commerce, on the ground that it was a reasonable police regulation upon a subject as to which Congress had made no provision. The case subsequently went to the Supreme Court of the United States (165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, affirming 142 N. Y. 646, 32 L.R.A.(N.S.)

37 N. E. 568, which, without opinion affirmed 18 N. Y. Supp. 939, which, without opinion, affirmed a judgment entered upon a directed verdict for plaintiff upon a retrial after the affirmance by the court of appeals [123 N. Y. 635, 23 N. E. 953] of an order overruling a demurrer to the complaint), where, in affirming the decisions of the New York courts, Mr. Justice Harlan said: "It was clearly competent for the state of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution,

... the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself, and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons traveling in the state of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the state to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the state is competent to legislate; namely, the personal security of those who are passengers on cars used within its limits. Why may not regulations to that end be made applicable, within a state, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such state? Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. The statute in question is not di-

process" clauses of the state and Federal Constitutions because its enforcement will require a loss of property to the defendant in doing away with the headlights on locomotives now in use, and cause the defendant to incur expense in equipping its locomotives with the headlights required by the act.

(a) The act is not violative of the "due process" clauses of the state and Federal Constitutions because it requires an arc electric headlight which shall consume "not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter," on the ground that it deprives the defendant "of its own right to make the contracts and manage its own business."

(b) The act was passed in the legitimate exercise of the police power of the state, and is not void on the ground that its requirements are unreasonable.

(c) Nor does the act violate the "due process" clauses of the state and Federal

Constitutions on the ground that it contains no emergency clause, and absolutely and without exception makes the railroad company guilty of a crime if it operated one of its engines on its main line after dark without the required headlight.

Same — commerce clause.

4. The act does not violate the "commerce clause" of the Federal Constitution, on the ground that it would require at the state line a change of headlights on locomotives doing an interstate business, if other states required headlights of a kind different from that prescribed by the act in question, although such change might involve some loss of time and expense on the part of the railroad company.

(December 16, 1910.)

CERTIFICATION by the Court of Appeals for the opinion of the Supreme

rected against interstate commerce. Nor is it, within the meaning of the Constitution, a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce, and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

This decision has, by way of argument, been mentioned with approval, among others, in the following cases: *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 769, 18 Sup. Ct. Rep. 335; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 405; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. —, 31 Sup. Ct. Rep. 275, affirming 86 Ark. 412, 111 S. W. 456.

And in *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, it was said that there is much to be said in favor of state laws regulating the facilities for the comfort of passengers, including the heating, lighting, and ventilating of passenger cars, where such regulations do not conflict with enactments upon the same subjects by Congress.

The only other case in which the question of the right of a state to regulate the manner of heating railroad cars seems to have directly arisen is *Gause v. L. S. & 32 L.R.A. (N.S.)*

M. S. R. Co. 4 Ohio Dec. Reprint, 369, wherein a statute requiring railroads to use certain kinds of heating apparatus so constructed as to extinguish the fires therein should the cars be overturned was held constitutional. In the report of the case, however, the specific grounds upon which the statute was attacked as not being "one the state has any power to make" do not appear, but the act is, by its terms, applicable to all railroads in the state, and therefore the court, by its sweeping decision that the act is one which the legislature had the authority to pass, impliedly, at least, holds the act as not violative of the commerce clause.

In *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. —, 31 Sup. Ct. Rep. 275, a state statute prescribing a minimum crew, to consist of an engineer, a fireman, a conductor, and three brakemen, for all freight trains of more than twenty-five cars, operated in the state, was held not an unconstitutional regulation of interstate commerce, although applicable to interstate trains, the court saying: "The statute here involved is not, in any proper sense, a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object."

Court of questions arising upon writ of error to review a judgment of the City Court of Richmond County, convicting defendant of violation of the headlight law. Answers favorable to defendant in error returned.

The facts are stated in the opinion.

The following questions of law were certified by the court of appeals to the supreme court for instructions:

"(1) Is what purports to be an act of the general assembly, approved August 17, 1908, and found in the published Acts of 1908, pp. 50, 51, commonly known as the 'headlight law,' a law of this state, as against the specific contention presented in this case that it did not receive on its alleged passage a majority of the votes of all the members elected to the senate, within the purview of, and according to the provisions of, article 3, § 7, ¶ 14, of the

Constitution of this state (Civil Code 1895, § 5777), and that it so affirmatively appears from the journals of the general assembly, especially the senate journal for 1908, pp. 132, 163, 203, 204, 339, 340, 700, and 701?

"(2) Is said act void as being in contravention of article 1, § 1, ¶ 3, of the Constitution of Georgia (Civil Code 1895, § 5700), which provides: 'No person shall be deprived of life, liberty, or property, except by due process of law'—as against the contention of the defendant [a railway corporation] 'that the said enactment requires defendant to discontinue the use of property already furnishing a sufficient and adequate headlight, forces defendant to abandon the use of material adequate and sufficient for the production of safe and sufficient headlight, compels defendant to purchase expensive machinery for the pur-

So, in *Pittsburgh, C. C. & St. L. R. Co. v. State*, 172 Ind. 147, 87 N. E. 1034, a full-train-crew act, similar to that discussed in the preceding paragraph, was held not an improper interference with interstate commerce, but to have been properly enacted by the state in the exercise of its police power. The act was also attacked on the ground that it related to a subject over which Congress was invested with exclusive powers to legislate, and that the failure of Congress to pass a law on the subject prohibited the state from so legislating; but the court said: "The act herein in controversy is local or confined to the state, in its operation, and may be permitted to stand until Congress sees fit to enter the field and actually legislate upon the precise subject-matter; in which event the statute in question would have to yield. It more properly belongs to a class in which the power of the state to legislate in respect thereto is concurrent with the Federal government; or, in other words, to a class or field into which either the state or the Federal government has authority or is competent to enter and legislate upon the precise subject-matter, but where the act of the state, in case of actual legislation by Congress, would be compelled to yield or give way to such Federal legislation in case of a direct conflict or repugnance between the two acts. . . . The silence or nonaction of Congress in respect to the legislation upon the precise subject-matter of the statute in this case may be regarded as the equivalent of the declaration by that body that, until it sees proper to legislate thereon, the matter may be controlled or regulated by the authority of the state." It was further contended that Congress had already legislated upon the subject-matter of the act, to the exclusion of enforceable state regulation, by the enactment of the safety appliance act and other acts relating to the safety of employees and passengers on interstate trains; and that the fact that Congress had

not seen fit to prescribe any specific rules in regard to the number of men required to man interstate trains does not affect the question of the right of the state to legislate in regard thereto; but this argument was also rejected on the authority of *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

In *Detroit, T. & I. R. Co. v. State*, 82 Ohio St. 60, 91 N. E. 869, a statute requiring automatic couplers on all cars engaged in moving traffic between points within the state was held neither directly to regulate interstate commerce nor to be in conflict with the Federal safety appliance act, although cars falling within the terms of the act were used on railroads commonly used in interstate traffic and in trains containing cars loaded with interstate traffic. The court said: "Our statute does not conflict with the Federal statute in the character of the coupler required, but requires the same kind of coupler, and was passed to promote the same object, though under a different power; and while, no doubt, it was enacted to apply to cases assumed not to be covered by the Federal statute, it is not unreasonable, and is not void merely because a failure to equip the car with automatic couplers would subject the railroad company to punishment under a state statute as well as under the act of Congress. . . . The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but it is well settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce, or in conflict with Federal regulations, but merely regulative of the instrumentalities of commerce, is not void; and when such state regulations do conflict with Federal regulations, they are not void on the ground that the state has exercised a power exclusively in Congress, but because the Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land. . . . The commerce clause of the Constitution

pose of generating a specific current of electricity as a means for lighting headlights, and compels defendant to purchase a reflector of a size designated by the statute,' thus not only depriving the defendant of the right to use property already owned, but compelling it to purchase property of a given description, and depriving it of its own right to make contracts and manage its own business?

"(3) Is said act void because it violates the provisions of article 1, § 1, par. 2, of the Constitution of Georgia (Civil Code 1895, § 5699), which provides that 'protection to person and property is the paramount duty of government, and shall be impartial and complete,' as against the contention that 'the said act does not apply equally to all persons and corporations in the same class or similarly situated; said act makes an unreasonable and arbitrary classification, whereby it excludes from the operation of said act persons owning and operating railroads, and likewise excludes from the operation of said act receivers operating railroads, even though said receivers operate fast trains through cities, towns, and thickly settled districts of the state; nor does said act apply to "tram roads, mill roads, or roads engaged principally in lumber or logging transportation in connection with mills," even though locomotives thereon, for a whole or part of their route, may be operated at a fast schedule, and through thickly populated districts?"

"(4) Is said act void because it violates the provisions of the 14th Amendment to the Constitution of the United States, which provides that 'no state . . . shall . . . deprive any person of life, liberty, or property without due process of law,' on the alleged ground 'that the said act requires defendant to discontinue the use of property lawfully acquired and lawfully held, although furnishing sufficient and adequate headlight, forces defendant to abandon the use of lamps, reflectors, headlights, and material lawfully held, although adequate and sufficient for the production

of safe and sufficient headlight, and reasonably adapted to the protection of person and property, whether on the track or on the locomotive and cars, and compels defendant to purchase expensive machinery for the purpose of generating a specific current of electricity, and to purchase a reflector of a size designated by the statute, thereby depriving defendant of its right to make contracts and to manage its own business?"

"(5) Is said act void because it violates the provisions of the 14th Amendment to the Constitution of the United States, which declares: 'No state . . . shall . . . deny to any person within its jurisdiction, the equal protection of the laws'—on the alleged ground 'that the said headlight law does not apply equally to all persons and corporations in the same class or similarly situated; said act makes an unreasonable and arbitrary classification, whereby it excludes from the operation of said act persons owning and operating railroads, and likewise excludes from the operation of said act receivers operating railroads, even though said receivers operate fast trains through cities, towns, and thickly settled districts of the state; nor does said act apply to tram roads, mill roads, or roads engaged principally in lumber or logging transportation in connection with mills,' even though the locomotives used thereon, for a whole or part of their route, may be operated at fast speed, and through thickly populated districts?"

"(6) Is said act void because repugnant to article 1, § 8, ¶ 3, of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations, among the states, and with Indian tribes,' on the alleged ground 'that the enforcement of said statute and said statute itself interferes with and regulates interstate commerce, hinders and delays the running of locomotives having no such headlight as is required by said statute, although said locomotives are lawfully engaged in hauling cars and trains for interstate commerce,

vests the power to regulate interstate commerce exclusively in the Congress, and leaves the power to regulate interstate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the state may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power." See also *Chicago*, 32 L.R.A. (N.S.)

M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

And in *Luken v. Lake Shore & M. S. R. Co.*—III.—, 94 N. E. 175, a state statute similar to the Federal safety appliance act, but limited to cars, etc., engaged in intrastate traffic, was held not to interfere with Federal control of interstate commerce, although applicable to roads engaged in both intra and interstate commerce.

As to state regulation of relations between railroad companies engaged in interstate commerce and their employees, see note to *State v. Northern P. R. Co.* 15 L.R.A. (N.S.) 134.

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and makes it unlawful for defendant or other companies operating interstate railways to use, in the state of Georgia, locomotives having no headlight of the kind described in said alleged enactment, although said locomotives are lawfully used up to the state line, all with the result of delaying interstate commerce and rendering it impossible for interstate railroad companies crossing the Georgia line to conduct their interstate business with usual, customary, and proper despatch?"

"(7) The plaintiff in error contends that the act in question was never passed by both houses of the general assembly, according to the method prescribed in the Constitution and set out in the first question above,—the specific contention being that it passed the lower house regularly in the form now appearing in the printed acts; that in the senate, the committee to which it was referred reported adversely to the passage of the bill; that the senate disagreed to the report of the committee and the bill went to second reading; that at the third reading a substitute was offered and adopted; the bill then passed by substitute, forty senators voting for it in this shape; the bill was transmitted to the house for concurrence in the substitute; the house refused to concur; thereafter the senate took up the bill for the purpose of receding from the substitute; and the motion to recede prevailed by a vote of 18 to 12. No further action appears. The defendant, at the trial in the court below, offered to set up by special plea in bar that the substitute passed by the senate was materially different in its provisions from the bill as passed by the house, and to prove this fact by the exhibition and introduction in evidence of a certified copy of the substitute, as filed in the office of the secretary of state. Was the special plea setting up this fact subject to be stricken on general demurrer thereto, and was the certified copy of the substitute admissible in evidence for the purpose of supplementing, varying, or explaining the entries in the journal of the senate, and would it, if it had been admitted, and had been established that the bill as passed in the senate by substitute was materially different from what it was as originally passed by the lower house, have impeached the validity of the act, under the circumstances recited above?"

"(8) It appears from the record that the defendant was engaged in interstate commerce; that it failed to equip one of its locomotives engaged in that interstate commerce with a headlight of the standard required by the act in question. Was the defendant, as to this locomotive, while so en-

gaged in interstate commerce (it being run partly in this state and partly in South Carolina), exempt from the provisions of the act, on the ground that to apply the law to the operation of this locomotive as so engaged would be violative of the provision of the Constitution of the United States quoted above, conferring upon Congress exclusive power to regulate interstate commerce?"

"(9) Where it appears from the proof that the defendant's locomotives were, prior to the passage of the act, equipped with oil-burning headlights, or with electric headlights different from that prescribed by the act in question, is it any defense to a prosecution under the act that these headlights have, in the experience of the defendants and other railroad companies, usually proved reasonably safe and efficient (there being proof, however, that headlights of the prescribed standard are more efficient), and that to substitute electric headlights of the standard prescribed would entail expense of greater or less amount; the contention of the defendant being that to enforce the act under the circumstances would amount to depriving the defendant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and in violation of article 1, § 1, ¶ 3, of the Constitution of this state, because it renders the value of the old headlights less, or totally destroys it, and entails upon the defendant the expenditure of large sums of money, and deprives the defendant of the right to regulate its own business and affairs, and causes it to submit to an arbitrary and unreasonable regulation thereof?"

Messrs. McDaniel, Alston, & Black, for plaintiff in error:

The presumption that a statute has been constitutionally enacted when it has been enrolled, signed by the officer of each house, and approved by the governor, is not conclusive.

Norman v. Kentucky Bd. of Managers, 93 Ky. 537, 18 L.R.A. 566, 20 S. W. 901; Moore v. Neece, 80 Neb. 600, 114 N. W. 767; Cohn v. Kingsley, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 427; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722.

Where the Constitution requires the journal to show that the bill upon its passage received the votes of a majority of the members elected to each house, the court will receive the journal as evidence that a bill has not done so.

Chamlee v. Davis, 115 Ga. 266, 41 S. E. 691; Speer v. Athens, 85 Ga. 49, 9 L.R.A.

462, 11 S. E. 802; *Salem v. Wachovia Loan & T. Co.* 143 N. C. 110, 118 Am. St. Rep. 791, 55 S. E. 442; *Carswell v. Wright*, 133 Ga. 714, 66 S. E. 905; *Wilkes County v. Coler*, 180 U. S. 531, 45 L. ed. 655, 21 Sup. Ct. Rep. 458; *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 154, 18 So. 334; *Sellers v. State*, 162 Ala. 35, 50 So. 340; *Simon v. State*, 86 Ark. 527, 111 S. W. 991; *Smithee v. Garth*, 33 Ark. 17; *Smithee v. Campbell*, 41 Ark. 471; *Harwood v. Wentworth*, 4 Ariz. 378, 42 Pac. 1025; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 12 Fed. 722; *Weill v. Kenfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180; *Eld v. Gorham*, 20 Conn. 8; *State ex rel. Markens v. Brown*, 20 Fla. 407; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Mathis v. State*, 31 Fla. 291, 12 So. 681; *Cohn v. Kingsley*, 5 Idaho, 416, 38 L.R.A. 74, 49 Pac. 985; *People ex rel. Oliver v. Knopf*, 198 Ill. 340, 64 N. E. 842, 1127; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Edger v. Randolph County*, 70 Ind. 331; *State ex rel. Colbert v. Wheeler*, 172 Ind. 578, 89 N. E. 1; *Stephens v. Labette County*, 79 Kan. 153, 98 Pac. 790; *Duncan v. Combs*, 131 Ky. 330, 115 S. W. 222; *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L.R.A. 566, 20 S. W. 901; *State ex rel. Caillouet v. Laiche*, 105 La. 84, 29 So. 700; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Green v. Graves*, 1 Dougl. (Mich.) 351; *People ex rel. Gale v. Onondaga*, 16 Mich. 254; *Atty. Gen. v. Joy*, 55 Mich. 94, 20 N. W. 806; *Callaghan v. Chipman*, 59 Mich. 617, 26 N. W. 806; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L.R.A. 609, 40 N. W. 750; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *State ex rel. Minnesota R. Constr. Co. v. Hastings*, 24 Minn. 78; *Bradley v. West*, 60 Mo. 33; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *State ex rel. Gregg v. Erickson*, 39 Mont. 280, 102 Pac. 336; *State ex rel. Huff v. McClelland*, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; *Chicago, B. & Q. R. Co. v. Smyth*, 103 Fed. 376; *Opinion of Justices*, 52 N. H. 622; *Opinion of Justices*, 35 N. H. 579; *Re Sol-*

diers' Voting Bill, 45 N. H. 607; *Purdy v. People*, 4 Hill, 384; *Rumsey v. New York & N. E. R. Co.* 130 N. Y. 88, 28 N. E. 763; *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088; *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *State v. Kiesewetter*, 45 Ohio St. 254, 12 N. E. 807; *Mumford v. Sewall*, 11 Or. 67, 60 Am. Rep. 462, 4 Pac. 585; *Southwark Bank v. Com.* 26 Pa. 446; *State ex rel. Whitson v. Algood*, 87 Tenn. 163, 10 S. W. 310; *State v. McConnell*, 3 Lea, 332; *Gaines v. Horrigan*, 4 Lea, 608; *Williams v. State*, 6 Lea, 549; *Brewer v. Huntington*, 86 Tenn. 732, 9 S. W. 166; *Nelson v. Haywood County*, 91 Tenn. 596, 20 S. W. 1; *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Wise v. Bigger*, 79 Va. 269; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209.

This act is violative of due process of law.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; *Elliott, Railroads*, § 668; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Cleveland, C. C. & St. L. R. Co. v. Connersville*, 147 Ind. 277, 37 L.R.A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66, 44 N. E. 929; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *National Phonograph Co. v. Schlegel*, 64 C. C. A. 594, 128 Fed. 733; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 41 L.R.A. 422, 49 N. E. 121; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 53; *Baxendale v. Great Western R. Co.* 5 C. B. N. S. 336, 28 L. J. C. P. N. S. 81, 4 Jur. N. S. 1279, 7 Week. Rep. 64; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A.(N.S.) 492, 128 Am. St. Rep. 1061, 116 N. W. 885.

The act is arbitrary and unreasonable.

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct.

Rep. 427; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Re Jacobs, 96 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 836; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 230, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408; McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Re Smith, 143 Cal. 368, 77 Pac. 180; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Welch v. Swasey, 214 U. S. 105, 53 L. ed. 927, 29 Sup. Ct. Rep. 567; 5 Enc. U. S. Sup. Ct. Rep. p. 513, note 21; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220.

This act denied equal protection of the law.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; State ex rel. Webber v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 A. & E. Ann. Cas. 65; Henderson v. Walker, 55 Ga. 481; Thurman v. Cherokee R. Co. 56 Ga. 32 L.R.A.(N.S.)

376; Ellington v. Beaver Dam Lumber Co. 93 Ga. 53, 19 S. E. 21; Youngblood v. Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838; Brown v. Comer, 97 Ga. 801, 25 S. E. 176; Robinson v. Huidekoper, 98 Ga. 306, 25 S. E. 440; Mutual Reserve Fund Life Asso. v. Augusta, 109 Ga. 73, 35 S. E. 71.

It violates the commerce clause of the Federal Constitution.

Gibbons v. Ogden, 9 Wheat. 193, 196, 6 L. ed. 69, 70; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 573, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; State Freight Tax Case, 15 Wall. 275, 21 L. ed. 161; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 473, 24 L. ed. 531; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Addyston Pipe & Steel Co. v. United States, 175 U. S. 228, 44 L. ed. 142, 20 Sup. Ct. Rep. 96; Kidd v. Pearson, 128 U. S. 17, 32 L. ed. 349, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Hinson v. Lott, 8 Wall. 152, 19 L. ed. 388; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Bowman v. Chicago & N. W. R. Co. 125 U. S. 493, 31 L. ed. 709, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Brown v. Houston, 114 U. S. 631, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091; Hall v. De Cuir, 95 U. S. 490, 24 L. ed. 548; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Robbins v. Taxing Dist. 120 U. S. 492, 30 L. ed. 695, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Mr. J. R. Lamar also for plaintiff in error.

Messrs. J. C. C. Black and T. S. Felder for the State.

Holden, J., delivered the opinion of the court:

1. The act referred to in the questions propounded by the court of appeals, known as the "headlight law," was duly deposited in the office of the secretary of state as an enrolled act of the general assembly, after having been duly signed by the president of the senate and the speaker of the house of representatives, and approved by the governor. The provision of the Constitution referred to in the first question propounded is as follows: "No bill shall become a law unless it shall receive a majority of the votes of all the members elected to each house of the general assembly, and it shall, in every instance, so appear on the journal." Civil

Code, § 5777. An act with the status above named cannot be attacked, as being invalid under the constitutional provision above quoted, by showing that the journal of the senate affirmatively shows that it did not receive on its passage the vote of a majority of all of the members elected to that body. When an enrolled act is signed by the presiding officers of both houses, approved by the governor, and deposited in the office of the secretary of state, it will be conclusively presumed that the measure was properly put to a vote in both houses, and that it received a constitutional majority; and the court will not upset the act because the journals of the houses happen to show that it did not receive a majority of the votes of either or both branches of the legislature. 36 Cyc. Law & Proc. p. 971 (G, b). The presiding officer of each branch of the general assembly, and the governor, are sworn officers of the state, and it is to be presumed that an enrolled act would not have been signed by these officials, and thereby authenticated as being a valid law, unless the act on its passage had received the number of votes which the Constitution requires in order to enact it. It will be deemed more likely that the subordinate officers of the general assembly, in the performance of clerical duties, should have made a mistake in recording on the journals the proceedings had by the respective legislative bodies, than that the sworn presiding officers of these bodies should have signed a duly enrolled act as having been lawfully enacted, when it did not in fact receive the number of votes required by the Constitution in order to insure its passage. In the case of *DeLoach v. Newton*, 134 Ga. 739, 68 S. E. 708, it was held: "If an enrolled act of the legislature was duly signed by the president of the senate and the speaker of the house, and approved by the governor, and deposited in the office of the secretary of state, it was not competent to attack its validity on the ground that the legislative journals showed that the bill originated in the house, was there passed by a constitutional majority, and transmitted to the senate, where it was amended and passed by a constitutional majority, and then transmitted to the house, where the senate amendment was concurred in, but failed to show that this was done by a constitutional majority." See also *Whitley v. State*, 134 Ga. 758, 68 S. E. 716.

If an act is not invalid under the provisions of the Constitution above quoted when the legislative journals fail to show that it received a constitutional majority, it would not be invalid when the journals affirmatively show that it did not receive

such majority. If it were permissive to look to the legislative journals to ascertain what occurred with respect to the passage of an act, after it had been duly enrolled, signed, approved, and deposited with the secretary of state as an existing law, an affirmative showing on the journal that a measure did not receive the requisite constitutional majority would be no more fatal to the validity of the act than a failure of the journal to show that it did receive such majority, where the attack is based on a constitutional provision that no bill shall become a law unless it shall receive a majority of all the members elected to each house of the general assembly, "and it shall, in every instance, so appear on the journal."

The first question propounded by the court of appeals must be answered in the affirmative. In answering this question, having ruled that an enrolled act duly signed by the presiding officers of both houses, approved by the governor, and deposited with the secretary of state, is conclusively presumed to be valid law, so far as its enactment is concerned, the special plea referred to in the seventh question was subject to be stricken on the general demurrer thereto, and the certified copy of the substitute referred to in the seventh question was not admissible in evidence "for the purpose of supplementing, varying, or explaining the entries in the journal of the senate." This ruling makes it unnecessary to determine whether or not the journal of the senate shows that the act in question was, or was not, in fact passed in conformity to the above-quoted provision of the Constitution.

2. The full text of the title and the body of the act referred to in the questions propounded to us is as follows:

An Act to Require All Railway Companies in the State to Equip and Maintain Each and Every Locomotive Used with Sufficient Electric Headlight, to Prescribe a Punishment for the Failure to So Equip, and for Other Purposes.

Section 1. Be it enacted by the general assembly of Georgia, and it is hereby enacted by authority of the same, that all railroad companies are hereby required to equip and maintain each and every locomotive used by such company to run on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter, and to keep the same in good condition. The word "main line," as used herein, means all portions of the railway line

not used solely as yards, spurs, and side tracks.

Section 2. Be it further enacted, that any railroad company violating this act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction shall be punished by fine as prescribed in § 1039 of the Code of 1895.

Section 3. Be it further enacted, that this act shall go into effect July 1, 1909.

Section 4. Provided this act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills.

Section 5. Be it further enacted, that all laws and parts of laws in conflict with this act be and the same are hereby repealed.

Approved August 17, 1908. (Acts 1908 pp. 50, 51.)

The act requires "all railroad companies" to equip every locomotive used by "such company to run on its main line" after dark with a light of the kind named, and provides that "any railroad company" violating the act shall be liable to indictment and to be punished by fine as prescribed in Penal Code, § 1039. Does the term "railroad company" include a natural person, so that the latter would be subject to indictment if such natural person owned and operated a railroad and failed to comply with the provisions of the act? In construing the term "railroad company," we should look to all the provisions of the act, and give proper consideration to the object intended to be accomplished by the act. Section 4 of the act provides: "Provided this act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills." It should be observed that, in making this exception, the act does not say that the owner or operator of the roads designated should be excepted, but simply provides that "this act" shall not apply to such "roads," indicating that the purpose of the act was to make the requirement in reference to the use of the named headlights on all other railroads, regardless of whether owned by a corporation or natural persons. The evident purpose was to except certain roads, but not to make any exception in favor of any particular owners of other roads. The object of the act was to require certain headlights on all railroads except those of a named class, and the term "railroad company" was intended to include natural persons as well as corporations. The word "company" does not necessarily mean a corporation. It may mean a firm or partnership. 8 32 L.R.A. (N.S.)

Cyc. Law & Proc. p. 380. If it includes a firm or partnership of two or more individuals, why should it not include one individual? Penal Code, § 1, ¶ 4, provides: "The singular or plural number shall each include the other, unless expressly excluded."

Penal laws should be construed strictly, but they should not be so construed as to defeat the obvious intention of the general assembly. In construing an act, whether of a civil or penal nature, the intention of the general assembly should be sought for, keeping in view the evil and the remedy. The evil against which protection is sought is the operation of engines without the headlight required by the act. The purpose of the law was to require named headlights on engines on the main line of all railroads except those of a specified character, and it was not the intention to make this requirement of corporations and companies and make no such requirement of an individual owning and operating a railroad. Civil Code, § 2199, provides that the terms railroad "corporation" and "company" used in the article in which such section appears shall include in their meaning any individual or individuals owning and operating railroads. Much of the law of this state pertaining to the operation of railroads, including the right of condemnation of private property, what is familiarly known as the "blow post" law, and requirements as to the furnishing of heat and light in railroad trains, are embraced in this article. We think the word "company" in the act in question was used in the same sense referred to in Civil Code, § 2199, as including "individuals." In this connection, see *State v. Stone*, 118 Mo. 388, 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Lewis v. Northern P. R. Co.* 36 Mont. 207, 92 Pac. 469; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249.

(b) The act does not violate the equal protection clauses of the state and Federal Constitutions because it provides: "Provided this act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills." The roads to which the act does not apply do not serve the public generally, but their work is mainly that connected with lumber mills. Their principal business is not the transportation of passengers and freight for the public, but involves work for private enterprises in a small territory. The danger of operating such roads without proper safety appliances is not so great as that attending the operation of ordinary railroads doing a general passenger and freight busi-

ness for the public. These differences furnish a reasonable basis for requiring a headlight of a certain kind on engines on main lines on ordinary railroads, and not requiring such lights on engines on roads of the kind excepted. The latter form an entirely separate and distinct class of railroads from the former, and the act cannot be said to make an arbitrary classification. *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Missouri & N. A. R. Co. v. State*, 92 Ark. 1, 31 L.R.A. (N.S.) 861, 121 S. W. 930; *People v. New York, N. H. & H. R. Co.* 55 Hun, 409, 608, 8 N. Y. Supp. 673; *Chicago, I. & L. R. Co. v. Railroad Commission*, 173 Ind. 475, 90 N. E. 1011.

Conceding, without deciding, that receivers of railroads are not within the provisions of the act, we do not think this fact would make the act void as a violation of the equal protection clauses of the state and Federal Constitutions. A receiver appointed by a court is one of its officers, and in the absence of any statute imposing a duty on a receiver of a railroad thus appointed, he must handle the property placed in his charge in accordance with the instructions of the court appointing him. His possession and operation of the road are those of the court. Should the court, through its receiver, have possession of a railroad whose engines were not equipped with the required headlight, or purchase other engines, the presumption is that the court—a branch of the government co-ordinate with the general assembly—would conform to the policy of the state as declared by the general assembly, in the exercise of the police power, and equip the engines with such headlights as it had by law required of railroad companies. A railroad is never retained in possession of and operated by the court longer than is necessary. The court does not permanently operate railroads; on the contrary, it only operates them for a short time and from necessity. If the act applies to a receiver, and if a receiver were appointed by the court for a railroad whose engines were not equipped with the required headlights, how could such receiver operate the engines without such lights without subjecting himself to numerous prosecutions and fines, should the court require him to operate the engines in violation of the penal laws of the state? If it were a railroad engaged in serving the public, the latter might suffer to a great extent if the road was not operated until all the engines were equipped with the required headlights. The act provided that it should not go into effect until a specified date, and thus time was given to railroad companies to equip their

engines in accordance with its provisions. But after the act went into effect, if a receiver were appointed for a railroad whose engines were not thus equipped, no time is allowed within which the receiver might comply with the act; and if the act applies to receivers, they would become subject to criminal prosecutions the day they were appointed, if they operated engines without the prescribed equipment, in disregard of the act. The court would dispose of a railroad under receivership as soon as it was proper and practicable to do so. Those to whom the receiver delivered it, under a contract of purchase or otherwise, would be subject to numerous prosecutions under the act in question, should they not equip the engines as required by that law, and the public might seriously suffer if the road should cease operations until its engines could be thus equipped. It is to be presumed that the court would not allow the road to be disposed of before its engines were equipped with headlights as required by the act. It is not to be presumed that it would dispose of the road to another when it was in such condition that the one acquiring it would violate the penal law of the state by immediately operating it.

Receivers, and courts through receivers, do not construct or buy railroads; but their ultimate aim is to get rid of the ones of which they are in possession. Courts, through receivers, never operate railroads except from necessity, and when they do so operate them it is only for a limited time. If the courts take possession of a road whose engines are not equipped as required by the "headlight law," the courts should not require its receiver to cease operating the road until the engines should be so equipped, thereby causing inconvenience and suffering to the public. In such cases, the court should yield to the necessity of the situation as it existed when thrust upon it, by immediately operating the road, where possible, to subserve the public convenience and requirements, and impose upon the receiver the duty of equipping the engines as rapidly as possible in accordance with the policy of the law, so as to put the road in a condition where its operation can be continued by those who take charge of it when disposed of by the court without involving a violation of law on their part. We think there was a reasonable basis for a requirement that railroad companies should equip their engines operated on main lines as prescribed in the act, without making such requirements applicable to receivers of railroads.

The answer to the third and fifth questions must be in the negative.

3. All property is held subject to the police power of the state. The determination by the railroad company that the reflector and the light in use by it constituted an adequate light cannot be conclusive on the general assembly, which has the authority to exercise the police power of the state, and in the interest of public safety to declare it inadequate. It is a matter of great importance for the protection of persons and property in the train attached to a locomotive, the persons on the locomotive, persons and property on the track, and persons and property on other trains with which a collision may be had, that there should be an adequate headlight on such locomotive. The general assembly, in the exercise of the police power of the state, has the right to require adequate headlights on such engines; and if, in conformity to the requirements of such law, the railroad company is compelled to do away with the headlights already in use by it, and substitute others therefor at its own expense, there is no taking of property without just compensation, in violation of the due process clauses of the state and Federal Constitutions. In such a case, there is no taking of property. The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of the public safety. The fact that the railroad company will, in order to equip its engines with the required headlights, be forced to do away with the reflectors and lights which it has in use, is only incidental to a compliance with the police regulation and requirement made in the act, and which is a valid and reasonable requirement. Damages cannot be required by one because he incurs expense in obeying a police regulation enacted for the common welfare and safety of the public. See, in this connection, *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047; 1 *Thomp. Corp.* § 449; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175, and authorities cited in the opinion; *Bacon v. Boston & M. R. Co.* 83 Vt. 421, 76 Atl. 128 (19).

The act provides that every engine used on a main line after dark shall be equipped "with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter." It is not required that the light shall consume no more than the specified number of watts at the arc,

nor that the reflector shall be exactly a particular size. A light consuming more than 300 watts at the arc and a reflector greater than 23 inches in diameter would be within the provisions of the act. The act requires "a good and sufficient headlight." In the exercise of the police power, the general assembly had the right to prescribe that such light should be an electric light. The fact that the railroad company is prevented from providing a light produced in some way other than by an electric current is no violation of the due process clause, "by depriving it of its own right to make contracts and manage its own business." In *McGehee on Due Process of Law*, p. 345, it is said: "Although freedom and the liberty to contract are fundamental rights within the guaranties of the Constitution, they may be limited by the state in the exercise of the police power, in the interest of public safety, health, or morals, or, under certain conditions, in the exercise of the legislative power merely." Also see *Freund, Pol. Power*, § 499.

It is to be presumed that the general assembly satisfied itself that the light power to be used in order to insure the public safety was the one required, and in the exercise of the police power it had the right to require the use of such light. The fact that, in obeying the law, the railroad company is deprived of the right to use a light other than an electric headlight, or to use an electric light below a specified intensity, or a reflector of less than a designated size, does not violate the due process clause of the state and Federal Constitutions. The legislature has the power to require such a headlight as is best promotive of the public safety, if the requirement is a reasonable one. An act requiring in general terms a light adequate for such purposes would be very indefinite, and would give rise to frequent disputes as to whether or not the law had been observed. A jury in one instance might declare the light in use inadequate, while another jury might declare it adequate, and the user of the light might be uncertain as to whether or not he was complying with the law. In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 102, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609, 612, the Supreme Court of the United States said: "If, in order to accomplish a given beneficial result,—a result which depends on the action of a corporation,—the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorneys' fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selec-

tion of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accomplish the result? As individuals we may think it better that the legislature prescribe the specific duties which the corporations must perform; we may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire *prima facie* evidence of negligence; but, clearly, as a court we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts." In *Freund on Police Power*, § 34, it is said: "Assuming that several measures are equally efficient to avert danger to health or safety, it would still seem to be within the legislative power to select one method and require its adoption; for it is easier to enforce uniform police regulations than a great variety of measures, the efficiency of each of which would be a question of fact in each particular case."

Requiring a light by virtue of which those on an engine can see a designated distance ahead is practically done by requiring that the light shall be of a certain intensity and behind a reflector of not less than a given size. The act declares that the light which is considered proper for the public safety must be of the kind required. The general assembly is presumed to have acted after due deliberation and investigation, and after finding that the light proper for the public safety must be of the kind prescribed. The courts cannot say that an electric light, and one of the intensity provided, with a reflector of the size named, is not one necessary for the public safety; nor can we say that the requirement that such a light shall be used on locomotives is an unreasonable requirement, although the act, in preventing the use of lights other than an electric light, affects the right of the company to contract for any other kind of light. The act is not void for the alleged reason that the government is undertaking to manage the company's business and interfere with its right to contract. In 1 *Thompson on Corporations*, 2d ed. § 425, it is said: "The legislature may exercise its discretion within wide limits in its regulations of corporations under this police power. If the statute appears to be within the apparent scope of such power, it is not for the courts to inquire into its wisdom and policy, or to substitute their discretion or judgment for that of the legislature. . . . The correct doctrine undoubtedly is that 32 L.R.A.(N.S.)

it is for the legislature to determine the exigency, or the occasion, for the exercise of this power; but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which this power is to be exercised, and the reasonableness of that exercise." And in § 426 the same author says: "The position of the courts in passing on the validity of statutes enacted by the legislatures in the exercise of this police power is regarded by them as both delicate and embarrassing. Courts should be, and are, slow to pronounce judgment upon what is purely legislative discretion. It is sufficient to stay the hands of the courts if the exercise of this power by the legislatures is reasonable. And in judging of its reasonableness courts will not look closely into mere matters of judgment, where there may be a reasonable difference of opinion. The courts will assume that this power will always be exercised by the legislature with the highest discretion; and the rule is that, where the legislative expression is clear and unequivocal, a clear case should be made to authorize an interference by the courts upon the ground of unreasonableness. The courts should and do proceed with the utmost caution, and hold such regulations void only when they clearly pass beyond the limits of the police power and infringe upon rights secured by the Federal law. This power rests solely within the legislative discretion, inside constitutional limits. It is for the legislature to determine when the public safety or welfare requires the exercise of this power, and the courts can interfere only when such exercise conflicts with the Constitution. With the necessity, wisdom, or policy of such legislation they have nothing to do."

The need for the exercise of the police power upon any given subject is a matter in the discretion of the legislature. The exercise of this power must be reasonable, and the question as to whether or not it is reasonable is one for the courts. We cannot say that the exercise of the power in this instance was unreasonable. In *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383, 390, the following language of the supreme court of Utah was approved: "Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government." The legislature has the right to prevent railroad companies from con-

tracting for and using a light not proper to be used for the public safety; and if the light required is one proper for this purpose, the legislature has the right to require its use, notwithstanding this prevents the use of another kind of light, if the requirement of the act is reasonable,—and we cannot say that its requirements are unreasonable.

The act is not void on the ground that it absolutely and without exception makes the company guilty of a crime when it fails to equip its locomotives with the required headlights, and operates them on its main line without such headlights. It is contended that the act is void for the reason that in case of accident or other unforeseen cause, if the light which the company had provided in conformity with the requirements of the act were injured or destroyed, no provision is made allowing the company to operate its engine without the required headlight to a repair shop, or to the place where another engine could be obtained, without violating the act and becoming liable to punishment thereunder. Every statute must be construed to have a reasonable intentment, and be construed in connection with other statutes. While we will not undertake to detail instances in which the company would be guilty of no offense under the act in question while operating an engine without the required headlight, an act will not be construed so as to require the performance of an impossible act, if any other construction can be legitimately given it. See *Southern R. Co. v. Atlanta Sand & Supply Co.* 135 Ga. 36, 68 S. E. 807. The statutes requiring railroad companies to erect blow posts 400 yards on either side of public crossings, and to blow the whistle on approaching such crossings, to furnish light and water for passengers, and other statutes imposing duties on railroad companies, and providing a penalty for violation thereof, contain no emergency clauses; and there are many statutes making the commission of specific acts crimes, without providing that there are circumstances under which a technical violation of the letter of the act would constitute no crime; but we are not prepared to hold that such acts are void for this reason. As to whether, in any particular instance, a person charged with violating a criminal statute has a good defense thereto, must depend upon the particular facts in each case.

We do not think that the act is violative of the due process clauses of the state and Federal Constitutions, and our answer to the second, fourth, and ninth questions must be in the negative.

4. The commerce clause of the Federal

Constitution is a limitation on, but is not a destruction of, the police power of the states. The police power has never been surrendered by the states. A railroad company driving an engine engaged in interstate commerce through the territory of this state, with a headlight which endangers the lives and property of the people, cannot claim that under the commerce clause of the Federal Constitution it is not subject to reasonable police regulations of this state, requiring an adequate headlight for the protection of the lives and property of the people. The act in question does not restrict or prohibit interstate commerce. It is an exercise of the police power, designed to protect persons and property in this state, and does not prohibit or regulate interstate commerce. The statute is not directed against interstate commerce. So far as the act affects interstate commerce, it is in aid thereof. It protects the persons and property on trains brought from another state into this state, as it also does persons and property not so brought; and it is the duty of the state to protect the former as well as the latter. One of the highest duties of government is the protection of the lives and property of the people. To the exercise of the police power, all rights of natural persons and corporations are subject.

If an engine doing an interstate business should come into this state from another state, or go out of this state into another state, when such other state had a law requiring a headlight on the engine other than an electric light and a reflector of a size different from that required by the act in question, the mere fact that this would necessitate changes of lights and reflectors, thereby causing expense, loss of time, and inconvenience, would not for this reason make the requirement of the act an unlawful interference with interstate commerce. *People v. New York, N. H. & H. R. Co.* 55 Hun, 409, 608, 8 N. Y. Supp. 673; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418. Many acts requiring trains doing an interstate business to stop at stations and public crossings, and to run at not exceeding a specified rate of speed, have been held not to be violative of the commerce clause. Such acts, however, necessarily to some extent prevent such trains from making the time they would make, but for such stops and slowing up of speed, and also of necessity involve some expense. A violation of the commerce clause would not exist merely because some loss of time, expense, and inconvenience was caused the railroad company in making the necessary changes in its headlight equipment in or-

der to meet the requirements of different states, nor because such changes involved some additional expense. Such expenses and loss of time would impose no substantial burden on interstate commerce. The act is in no sense a regulation of interstate commerce. If every law enacted in the exercise of the police power, with a design to enhance the public safety, be declared void because it to some extent affected interstate commerce, many of the most salutary police regulations of the states must fall. In *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881, it was declared: "Courts always presume that a legislature, in enacting statutes, acts advisedly and with full knowledge of the situation; and they must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action." Every presumption is to be indulged in favor of the constitutionality of an act. There is no legislation by Congress making any requirements with respect to the kind of headlights to be used on engines engaged in interstate business.

The act in question is not violative of the commerce clause of the Federal Constitution, and our answer to the sixth and eighth questions is in the negative.

All the Justices concur.

IDAHO SUPREME COURT.

WILLIAM DOYLE, Appt.,

v.

CITY OF SANDPOINT, Resp't.

(18 Idaho, 654, 112 Pac. 204.)

Injunction — wrongful issuance — liability of municipality.

1. Under the statute of this state, § 4291, Rev. Codes, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation.

Same — absence of bond — effect.

2. Where no bond or undertaking is required on the issuance of an injunction, there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously and without probable cause.

Municipal corporation — injunction — malice — liability.

3. A municipal corporation cannot be held for the maliciously suing out of a writ

of injunction without probable cause, for the reason that such an act would be *ultra vires* and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting.

(November 21, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Bonner County in defendant's favor in an action brought to recover damages claimed to have resulted from the wrongful continuance of an injunction issued at the instance of defendant against plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Jones and E. W. Wheelan for appellant.

Messrs. Herman H. Taylor and B. S. Bennett, for respondent:

The statute exempts the state or a municipal corporation from undertaking to pay damages, costs, and counsel fees, where a temporary injunction is granted to them.

3 Elliott, Ev. 1969; Hayden v. Keith, 32 Minn. 277, 20 N. W. 195; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Robinson v. Kelum, 6 Cal. 399; Mark v. Hyatt, 135 N. Y. 306, 18 L.R.A. 275, 31 N. E. 1099; 2 High, Inj. § 1048; Hess v. German Baking Co. 37 Or. 297, 60 Pac. 1011; Morgan v. Menzies, 60 Cal. 341.

Allshie, J., delivered the opinion of the court:

This action was commenced by appellant against the city of Sandpoint to recover damages for the issuance and wrongful continuance of an injunction preventing

Note. — Liability of municipality for wrongful legal proceedings instituted by its officers for its benefit.

This note is confined to a discussion of the liability of the municipality itself, not that of its officers. It is confined to the liability of the municipality for wrongful suits only, and does not include other wrongful acts, such as false imprisonment and unlawful arrest.

As to the right to recover damages caused by an injunction, see note to Mark v. Hyatt, 18 L.R.A. 275.

As to liability of municipal corporations for false imprisonment and unlawful arrest, see note to Bartlett v. Columbus, 44 L.R.A. 795.

As to municipal liability for arrest and imprisonment under invalid ordinance, see note to McGraw v. Marion, 47 L.R.A. 593.

Wrongful injunction.

It is a well-settled rule of law that no right of action exists for damages sustained in consequence of an injunction erroneously issued, where no injunction bond or under-

the use of a certain building owned by him, situated in the corporate limits of the defendant city. The original action in which the injunction issued was instituted by the city against Doyle to enjoin and restrain him from connecting his building with a bridge constructed and maintained by the city along and over the street in front of the building. That case was finally determined by this court adversely to the city. *Sandpoint v. Doyle*, 14 Idaho, 743, 17 L.R.A.(N.S.) 497, 95 Pac. 945. Under the provisions of the statute, § 4291, Rev. Codes: "On granting an injunction, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written

undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto."

It will be observed from the provisions of the foregoing section that the city comes within the excepted class, and was not required to give an undertaking on the issuance of an injunction, and so no undertaking was required or given by the city on the suing out of the injunction in the case of *Sandpoint v. Doyle*.

The question with which we are con-

taking was given, and the injunction was not sued out maliciously and without probable cause. See note in 18 L.R.A. 275, and 16 Am. Eng. Enc. Law, p. 439. This rule is as applicable when a municipal corporation obtains the injunction as in other

Thus, in an action by a municipal corporation in which a temporary injunction is neither asked nor granted, but in which a final judgment is rendered, and a final injunction granted in favor of the municipal corporation, by the trial court, without exacting any injunction bond, but which final judgment and injunction are set aside on appeal, no damages can be assessed against the municipal corporation on account of the wrongful injunction, as no bond was given. *St. Louis v. St. Louis Gaslight Co.* 82 Mo. 349.

In *St. Louis v. Alexander*, 23 Mo. 483, which was an action by the city and county of St. Louis as stockholder in a railroad company, to enjoin the sale of property covered by a trust deed given by the railroad company, in which a temporary injunction was granted, but which was afterward dissolved on the ground that said city and county were not a stockholder, it was assumed by both parties that the defendants were entitled to some damages against the city and county on account of the wrongful injunction, the only dispute being how much was recoverable under the evidence. It did not appear, however, whether an injunction bond had been given or not.

Cases like *Chicago Title & T. Co. v. Chicago*, 110 Ill. App. 395, affirmed in 209 Ill. 172, 70 N. E. 572, which consider whether damages for the malicious suing out of a temporary injunction are recoverable in an action upon the injunction bond, are omitted, although a municipality was a party, where no question was raised as to whether a different rule would apply in the case of municipalities from that applying to private individuals or corporations.

—power of officer to bind municipality by bond.

Where a temporary injunction obtained 32 L.R.A.(N.S.)

by a city in a suit instituted by it is dissolved, the mayor of the city, in order to have the temporary injunction remain in force pending an appeal, cannot, as an incident to authority given him to prosecute suits and appeals, bind the city by giving a bond staying the operation and effect of the order dissolving the injunction. *Baltimore v. Baltimore & O. R. Co.* 21 Md. 50.

Wrongful attachment.

It has been held that a county is not liable in damages for its wrongful attachment of property in a suit instituted by its officers while engaged in the performance of public duties enjoined on them by the direct authority of the state, and not undertaken by those officers for the private benefit or emolument of the county. *Reed v. Howell County*, 125 Mo. 58, 46 Am. St. Rep. 466, 28 S. W. 177.

But, in *Merritt v. St. Paul*, 11 Minn. 223, Gil. 145, which was an action of trespass against a city and its attorney, it was held that a demurrer was properly overruled to a complaint alleging that the city, by its attorney, commenced an action against the plaintiff and procured to be issued, without any allowance by the court or judge, a warrant of attachment, regular in form, against his property; that the present plaintiff defended and recovered judgment in said action, and that his property had not been returned to him. The question whether there would be a different rule when municipal corporations were concerned, from that obtaining when only individuals were parties, was neither raised nor discussed; nor does it appear what was the nature of the action in which the attachment issued.

In *Ashland County v. Stahl*, 48 Wis. 593, 4 N. W. 752, the question was raised, but not decided, whether a county could be subjected to damages in a case where the district attorney attached property maliciously and without probable cause, on behalf of the county; but it was there held that the remedy in case of a discontinuance of the attachment suit, where there is no

fronted in this case is whether a municipal corporation is liable for damages for wrongfully suing out a writ of injunction or wrongfully causing the same to be continued in force. It is clear to us that as to any party specifically excepted from the operation of the statute, there can be no liability for damages, unless it be alleged and proven that the injunction was procured maliciously and without probable cause. 22 Cyc. Law & Proc. p. 1061. It is well established by the authorities that damages caused by an injunction erroneously granted in the exercise of jurisdiction, where the proceedings have been regular, cannot be recovered from the party who obtained the writ in the absence of a bond or undertaking, unless it be shown that the transaction was malicious and without probable cause. *Mark v. Hyatt*, 135 N. Y. 306, 18 L.R.A. 275, 31 N. E. 1099; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Hess v. German Baking Co.* 37 Or. 297, 60 Pac. 1011; *Columbus, H. V. & T. R. Co. v. Burke*, 54 Ohio St. 98, 32 L.R.A. 329, 43 N. E. 282; *Cox v. Taylor*, 10 B. Mon. 17.

In the note to *Mark v. Hyatt*, 18 L.R.A. 275, the editor says: "The law is well settled that no right of action exists for damages sustained in consequence of an injunc-

tion, except when founded upon an injunction bond or undertaking, unless the injunction was obtained maliciously and without probable cause." A large number of authorities are cited in support of that statement. In *Robinson v. Kellum*, 6 Cal. 399, the court says: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice." This case is cited and quoted from with approval in *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

It will be observed that where the statute requires an undertaking on the issuance of an injunction, it obligates the plaintiff and sureties "to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled

avermert of malice or want of probable cause, is by an assessment of damages by a jury in the attachment suit, as provided in the general statutes regulating attachments, and not by independent suit nor by counterclaim in a subsequent action by the county against the attachment debtor.

Under a statutory provision that "in any civil action or proceeding wherein . . . any county, city, or town is a party plaintiff or defendant, no bond, written undertaking, or security can be required . . . of any county, city, or town," an attachment undertaking given by a city in a suit in which it is plaintiff is in contravention of the policy of the law, is without consideration, and is therefore void and unenforceable against the sureties, when the city is defeated. *Morgan v. Menzies*, 60 Cal. 341.

Malicious prosecution.

A municipal corporation is not liable in an action for malicious prosecution because its officers, in enforcing the police ordinances of the municipality, instituted a prosecution maliciously and without probable cause. *Robertson v. Marion*, 97 Ill. App. 332.

A municipal corporation is not liable in an action for malicious prosecution based on a suit instituted by a tax collector to collect a tax, where the city neither authorized nor ratified the bringing of the suit. *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910.

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In *Purcell v. Long Island City*, 84 Hun, 439, 32 N. Y. Supp. 302, the court, after assuming, though not deciding, that an action for malicious prosecution would lie against a municipality, held that the municipality was not sufficiently connected with the prosecution for it to be held liable, by evidence that one of the school trustees of the municipality, acting as such, charged the plaintiff with larceny of school property belonging to the municipality, and that the prosecution was carried on by the corporation counsel until the charge was dismissed.

A petition in an action against a municipal corporation for malicious prosecution of a civil action to collect taxes does not state a cause of action when it contains no statement of facts sufficient to enable the court to determine whether the corporation had authority to levy, impose, and collect the taxes involved, since, if the taxes were valid and the city had power to impose and collect them, its motives are irrelevant and immaterial. *Brown v. Cape Girardeau*, 90 Mo. 377, 50 Am. Rep. 28, 2 S. W. 302.

In *Barthe v. New Orleans*, 42 La. Ann. 43, 7 So. 70, an action for damages *in solido* against a city and three others who were the lessees of the city public market, it was held that a petition stated a cause of action which alleged that the city, at the instigation of the other defendants, brought several prosecutions against the plaintiff for violation of a city ordinance prohibiting private markets within six blocks of the

thereto." The statute therefore provides in those cases for the recovery of damages by the defendant, irrespective of the question of "malice" or "probable cause," in the event "the court finally decide that the plaintiff was not entitled" to the injunction. On the other hand, as may be seen from an examination of the authorities, it is firmly established that, in the absence of an undertaking, the only liability against the party suing out the injunction is for damages caused, where the injunction was procured through malice and without probable cause. In the present case, the action is not prosecuted on the grounds of malice, but the suing out of the writ of injunction, and continuing it in force from the time of its issuance, is alleged as the cause of the damage, and the damages demanded are the usual damages allowed and recoverable under the statutory undertaking. It is clear that such an action cannot be maintained.

It is argued by counsel for appellant that the state, a county, municipal corporation, or married woman, is, under the provisions of that section, just as liable for damages resulting from the wrongful or erroneous issuance of an injunction, as is anyone who gives an undertaking under the provisions of the statute, and that the only purpose

of the exception was to avoid the inconvenience and annoyance that might be entailed on the state, county, or city officer, or a married woman, in case they were required to secure an undertaking before the writ would issue. It is further contended by counsel that an undertaking on the part of the excepted classes would not add anything to the security. We cannot agree to this line of reasoning. In the entire absence of this statute, there would be no liability for the wrongful or erroneous suing out a writ of injunction, except in cases where a court of equity might see fit to require a bond in advance. In the absence of the statute, it is therefore clear that the state, county, and municipal corporation would not be liable as on bond. It is equally certain that this statute does not require them to give a bond, or declare that they shall be liable, the same as an individual, although they do not give a bond. The reasons for the enactment of this statute might be the subject of much speculation, but we are inclined to think that it was the legislative purpose to exempt the public from such liability, whether they be acting as a state, a county, or a municipal corporation, and that it was considered by the lawmaking power that, since an injunction procured

public market, in which he had been convicted and had appealed to the supreme court; that pending the appeal, the city, at the instigation of the other defendants, sued out and obtained an injunction restraining plaintiff from carrying on his market, on the ground that it was within the prohibited distance, and allowed such injunction to remain in force for a considerable time after the supreme court had set aside his conviction for violation of the ordinance, on the ground that his market was not within the prohibited distance. The gist of the action was the permitting of the injunction to remain in force after the decision of the supreme court had demonstrated its invalidity. No mention is made in the report of any injunction bond being given, and the action apparently was not on the bond, but was for malicious prosecution.

It was held in *Gould v. Atlanta*, 60 Ga. 164, that a nonresident merchant has a right of action for damages against a city, where the latter, by its officers, the mayor and common council, in order to prevent him from competing with the resident merchants, and at the request of the latter, and with the malicious intent of injuring such nonresident merchant, passes a resolution declaring him to be within an ordinance (since declared invalid) taxing nonresident traders, and directing the ordinance to be enforced against him, and which is enforced against him by suit and executions for the amount of the tax, and which tax by another ordinance was in-

creased to 25 per cent of the amount of gross sales.

A city is liable in debt for the costs and expense incurred by one against whom the public administrator negligently and without proper inquiry brought a groundless, vexatious, and unnecessary suit, without probable cause or foundation, where a statute gives the city power to appoint and remove such administrator, authorizes it to direct his conduct by rules and regulations, and makes the city responsible for the application of all moneys received by him for the due and faithful execution of his office, and where a judgment for costs was rendered against such administrator, which could not be satisfied because the assets of the estate and of the administrator were insufficient. *Matthews v. New York*, 1 Sandf. 132.

See also *Chicago Title & T. Co. v. Chicago*, supra, under heading "Wrongful injunction."

Suits to collect taxes.

A city which in good faith attempts to enforce a tax lien by suit is not liable in damages to the successful defendant for attorneys' fees, vexations, and annoyances caused by the suit. *Leeds v. Hardy*, 44 La. Ann. 556, 11 So. 1.

See also *Horton v. Newell*; *Brown v. Cape Girardeau*; and *Gould v. Atlanta*, supra, under heading "Malicious prosecution." Cases dealing with collection of taxes in a summary manner without suit are not included in this note. R. A. E.

by a municipal corporation must be sought and procured through executive or administrative officers, who can have no personal interest in the matter except the discharge of their public duties, and the writ, if granted at all, must be granted by the judicial department of the state,—that, with these two means of investigation and two branches of the state government passing upon the matter, the chances of damages occurring to the individual would be minimized, and that no liability should be imposed on the public for any error or misjudgment on the part of the officers, both executive and judicial, so acting. Primarily and theoretically, it is supposed, as a principle of law, that the public, whether it be the state, a county, or municipal corporation, acting through its duly constituted officers, will not commit any wrong against the citizen. This will be true in practice as well as theory, so long as the officers who represent the public do not fall into any errors, either of omission or commission. Experience has shown, however, that the latter is largely a theory, and not always a fact.

Now, if the plaintiff had commenced this action charging the city of Sandpoint with having procured the injunction maliciously and without probable cause, he would, it seems to us, fail, for the reason that the municipality could not be guilty of procuring a writ of injunction maliciously. If the officers of the city acted maliciously and without probable cause in suing out the writ, the act would be that of the individuals, and not of the municipality. To act maliciously would be outside of the scope of official duty and authority, and would become the personal act of the individual, for which he, and not the city, would be responsible. *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910; *Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905; 1 Smith, *Modern Law of Mun. Corp.* § 811.

The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, Ch. J., concurs.

IDAHO SUPREME COURT.

WILLIAM M. CAIN, Appt.,
v.

JOHN P. VOLLMER et al., Resp'ts.

(— Idaho, —, 112 Pac. 686.)

Master — injury to servant — recovery of damages.

Where C. has an apprentice who is serv-

Headnote by AILSHIE, J.
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ing him as a horse jockey, and who is riding in a race at a racing association, and is thrown and injured and disabled for future riding by reason of the wrongful act of V. and others, in allowing a dog to rush upon the race track in front of the horse as he is making the home stretch, and C. thereafter sues V. and others for damages on account of the injury to his jockey and his disability for riding in future races, and alleges that he will be unable to secure another jockey of equal skill and ability in riding races, and that he would have won large prizes and premiums had his jockey not been thus injured, held that the damages claimed by the master on account of the injury to his apprentice, the jockey, are too remote, speculative, contingent, and uncertain, to be estimated or allowed, and that no recovery can be had therefor.

(December 31, 1910.)

Note. — Damages recoverable in action by master for injury to servant or apprentice.

This note is restricted to cases where the relation between the person bringing the action and the one injured is merely that of master and servant, and not that of parent or one *in loco parentis* and child. It is true that the legal foundation in some actions, at least by parents or those *in loco parentis*, for injuries to children, is based upon the relation of master and servant, and not that of parent and child; but this relation has generally come to be regarded as a mere fiction of law, and only to permit the parents to obtain proper redress for the injuries to them. These cases are therefore not in point.

In *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 3 Perry & D. 200, 9 Car. & P. 63, where a watchmaker's apprentice was bitten in the hand and arm by a dog, it was held that the master, in addition to the damages for loss of services before the bringing of the action, can also recover prospective damages.

In *McKenzie v. Hardinge*, 23 Times L. R. 15, it was held that, for the seduction of a servant, the master, who is neither the parent of, nor *in loco parentis* to, the servant, can recover only the out-of-pocket expenses owing to his being deprived of the services.

In *Ford v. Gourley*, 42 U. C. Q. B. 552, it was held that while, for the seduction of a servant, none of the special grounds for compensation or consolation which are properly considered in such a case for a parent, or for one in the place of a parent, can be applied in favor of one who is merely a master or employer, the master whose servant is seduced is not restricted to the mere actual pecuniary outlay or loss. The court said: "The master's house has been violated by the defendant. He was received by the plaintiff as a suitor for the young woman, and he ended by debauching her. The plaintiff himself, it appears, had a

APPEAL by plaintiff from a judgment of the District Court for Nez Perce County in defendants' favor and from an order denying a new trial in an action brought to recover damages for injuries to plaintiff's apprentice alleged to have been caused by defendants' negligence. Affirmed.

Statement by Allshie, J.:

This is an appeal from a judgment of nonsuit and an order denying a motion for a new trial. The action was one of trespass *vi et armis*, whereby the respondents are alleged to have wrongfully and unlawfully injured and disabled appellant's apprentice from the further discharge of his duties. The facts and circumstances out of which the injury or accident occurred are quite fully stated in *McClain v. Lewiston Interstate Fair & Racing Asso.* 17 Idaho, 63, 25 L.R.A.(N.S.) 691, 104 Pac. 1015.

McClain v. Lewiston Interstate Fair & Racing Asso. and this case both grew out of the same injury and accident. In that case the apprentice, a horse jockey, sued the owner of the dog which caused the injury, for injuries and damages sustained by him personally. This action is prosecuted by the master against the owner of the dog for damages caused by reason of the injury and disability received by the jockey, whereby the latter was disabled and disqualified from thereafter riding appellant's race horses in speed contests. Appel-

lant alleged in his complaint that, by reason of the injury and disability received by the jockey, Benny McClain, the latter was thereafter unable to perform the contract of apprenticeship and discharge the duties for which he had been apprenticed, and that by reason thereof the appellant sustained large damages, for the reason that he would thereafter, during the life of the contract of apprenticeship, be unable to employ a jockey equal in skill and ability to his apprentice, McClain, and that it would thereby defeat and deprive him from earning large prizes and purses in speed contests, state and county fairs, and racing associations. He alleges that the jockey, by reason of being an expert at the business of riding in speed contests, had earned him upwards of \$12,000 in the preceding year. Evidence was introduced, and other evidence offered which was refused, all of which tended to establish such facts after a manner and as definitely perhaps as would be possible. At the close of the plaintiff's case, defendants moved for a nonsuit, which was granted.

The original contract of apprenticeship was entered into in the state of Missouri by one Claude Lorene Enyart, party of the first part, as master and employer, and Benjamin Franklin McClain and Louise J. McClain, father and mother of the apprentice, and B. F. McClain, Jr., apprentice. It provided that B. F. McClain, Jr., should have free board, lodging, medical attend-

daughter at home, who had to do the work of the girl while she was unwell, and while she was absent for her confinement. And the defendant's conduct was injurious to the good name of the plaintiff's household, and may have had a prejudicial effect upon the young women of the plaintiff's family. It must depend very much upon the position in the household of the person who is called a servant, what damages should be given. A mere menial servant who did not in any way associate with the members of the family, or who had been in her place for only a little while, might not, by her seduction, be supposed to entail much loss, if any, upon her master; while a governess associating with the young women of the family, or a respectable girl in a farmer's family in the country, who associated freely and upon almost equal terms with the members of the family, as is usual in such cases, if seduced might, it is evident, cause very serious prejudice to that household in many ways, and much more harm could be done than in the case first put. So, the master might be much more injured by the seduction of a trusted servant who had been brought up in the family, than by one who had served only for a short term. It is impossible that the like exact assessment is to be made for the master in every case when a servant, as it is called, has been 32 L.R.A. (N.S.)

seduced, simply because it is a servant, without regard to the character and position of the particular servant, and the position and composition of the family in which she is employed, and the social relations that existed between them, and the effect that such a misfortune is likely to have upon the family; and without regard also to the conduct of the defendant in gaining admittance to the household; whether he has not broken the confidence which was placed in him, and committed an outrage upon the hospitality which was extended to him, and done his best to bring discredit and disgrace upon the household. For this particular kind of action does not change its character because it is brought by the master, and not by the parent. It is still an action *sui generis*, in which grounds of damage may be taken into consideration, in estimating the plaintiff's quantum of damage, which are not permitted in other kinds of action. While, therefore, the master cannot recover upon the like grounds as a parent may, he is not, in my opinion, restricted to the return of his mere money loss."

The cases dealing with measure of damages for enticement of servant are included in a note to *Thacker Coal & Coke Co. v. Burke*, 5 L.R.A. (N.S.) 1100. G. V.

ance, and transportation, and the right and privilege to collect for all "outside mounts when the first party has no horses entered in such race," and that the first party would pay to the parents of the apprentice \$15 per month for the first year, \$20 per month for the second year, and \$20 per month for the third year. This contract was entered into on the 26th day of December, 1905. Thereafter, and on the 30th day of March, 1907, at Emeryville, California, Enyart for and in consideration of the sum of \$500, as provided in the contract, "did sell, assign, and transfer to William Cain all the right, title, and interest in and to that certain contract for the services of B. F. McClain, Jr., bound to him, C. Enyart, for three years, and agreed to deliver to the said William Cain said contract for services, properly assigned, as may be required by racing clubs and associations." The parents of the apprentice did not approve or consent to this assignment by any writing or apparently in any manner, unless it be by subsequently receiving monthly wages from the assignee, Cain.

Messrs. I. N. Smith, Clay McNamee, and James L. Harn for appellant.

Messrs. George W. Tannahill and Fred E. Butler, for respondents:

The contract of apprenticeship was not assignable.

3 Cyc. Law & Proc. p. 555; 4 Enc. L. & P. 1204; Barton v. Ford, 35 Hun, 32; Rex v. Stockland, 1 Dougl. K. B. 70; Baxter v. Burfield, 2 Strange, 1266; 1 Bott, Poor Law Cas. 696; Davis v. Coburn, 8 Mass. 290; Hall v. Gardner, 1 Mass. 172; Biggs v. Harris, 64 N. C. 414; Allison v. Norwood, 44 N. C. (Busbee, L.) 414; Futrell v. Vann, 30 N. C. (8 Ired. L.) 402; 4 Bacon Abr. Wilson's ed. p. 577; Coventry v. Woodhall, Hobart, 154; Rex v. East-Bridgeford, 2 Strange, 1115.

These profits are so speculative and uncertain that they cannot be taken into account in determining the measure of damages.

Western U. Teleg. Co. v. Crall, 39 Kan. 580, 18 Pac. 719; Chapman v. Western U. Teleg. Co. 90 Ky. 265, 13 S. W. 880; Smitha v. Gentry, 20 Ky. L. Rep. 171, 42 L.R.A. 302, 45 S. W. 515; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844; Paquin v. St. Louis & Suburban R. Co. 90 Mo. App. 118; Garitee v. Baltimore, 53 Md. 422; Cutting v. Miner, 30 App. Div. 457, 52 N. Y. Supp. 288; McDaniel v. Crabtree, 21 Ark. 431; Lightfoot v. West, 98 Ga. 546, 25 S. E. 587; Butler v. Collins, 12 Cal. 457; Blair v. Kilpatrick, 40 Ind. 312; Hesse v. Columbus, S. & H. R. Co. 58 Ohio St. 167, 32 L.R.A. (N.S.)

50 N. E. 354; Brown v. Chicago, R. I. & P. R. Co. 64 Iowa, 652, 21 N. W. 193; Giacomini v. Bulkeley, 51 Cal. 260; Bonnet v. Galveston, H. & S. A. R. Co. 89 Tex. 72, 33 S. W. 334; 1 Sutherland, Damages, 187, § 59; Mitchell v. Chicago, R. I. & P. R. Co. 138 Iowa, 283, 114 N. W. 622; Brockway v. Thomas, 36 Ark. 518; Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; Cooper v. Young, 22 Ga. 269, 68 Am. Dec. 502; Smith v. Eubanks, 72 Ga. 280; Glass v. Garber, 55 Ind. 336; New York & C. Min. Syndicate & Co. v. Fraser, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Red v. Augusta, 25 Ga. 386; Green v. Williams, 45 Ill. 206; States v. Durkin, 65 Kan. 101, 68 Pac. 1091; Gottheim v. Nassau Electric R. Co. 60 Misc. 69, 11 N. Y. Supp. 678; Holmes v. Pennsylvania R. Co. 220 Pa. 189, 123 Am. St. Rep. 685, 69 Atl. 597; Findlater v. Dorland, 152 Mich. 301, 116 N. W. 410; Harper Furniture Co. v. Southern Exp. Co. 148 N. C. 87, 30 L.R.A. (N.S.) 483, 128 Am. St. Rep. 588, 62 S. E. 145.

Allshie, J., delivered the opinion of the court:

Two principal and decisive questions are presented to the court in this case. The first is that an apprentice is not assignable, or, in other words, that a contract of apprenticeship may not be assigned by the master or employer. The second question is that, even if the contract was assignable, the damages claimed are too speculative, remote, and contingent to be recognized or considered by a court. In the argument of these matters, counsel for appellant contends that the question of the right to collect damages in such a case has been definitely decided and settled by this court in McClain v. Lewiston Interstate Fair & Racing Asso. 17 Idaho, 63, 25 L.R.A. (N.S.) 691, 104 Pac. 1015, and that therefore the only real question to be considered is that of the assignment of the contract of apprenticeship.

Addressing our attention then, first, to this initial contention made by appellant, we will see what rule as to the law of damages was settled in McClain v. Lewiston Interstate Fair & Racing Asso. There the boy sued for the injury received and the resultant pain and suffering and attendant loss of earning capacity. In proving loss of earning capacity, he was allowed to produce what he called a "dope" book, wherein he had a memoranda of his earnings from races in running "outside mounts." It is now contended that this element of damage claimed in this case is

no more speculative than the damages allowed in the other case. In this case the one seeking damages is a race horse man,—one who follows the races and enters his horses, and, according to the record, depends on making his money by winning prizes in the various races. That there is a wide difference between the nature and character of damages asked in each of these cases cannot escape the attention of anyone. The one is direct; the other is proximate and dependent on innumerable secondary and intervening causes. The jockey earned a salary and certain sums for "outside mounts," whether he won the race or not. This was his earning capacity. On the other hand, the jockey alone cannot win the race; he must have a fleet horse. In the meanwhile other horses may develop that can outrun Cain's horse, jockey, and all. Other jockeys may in the meanwhile develop as much skill as Cain's jockey, and upon the whole these imaginative profits may dwindle into real losses.

Again, horse racing is not an established business which can be estimated and counted upon to yield a permanent and reasonably certain income, like most of the occupations and businesses out of which appellant's cited cases arose. The business of horse racing and competing for prizes is not to be compared with an established right of fishery (*Pacific S. W. Co. v. Alaska P. Asso.* 138 Cal. 632, 72 Pac. 161); the profits of sheep growing (*Schrandt v. Young*, 2 Neb.[Unof.] 546, 89 N. W. 607); or cattle raising (*Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458); or mining (*Paul v. Craganz*, 25 Nev. 293, 47 L.R.A. 540, 59 Pac. 857, 60 Pac. 983); or the established practice of a midwife (*Wardle v. New Orleans City R. Co.* 35 La. Ann. 202); or the profession of a music teacher (*Baker v. Manhattan R. Co.* 22 Jones & S. 304); or a personal injury (*Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333); and the many other cases to that effect cited by appellant.

Western U. Teleg. Co. v. Crall, 39 Kan. 580, 18 Pac. 719, was an action against the telegraph company for the inaccurate transmission of a message, by reason of which the plaintiff claimed to have lost anticipated gains and profits from a failure to be able to have his horse entered in certain racing and trotting contests. The court, after reciting the character of the evidence offered and the nature of damages sought, said: "The law excludes uncertain and contingent profits and also speculative profits or gains. No damages ought to have been allowed based upon the probability of the horse being able to win prize purses in trotting races." In support of,

this holding, the court cited *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577. In the latter case the court considered at some length what constitutes speculative and remote damages for which no recovery ought to be allowed.

In *Smitha v. Gentry*, 20 Ky. L. Rep. 171, 42 L.R.A. 302, 45 S. W. 515, the plaintiff sued for damages sustained by reason of the defendant wrongfully disclosing the hiding place of a fugitive for whose capture a reward had been offered, and whose arrest the plaintiffs were planning to make. The defendant wrongfully, and in violation of the confidence he had assumed, disclosed the whereabouts of the fugitive, and enabled the officers to arrest him before the plaintiffs were able to perfect their capture of the fugitive. In considering the question as to whether the plaintiffs were entitled to recover damages, the court of appeals of Kentucky said: "But the basis of the recovery had in this case was evidently the loss by appellees of the reward which they expected to obtain for the arrest of the fugitive, and this seems to us to be at once too remote and too contingent an item of damage to sustain a recovery. It is uncertain whether the gain would have been realized. The chance is too remote to be estimated."

Another author, in speaking of this class of damages, has well said: "The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture." 1 *Sutherland, Damages*, § 30; *Walker v. Goe*, 3 *Hurlst. & N.* 395.

So, it is in the case at bar. The profits it is claimed appellant would have realized depend on so many intervening circumstances and contingencies, the unfavorable happening of any of which would dissipate these prospective gains. We are fully satisfied that prospective profits to a race horse man for races that have never been run, and race meets and associations that have never been held, and against all contestants, is entirely too remote, uncertain, and indeterminable to be allowed. If this were a case where appellant was seeking damages for the loss of a prize for a race in which his horse had been entered, and in which at the time of the injury he had turned the home stretch, and was so in the lead that it could be said with reasonable certainty that he would have won the contest, then the damage would be direct,

and a recovery might be had; but that is not the case before us.

The conclusion we have reached as to the character of the damages sought renders it unnecessary for us to consider the other questions presented.

The judgment should be affirmed, and it is so ordered, with costs in favor of respondents.

Sullivan, Ch. J., concurs.

ILLINOIS SUPREME COURT.

EMILIE WILHELMINE PEACOCK et al.

v.

LILLIE M. PHILLIPS et al.

J. ARNOLD SCUDDER, Appt.,

v.

EDWIN F. MASTERSON.

(247 Ill. 467, 93 N. E. 415.)

Mortgage — collateral — enforcement by assignee.

One who, with knowledge of the facts, purchases a note and mortgage held by a bank as collateral for a note of less amount executed by one of the makers of the mortgage, at a sale by it in accordance with the contract, upon default in payment of its note at maturity, can enforce the collateral note and mortgage securing it only to the extent of the amount due on the obligation for which it stood as collateral.

(December 21, 1910.)

Note. — Right of purchaser of collateral security to enforce it for more than the amount of the debt secured.

Excluding those cases wherein accommodation paper, corporation bonds, or stocks are pledged as collateral security and sold, for the reasons so clearly stated in *PEACOCK v. PHILLIPS*, and assuming that the holder of the collateral security may sell it for the payment of the debt secured, this note gives consideration to the question whether a purchaser of such collateral may enforce it for more than the amount of the debt secured.

In *Jenckes v. Rice*, 119 Iowa, 451, 93 N. W. 384, where a bank, as pledgee of a contract of indemnity which it held as collateral security for a debt, sold it for an insignificant sum in comparison with its real value, it was held, in an action by the purchaser thereof to recover its face value, that the sale of the collateral security by the bank did not vest the absolute title in him, but simply subrogated him to the rights of the bank. The court said: "The bank had no interest in the collateral except as a pledgee, and it could not, therefore, sell or assign a greater interest than it had, which was the security of the . . . note. It might lawfully sell and 32 L.R.A.(N.S.)."

A PPEAL by J. Arnold Scudder from a judgment of the Branch Appellate Court, First District, reversing a decree of the Circuit Court for Cook County in his favor, and dismissing his cross bill, in a proceeding to foreclose a deed of trust. Affirmed.

The facts are stated in the opinion.

Mr. Laird Bell, with Messrs. Mats, Fisher, & Boyden, for appellant:

The intention must have been that the note and trust deed should be good in the purchaser's hands for the face value thereof.

Zeigler v. Illinois Trust & Sav. Bank, 245 Ill. 180, 28 L.R.A.(N.S.) 1112, 91 N. E. 1041.

The purchaser took absolute title to the note and mortgage, with the right to enforce the face value thereof either at law or in equity, either before or after maturity.

Re Woods, 52 Md. 520; *Morris Canal & Bkg. Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Potter v. Thompson*, 10 R. I. 1; *Farmers' Loan & T. Co. v. Toledo & S. H. R. Co.* 4 C. C. A. 561, 6 U. S. App. 469, 54 Fed. 759; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 86 Fed. 975; *Miller v. Larned*, 103 Ill. 562; *Naef v. Potter*, 226 Ill. 628, 11 L.R.A.(N.S.) 1034, 80 N. E. 1084; *McIntire v. Yates*, 104 Ill. 491; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

Messrs. E. F. Masterson and E. F. Dunne, for appellee:

A trust deed or mortgage is not a nego-

transfer its debt, . . . and transfer with it the collateral held to secure its payment, but nothing more; and where the note secured is paid, the plaintiff has no further interest in or right to the collateral."

But in *Re Woods*, 52 Md. 520, where the pledgeor's own notes, which had been deposited as collateral security, were sold in order to apply the proceeds on the debt, the decision was in direct opposition to the holding in *PEACOCK v. PHILLIPS*, in that here it was held that the purchaser of the notes was entitled to prove under a trust deed for the benefit of the creditors of the pledgeor the face value of the notes. However, in *PEACOCK v. PHILLIPS* the purchaser bought the collateral with knowledge of all the facts.

And in *McDougall v. Hazelton Tripod-Boiler Co.* 31 C. C. A. 487, 60 U. S. App. 209, 88 Fed. 217, it was held that a pledgeor of a certain contract as collateral, which had been sold, could not claim from the purchaser any surplus over and beyond the amount of the debt secured.

As to the authority of pledgee to compromise obligations held as collateral security, see note to *Matheney v. Eldorado*. 28 L.R.A.(N.S.) 980.

E. M. S.

tible instrument, and when assigned the assignee takes it subject to all the equities existing between the mortgagor and mortgagee.

Olds v. Cummings, 31 Ill. 188; *Sumner v. Waugh*, 56 Ill. 531; *Haskell v. Brown*, 65 Ill. 29; *Thompson v. Shoemaker*, 68 Ill. 256; *Walker v. Dement*, 42 Ill. 272; *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; *Humble v. Curtis*, 160 Ill. 193, 43 N. E. 749; *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *KJeevan v. Frisbie*, 63 Ill. 482; *Sroelowitz v. Schultz*, 86 Ill. App. 341, 191 Ill. 249, 61 N. E. 92; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Chicago Title & T. Co. v. Aff*, 183 Ill. 91, 55 N. E. 659; *Martina v. Muhke*, 186 Ill. 327, 57 N. E. 954; 2 Am. & Eng. Enc. Law, 2d ed. p. 1079.

Cartwright, J., delivered the opinion of the court:

Emilie Wilhelmine Peacock, who was the owner of a promissory note for \$15,000 secured by a trust deed on premises known as 151 Astor street, in Chicago, and the trustee in the said trust deed, filed their bill in the circuit court of Cook county to foreclose the same. The appellant, J. Arnold Scudder, filed his cross bill in the case to foreclose a trust deed which was a second lien on the premises, and was made to secure the payment of a note for \$4,000 which he had purchased from the Chicago Savings Bank & Trust Company, and which was held by the bank as collateral security for a note of \$2,500. The appellee, Edwin F. Masterson, had purchased the premises, and he and his wife, by their answer, disputed the right of the appellant to a foreclosure for the full amount of the trust deed, and insisted that it was a lien upon the premises only to the amount of the note for which it was collateral, which amount they were ready and willing to pay. The appellant had paid for the note and trust deed on April 29, 1907, \$2,530.62, which was the amount due the bank, and appellee offered to pay that amount, with interest. The appellee paid the amount secured by the first trust deed, and the original bill was dismissed without prejudice to the cross bill. He also paid to appellant the amount which appellant had paid for the note and trust deed, together with interest covering the amount for which it had been held as collateral, and \$200 solicitors' fees agreed upon by the parties. Appellee also deposited with the clerk of the court \$1,800, to be held pending the result of the suit, and the lien of the trust deed was transferred, by order of the court, from the land to the fund deposited. The issues were referred to a master in chan-

cery, who reported that appellant was entitled to the full amount of the \$4,000 note, with interest. The chancellor overruled exceptions to the report and entered a decree for \$1,618, and interest from March 3, 1908, and ordered the clerk to pay that sum to the appellant out of the funds in his hands. The branch appellate court for the first district reversed the decree and remanded the cause, with directions to order the payment of the amount deposited to the appellee, and to dismiss the cross bill of the appellant. The court then granted a certificate of importance and an appeal to this court.

The question to be decided is whether the appellant, who purchased the note of \$4,000, and the trust deed securing the same, with notice that they had been deposited for the payment of a note for \$2,500, was entitled to a decree for the full amount of the note and trust deed purchased, or was only entitled to the amount due the bank and secured by the note and trust deed, which was paid to him, together with solicitors' fees. The material facts were agreed upon before the master, as follows: Lillie M. Phillips, who was the owner of the mortgaged premises, made her promissory note on November 27, 1906, for \$2,500 to the Chicago Savings Bank & Trust Company, and at the same time she and her husband executed their note for \$4,000, payable to their own order and indorsed in blank, together with a trust deed to secure its payment. The \$4,000 note and trust deed were delivered to the bank as collateral security for the \$2,500 note, which provided that upon default in payment the bank might sell the collateral pledged for such payment. Upon the maturity of the \$2,500 note, on January 26, 1907, a new note for the same amount, payable thirty days after date, with interest at 7 per cent, and with the same provisions as to the collateral, was given, and the same collateral security was retained by the bank. The \$2,500 note was not paid, and on April 29, 1907, the bank sold the collateral security for the amount due it, to the appellant. The amount due was \$2,530.62, and appellant knew all the circumstances of the pledge. The bank canceled the \$2,500 note and returned it to Mrs. Phillips. Six weeks after the sale of the collateral to appellant, Mrs. Phillips and her husband conveyed the premises to the appellee, who was informed of the note and trust deed pledged as collateral security with the bank, and that the bank had authority to sell the note and trust deed on default of payment of the \$2,500 note; but he did not know that the sale had already been made.

A creditor, holding goods, chattels, or

tangible personal property as a pledge to secure the payment of the indebtedness to him, may sell the same and apply the proceeds to the payment of his debt, accounting to his debtor for any surplus. 22 Am. & Eng. Enc. Law, 2d ed. p. 882. From the nature of the property, the only method of applying it to payment of the debt is through a sale; but it is not so with bonds, mortgages, or promissory notes, which are available for the payment of the principal debt by collecting them and applying the proceeds. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Union Trust Co. v. Rigdon*, 93 Ill. 458. In *Jenkins v. International Bank*, 111 Ill. 462, where notes and a mortgage were pledged to the bank, it was said that a creditor holding such securities has three remedies, and may file his bill to have the collaterals sold for the payment of the principal indebtedness, or may bring suit upon the collaterals themselves, or collect the same by a sale of property conveyed in trust to secure them. The creditor, in the absence of a power of sale given him by his debtor, cannot sell commercial paper or choses in action, but may collect the same and apply enough of the proceeds to pay his debt, and, if there is any balance, must return it to the pledgor. *Zimpleman v. Veeder*, 98 Ill. 613. If the collateral security consists of a mortgage, the holder of it has a right to foreclose (*Union Trust Co. v. Hasseltine*, 16 A. & E. Ann. Cas. 123, note), and in such case must account for any surplus above his debt (31 Cyc. Law & Proc. p. 888).

If the securities of a third person are deposited as collateral, the creditor may collect the whole amount due from the maker, and will hold any surplus above his own debt as trustee for his debtor, and in such a case the maker of the securities is not concerned how the pledgor and pledgee should settle between themselves, but is held for the full amount of his debt. *Tooke v. Newman*, 75 Ill. 215. In this case there was a contract authorizing the bank to sell the \$4,000 note and trust deed at public or private sale, without advertising the same, or demanding payment, or giving notice, and with the right of the bank to purchase at the sale, if made at any broker's board or any public sale. Where there is a contract for such a sale of securities on default in payment of the debt secured, the right to sell is conferred not by the law, but by the contract, and is to be exercised according to the contract. *McDowell v. Chicago Steel Works*, 124 Ill. 401, 7 Am. St. Rep. 381, 16 N. E. 854. The bank, therefore, might have foreclosed the trust

deed pledged for the payment of its note of \$2,500, and could not have had a decree for any more than the amount due on such note, or it could elect to sell the collateral in accordance with the power given by the contract. In case of foreclosure, the equities between the parties would have forbidden an enforcement of the lien for more than the debt to the bank; and the question is whether that result could be accomplished by selling the note and trust deed, in pursuance of the agreement, to one who had notice of the facts.

A trust deed or mortgage is not assignable either by the common law or under the statute; and while the assignment of a promissory note secured by mortgage carries with it the mortgage as an incident of the debt, it does so only in equity. When resort is had to a court of equity to enforce the obligation created by the mortgage, it will let in any defense which would have been good against the mortgage in the hands of the mortgagee himself, excepting only defenses based on latent equities of third persons, of whose rights the assignee had no notice. *Olds v. Cummings*, 31 Ill. 188; *Silverman v. Bullock*, 98 Ill. 11; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287. A mortgage gives notice, on its face, that the mortgagor is the debtor; and if the assignee fails to obtain actual notice of any equities or defenses of such debtor, it is due to his own neglect. 20 Am. & Eng. Enc. Law, 2d ed. p. 1041. The assignee is not bound to inquire of third persons whether they have any equities, and is presumed to take without notice of any such equities and free from them. The equities here involved existed between the bank and the makers of the note and trust deed, and were not latent. There can be no room for doubt that in case of an ordinary sale by the bank of such securities they would be subject to such equities in the hands of the assignee, and the argument that they are not is based on the fact that there was a contract giving the bank a power of sale. As we have seen, the bank could not sell at all without a power so conferred, and the purpose of the contract was merely to enable the bank to do an act to obtain payment which could not otherwise be done. We do not see any good reason for saying that a mere grant of power to sell enabled the bank to confer a greater right upon the purchaser, with full notice of the facts and circumstances and the extent to which the bank could enforce the obligation, than the bank would have had in case of foreclosure.

Counsel for appellant regard the collateral as answering the same purpose as accommodation paper; but there is no similarity between the two. Accommodation paper is made without legal consideration, and would fail of its only purpose if the assignee could not recover on it discharged of all defenses that might have existed against the accommodated party. *Miller v. Larned*, 103 Ill. 562; *Naef v. Petter*, 226 Ill. 628, 11 L.R.A. (N.S.) 1034, 80 N. E. 1084. There is an exception to the doctrine that one seeking to enforce in equity a mortgage security is subject to any defense which would have been good against the mortgage in the hands of the mortgagee. That is the case of corporation bonds, and the appellant relies upon a decision relating to collateral of that kind. *Morris Canal & Bkg. Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423. Bonds of that kind are issued for the purpose of raising funds for the corporation, and are intended to be thrown upon the market and to pass from hand to hand. The mortgage or trust deed secures the holders of the bonds, and they can be enforced by such holders for the full face value, regardless of equities. To permit equitable defenses to be interposed would practically destroy such methods of raising money, and the corporation is properly estopped to deny its liability. *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187. *Re Woods*, 52 Md. 520, related to notes deposited as collateral security, and no question concerning choses in action not assignable was involved. No well-considered case has been cited expressing a view contrary to the settled law in this jurisdiction.

The judgment of the Appellate Court is affirmed.

KANSAS SUPREME COURT.

M. W. POTTER, Appt.,
v.

RORABAUGH-WILEY DRY GOODS COMPANY.

(— Kan. —, 112 Pac. 613.)

Highway — projecting awning — liability for injury.

It is the duty of one who projects or maintains an awning over a street to keep

Headnote by JOHNSTON, Ch. J.

Note. — The question of liability for injury from falling of object suspended over street is discussed in notes to *Waller v. Ross*, 12 L.R.A. (N.S.) 721, and *McCrorey v. Garrett*, 24 L.R.A. (N.S.) 139. A recent case also dealing with this question is *Joyce v. Black*, 27 L.R.A. (N.S.) 863, 32 L.R.A. (N.S.)

it from becoming dangerous to pedestrians lawfully upon the street, and where it appears that an awning or a part of it fell and injured the plaintiff while passing along the street, the burden is cast upon the defendant, to whose building the awning is attached, to prove that all proper and reasonable care had been employed in the construction and maintenance of the awning.

(January 7, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Reno County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. R. P. B. Wilson, W. H. Lewis, Carr W. Taylor, and George A. Neeley, for appellant:

The court erred in refusing to instruct the jury that the burden rested upon the defendant to show it was without blame in the premises.

Atthison v. Plunkett, 8 Kan. App. 308, 55 Pac. 677; *Waller v. Ross*, 100 Minn. 7, 12 L.R.A. (N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715; *Cragg v. Los Angeles Trust Co.* 154 Cal. 663, 98 Pac. 1064, 16 A. & E. Ann. Cas. 1061; 1061; 21 Am. & Eng. Enc. Law, p. 478.

Messrs. Smith & Malloy for appellee.

Johnston, Ch. J., delivered the opinion of the court:

M. W. Potter brought this action against the Rorabaugh-Wiley Dry Goods Company to recover damages for injuries alleged to have been sustained through the falling of an awning attached to appellee's store building, which struck appellant on the head while she was passing along the street. It was averred that it was negligently constructed and insecurely fastened, and also that it was maintained in violation of an ordinance of the city. The trial resulted in favor of the dry goods company, and the appellant complains of rulings in the admission of testimony and in instructing the jury.

The evidence is conflicting as to the exact cause of the accident and the extent of the injury. By some of the testimony a rod of the awning fell and hit appellant on the head. She said it was a hard blow, which at the time dazed and affected her vision. A witness said he saw the occurrence, and it appeared to him that a rod loosened from the awning and fell on her head, tipping her hat; and he remarked to her, "Pretty hard blow, wasn't it?" Another witness said he was near and saw a part

of the awning strike appellant on the head, that she staggered a little, and then passed on in company with her friend. The woman who was walking with appellant testified that she could not tell whether the rod fell on appellant, or whether she ran against it, but that the collision did not stagger her, or arrest her progress, or even make a break in her conversation. One witness said that there was no exclamation of pain, but that she adjusted her hat and passed on laughing and conversing with the woman who was walking with her. Counsel for appellant asked the court to instruct the jury that "the law casts upon the owner of buildings abutting upon the street, who attaches thereto structures overhanging the street, the duty of preventing the overhanging structures from becoming, in any way, dangerous to persons passing on the highway, and where the plaintiff shows that while passing on the highway, or on the sidewalk, she is injured by some part of the structure falling upon her, the burden rests upon the defendant to show that it was blameless in the premises." The instruction was refused, and the court placed the burden of proof wholly upon appellant. The testimony, although conflicting and unsatisfactory, did tend to prove that a part of the awning projecting over the street fell upon and injured appellant. She was entitled to an instruction stating the rule of law applicable to the evidence which her testimony tended to prove. Those who place or project objects over the street upon which persons are passing and re-passing take upon themselves the duty of making them secure, and, if the object falls and injures a pedestrian, the maxim of *res ipsa loquitur* applies, and the burden rests upon them to show that the fall and injury did not occur through their negligence. The rule was applied in *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 40, where, in lowering sugar from the warehouse to the pavement below, the dock company dropped a bag of sugar upon a pedestrian who was lawfully passing along the pavement. It was said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The New York court of appeals announced the same rule in *Breen v. New York C. & H. R. R. Co.* 109 N. Y. 297, 32 L.R.A.(N.S.)

16 N. E. 60, 4 Am. St. Rep. 450, and in *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, the same court held that it was not the injury itself, but the manner and circumstances of the injury, that justified the application of the maxim and the inference of negligence, and that the maxim is based in part "on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." The Supreme Court of the United States, in discussing occurrences which of themselves give rise to the inference of negligence, approvingly quoted from an English case in which it was said: "If a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it." *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859, in *Atchison v. Plunkett*, 8 Kan. App. 308, 55 Pac. 677, the same view is taken. The supreme court of Minnesota applied the rule in a case where an awning projecting over a public street of a city fell and injured a person walking along the street. There the plaintiff contended that the owner of the building was an insurer of safety and therefore absolutely liable; but the court denied that claim, and held that the case was to be decided upon the principles of negligence in accordance with the theory of *res ipsa loquitur*. *Waller v. Ross*, 100 Minn. 7, 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252. In a note appended to the report of that case in 10 A. & E. Ann. Cas. 715, many authorities are collected relating to the rule in question. A good statement of the rule and its exceptions may be found in 29 Cyc. Law & Proc. p. 590.

The court appointed a commission to make an examination of the physical condition of appellant, to which she appears not to have objected; but she did insist that her physician who had treated her for considerable time should be present and assist in making the examination, and this the court refused. No good reason has been suggested why her physician should be added to the commission, nor for permitting him to take any part in the investigation. The court allowed appellant's husband to be with her while they were examining her, and there is no objection to the method

of those making the examination nor of the character of the tests that were had. No error was committed by the expulsion.

For the error in charging the jury, the judgment will be reversed, and the cause remanded for a new trial.

All the Justices concur.

NEBRASKA SUPREME COURT.

FRANK GROSS et al.

v.

STEPHEN H. JONES, Appt.

(85 Neb. 77, 122 N. W. 681.)

Dam — *ad quod damnum* — rights secured.

1. A petitioner in *ad quod damnum* proceedings who owns the land on each side of a water course at the point where he proposes to construct and maintain a dam does not, by a judgment in his favor and payment of the damages assessed, acquire

Headnotes by Root, J.

Note. — Abandonment of privilege or easement incidental to milldam.

It will be noted that several cases were cited in *Gross v. Jones*, as supporting the proposition that the condemnation proceedings by which the owners of a milldam acquired the right to overflow the land of upper proprietors did not vest them with the right of flowage in perpetuity, but merely the privilege of exercising that power until the easement was extinguished in some manner.

That by condemnation proceedings to overflow land by a milldam one does not obtain a title in fee to the land overflowed was also held in *Hunter v. Matthews*, 1 Rob. (Va.) 468, and *Whitworth v. Puckett*, 2 Gratt. 528.

And that the right of flowage thus obtained may be lost by the abandonment or nonuse for an unreasonable length of time, see *French v. Braintree Mfg. Co.* 23 Pick. 216, sufficiently set out in *Gross v. Jones*.

Where, under the flowage act, a petition was brought for leave to erect a dam which would submerge the dam of an upper owner, it was held a question of fact for the committee to determine whether the upper owner, by his failure for eight years to carry into execution an intent to build a mill, had abandoned such intent. *McArthur v. Morgan*, 49 Conn. 347.

In *French v. Braintree Mfg. Co.* supra, the court said that as the privilege granted by statute of overflowing land by a milldam was given to a proprietor of a mill site in the expectation and upon consideration of his keeping up mills useful and beneficial to the public, if the owner of the land to which the privilege is attached should voluntarily

the right in perpetuity to flow the lands of upper riparian owners, but secures a privilege which may be lost by abandonment or nonuser for an unreasonable length of time.

Same — adverse possession.

2. A miller may also by uninterrupted, continuous, and adverse possession and user, obtain said right of flowage.

Same — user not adverse.

3. If the exercise of that privilege is commenced by virtue of *ad quod damnum* proceedings, possession and use alone, no matter how long continued, will not vest the miller with any title, privilege, or right, other than those acquired in said proceedings.

Trial — nonuser of privilege — question of fact.

4. In a contest between upper riparian owners and the proprietor of a mill site, over the latter's right to reconstruct a dam that has been washed away, the question of whether or not there has been a nonuser of a privilege acquired by condemnation proceedings for such a length of time as will amount to an abandonment of the right of flowage is one of fact, to be determined in each particular case upon the evidence before the court.

untarily abandon it by an express declaration that it is no longer his intention to keep up his mills, accompanied with corresponding acts, such as removing his dam and mills, giving notice to those whose lands he has before flowed and to whom he has paid damages, that it is no longer his intention to flow them, and the like, this would be an abandonment and extinguishment of the privilege. The court, in regard to the question of nonuser, also took occasion to say: "Where a dam and mill have been erected and put in operation, so that the statute privilege has attached to it, an entire and continued disuse of the dam for mill purposes, for the term of twenty years, is strong prima facie evidence of ceasing to use the privilege for an unreasonable time, by which the privilege is lost to the owner; and unless rebutted by clear, strong, and satisfactory proof of explanatory circumstances, must be taken to be conclusive. If the rebuilding of the dam or mill has been commenced, but destroyed by fire or flood or other casualty,—if definite arrangements have been made to rebuild, in good faith, but are defeated by causes over which the parties had no control,—these might well be deemed proof of a proper character tending to rebut such presumption of unreasonable delay. But the presumption should be regarded as the settled rule, and not to be changed without full proof of circumstances showing a reasonable and satisfactory excuse for the delay."

In *Curtiss v. Smith*, 35 Conn. 156, it was held that, under a milldam act providing that no dam shall be erected thereunder to the injury of a mill site on the same stream on which a milldam has been lawfully erected and used, unless the right to maintain a

Evidence — sufficiency — abandonment.

5. In such an action the district court was justified in finding that the owner of the mill site had abandoned his right to flow the lands of the upper riparian owners for the purpose of maintaining a public gristmill, where it appeared from the evidence that the principal mill had been dismantled, and, with its machinery, removed from the mill site ten years next preceding the institution of the suit; that for eight of those years an occasional grist of a few bushels of buckwheat, rye, corn, or oats had been ground in an ancient building on the premises; that the public was not served by the operation of said mill, which for months at a time was not used at all; that the owner of the mill site maintained the mill-pond principally to procure ice therefrom; and that two years before the commencement of the suit, the dam was washed away, and no steps whatever had been taken during that time to reconstruct it.

Dam — reconstruction — injunction.

6. It was error, however, for the court to absolutely enjoin the owner of the mill site from constructing said dam, but the injunction should continue only until by *ad quod damnum* proceedings and the payment of damages assessed therein he had established his right to construct and maintain the dam.

(September 25, 1909.)

mill thereon has been lost or defeated by abandonment or otherwise, in order to deprive the owner of a mill site of the benefit of the statute it is only necessary that he shall have abandoned it for mill purposes for a period long enough to show that he does not intend again to improve it for that purpose.

In *Mowry v. Sheldon*, 2 R. I. 369, it was held that the mere fact that the owner of a milldam leaves it unoccupied for a number of years, that such dam is in an injured condition so as not to pond the water, and that the gate had been taken out of the bulkhead, will not justify a lower proprietor in erecting a dam which will cause the water to flow the upper dam. The court said: "We think a dam created for mill purposes cannot be liable to flowage from below unless the neglect to occupy it (in other words, the nonuser) is continued for such a length of time as will afford a reasonable ground to presume the design of a mill has been abandoned. Then there are other circumstances to be considered besides mere lapse of time. Thus, the presumption of abandonment would require much more evidence to support it, in the case of a privilege of great power and value were small. It is reasonable to presume the owner of a dam will use it in the way most for his interest, and a contrary intent ought not to be inferred except from circumstances of the most unequivocal nature. So, a man may buy a privilege with a dam thereon, on speculation, not meaning to build himself, 32 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the District Court for Saunders County, enjoining him from building and maintaining a dam across a certain creek on his land. Modified and affirmed.

The facts are stated in the opinion.

Mr. J. H. Barry for appellant.

Messrs. Simpson & Good for appellees.

Root, J., delivered the opinion of the court:

In 1871 the then owners of a tract of land crossed by the Wahoo creek, by *ad quod damnum* proceedings in the district court of Saunders county acquired the right to flow the lands of upper proprietors so far as might be necessary in constructing and maintaining a dam 20 feet in height across said stream and upon the land of the petitioners. A dam and gristmill were constructed, and the mill thereafter operated. In 1887 a flouring mill with modern appliances was built upon said mill site, and subsequently operated; the original mill being used for grinding corn and oats. In 1893 the last mill constructed was dismantled, and, with the machinery, removed. Subsequently defendant became the owner of the mill site and the mill first constructed. At that time the dam had been washed away, but

but to sell to others to build; and, while he holds it, his privilege is not liable to be flowed out. Again, a man may not be able to build, and holds on in the hope of being able to build hereafter; or he may think the state of the business he intends to embark in does not warrant his building for the time being."

Failure for nearly two years to rebuild a mill destroyed by fire, and declarations by the owner indicating an intention not to rebuild, do not authorize a county court to disregard his rights in the mill and dam, and to grant another the privilege of erecting a mill and dam immediately below, the erection of which would destroy the use of the former, where it appears that public necessity did not demand a mill at the lower point, that the legality of the old mill and dam could not be questioned, and where the owner thereof had title to the land on both sides of and in the bed of the stream, and therefore could not be affected by the statutory provision declaring a reverter of land condemned for mill purposes for failure for more than one year to rebuild, and where it further appeared that such owner had evinced his intention to retain his privilege by erecting a small mill, although a mere makeshift. *McDougle v. Clark*, 7 B. Mon. 448.

A case which is of some interest in this connection is *Hall v. State*, 92 App. Div. 96, 87 N. Y. Supp. 338, where it was said in regard to the maintenance of a dam in a certain river, and the setting the waters of

was rebuilt by defendant about eighteen months after his purchase. Thereafter defendant occasionally operated the mill on a very small scale, and cut ice from the millpond for his ice business in Wahoo. In May, 1903, the dam was again washed away, and in May or June of 1905 defendant was preparing to reconstruct it, when this action for an injunction was instituted by the upper riparian owners. The court found generally for plaintiffs, and perpetually enjoined defendant from building, constructing, and maintaining any dam across the Wahoo creek upon his said land, and he appeals.

1. While the condemnation proceedings were regular, they did not vest defendant or his grantors with the right of flowage in perpetuity, but merely the privilege of exercising that power until the easement was extinguished in some lawful manner. *Pratt v. Brown*, 3 Wis. 603; *Curtiss v. Smith*, 35 Conn. 156; *French v. Braintree Mfg. Co.* 23 Pick. 216; *Nosser v. Seeley*, 10 Neb. 460, 6 N. W. 755. A right of flowage thus acquired may be lost by abandonment or nonuser for an unreasonable length of time. *French v. Braintree Mfg. Co.* 23 Pick. 216. Whether the nonuser has continued for an unreasonable period in a particular case will be ascertained from

the surrounding facts and circumstances. No arbitrary rule can safely be followed. If the right of flowage has been acquired by deed or adverse enjoyment, then it may be conceded that nonuser for less than ten years will not be held an unreasonable delay. *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236. But a right or easement by adverse enjoyment will not be created unless the use has been adverse to the owner of the servient estate for ten continuous years. *Johnson v. Sherman County Irrig. Water-Power & Improv. Co.* 63 Neb. 510, 88 N. W. 676. If the person enjoying the right or easement acquires it by condemnation proceedings, his possession in the first instance is in conformity with the terms of the judgment; and a continuation of that possession will not enlarge his estate, unless he intends thereby to acquire a greater interest, and knowledge of that intent is brought home to the owner of the servient estate. A defendant who pleads and proves possession by virtue of a legal title ought not to be considered an adverse occupant. *Tinkham v. Arnold*, 3 Ma. 120. There is not a scintilla of evidence that defendant or any of his grantors ever, prior to the filing of the answer in this case, claimed to have other or greater rights in the premises than vested in

the river upon adjacent property, that nonuser does not affect the right to the easement unless the circumstances show an inference of abandonment; and there must be an overt act indicating that the right is disturbed.

And the mere nonuser for nine years of a prescriptive right to maintain a milldam and flood lands is not sufficient to extinguish that right. *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

Mere nonuser of a mill privilege for more than twenty years, if unaccompanied by any decided or unequivocal acts of the owner inconsistent with the continued existence of the easement, will not extinguish it. *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306.

In *Hurd v. Curtis*, 7 Met. 94, it was held that a privilege to take water through a canal on another's land for use of a fulling mill cannot be construed as extinguished or abandoned by disuse, until such disuse has been continued for a term of twenty years.

In *Day v. Walden*, 46 Mich. 575, 10 N. E. 26, it was held that an easement to take water to be used for operating a mill, created by grant, is not lost by the mere neglect to assert, use, and enjoy it for the period of twenty years. The court said:

"There is no doubt of this upon the authorities. The easement was created by grant as an appurtenance to the mill; and there were no conditions or limitations attached which rendered its use necessary to its continuance. The grant was perpetual

and without conditions; and therefore the privilege granted would continue indefinitely whether the grantee did or did not avail himself of it. An accepted grant cannot be waived or abandoned; and the neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant."

If the mill is wholly removed and the head of water is kept up by the dam, before used as a milldam, for wholly distinct purposes, as for the irrigation of land, the privilege attached to the mill site by statute would cease after twenty years of such nonuser for mill purposes. *French v. Braintree Mfg. Co.* 23 Pick. 216.

Where a right of flowage granted by a milldam act is abandoned, if a municipal corporation desires the continuance of the body of water, it can acquire that right only by condemnation proceedings. *Albert Lea v. Nielson*, 80 Minn. 101, 81 Am. St. Rep. 242, 82 N. W. 1104.

The cases concerning extent of rights acquired in eminent domain proceedings for the purposes of securing a water supply are included in a note to *Stearns v. Barre*, 58 L.R.A. 248.

The general question of failure to maintain an easement as raising a presumption of its abandonment is discussed in a note to *Oney v. West Buena Vista Land Co.* 2 L.R.A.(N.S.) 832.

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Ray and Flor, the petitioners in condemnation. Defendant has never executed a specific release of his right of flowage, nor indicated by any statement that he has abandoned it, and there remains but one question for consideration upon this branch of the case, and that is whether the facts, taken altogether, will justify a finding of such abandonment.

Defendant's grantors by the exercise of the power of eminent domain were granted a servitude upon the lands now owned by plaintiffs, to the end that a public gristmill operated by water power might be constructed and maintained. In the early history of this state, in common with like periods in the experience of sister commonwealths, the law was construed liberally in the interests of the millers who manufactured foodstuffs for the community. With the evolution of transportation and steam power, the reasons underlying those decisions have largely vanished. Speculators who cling to the old mill sites and rickety, moss-covered dams to the detriment of acres of valuable, fertile land, made valueless by the overflow of water that has ceased to furnish power for the benefit of a community, must in good faith keep their franchises alive to hold the upper riparian lands in servitude. The payment of damages assessed for the benefit of the upper proprietors is not the sole consideration upon which the miller receives the right of flowage, but there is the further consideration that he shall construct, equip, and operate a gristmill for the benefit of the public. If he does not, the consideration for his grant fails, and the upper proprietors ought not to hold their lands in bondage to him.

The evidence proves to our satisfaction that defendant's real purpose in maintaining the millpond has been to furnish an ice field from whence he could procure ice for his trade. Defendant, since he became the owner of the mill, and preceding the destruction of the dam in 1903, has not operated the mill with any regularity, but, on the contrary, during long and infrequent intervals of time has operated not to exceed three hours at a time. Months would pass during which the mill was not operated at all. Witnesses who frequently traveled the highway adjacent to the property testified that they never saw it in operation. One witness who passed the mill six days in the week for years only saw a team at the mill on two occasions. The infrequent grists ground consisted generally

of but a few bushels of rye, buckwheat, corn, or oats. The public did not patronize the mill. It is poorly equipped for practical work, and for years has ceased to be of any benefit to the public or the community in which it is situated. Taking all of these facts into consideration, and the further fact that defendant remained passive for over two years subsequent to the loss of the dam in 1903, we are of opinion that the trial judge was justified in finding that defendant had abandoned the rights acquired by him from his grantors to overflow plaintiffs' land. The statute in force when this action was commenced (§ 15, chap. 57. Comp. Stat. 1903) provided that if a miller who has acquired a mill site by condemnation does not commence to build his mill or dam within a year of the final judgment, or within two years does not commence to reconstruct his mill or dam, if either structure is destroyed, the mill site will revert to the original proprietor; and thereby indicates the then legislative idea of a reasonable time within which a miller must act to preserve his privileges acquired by condemnation proceedings. Defendant is not within the saving clause of the cited statute, nor the more liberal limits of the amendment thereto. Neb. Laws 1905, chap. 101, p. 496. The statute does not in terms apply to the case at bar, but it warrants a court in exacting the same degree of diligence on the part of the individual owning the mill site if he asserts a right to flow the land of upper riparian owners.

2. The injunction is absolute, forbidding the reconstruction of a dam upon defendant's land. Defendant owns a mill antiquated, but still constructed for the milling trade. He also owns the land on both sides of the creek, where he proposes, and alleges that he desires, to construct a dam. He has a right to proceed under the statute to establish his right to construct and maintain the dam and operate the mill.

The judgment of the District Court, therefore, is modified so as to enjoin defendant from constructing or maintaining a dam upon the land described in the petition until and unless he shall have again acquired the right so to do by *ad quod damnum* proceedings in the District Court of Saunders County, and, as thus modified, the judgment is affirmed.

Reese, Ch. J., absent and not sitting.

Petition for rehearing denied.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

CARL SCHWINN, Plff. in Err.,
v.

RUDOLPH PERKINS.

(— N. J. —, 78 Atl. 19.)

**Forcible entry and detainer — posses-
sory title.**

1. Where the rightful owner gains possession of lands by a forcible entry, he may, as punishment for his violence, be deprived of it by the statutory proceeding in favor of one in actual peaceable possession, although not rightfully entitled thereto.

Headnotes by SWAYZE, J.

Note. — Right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who forcibly dispossessed him.

Consideration is given in this note to those cases only which have been decided since the note to Wilson v. Campbell, 8 L.R.A. (N.S.) 426, on the same subject, was written.

The main object of the statutes relating to forcible entry and detainer, as appears from a consideration of the cases upon the subject, is to preserve the peace by preventing those not in the actual possession of real property from resorting to physical force or threats or intimidation of any kind to gain possession of the property from the one in the actual enjoyment thereof. It matters not that the claimant out of possession may have the better right to immediate possession; if his title or right are not recognized by the one in possession, he must not attempt to enforce his claim by the strong hand, but must seek redress in the courts, and if, through force of whatever nature, he succeeds in ousting his adversary from possession, an action of forcible entry and detainer will lie against him, no matter how strong may be his title or his right to possession. All that needs be shown in such action, to sustain the plaintiff's right to restitution, is that the plaintiff was in the actual possession of the property, and was forcibly dispossessed by the defendant.

"There was a time in the early days in England when the owner could forcibly dispossess one in possession without legal right, as, for instance, a tenant holding over, and the latter was without remedy. This state of the law led to unseemly conflicts and breaches of the peace, so that, by act of Parliament, it was made unlawful, both criminally and civilly, for the owner thus to take the law into his own hands. By these acts against forcible entry, the rightful owner, though entitled to the possession, was made to restore it and set to seeking his rights in a lawful manner. These forcible entry and detainer statutes 32 L.R.A. (N.S.)

Same — peaceable possession.

2. It is essential to the maintenance of the action for forcible entry that the complainant should have been in peaceable possession.

Same — what is.

3. Mere occupancy or personal presence of the complainant upon the ground does not of itself constitute such possession as will sustain an action of forcible entry.

Same — trespass.

4. A mere trespasser cannot, by the very act of trespass, immediately and without excuse, give himself what the law understands by "possession" against the person whom he ejects.

(November 14, 1910.)

are found enacted in quite similar form in most of the states in this country." Levy v. McClintock, 141 Mo. App. 593, 125 S. W. 546.

"Generally speaking," said the court in Grammer v. Blansett, 93 Ark. 421, 124 S. W. 1037, "forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore, ordinarily, the only matters involved are the possession of plaintiff and the use of force by defendant."

Where the defendant's entry is forcible and unlawful, the plaintiff may maintain the action of forcible entry and detainer, regardless of the question of the right of the defendant to enter the premises. Fisher v. Harman, 67 W. Va. 619, 68 S. E. 885.

So, where a tenant holding over against his landlord's consent is dispossessed against his will by the landlord's entry into the premises, the only remedy he has is the right to maintain forcible entry and detainer. Levy v. McClintock, supra.

The law is well settled that the rightful owner of real estate, entitled to the possession thereof, cannot take the law into his own hands and recover that possession by violence from one in actual and peaceable possession of the premises. Anderson v. Carlson, 86 Neb. 126, 125 N. W. 157, wherein a tenant holding over after the expiration of his lease, and who was forcibly dispossessed by one entitled to possession under a new lease, was held to be entitled to bring an action of forcible entry and detainer.

In an action of forcible entry and unlawful detainer, the law seems to be well settled that neither the title to the land nor the right to its possession is an issue. Underwood v. Caruthersville, 146 Mo. App. 288, 129 S. W. 1076; Patton v. Balch, — N. M. —, 106 Pac. 388.

In Cranberry v. Storey, — Tex. Civ. App. —, 127 S. W. 1122, the plaintiff was held clearly to be entitled to resort to the statutory action of forcible entry and detainer

ERROR to the Supreme Court to review a judgment reversing a judgment of the First District Court of Jersey City in plaintiff's favor in an action of forcible entry and detainer. Affirmed.

The facts are stated in the opinion.

Messrs. Hartshorne, Insley, & Leake for plaintiff in error.

Mr. Marshall VanWinkle, for defendant in error:

A mere intruder or trespasser cannot institute proceedings under the statute, and be restored to the possession which he held unlawfully.

People ex rel. M'Inroy v. Reed, 11 Wend. 157; Voll v. Butler, 49 Cal. 74; Lawton v. Savage, 136 Mass. 113.

Peaceable possession cannot be based on a nocturnal entry upon the premises.

Newton v. Doyle, 38 Mich. 645; Harrington v. Scott, 1 Mich. 17; Seitz v. Miles, 16 Mich. 456; Bowers v. Cherokee Bob, 45 Cal. 496; Voll v. Butler, 49 Cal. 75.

Forcible detainer can be maintained only by one who is entitled to possession.

Mueller v. Newell, 29 Ill. App. 192; Reed v. Bell, 26 Mo. 216.

Swayze, J., delivered the opinion of the court:

This was an action of forcible entry and

detainer by Schwinn against Perkins in the first district court of Jersey City. Prior to August, 1908, Schwinn was in possession of the main front room on the first floor of a house in Jersey City under a lease from Perkins ending November 1, 1908. There was evidence that on September 3, 1908, during the term, one Willits was in the room in the employ of the plaintiff as caretaker and watchman. The plaintiff had there conducted a tailoring business, but about August 16th or 18th had moved to New York all his stock in piece goods and most of the things necessary to do business. He testified, however, that he had left part of his property used for trying on purposes in the premises; that he also had there a complete set of fall samples; that he did not take down his sign, but had made arrangements to do so, intending to use it in New York. On September 3d Willits was forcibly ejected from the premises by the defendant. The evidence of force was sufficient to bring the case within the statute relating to forcible entries and detainers. The defendant sought to prove that he had had possession from the 21st day of August under an agreement for surrender of the term between him and Schwinn, and he offered evidence that the plaintiff had contracted to have his sign taken

for the purpose of recovering possession, where it appeared that he had been forcibly ejected from certain premises and his household goods, etc., hauled therefrom, under the authority of a writ of possession which did not embrace the premises from which he was ousted.

And in the preceding case the court said that, the writ not being authority nor color of authority for the act of the defendant and the officer, and the plaintiff having been forcibly ejected from the premises, it was of no importance that the defendant may have been entitled to a judgment foreclosing his lien on the land in dispute, and that it was due entirely to a mistake or oversight that he had not obtained such a judgment. "The court was not called upon nor entitled to consider such matters in determining the controversy."

But it was held in *Napier v. Spielmann*, 127 App. Div. 567, 111 N. Y. Supp. 983, affirmed in 196 N. Y. 575, 90 N. E. 1162, that an action for forcible entry and detainer will not lie where the ousted occupier is a servant or mere licensee; that in such a case the possession is not changed, for it remains in the master or licensor.

In *Grammer v. Blansett*, supra, the plaintiff was permitted to bring an action of forcible entry and detainer, under a statute (Kirby's Dig. § 3629) providing that "if any person shall enter into or upon any lands, tenements, or other possessions, and detain or hold the same without right or claim of title, . . . or by such words and actions as have a natural tendency to

excite fear or apprehension of danger, . . . or frightening by threats or other circumstances of terror the party to yield possession, in such cases every person so offending shall be deemed guilty of a forcible entry and detainer." The facts of which case clearly appear in what the court said: "In this case the evidence shows that plaintiff was in the actual possession of the land in controversy, fencing and clearing the same, and at least prima facie entitled to the possession. While doing so, the defendant approached him in anger, and in effect called him a cur. He posted upon the land notices against trespassers and threats of arrest; and then, calling to his assistance four or five other men, forcibly took possession of the land by tearing down plaintiff's fence and inclosing the same with a fence of his own. Under the most provoking circumstances he left to him the choice of two evils,—to engage in an unequal combat to maintain his possession, or yield possession under necessity and bring this action, the course prescribed by law in such cases." And *Knowles v. Crocker Estate Co.* 149 Cal. 278, 86 Pac. 715, is a case to the same effect under a similar statute.

So, in *Zuercher v. Startz*, — Tex. Civ. App. —, 115 S. W. 1175, under a statute providing that a forcible entry is "an entry without the consent of the person having the actual possession," it was held the plaintiff, whose pasture lands were invaded during his temporary absence therefrom, was entitled to maintain an action of forcible entry and detainer.

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down; that another person was in possession of the premises; and that his own representatives had been in possession of the premises in August. In short, he offered evidence of a parol surrender of the lease, executed by an actual possession. *Miller v. Dennis*, 68 N. J. L. 320, at page 323, 53 Atl. 394. This evidence was rejected, and the trial judge directed a verdict in favor of the plaintiff. Judgment was entered that Schwinn, the plaintiff, be restored to the possession of the premises specified in his complaint, and recover treble costs. This judgment was reversed by the supreme court.

The only question we think it necessary to consider is whether a parol surrender executed by an actual possession would constitute a defense in an action of forcible entry and detainer. The peculiarities of this action have been frequently dwelt upon by the courts, and the difficulties have arisen out of the seeming injustice of a judgment restoring the possession of property to one not rightfully entitled thereto. The difficulties are well illustrated by the prolonged litigation in *Newton v. Harland*, 1 Mann. & G. 644, 1 Scott, N. R. 473, 2 Jur. 350. In *Harvey v. Brydges*, 14 Mees. & W. 437, Baron Parke said: "If it were necessary to decide it, I should have no difficulty in saying that where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assails a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." It is evident that his view was that in such a case the only remedy was by an indictment for the forcible entry and detainer, and that a civil action to redress the private wrong would not lie. These cases were, however, actions of trespass, did not necessarily involve the construction of the forcible entry and detainer act, and are not inconsistent with the view that one who is in possession and wrongfully ejected by force may be entitled to be restored to the possession in the method prescribed by the act. *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, 50 L. J. Ch. N. S. 401, 44 L. T. N. S. 248, 29 Week. Rep. 484, was a case of forcible entry, and Mr. Justice Fry distinctly held that there was no civil remedy for the forcible entry alone, 32 L.R.A. (N.S.)

unaccompanied by some independent wrong. Our supreme court, however, has held that trespass can be maintained. *Thiel v. Bull's Ferry Land Co.* 58 N. J. L. 212, 33 Atl. 281. Mr. Pollock says (Pollock, Torts, 312): "The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but he shall be punished for the breach of the peace by losing it, besides making a fine to the King." The opinion as to the right of the party who is forcibly dispossessed to bring an action of trespass, expressed by the learned chief justice in *Thiel v. Bull's Ferry Land Co.*, was referred to, but neither approved nor disapproved, by this court in *Mershon v. Williams*, 62 N. J. L. 779, at pages 784, 785, 42 Atl. 778. It is not involved in the present case. We think that under the statute, which forbids an inquiry into the estate or merit of the title, the plaintiff, even though his possession may be wrongful, is entitled to recover possession by this statutory action, where he is ejected by violence, whether he is or is not entitled to sue in trespass for damages. It is essential, however, to the maintenance of the action, that he should have been in peaceable possession. The old forms of indictment for forcible entry and detainer contained that allegation. 3 Chitty, Crim. Law, 887, 888; 2 Burn's J. P. 220. The reported cases in this state where the statutory action is brought by the person injured sustain the same view. *Mairs v. Sparks*, 5 N. J. L. 513; *Berry v. Williams*, 21 N. J. L. 423, at page 427; *Funkhauser v. Collyot*, 67 N. J. L. 132, at page 135, 50 Atl. 580. The peculiar section of our act which was the subject of discussion in *Mason v. Powell*, 38 N. J. L. 576, recognizes the necessity of possession, and the language of the act is: "If any person shall enter upon or into any lands, tenements, or other possessions," the judgment, if in favor of the complainant, is followed by a writ of restitution directed to the sheriff, to cause the complainant to be re-seised or repossessed. 1 Gen. Stat. 1598, pl. 13.

The important question now presented, one of the difficult and important questions of the law, is: What constitutes "possession?" The learned trial judge seems to have thought that mere occupancy was possession in the view of the law,—a not uncommon confusion of thought, to which the court of appeals of New York called attention in *Mygatt v. Coe*, 142 N. Y. 78, 24 L.R.A. 850, 36 N. E. 870, 872. The distinction has been touched upon in our own cases. *Corlies v. Corlies*, 17 N. J. L. 167, was an action for forcible entry and detainer. Mr. Justice Dayton, in dealing with the aver-

ments of the complaint, said that the complainant must have had actual possession of the premises, and that an averment that he and his horses and wagon were pushed and backed off the premises, when coupled with an averment of seisin in fee simple, did not suffice, since it might be true that he was actually on the premises, but was there only by accident or as a visitor or trespasser. That mere occupancy or personal presence upon the ground is not sufficient to constitute that possession which the law clothes with legal rights is shown by a few illustrations. There may be possession without occupancy, as where a man's servant is in the actual occupancy of the property, holding possession for him, or where a man has temporarily gone out of his house, leaving no one in charge, but still having legal possession; and there may be a case of occupancy without possession, as where, in a man's absence, a mere stranger, visitor, or trespasser goes into his house without claim of right. In Bacon's Abridgment, under the head of "Forcible Entry and Detainer" (4 Bacon, Abr. Am. ed. 328), it is said: "A man who breaks open the doors of his own dwelling house or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes;" and *Com. v. Keeper of the Prison*, 1 Ashm. (Pa.) 140, is quoted as authority for the statement that the possession of the prosecutor must be quiet, peaceable, and actual, not a mere scrambling possession. Archbold (2 Archbold's Criminal Pleading, 331) cites this passage as the law. In a recent philosophical treatise (Pollock & W. on Possession), it is said that whether legal possession shall follow physical possession or not is a point of law; and that whether there exists at the date in question, between a given person and a given thing, the relation of physical possession or occupation, is wholly or mainly a matter of fact (page 10). The distinction thus made between occupancy or physical possession and legal possession appears very clearly when the case is presented of two persons in the occupancy of the same property. Littleton says that "if A. of B. be seised of a mese [i. e., a house including 'buildings, curtilage, orchard, and garden,' Co. Litt. 56a] and F. of G., that no right hath to enter into the same mese, claiming the said mese to hold to him and to his heires, entereth into the sayd mese, but the same A. of B. is then continually abiding in the same mese, in this case the possession of the freehold shall bee alwayes adjudged in A. of B., and not in F. of G., because in such case where

two bee in one house or other tenements, and the one claimeth by one title and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements." [2 Co. Litt. 368a.] Bacon's Abridgment (4 Bacon, Abr. 327) cites Dalton: "If two are in possession of a house, and the one enters by one title and the other by another, he that hath right shall be supposed to be in the possession." It is said in Pollock & Wright, p. 19: "We must have some positive rule to meet the case of a thing which is the object of dispute, and so evenly disputed that no claimant can be said to have *de facto* possession rather than another. It might conceivably be held that legal possession is in suspense as well as the physical possession. But the common law does not so hold; it prefers, in the absence of a decisive state of fact, to make legal possession follow the better right." Although the authors last cited were not dealing with cases involving force, the citations are important as showing the difficulties that arise in determining the question of actual possession, which alone is important in an action of forcible entry and detainer. The illustrations last given are quite like the case at bar. If Perkins had been allowed and able to prove what he offered to show, he would have established a prior possession of the premises in dispute, with the acquiescence of Schwinn. This, as the supreme court said, did not involve any questioning of Schwinn's title or estate, but only the question of his assent to Perkins's actual possession. While Perkins may not have been physically present in the premises at all hours, if he had taken possession in execution of a parol surrender of the lease, he was legally in possession of the property, and thereafter any attempt by Schwinn to resume possession was a trespass. A mere trespasser may be forcibly ejected, if no more force than is necessary for the purpose is used; it is only when a trespasser has ceased to be a mere trespasser, and his occupancy has ripened into a possession, although it may be a wrongful possession only, that the statute relating to forcible entry and detainer becomes applicable. We agree with the statement of Pollock that a mere trespasser does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner. Pollock, Torts, 312. This was the view taken by Lord Denman in *Browne v. Dawson*, 12 Ad. & El. 624, at page 629, 10 L. J. Q. B. N. S. 7. He says: "A mere trespasser cannot, by the very act of trespass, immediately and without

acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay re-instate himself in his former possession." The use of the word "former" in connection with possession seems to be inaccurate, as the possession can hardly be said to have been terminated by the act of trespass, if the trespasser did not himself gain possession by that act alone. It is difficult to say what will suffice to enlarge a mere occupation into a legal possession. Some light is thrown upon the subject by the passage from Bracton quoted by the supreme court of Massachusetts in *Page v. Dwight*, 170 Mass. 29, 39 L.R.A. 418, 48 N. E. 850. Bracton, 162b. Bracton is dealing with a case of disseisin, and says the first and principal remedy is of this kind, namely, that he who has been disseised may eject the spoiler by his own strength if he can, or by strength which he has called in or recalled, provided no interval has elapsed, the disseisin or misdeed being flagrant. Bracton's expression as translated, "provided no interval has elapsed," hardly differs from Lord Denman's expression six centuries later, "without delay." In such a case as *Mr. Justice Barker* suggests in *Page v. Dwight*, the forcible entry and the recapture are but one transaction, and the recapture is not a forcible entry, but a successful and proper resistance of a forcible entry; all that has been done is to resist successfully a wrongful act. It would be a travesty of law, if a man could enter my house and defy me to protect my own possession, except by the slow process of the courts; and, if I am in possession, it can make no difference whether the trespasser enters by force or by stealth. The act as to forcible entries and detainers was for the protection of those who already had actual and peaceable possession, not for those who newly acquired a mere foothold by force or by stealth. No distinction in the two methods is made by the books, and in *Mason v. Powell*, 38 N. J. L. 576, the entry which was held to be a forcible entry was made in the absence of the rightful possessor and without any breach of the peace. These views are in harmony with the expressions of our own courts. *Mairs v. Sparks*, 5 N. J. L. 513, at page 516, and *Mercereau v. Bergen*, 15 N. J. L. 244, at page 247, 29 Am. Dec. 684. These cases are similar to the present. If Perkins took possession in August in execution of Schwinn's surrender, that possession was in him still, unless Schwinn had in some way acquired a new possession; and the jury might have found that Perkins, instead of acquiescing, undertook to resist what amounted, under the decision in 32 L.R.A. (N.S.)

Mason v. Powell, to a forcible entry by Schwinn, and, so far from being himself guilty of a forcible entry, was only defending his already existing possession against a mere trespasser. The Massachusetts supreme court has reached the same result in a similar case. *Hodgkins v. Price*, 132 Mass. 196. The court said: "The process is for the purpose of restoring one to a possession which has been kept from him by force. It is not a process against a party who resists the right of possession by force, but it is for an interference with an actual possession. The claim that this plaintiff was ever in possession of this estate is simply preposterous. He had no more possession of it than he would have had of one of the rooms of the building if he had gone into such room and said to the occupant of it: 'I have come to take possession of this room. Here I am, in possession; you will please to go out. I propose to hold this by force, and, if you attempt to remove me by force, then the weaker of us, on being ejected, will bring an action of forcible entry and detainer against the other.' But, to make this illustration precisely analogous, we will say that this party, instead of calling in at the place of business when the tenant was there, took the opportunity while he had gone to dinner to clamber through the transom window over his door, and in the mode before suggested salute him upon his return. It would be a disgrace to the law and to all concerned in the administration of it, to say that a possession thus forcibly obtained before the business hours of the day, from one who is in actual peaceable occupation of the premises, is to be protected and restored by the law when the actual occupant shall resume his occupation." If the rejected evidence had been received, it would have presented a question for the jury whether the plaintiff's agent, Willits, was occupying the premises under such circumstances as amounted to a legal possession, or whether Perkins had the legal possession by virtue of an executed surrender. We think the evidence should have been received, and that the Supreme Court was right in reversing the judgment of the District Court.

NEW YORK COURT OF APPEALS.

RE CO-OPERATIVE LAW COMPANY.

(198 N. Y. 479, 92 N. E. 15.)

Corporation — law practice — validity.
1. A corporation for the practice of law is not authorized by a statute permitting

the organization of a corporation for any lawful business, since the practice of the law is not a lawful business except for members of the bar, who have complied with all the conditions required by statute and the rules of the courts: and a corporation cannot perform the conditions.

Attorney general — intervention — right to practise law.

2. The attorney general may properly appear in a proceeding to test the right of a corporation to engage in the practice of the law.

(May 17, 1910.)

Note. — Practice of law or medicine by corporation.

RE CO-OPERATIVE LAW CO. was followed in *Re Benseel*, 68 Misc. 70, 124 N. Y. Supp. 726, where it was held that since a corporation is not an attorney at law, and cannot practise law through lawyers employed by it, it cannot enforce a lien for legal services.

In *Re Associated Lawyers' Co.* 134 App. Div. 350, 119 N. Y. Supp. 77, there was a denial of the application for the approval of the court, under the statutes involved in RE CO-OPERATIVE LAW CO., filed by a corporation organized to do a general law and collection business. The court placed the denial upon the ground that the corporation was not one whose existence, organization, or incorporation it was authorized to approve, and said that it was not necessary to determine just what portion of its business the statute prohibited.

For a similar application of the principles involved in RE CO-OPERATIVE LAW CO., attention is directed to the following cases involving the practice of medicine or dentistry by a corporation:

The theory that a corporation cannot be examined as to fitness, and that therefore, since it cannot qualify as a practitioner, it cannot claim the right to practise through agents, was applied in *Com. ex rel. Atty. Gen. v. Alba Dentist Co.* 13 Pa. Dist. R. 432, where it was held that a corporation not authorized by its charter to practise dentistry was within the meaning of a statute forbidding any person to enter upon the practice of dentistry without having obtained a license.

It was held in *People v. John H. Woodbury Dermatological Inst.* 192 N. Y. 454, 85 N. E. 697, that a corporation organized for manufacturing chemical preparations, and publishing and selling books and pamphlets relating to the same, was a person within the meaning of, and might be convicted under, a statute making it a misdemeanor for any person not a registered physician to advertise to practise medicine; and it was pointed out that this construction of the statute did not affect hospitals, dispensaries, and similar institutions, for the reason that the statute was not intended to apply to such institutions, which, by the express provisions of other statutes, 32 L.R.A. (N.S.)

A PPEAL by a petitioner from an order of the Appellate Division of the Supreme Court, Second Department, denying its application for approval by the court of its existence and incorporation, and the continuance of its business for the purpose of practising law. Affirmed.

The facts are stated in the opinion.

Mr. Darwin J. Meserole, for appellant:

The business in which the petitioner is engaged is a lawful one.

Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 252, 21 Am. St. Rep. 448, 27 N. E. 831; *Legrand v. Manhattan*

were authorized to carry on the practice of medicine without registration.

In *Hannon v. Siegel-Cooper Co.* 167 N. Y. 244, 52 L.R.A. 429, 60 N. E. 597, the court seemed to think that, in view of a statute making it a misdemeanor for any person, without having obtained a license, to practise, or to hold himself out to the public as practising, dentistry, the action of a department-store corporation in assuming to carry on the business of dentistry was illegal and *ultra vires*; the decision in the case being that although such acts might be beyond the corporate powers, the company might be held responsible for the malpractice of a dentist employed by it.

The Nebraska court has reached a contrary conclusion.

In *State Electro-Medical Inst. v. State*, 74 Neb. 40, 103 N. W. 1078, 12 A. & E. Ann. Cas. 673, it was held that a corporation, although a person, was not, because of its impersonality, such a person as is capable of obtaining a license to practise medicine, and that if it had engaged in the practice of medicine, it was within the operation of a statute forbidding any person to practise without having obtained a license. But it was held that, in view of a provision of the statute that any person should be regarded as practising medicine who should operate, or profess to heal or prescribe for, or otherwise treat, any physical or mental ailment of another, the practice of medicine consisted in the diagnosis of cases, and the prescribing and administration of remedies, and that a corporation did not, by making contracts for the furnishing of services of duly licensed physicians, place itself within the prohibition of the statute. In *State Electro-Medical Inst. v. Platner*, 74 Neb. 23, 121 Am. St. Rep. 706, 103 N. W. 1079, involving a suit by the corporation upon such a contract, it was held that the contract would not be held void upon the ground of public policy, or upon the theory that the statute was intended to prevent unlicensed persons from being beneficially interested in the practice of medicine.

Upon the general question as to the right of an unlicensed person to recover for services of licensed person, see notes to *Deaton v. Lawson*, 2 L.R.A. (N.S.) 392, and *Bronold v. Engler*, 21 L.R.A. (N.S.) 176.

L. A. W.

Mercantile Asso. 80 N. Y. 638; Snow, C. & Co. v. Hall, 19 Misc. 656, 44 N. Y. Supp. 427; Re Associated Lawyers' Co. 134 App. Div. 350, 119 N. Y. Supp. 77.

Messrs. Edward A. Freshman and Walter Shaw Brewster, for respondent:

The appellant corporation was not a corporation lawfully engaged in a business authorized by the provisions of any existing statute.

People ex rel. Fairchild v. Preston, 140 N. Y. 552, 24 L.R.A. 57, 35 N. E. 979; Re White, 118 App. Div. 869, 103 N. Y. Supp. 688; Hannon v. Siegel-Cooper Co. 167 N. Y. 246, 52 L.R.A. 429, 60 N. E. 597.

It is the policy of the state and of its laws to restrict the practice of the law to duly qualified individuals.

Re Clark, 184 N. Y. 222, 77 N. E. 1; Hirschbach v. Ketchum, 5 App. Div. 324, 39 N. Y. Supp. 291; Re Shay, 133 App. Div. 547, 118 N. Y. Supp. 146; Stedwell v. Hartmann, 74 App. Div. 126, 77 N. Y. Supp. 498; Hess v. Allen, 24 Misc. 393, 53 N. Y. Supp. 413.

Messrs. Edward R. O'Malley, Attorney General, and Edward H. Letchworth for the State:

The right of the attorney general to be heard in the matter is clear, whether regarded simply as *amicus curiæ*, appearing as he does at the request of the court, or as performing his ancient common-law duties in representing the people of the state in any proceeding in which their interests may require such representation.

People v. Santa Clara Lumber Co. 126 App. Div. 616, 110 N. Y. Supp. 280.

Applicant is not authorized to conduct the "business" of practising law.

Article by Samuel Marsh, N. Y. L. J. Feb. 26, 1909; People v. John H. Woodbury Dermatological Inst. 192 N. Y. 454, 85 N. E. 697.

Vann, J., delivered the opinion of the court:

On the 23d of November, 1901, the Co-operative Law Company, the appellant in this proceeding, claims to have been lawfully organized under the business corporations law (Consol. Laws, chap. 4), with power to carry on the business of practising law. Its objects, as stated in the certificate of incorporation, are "to furnish to its subscribers legal advice and service; to operate in connection with the above a department of law and collections for the use and benefit of the subscribers of the company only; and to accomplish these objects said company proposes to employ and maintain a staff of competent attorneys and counselors at law to give such

advice; and to prosecute or defend, through such counsel, any claim or suit intrusted to its care by subscribers." Its original capital was \$500, which was subsequently increased to \$25,000. As it states under the oath of its president: "The company transacts through its staff of attorneys and counselors at law a general law business, including the prosecution and defense of suits; incorporation of business enterprises; drawing of contracts, leases, and agreements, drawing and probating of wills, management of estates, etc. The company's legal staff and general counsel are selected by the board of directors, and all matters of general policy including the general schedule of fees for legal services, are under the direct supervision and control of the directors."

By chapter 483 of the Laws of 1909 it was made unlawful for any corporation to practise law, to render or furnish legal services or advice, to furnish attorneys or counselors for that purpose, or to advertise for or solicit legal business. Penal Law, § 280. Violation of the statute by a corporation or its officers was made a misdemeanor. The last sentence of the section is as follows: "This section shall not apply to any corporation lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization, or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation may be located." Although the statute did not take effect until the 1st of September, 1909, still in June of that year the Co-operative Law Company applied *ex parte* to the appellate division of the second department "for an order pursuant to chapter 483 of the Laws of 1909, approving the existence of your petitioner and the continuance of its business for the purposes mentioned in its certificate of incorporation." On the 18th of June, 1909, said court "ordered that the existence, organization, and incorporation of said Co-operative Law Company, a corporation organized under the business corporations law of the state of New York, and lawfully engaged in a business authorized by the provisions of that statute, is

hereby approved, and that the corporation be and the same hereby is permitted to continue its business pursuant to the terms of its certificate of incorporation." In November, 1909, an application was made by Charles J. McDermott, Esq., a member of the Kings county bar and the chairman of the committee on grievances of the Brooklyn Bar Association, upon notice to the Co-operative Law Company and to the attorney general, to vacate said order, and after a hearing the appellate division vacated its previous order, and denied the application for approval. While no opinion was written, it was recited in the order "that petitioner is not a corporation whose existence, organization, and incorporation this court has power to approve under the terms of chapter 483 of the Laws of 1909." From that order this appeal was taken.

We agree with the learned counsel for the appellant that the vital question is whether, prior to the act of 1909, a corporation could be lawfully organized to practise law. He claims that authority may be found in that part of the business corporations law which provides that "three or more persons may become a stock corporation for any lawful business." Business Corporations Law, § 2. This means a business lawful to all who wish to engage in it. The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practise law is in the nature of a franchise from the state, conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the supreme court, and is protected by registration. No one can practise law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practise law directly, it cannot indirectly, by employing competent lawyers to practise for it, as that would be an evasion which the law will not tolerate. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.* Co. Litt. 223. 32 L.R.A. (N.S.)

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practise law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client, but the corporation, conducted, it may be, wholly by laymen, organized simply to make money, and not to aid in the administration of justice, which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning, or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

A corporation can neither practise law nor hire lawyers to carry on the business of practising law for it, any more than it can practise medicine or dentistry by hiring doctors or dentists to act for it. *People v. John H. Woodbury Dermatological Inst.* 192 N. Y. 454, 85 N. E. 697; *Hannon v. Siegel-Cooper Co.* 167 N. Y. 244, 246, 52 L.R.A. 429, 60 N. E. 597. The legislature, in authorizing the formation of corporations to carry on "any lawful business," did not intend to include the work of the learned professions. Such an innovation, with the evil results that might follow, would require the use of specific language clearly indicating the intention. Recent legislation simply emphasizes and protects the established policy of the state, and, although *ex post facto*, tends to show that no such object was in contemplation when the general term "lawful business" was used in the statute to authorize the

formation of business corporations. Laws 1909, chaps. 483, 484. Business in its ordinary sense was aimed at, not the business or calling of members of the great professions, which, for time out of mind, have been given exclusive rights and subjected to peculiar responsibilities. All statutes relating to the same subject-matter must be read together and construed as parts of an entire system. When the provisions of the Code of Civil Procedure regulating the practice of law and the conduct of lawyers are read in connection with the clause of the business corporations law quoted above, it is obvious that they do not relate to the same subject-matter, and that, in enacting the latter, the legislature was dealing with something utterly foreign to the former. Code Civ. Proc. §§ 56-81; judiciary law, Laws 1909, chap. 35 (Consol. Laws, chap. 30). The special provisions relating to lawyers were not modified or affected by the general provision authorizing the formation of business corporations.

The appellate division was clearly right in vacating its inadvertent order of approval, for it had no power to approve of an organization not authorized by law. *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800. The appellant was not "a corporation lawfully engaged in a business authorized by the provisions of any existing statute," and according to no possible construction of the final sentence of § 280 could its "existence, organization, or incorporation" be lawfully approved by the appellate division. These remarks are not intended to cover title guaranty companies, organized under the insurance law (Consol. Laws, chap. 28), and authorized to examine titles, guarantee the correctness of searches, and insure against loss by reason of defective titles. § 170. The searching of titles is open to all, and guaranty companies may employ either lawyers or laymen to transact their business. It is not claimed that they prosecute or defend the rights of others, but only their own, including such as the contract to indemnify gives them.

The appearance of the attorney general in this proceeding, pursuant to the notice served on him by order of the appellate division, although criticized by the appellant, was entirely proper, for his ancient common-law duty to represent the people called upon him to take part in a controversy in which the people are vitally concerned.

The order appealed from should be affirmed, with costs.

Cullen, Ch. J., and Gray, Haight, Werner, and Hiscock, JJ., concur.
32 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

CITY WATER POWER COMPANY, Respt.,
v.

CITY OF FERGUS FALLS, Appt.

(— Minn. —, 128 N. W. 817.)

Dam — giving way — liability for injury.

1. Action by a lower riparian owner for damages caused by the destruction of his milldam by the breaking of the dam of an upper owner. Held: (1) The erection and maintenance of a dam across a natural water course for the purpose of utilizing a water power is not a nuisance, nor is the owner thereof an insurer of its safety, but he is bound to exercise in the premises a degree of care proportionate to the injuries likely to result to others if it proves insufficient. The dam must be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated.

Same — *res ipsa loquitur*.

2. The maxim, *Res ipsa loquitur*, applies to the facts alleged in the complaint, but it is a rule of evidence, not of pleading, and it cannot supply an allegation of an essential ultimate fact.

(December 16, 1910.)

A PPEAL by defendant from an order of the District Court for Otter Tail County overruling its demurrer to the complaint in an action brought to recover damages for the destruction of plaintiff's dam. Reversed.

The facts are stated in the opinion.

Mr. N. F. Field, for appellant:

The right of riparian ownership includes the building of a dam.

29 Cyc. Law & Proc. p. 335.

Gould, Waters, § 148; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *State v. Minneapolis Mill Co.* 26 Minn. 229, 2 N. W. 839; *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41.

The owner of a dam built across a stream or river for power and milling purposes, in case of its breaking or giving away, whereby property below it is injured, is not liable without proof of negligence.

Ray, Neg. pp. 438, 448; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 448;

Headnotes by START, Ch. J.

Note. — The cases concerning the liability of one for injury caused by escape of water stored on his premises or retained by a dam are included in a note to *Brennan Constr. Co. v. Cumberland*, 15 L.R.A. (N.S.) 541.

Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9, 26 Am. Dec. 111; Bell v. McClintock, 9 Watts, 119, 34 Am. Dec. 507; Monongahela Nav. Co. v. Coon, 6 Pa. 379, 47 Am. Dec. 474; Lacy v. Arnett, 33 Pa. 169; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Knoll v. Light, 76 Pa. 268; New York v. Bailey, 2 Denio, 433; Shrewsbury v. Smith, 12 Cush. 177; Wendell v. Pratt, 12 Allen, 464; Smith v. Agawam Canal Co. 2 Allen, 355; Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; China v. Southwick, 12 Me. 238; Hoffman v. Tuolumne County Water Co. 10 Cal. 413; Everett v. Hydraulic Flume Tunnel Co. 23 Cal. 225, 4 Mor. Min. Rep. 589; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Mor. Min. Rep. 205; Bristol Hydraulic Co. v. Boyer, 67 Ind. 230; 1 Thomp. Neg. 2d ed. §§ 705-707; 2 Shearm. & Redf. Neg. 5th ed. § 732; Gould, Waters, § 298; Angell, Watercourses, § 336.

The city, in building and maintaining its dam, was acting under and by virtue of express statutory authority, and cannot be held liable in this action, in the absence of proof of negligence either in the construction and building of the dam, or in its subsequent management.

Dixon v. Metropolitan Bd. of Works, L. R. 7 Q. B. Div. 418, 50 L. J. Q. B. N. S. 772, 45 L. T. N. S. 312, 30 Week. Rep. 83, 46 J. P. 4; Boughton v. Midland Great Western R. Co. Ir. Rep. 7 C. L. 169; Whitehouse v. Birmingham Canal Co. 27 L. J. Exch. N. S. 25; Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441; Gould v. Winona Gas Co. 100 Minn. 258, 10 L.R.A.(N.S.) 889, 111 N. W. 254.

Mr. J. W. Mason, for respondent:

Defendant is liable.

Cahill v. Eastman, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184; Knapheide v. Eastman, 20 Minn. 478, Gil. 432; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114, 100 Minn. 548, 111 N. W. 1134.

Start, Ch. J., delivered the opinion of the court:

Appeal by the defendant from an order of the district court of the county of Otter Tail overruling its general demurrer to the complaint. The here material facts alleged in the complaint, briefly stated, are these: The defendant is a municipal corporation with power to furnish light for all municipal purposes, and to supply light to the inhabitants of the city for profit. In the execution of this power, and for its profit, it built and maintained upon its own land

and across the Red river a dam for the purpose of creating the necessary water power. This dam was located upon the river $1\frac{1}{2}$ miles above a dam which the plaintiff built and maintained on its own land and across the river. The water in the river could be raised by the defendant's dam to the height of 30 feet, and was so raised, whereby a great reservoir of water, a mile long and 30 rods wide, was created and confined within the banks of the river. The water so collected and confined by the dam in the reservoir did not naturally belong there, and its natural tendency was to do great damage and mischief if it escaped. On the 24th day of September, 1909, the dam of the defendant, in consequence of the great pressure of the water in the reservoir above it, suddenly and without previous warning gave way, and thereby all the water contained therein escaped, and in a great flood rushed down the river upon and over the dam of plaintiff, whereby a great portion of it was destroyed, to plaintiff's damage in the sum of \$5,697.43. The learned trial judge stated his reason for overruling the demurrer in these words: "Even if, as defendant claims, the rule of absolute liability established by Cahill v. Eastman, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184; Knapheide v. Eastman, 20 Minn. 478, Gil. 432; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336; and Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114, does not apply, I think the complaint brings the case within the rule, *res ipsa loquitur*, as established in Waller v. Ross, 100 Minn. 7, 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715, and Gould v. Winona Gas Co. 100 Minn. 258, 111 N. W. 254, and the numerous cases cited in those decisions."

1. The first question presented by the record is whether the rule of liability without proof of negligence held in the cases cited by the trial court applies to the facts admitted by the demurrer. The rule was applied in the case of Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114. The facts in that case were that the defendant city constructed on the side of a bluff 150 feet above plaintiff's house a reservoir, and pumped into it water from the river, and stored therein 800,000 gallons of water for use in connection with its system of waterworks. The reservoir gave way and the water was thrown upon the house, whereby it was destroyed. We held upon these facts, following the previous decisions of this court that the city was liable for the resulting damages, without proof of negligence in its part in the construction

and maintenance of the reservoir. The doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129, was first adopted and applied by this court in the case of *Cahill v. Eastman*, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184, and in the *Wiltse Case* was refused, on the ground of *stare decisis*, to overrule the former decisions. While an examination of the judicial decisions of other jurisdictions seems to indicate that the rule of *Rylands v. Fletcher* has been rejected as unsound in the majority of the states, yet we are not prepared to overrule our own decisions on the question. Nevertheless we are of the opinion that the rule ought not to be extended to cases not clearly within its reason. We have, then, the question whether the rule ought to be extended to the case of the construction and maintenance by riparian owners of dams across natural water courses for the purpose of utilizing water powers, a matter of great and increasing importance to public as well as to private interests. Such a use of the water of rivers and lesser streams is not an unnatural or unusual use, but the contrary. Nor does such use involve the bringing upon the owner's premises that which does not naturally belong there,—not the creation and maintenance of a nuisance, the existence of which fixes liability without proof of actual negligence. The legislature as early as 1857 (Pub. Stat. 1849–1858, chap. 129) recognized the public benefit to result from a development of the water powers of the state, by enacting a statute “to encourage the erection of mill-dams and mills,” by authorizing their construction, and giving the owners of water powers the right to exercise the power of eminent domain to secure the necessary land for flowage. This statute is still in force. Rev. Laws 1905, chap. 42. The constitutionality of the statute was sustained in the case of *Miller v. Troost*, 14 Minn. 365, Gil. 282. In the case at bar both the plaintiff and defendant had a right as riparian owners to build their respective dams across the stream. *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41. In so doing each exercised a lawful right the exercise of which was a substantial public benefit. On principle it is clear that the rule of absolute liability ought not to be extended to milldams lawfully constructed and maintained without any negligence in fact. Such is the rule in other jurisdictions, notably in Massachusetts, although the rule of *Rylands v. Fletcher* is there accepted. *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; 32 L.R.A. (N.S.)

Mears v. Dole, 135 Mass. 508. In these cases the rule of *Rylands v. Fletcher* was recognized and applied, but in the cases of *Shrewsbury v. Smith*, 12 Cush. 177, and *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61, which were milldam cases, it was held that negligence in fact was the test of liability of an owner of a milldam for damages caused by the breaking of his dam. These cases, however, impose upon the owner of the dam a high degree of care in these words: “It must be in proportion to the extent of the injury which will be likely to third persons provided it should prove insufficient. And it is not enough that the dam be sufficient to resist ordinary floods; for, if the stream is occasionally subject to great freshets, those must likewise be guarded against, and the measure of care required in such cases must be that which a discreet person would use if the whole were his own. . . . The dam should be sufficient to resist not merely ordinary freshets, but such extraordinary floods as may be reasonably anticipated.”

This court in the case of *Gould v. Wirona Gas Co.* 100 Minn. 258, 10 L.R.A. (N.S.) 889, 111 N. W. 254, declined to extend the rule of absolute liability to gas collected in the mains of the defendant, which escaped, whereby plaintiff's premises were damaged. We have been unable to find any case where the rule of absolute liability had been extended to milldams constructed in natural water courses. This suggests the distinction between the *Wiltse Case* and the one at bar. In the former case the conditions where wholly artificial. The water was brought by artificial means upon the defendant's premises, where it did not naturally belong, and stored in an artificial reservoir upon the side of a high bluff, a menace to the safety of property below it lawfully. These are conditions not strictly analogous to those in the case at bar, where the waters of a natural water course were impounded within its banks in the usual and natural way for a public as well as a private purpose. See, in this connection, 3 Farnham, *Waters*, §§ 875, 982. We accordingly hold that the erection and maintenance of a dam in a natural water course by a riparian owner, for the purpose of utilizing a water power, is not a nuisance, and that the owner thereof is not an insurer of its safety, but he is bound to exercise, in its construction and maintenance, a degree of care proportionate to the injuries likely to result to others if it proves insufficient.

2. This brings us to the question whether the maxim, *Res ipsa loquitur*, applies to the facts alleged in the complaint. We are of

the opinion that it does. The dam, its construction, and its maintenance were within the exclusive possession and control of the defendant or its agents. Dams constructed and maintained with the care required by law do not, in the ordinary course of things, break by the pressure of the water held back by them. The very purpose of constructing them is to impound the water of the stream. *Waller v. Ross*, 100 Minn. 7, 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715; *Gould v. Winona Gas Co.* 100 Minn. 258, 10 L.R.A.(N.S.) 889, 111 N. W. 254. The maxim, however, is a rule of evidence, not of pleading, and ultimate facts, not evidentiary ones, should be pleaded. On the other hand, it is true that proof of the fact alleged in the complaint in this case would establish a prima facie case in favor of the plaintiff, for the inference of facts from the facts pleaded would be that the defendant failed to use due care in the premises, hence it was negligent. It would be; from the very nature of this case, a great hardship, if not an impossibility, for the plaintiff to affirmatively allege and prove the particular negligence in the construction and maintenance of the dam; but, on the other hand, the defendant knows presumably just how it was constructed and maintained. In any event, a general allegation of negligence in such respects would be sufficient. *Olson v. St. Paul, M. & M. R. Co.* 34 Minn. 477, 26 N. W. 605; *Rogers v. Truesdale*, 57 Minn. 126, 58 N. W. 688.

We have reached the conclusion that the complaint should have alleged in general terms, at least, the ultimate fact of the negligence of the defendant in premises, for the inference of negligence from the evidentiary facts pleaded is not a presumption of law, but a rebuttable inference of fact. It is only where the evidentiary facts pleaded are such that the conclusion of the ultimate fact necessary to sustain the action inevitably follows that such a pleading can be sustained. *Zimmerman v. Morrow*, 28 Minn. 367, 10 N. W. 139.

Order reversed and cause remanded, with leave to the plaintiff to apply to the trial court to amend the complaint.

NEW YORK COURT OF APPEALS.

DAVID HORDERN, Appt.,

v.

SALVATION ARMY, Respt.

(199 N. Y. 233, 92 N. E. 626.)

Charity — unsafe property — negligence — liability.

A religious or charitable corporation is 32 L.R.A.(N.S.)

not immune from liability for injuries to persons coming upon its property to perform services for it, because of the unsafe condition of the premises due to the negligence of its servants.

(September 27, 1910.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a nonsuit entered at a trial term for New York County, Part VIII. in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. John Brooks Leavitt, with Mr. Louis Levene, for appellant:

A religious or charitable corporation is not immune from the consequence of its neglect to keep its passageway reasonably safe.

Doyle v. New York Eye & Ear Infirmary, 80 N. Y. 631; *Church of Ascension v. Buckhart*, 3 Hill, 193; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 A. & E. Ann. Cas. 150; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Wahrman v. Board of*

Note. — Liability of charitable institutions for personal injuries.

The earlier cases passing upon the liability of charitable institutions for personal injuries are collated and fully discussed in the notes to *Farrigan v. Pevear*, 7 L.R.A.(N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A.(N.S.) 74; and *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) 486. It is the purpose of the present note to review the cases that have been decided since the note in 22 L.R.A.(N.S.) was written.

No principle of law, said Spear, J., in *Jensen v. Maine Eye & Ear Infirmary*, — Me. —, — L.R.A.(N.S.) —, 78 Atl. 898, seems to be better established, both upon reason and authority, than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. "Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness."

In accordance with this principle it was held in the preceding case that an infirmary was not liable for the negligence of its servants in allowing the plaintiff's decedent, while an inmate of the institution, to evade the supervision of her attendants and fall through a window to the sidewalk.

A patient, in *Gable v. Sisters of St.*

Education, 187 N. Y. 331, 116 Am. St. Rep. 609, 80 N. E. 192, 10 A. & E. Ann. Cas. 405; Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566; Chapin v. Holyoke Y. M. C. A. 165 Mass. 280, 42 N. E. 1130; Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784, 65 App. Div. 64, 72 N. Y. Supp. 587, 78 App. Div. 317, 79 N. Y. Supp. 1004.

Messrs. Frederick B. Campbell and Henry S. Curtis, with Messrs. Butler, Notman, & Mynderse, for respondent:

The defendant, being a religious and charitable institution, cannot be held liable even for the negligence of its trustees.

Corbett v. St. Vincent's Industrial School, 79 App. Div. 334, 79 N. Y. Supp. 369, 177 N. Y. 16, 68 N. E. 997; Collins v. New York

Post Graduate Medical School, 59 App. Div. 63, 69 N. Y. Supp. 106; Haas v. Missionary Soc. 6 Misc. 281, 26 N. Y. Supp. 868; Joel v. Woman's Hospital, 89 Hun, 73, 35 N. Y. Supp. 37; Wilson v. Brooklyn Homeopathic Hospital, 97 App. Div. 37, 89 N. Y. Supp. 619; Van Tassell v. Manhattan Eye & Ear Hospital, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; Noble v. Hahnemann Hospital, 112 App. Div. 663, 98 N. Y. Supp. 605; Heriot's Hospital v. Ross, 12 Clark & F. 507; Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Adams v. University Hospital, 122 Mich.

Francis, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, was held not entitled to recover from a charitable institution for an injury due to the negligence of a nurse who so placed or left hot-water bottles that water escaped from one of them and seriously scalded the patient while she was lying unconscious and helpless in bed. The court observed: "It is a doctrine too well established to be shaken, and as unequivocally declared in our own state as in any other, that a public charity cannot be made liable for the tort of its servants. The doctrine rests fundamentally on the fact that such liability, if allowed, would lead inevitably to a diversion of the trust funds from the trust's purposes."

In Thornton v. Franklin Square House, 22 L.R.A. (N.S.) 486, a corporation conducting a working girls' home as a public charity was held to be not liable for an injury to an inmate by the fall of a fire escape on the premises, due to the negligence of its servants or agents properly selected. And this is the effect of Barden v. Atlantic Coast Line R. Co. 152 N. C. 318, — L.R.A. (N.S.) —, 67 S. E. 971, where the negligence complained of was the malpractice of the surgeon of the hospital and his attendants, but it was nowhere alleged that they were carelessly or negligently selected by the defendant, or, if they were incompetent, that such incompetency was known to the defendant.

Cunningham v. Sheltering Arms, which is sufficiently set out in the note to Thornton v. Franklin Squire House, 22 L.R.A. (N.S.) 486, was affirmed in 135 App. Div. 178, 119 N. Y. Supp. 1033, wherein Scott, J., said: "It is a well-established rule, upheld by a number of decisions in this and other states, that a charitable institution, from which no financial benefit accrues to its directors or organizers, is not liable for an injury to a recipient of its charity, resulting from the negligence of a person employed by the institution in the furtherance of its objects, providing that due care had been exercised in selecting the employee. Whatever may originally have been the reason for the rule, it is now too firmly estab-

lished to be questioned here, and should be considered as constituting an element of the relation between the benefactor and the beneficiary."

Nor is the institution any the less a benevolent and charitable organization, and thus to be stripped of its immunity from liability for negligence, merely because it may receive pay from the patient as part compensation for his care. Cunningham v. Sheltering Arms, 135 App. Div. 178, 119 N. Y. Supp. 1033, affirming 61 Misc. 501, 115 N. Y. Supp. 576; Jensen v. Maine Eye & Ear Infirmary, — Me. —, — L.R.A. (N.S.) —, 78 Atl. 898.

Thus in Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, Mr. Justice Stewart said: "It is wholly immaterial that the plaintiff, who here complains of injury, was admitted as a pay patient. It is insisted, however, that the reason for the rule does not obtain in this particular case, since the appellees have filed a paper in the court below disclaiming any right of execution against any fund of the defendant corporation held for charitable uses and all income of said corporation other than that received from pay patients; and have asked that the verdict be paid out of funds derived from pay patients only. The argument overlooks the fact that every dollar received by the defendant corporation, from whatever source, is stamped with the impress of charity. For what did these plaintiffs pay? For accommodations which the hospital was enabled to provide through the use of money charitably donated to it. The room, the bed, the furnishings, and conveniences for which the plaintiff paid, are all of them the direct and immediate product of the voluntary donations it received. It follows that the money that the hospital receives from its pay patients is as strictly the increment of the charitable donations it has received, as would be the interest on the money given it if invested on loan. If any profit results from this source, it can only be regarded as incidental addition to the trust fund or income."

But in HORDERN v. SALVATION ARMY, it is held that while one who is the bene-

675, 99 S. W. 453; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 A. & E. Ann. Cas. 1109; *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566; *Cunningham v. Sheltering Arms*, 61 Misc. 501, 115 N. Y. Supp. 576, affirmed in 135 App. Div. 178, 119 N. Y. Supp. 1033; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553.

Cullen, Ch. J., delivered the opinion of the court:

The action was brought to recover for personal injuries received by the plaintiff, a journeyman mechanic, who was engaged in making repairs on a boiler on defendant's premises. The accident occurred through the defective condition of a runway or staging leading from a door in the boiler room. It is unnecessary to narrate the details of the occurrence. The learned court below was of the opinion that the runway was not of such a character as to warrant an inference of negligence on the part of the defendant in maintaining it. It is sufficient to say that, while it may be conceded that the case is a close one, we are of the opinion that the evidence presented a question of fact for determination by the jury. This statement brings us to the principal question of law presented on this appeal.

The respondent contends that, being a religious or charitable corporation, it cannot be held liable for the torts or negligence of its agents or servants. In other words, that the rule of *respondet superior* has no application to such a corporation. That such immunity exists in certain cases is conceded in every jurisdiction so far as our research goes, and in many jurisdictions the immunity is unqualified, existing in all cases, but the extent of the immunity and the grounds on which it rests are the subject of very diverse judicial views. Where the doctrine that the immunity is universal obtains, it is rested on the proposition that

the funds of the corporation are the subject of a charitable trust, and that to suffer a judgment to be recovered against the corporation and to subject its property to the judgment would be an illegal diversion and waste of the trust estate. This doctrine has been asserted in Pennsylvania (*Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553), Maryland (*Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495), Tennessee (*Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351), Kentucky (*Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065), Illinois (*Parks v. Northwestern University*, 218 Ill. 385, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 A. & E. Ann. Cas. 103), and Missouri (*Adams v. University Hospital*, 122 Mo. App. 675, 90 S. W. 453). It is true that in several of these cases the same decision might have been reached on other grounds,—grounds of exemption which seem to be recognized everywhere,—but the ground on which the learned courts before whom the cases came placed their decisions was the one stated, viz., the general immunity of charitable corporations for the torts of their agents. In Massachusetts the exemption of certain hospitals from liability seems by the opinions of the supreme court to have been based rather on the theory that those institutions were governmental instrumentalities, than on their character as public charities, though they were recognized as such. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836. In the earlier case the plaintiff was a gratuitous patient seeking to recover for negligence of the defendant's employee. In the second the plaintiff, a visitor to a patient in the hospital, sought to recover for injuries sustained in the hospital through the unsafe condition of the stairs. At the same time the supreme court held a religious corporation liable to a workman engaged in

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upon the property controlled by the defendant in the prosecution of a lawful work has received injury. He was not a beneficiary of a charity. Nor was the negligent employee in an independent employment, as a surgeon or a trained nurse, . . . the doctrine of *respondet superior* did apply."

And the case of *Kellogg v. Church Charity Foundation*, which is also sufficiently set out in the note in 22 L.R.A.(N.S.) 486, came up again, after a second trial, in 135 App. Div. 830, 120 N. Y. Supp. 406, and the court held that the maxim of *respondet superior* was applicable to the corporation

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fiary of the bounty of a charitable institution may not hold it liable for personal injuries, a person not the recipient of its favor at the time of his injury may recover. So, in *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24, affirming 61 Misc. 643, 113 N. Y. Supp. 1087, which case in the lower court is discussed in the note to *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) 486, the court, although much in doubt as to whether the corporation in question was a charitable organization, said: "But even if it were a charitable institution, we think it would still be liable. Here is a tort committed by one of its employees by reason of which a person who was lawfully

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painting the ceiling of a church, for defective staging (*Mulchey v. Methodist Religious Soc.* 125 Mass. 487), and a similar society liable to a person invited on the premises, for their defective condition (*Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368), and still another liable to a traveler on the highway, for having suffered snow to fall upon him from the roof of the church (*Smethurst v. Independent Cong. Church*, 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387). But in *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, the same court held that the trustees of an unincorporated charity for the education and maintenance of indigent boys were not liable for the injuries caused by their servants, if they used proper care in their selection, stating that the *Davis* and *Smethurst* Cases were not controlling, because the question of the exemption from liability by reason of the charitable character of the defendants was raised in neither case. Whether since this last decision Massachusetts is to be placed in the class of states adhering to the doctrine of total immunity may well be doubted. Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though of course not so frequently.

In several jurisdictions, however, the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state. *Collins v. New York Post Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37. See also *Pryor v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 621, note, and *Haas v. Missionary Soc.* 6 Misc. 281, 26 N. Y. Supp. 868. It is also the law in this state that there is similar immunity from liability in the case of a charitable institution of a quasi penal character, as against an inmate committed to it for punishment or reformation. *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. That decision proceeded on the ground that the defendant was engaged in the performance of a governmental duty for the benefit of the state in respect to persons committed to its custody, and possessed the same immunity as the state. The principle of this case is very much akin to that on which the early hospital cases in Massachusetts were decided. On 32 L.R.A. (N.S.)

the other hand, in *Church of Ascension v. Buckhart*, 3 Hill, 193, a recovery against a religious corporation by a person injured by the falling of a church wall was upheld. The authority of this case has never been questioned, and the decision is conclusive against the doctrine of total immunity. In *Blaechinska v. Howard Mission*, 56 Hun, 322, 9 N. Y. Supp. 679, reversed in 130 N. Y. 497, 15 L.R.A. 215, 29 N. E. 755, but on another point, a recovery was had against a charitable organization for the maintenance of a vault under a sidewalk, with a defective cover, but no question seems to have been raised as to the immunity of the defendant on account of its charitable character. These seem to be the only cases in this state bearing on the question before us. In at least two other states the doctrine of total immunity has been rejected. In *Hewett v. Women's Hospital Aid Asso.* 73 N. H. 550, 7 L.R.A. (N.S.) 496, 64 Atl. 190, a recovery by a nurse for failure to warn her against the presence of a contagious disease was upheld. In *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 A. & E. Ann. Cas. 150, the defendant was held liable to a workman employed in painting the church, for defective scaffolding.

So much for authority. If, however, we are to consider the question of the liability of the defendant an open one despite the decision in *Church of Ascension v. Buckhart*, *supra*, we feel clear that on reason and principle the defendant's claim of immunity should not prevail. In the case of *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, and in the case we have cited from the courts of Michigan, there will be found not only an elaborate review of the authorities, but an exhaustive discussion of the grounds on which the claim of universal immunity is sought to be sustained. In the earlier case Judge Lowell, of the United States circuit court, shows that the analogy of the immunity of private trust estates does not support the doctrine. That immunity is only nominal, not real. "It is true that a suit cannot be maintained against a trustee as such for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault. *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Benett v. Wyndham*, 4 De G. F. & J. 259. The trust fund is protected from immediate levy to

satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection." Of the exemption of charitable institutions against the recipients of the charity the learned judge said: "One who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants, . . . it would be intolerant that a good Samaritan who takes to his home a wounded stranger for surgical care should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerant that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. . . . If in their dealings with their property appropriated to charity they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected." In the later case *Judge Carpenter*, of the supreme court of Michigan, after pointing out that in the earlier decisions in that state immunity only as against beneficiaries of the charity was involved, said: "I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantage reaped by the public from

such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell.

To avoid misapprehension, it may be well to say that we do not intimate any view as to the status of persons visiting charity patients and received through the courtesy of the charitable institution,—whether there would be any greater liability to such persons than to the patients themselves. In this case plaintiff bore the same relation to the defendant as he would bear to any other owner of property on whose premises he was called to work.

The judgments of the Appellate Division and Trial Term should be reversed, and a new trial granted, costs to abide the event.

Gray, Vann, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

NEW YORK COURT OF APPEALS.

SAVERIO GALLO, Resp.,
v.

BROOKLYN SAVINGS BANK, Appt.

(199 N. Y. 222, 92 N. E. 633.)

Savings bank — giving check to impostor — liability to one cashing it.

1. A savings bank which, upon not being satisfied of the identity of one presenting a pass book and demanding money from the account, gives him a check for the amount, payable to the order of the depositor, is not

Note. — The question who must bear the loss when a check or bill is issued or indorsed to an impostor is considered in the notes to *Land & T. Co. v. Northwestern Nat. Bank*, 50 L.R.A.(N.S.) 75, and *Harmon v. Old Detroit Nat. Bank*, 17 L.R.A.(N.S.) 514. As there shown, the weight of authority, although there is a conflict on the point, holds that as between the drawer and drawee, or as between the drawer and holder in good faith, the loss must, in an action *ex contractu*, fall on the drawer, whether he was completely deceived as to the identity of the person to

guilty of such negligence or fraud as to be liable in tort to one who cashes the check for the one to whom it was delivered.

Check — to imposter — liability of drawer.

2. The liability, as drawer of a savings bank which, upon not being satisfied of the identity of one presenting a pass book and demanding money from an account, gives him a check payable to the order of the depositor, is terminated by the payment of the check by the drawee, so that it cannot be held liable as such to one who cashed the check and is compelled to return the amount which he collects from the drawee, because the instrument was forged, on the theory that the one to whom the check was delivered must be regarded as the true payee.

Action — duty of stranger to defend — drawer of check.

3. A savings bank which has issued a check in payment of a deposit account is under no obligation to defend a suit by the drawee against one who cashed it and collected its amount from the drawee, for a return of the money on the theory that the indorsement was forged.

(September 27, 1910.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Division, reversing a judgment of a Trial Term for Kings County, Part I., dismissing the complaint in an action brought to recover the amount of a check drawn by the defendant bank and cashed by plaintiff, and also the costs of an unsuccessful litigation between plaintiff and a subsequent indorsee of the check. Reversed.

The facts are stated in the opinion.

Messrs. Alden S. Crane and Leonard N. Snedeker, with Mr. John D. Snedeker, for appellant:

Defendant was not negligent.

National Exch. Bank v. Lester, 194 N. Y. 461, 21 L.R.A. (N.S.) 402, 87 N. E. 770, 16 A. & E. Ann. Cas. 770; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661.

Mr. J. Stewart Ross, with Mr. Effingham L. Holywell, for respondent:

If the defendant had intended that it should be paid only on the indorsement of its depositor, it should have so stated.

whom he issued the check, or, being in doubt, intended to throw the responsibility upon the drawee or holder. The cases cited in those notes, however, differ from GALLO v. BROOKLYN SAV. BANK in that they were actions on contract, and not in tort, and did not involve the effect of a previous judgment against the party seeking to hold the drawer liable, and the opportunity afforded him in the previous ac-

Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 717, 75 N. E. 1103, 5 A. & E. Ann. Cas. 158.

The party for whom plaintiff cashed defendant's draft was the payee thereof, not only by name, but as the party to whom defendant delivered the same.

First Nat. Bank v. American Exch. Nat. Bank, 170 N. Y. 88, 62 N. E. 1089; Sherman v. Corn Exch. Bank, 91 App. Div. 84, 86 N. Y. Supp. 341; Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420.

If one of two innocent persons must suffer by a deceit, he who puts trust and confidence in the deceiver should be a loser, rather than a stranger.

Carpenter v. Longan, 16 Wall. 273, 21 L. ed. 315; Timpson v. Allen, 149 N. Y. 513, 44 N. E. 171.

Cullen, Ch. J., delivered the opinion of the court:

The complaint alleges that on November 23d, 1903, one Antonio Cona was a depositor in defendant bank. That on said day a person representing himself as Antonio Cona presented to the defendant the deposit book of said Cona, and in payment of said deposit the defendant delivered to the said person, so representing the deposit book, a check for \$610.50, drawn by its comptroller on the Nassau National Bank to the order of John Ray, its teller, and indorsed by the teller to the order of Antonio Cona. That thereafter, upon identification of the said person as Cona, the plaintiff cashed said check and deposited it with the Oriental Bank. That the check was presented by the Oriental Bank to the Nassau Bank, by which it was paid. That subsequently an action was brought by the Nassau Bank against the Oriental Bank to recover the amount of the check, on the ground that the indorsement of said Cona was a forgery, and the Oriental Bank was compelled to repay the Nassau Bank the amount of the check. That thereafter, in May, 1904, the Oriental Bank brought an

tion to establish his contention that the person to whom the check was issued was the person intended by the drawer as payee, or at least that the drawer was estopped to affirm the contrary.

As to the effect of certification of a check as release of drawer or indorser, see notes to First Nat. Bank v. Currie, 9 L.R.A. (N.S.) 698, and Scheffenacker v. Hoopes, 29 L.R.A. (N.S.) 205.

action against the plaintiff to recover the amount of the check on the same ground,—that the indorsement of Cona was a forgery. That the plaintiff notified the defendant of the pendency of the action, and that, in case it was determined adversely to him, he would look to the defendant to make good the loss sustained by him. That the defendant refused and neglected to intervene and contest the claim of the Oriental Bank. That the trial of the action resulted in a judgment in favor of the Oriental Bank, which was subsequently affirmed by the appellate division and by this court, as the result of which the plaintiff was compelled to pay the amount of the check, as well as the costs of the litigation. It is then alleged that, by reason of the foregoing facts, and the negligence and want of care of the defendant, the plaintiff was damaged in the sum of \$1,500; that Cona was irresponsible; that the plaintiff offered to return said check to the defendant, and demanded the payment of the amount thereof and the costs of the unsuccessful litigation, which the defendant refused to pay. The answer averred that the indorsement of Cona was in fact forged, that the plaintiff had the check certified by the Nassau Bank, and that he negligently failed to properly identify the payee.

From the evidence taken at the trial, it appeared that one Antonio Cona was a depositor in the defendant bank; that at the time of drawing the check in suit, a young man presented himself to the defendant bank with the deposit book of Antonio Cona. He was unknown to the officers of the bank, and they referred to the book in which savings banks enter statements and information given by the depositor, which may tend to identify him when he calls to draw upon the deposit. He answered the questions satisfactorily, but his age seemed to be much less than that given by the depositor. The explanation was given that the depositor was his uncle, but the deposit was his; that his uncle had given the right name, but had mistakenly given his own description; that the uncle had gone to Italy, and could not be found. The defendant, not being satisfied with the identification, finally refused to give him the money, but, to settle the matter, agreed to give him a check to the order of Antonio Cona, the name of the depositor. The person so representing himself as Alphonse Cona, though commonly called Tony Cona. Being identified as such, he succeeded in getting plaintiff to cash the check. The true depositor subsequently appeared at the defendant bank, and from him it was learned that his bank book had been stolen. Alphonse Cona was subsequently criminally

prosecuted for forgery, but the record does not show what was the result of that prosecution. Upon these facts the trial court dismissed the complaint. The judgment entered thereon was reversed by the appellate division, which granted a new trial. From that order an appeal was taken to this court.

I do not see upon what theory the present action can be sustained. The learned justice who wrote for the appellate division has said: "It is certain that the defendant drew its check and delivered it to the person claiming to be the payee, or technically in this case the indorsee, and that it knew that he would try to get the money on the check, and would succeed if identified to the drawee or to third parties as Antonio Cona. Either the person presenting the pass book was the depositor, or he was trying to perpetrate a fraud. In the latter case, the defendant surely did not expect him to seek out the real depositor and deliver the check to him. It seems to me that the defendant must take one of two positions; either it intended to make the check payable to the person to whom it delivered it, or it knowingly put in his hand an instrument to defraud innocent third parties, and it will not be heard in a court of justice to assert the latter." [129 App. Div. 699, 114 N. Y. Supp. 78.] I am not prepared to admit the proposition that when a bank or individual, not being satisfied of the rights or identity of the party claiming payment from it or him, declines to pay the party in money, but gives a check to the order of the known creditor, it or he is thereby necessarily guilty of negligence or fraud. It is the general rule of law in this country, and such is the common law, that the drawee of a bill or check, or persons purchasing it, "take the paper relying solely upon the reputed responsibility of their transferrers and the other parties to it, and its apparent genuineness, and they, therefore, deal in it at their peril." *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 162, 2 N. E. 881. In *Graves v. American Exch. Bank*, 17 N. Y. 205, it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee or is authorized by him to receive it, and that it is no defense against such payee that the drawee, in the regular course of business and with nothing to excite suspicion, paid the bill to a holder in good faith and for value, under the indorsement of a person bearing the same name as the payee, but not that person. It is on the faith of this rule that business in this country is conducted. Corporations, some

of them numbering their stockholders by thousands, and usually ignorant of their identity and signatures, pay their dividends by checks to the orders of the various stockholders, transmitted by mail, relying on their right to reclamation from the banks in case the checks have been indorsed or collected by persons not entitled thereto. So, also, a person will send by post to the most distant part of the country his check to the order of another person to whom he wishes to pay or transfer money, confident in the knowledge that the abstraction of the check can entail no loss on him. On the continent of Europe a different rule prevails, and payment by the drawee to a party presenting the same, of a bill drawn to order, is valid, even though the indorsement is forged, provided the drawee acts in good faith and without negligence. In England the common-law rule prevailed as to bills (but not as to checks) until the bills of exchange act of 1882, which adopted the continental rule as to sight bills, but not as to time bills, though a limited protection against forgery of the name of the payee may be had by "crossing." Such a rule would render the present business methods of this country impossible. Although at times banks have complained of the harshness of our rule, and in some instances while acting in good faith have been subjected to severe loss (*Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371), as a result of this rule banks are used by all classes of our people for the deposit of funds, and payment is made by check to an extent unknown elsewhere. Of course, a party entitled to the receipt of money may insist upon its payment in cash, and not by check.

Still, there are cases in which the conduct of the drawer of a check or bill, or the maker or indorser of a negotiable instrument, has been such as to impose a liability upon him beyond his intent, as where, having signed an instrument in blank, it is filled in for an unauthorized amount. So, also, he may be estopped from denying the right of the particular payee to the ownership of the instrument. Also cases have arisen presenting nice questions as to what person was to be considered the payee of a bill or check. *First Nat. Bank v. American Exch. Nat. Bank*, 170 N. Y. 88, 62 N. E. 1089; *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420; *Sherman v. Corn Exch. Bank*, 91 App. Div. 84, 86 N. Y. Supp. 341. In all such cases, however, the action is on the bill itself, and the defendant is estopped, as against a bona fide holder, from asserting 32 L.R.A. (N.S.)

that the instrument was for a different amount than that which it purports to be, or that its holder was not entitled to it. Such cases are on contract, though the contract may rest on mere estoppel. I can find no case in which it was sought to maintain an action in tort on the ground of negligence.

On the original transaction, had the check not been paid and the plaintiff sued the defendant as drawer, two questions might have arisen: (1) The identity of the payee, —whether the person to whom the check was delivered was not to be considered the payee thereof. (2) Whether the defendant was not estopped from denying that he was such payee. Assuming that the circumstances were such as to authorize the court as a matter of law, or a jury as a matter of fact, to determine either of those questions in favor of the plaintiff, the result of such determination would be that the plaintiff was the owner of the check, and the indorsement by which he obtained title valid. The certification of the check and its payment by the drawee discharged the defendant as drawer. *Negotiable Instruments Law* (Consol. Laws, chap. 38) § 324; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708. I do not see how thereafter it could become liable. When the plaintiff was sued by the Oriental Bank, the claim on which he now seeks to impose liability on the defendant would, if established, have been a complete defense to that suit. If the man for whom he cashed the check was the real payee, or if this defendant was estopped from denying that he was such, there was no forgery of the check so far as the present plaintiff was concerned. On the contrary, his title was complete and he was under no liability to refund. *Hortsmann v. Henshaw*, 11 How. 177, 13 L. ed. 653. But the difficulty is that, as alleged in the complaint, that issue has been decided against him. It is alleged that he called upon this defendant to defend the suit, but the defendant was under no obligation of that character. It discharged its obligation when it provided funds for the payment of the check and the check was paid. It may have been interested in establishing that the check was improperly charged to its account, and thus relieving itself from the obligation to make a second payment to the true Antonio Cona, and it may be surmised that the litigation which terminated adversely to the plaintiff was instituted in its behalf. If this fact were proved, the defendant, though not a party to the action by the Oriental Bank, would be concluded by the judgment rendered therein. 2 Black, Judgm. § 539. But that judgment was against the plaintiff, not in

his favor. It is very difficult to see how this defendant could be under any obligation to defend a suit the prosecution of which was in its interest. If, as stated by the learned court below, the defendant was estopped from denying that the man to whom it had delivered the check was the payee thereof, that should have been so decided in the suit of the Oriental Bank against the plaintiff.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in all courts.

Werner, J., concurring:

After a most careful consideration of this case, I am constrained to yield my own earlier impressions, and to concur in the conclusions set forth in the opinion of Chief Judge Cullen. This change of attitude is due to my inability to work out any theory in law or logic under which a judgment for the plaintiff could be sustained. I had thought it possible to uphold the order of the appellate division upon the ground that the defendant's conduct, in the issuance of the check upon which this litigation has arisen, constituted such negligence as to render it liable in tort, without reference to the rules of the law merchant. That position I have been compelled to abandon as untenable, for reasons which I shall briefly state.

In the first place, the complaint is not only barren of allegations which would tend to support that theory, but it affirmatively charges that the check was delivered to a person purporting to be Antonio Cona upon a presentation of the pass book evidencing his right to the moneys therein credited, "after identification satisfactory to said defendant, to wit, to said Maynard, the teller thereof, and to F. E. Flandreau, the cashier of the defendant." If this was intended as an allegation of negligence against the defendant, the pleader was singularly unfortunate in his choice of language. As I read the third paragraph of the complaint, it contains an unequivocal assertion that the defendant issued the check to the person whom its officers supposed to be its depositor, after taking all the usual precautions to establish his identity. If that specific paragraph of the complaint is thus correctly interpreted, it overrides the general conclusions of law which are pleaded in the twelfth paragraph, to the effect "that by reason of the premises, and through the neglect, carelessness, and want of care on the part of the defendant herein," the plaintiff has been damaged, etc. As this criticism of the complaint does not appear to have been made at the trial, it is of no present significance except

as it indicates that the complaint as a whole was framed for the purpose of pleading a cause of action under the law merchant, which would be governed by the rules relating to contract by estoppel, and not by the law of torts under the head of negligence.

Waiving the form of pleading, however, and assuming, without deciding, that an action sounding in tort is a permissible and appropriate remedy in circumstances similar to those in the case at bar, I am of the opinion that the evidence in the record does not establish actionable negligence. The defendant is a savings bank with nearly 70,000 depositors. In the nature of things these could not all be personally known to its officers. Equally impracticable would it be to search the personal history or identity of each depositor with absolute completeness and accuracy. There are, of course, a few obvious and necessary precautions which savings banks may observe without great inconvenience in their business, such as keeping a record of the signature, general description, and place of residence of each depositor. The practice in that regard is so familiar, general, and uniform that the courts may take judicial cognizance of it without proof. This general course was followed by the defendant in opening an account upon its book in the name of Antonio Cona, and to the record thus kept the defendant referred when the pass book issued to him was presented with a request for the withdrawal of the money on deposit to his credit. This latter stage of the transaction may properly be punctuated by reference to a few circumstances which are of paramount importance in passing upon the defendant's alleged negligence. The real depositor was an Italian, and so was the impostor who applied for a withdrawal of the money. As the record discloses no details concerning the character of either signature, it is fair to assume that both depositor and impostor belonged to that large class of Italians who either cannot write at all, or who write so imperfectly as to render the handwriting test of little or no value. Almost equally difficult is it to identify persons of this class by their physical characteristics, for there is a general racial resemblance in which individual peculiarities are lost to all except the most critical observers. These were the conditions under which the defendant's officers were called upon to decide whether they would grant or refuse the application for a withdrawal of the money deposited in the name of Antonio Cona. The applicant gave that as his name. He answered the "test" questions correctly, but his description did not correspond with

that of the depositor. When his attention was called to this discrepancy, he explained it by saying that he had given the money to his uncle, of the same name, to deposit, and that the uncle had given his own description instead of that of the nephew. When asked to produce his uncle at the bank, he explained that the uncle had gone to Italy, and that he was also intending to sail in a day or two. Was this an improbable story? In the light of the well-known habits and customs of this class of persons, I should say it was quite probable; and if it was, the defendant's officers had the right to rely upon it, even to the extent of paying him in money. They did not do that, however, but took the precaution to give him a cashier's check, which would have to be indorsed by the real depositor before the money could be lawfully obtained upon it. This circumstance is relied upon by the plaintiff to establish the defendant's negligence. The learned appellate division have said: "That the defendant was culpably negligent cannot be doubted. The person to whom the check was delivered succeeded in doing what the defendant knew he would try to do with the means with which it supplied him." That might be quite true if the check had been delivered under circumstances clearly charging the defendant with knowledge that the person to whom the check was issued was an impostor, for then the presumption would naturally have followed that the recipient would resort to unlawful methods to have it cashed. But the facts brought to the knowledge of the bank were such that it had quite as good a right to rest upon the presumption that the check would be properly used as to suspect that it would be criminally altered (*Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661), and where that is the case culpable negligence is not predictable. In the case of *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 69 L.R.A. 317, 105 Am. St. Rep. 720, 72 N. E. 995, where the relations between savings banks and their depositors were discussed at length, it was held that savings banks in making payments upon depositors' accounts are bound to exercise only ordinary care; and we there endeavored to point out the hardships which a stricter rule would entail, not merely upon the banks, but upon the thousands of poor and honest, but unknown, depositors who would find it extremely difficult, if not quite impossible, to so establish personal identity as to leave no room for doubt or mistake.

Upon the other phase of the case, which relates to the plaintiff's right to recover upon the check under the rules of the law merchant, I think Chief Judge Cullen has 32 L.R.A. (N.S.)

demonstrated that the plaintiff cannot recover. When the plaintiff procured the check to be certified, the drawer (defendant) and prior indorsers were discharged (Neg. Instr. Law, § 324), and the holder (plaintiff) could thereafter look for payment only to the drawee. But even if that circumstance were not in the case, the plaintiff would be no better off. When he was sued by the Oriental Bank, with which he deposited the check, he had the right to insist that the defendant here was estopped, by its conduct, from denying that the person from whom he received the check was not the payee therein named. That contention would have presented an issue of fact which, if established in the plaintiff's favor, would have been a complete defense in that action. The plaintiff appears to have taken it for granted, however, that the indorsement of Antonio Cona was a forgery, and so the only issue upon which he could have successfully defended that suit seems to have gone against him by default. The result is precisely as conclusive as though it had been fully litigated and affirmatively decided against him. He cannot now litigate an issue which he was called upon to present and defend in the suit against him.

I shall not discuss the case of *First Nat. Bank v. American Exch. Nat. Bank*, 170 N. Y. 88, 62 N. E. 1089, and the other cases relied upon by the plaintiff. As pointed out in the opinion of Chief Judge Cullen, they rest upon principles which have no application to the case at bar.

I agree that the order of the appellate division should be reversed, and the judgment of the trial term affirmed, with costs in all courts.

Gray, Willard Bartlett, Hiscock, and Chase, JJ., concur with Cullen, Ch. J., and Werner, J.

NORTH DAKOTA SUPREME COURT.

ROBERT AULD et al., Appts.,

v.

F. W. CATHRO et al., Respts.

(20 N. D. 461, 128 N. W. 1025.)

Trial — will contest — absence of evidence — submission to jury.

1. There is no evidence to establish the fact that the will in controversy was executed as a result of undue influence practised upon the testatrix; hence the ruling of the trial court was correct in refusing to submit such issue to the jury.

Headnotes by CARMODY, J.

Witness — physician — privilege — testamentary capacity.

2. The privilege of secrecy to all information acquired by a physician from a patient in attending the patient professionally, in a proceeding contesting the probate of an alleged will of decedent, the testimony and opinion of decedent's attending physician as to her mental capacity, based entirely on information derived from her statements or the physician's observation while treating her professionally, and for the purpose of such treatment, were properly excluded.

Trial — neglect to comply with jury's request — effect.

3. The failure of the trial court to have the testimony of a witness read at the request of the jury held, under the circumstances of the case at bar, not error.

Note. — Competency of attending physician to testify as to capacity of testator in will contest.

Rule in absence of waiver.

Under the several statutes creating a privilege as to communications between physicians and patients, the former are, in the absence of waiver, generally held incompetent to testify in will contests as to the testator's mental capacity.

Thus, under statutes providing that a physician "cannot, without the consent of his patient," be examined as to information obtained while attending a patient in a professional capacity, which was necessary to enable him to prescribe, an attending physician cannot testify in a will contest as to the testator's mental capacity. *Re Flint*, 100 Cal. 391, 34 Pac. 863; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Re Budan*, 156 Cal. 230, 104 Pac. 442.

And under a statute in effect the same, it is held that attending physicians are disqualified to testify concerning testator's mental capacity, although called by the proponent, where the contestant objects. *Re Van Alstine*, 26 Utah, 193, 72 Pac. 942.

Where it is provided that physicians are not competent witnesses as to matters communicated to them, as such, by patients in the course of their professional business or advice given in such cases, it has been held not competent for an attending physician to testify as to the testator's mental or physical condition in a contest over the patient's will. *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. 129; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261.

And in an action to set aside one will and probate a subsequent one, the testator's physician is incompetent under this statute to testify as to matters learned in his professional capacity as to the testator's mental condition. *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805.

And, likewise, a physician who attended testatrix during her last illness, and who was present when she made her will, is 32 L.R.A. (N.S.)

Same — instructions — correctness.

4. The charge of the court relating to the disposition a testator or testatrix can make of his or her property, under the laws of this state, correctly states the law.

Evidence — opinion — testamentary capacity.

5. The rule is that a nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversations, or conduct which to some extent indicate sanity.

Appeal — discretion — witness — expert.

6. In this class of cases the question of the competency of the witness to testify is one for the court, and is also a question lying within the sphere of judicial discretion; and the familiar rule that such dis-

not competent to testify as to the soundness of her mind, there being no administrator or executor, and no waiver. *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279.

And under this statute the fact that an administrator in the contest of a will fails to call the testator's physician, and refuses to allow him to testify, cannot be commented upon by the opposing party's attorney, or be taken into consideration by the jury. *Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303.

A statute providing that a physician shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to act, has been held to apply in contests of the patient's will, and to exclude the testimony of an attending physician called to testify as to the competency of the testator. *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Mason v. Williams*, 53 Hun, 398, 6 N. Y. Supp. 479; *Re O'Neil*, 26 N. Y. S. R. 242, 7 N. Y. Supp. 197; *Re Loewenstine*, 2 Misc. 323, 21 N. Y. Supp. 931; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re Boury*, 8 N. Y. S. R. 809.

The court in *Renihan v. Dennin*, supra, said: "It is probably true that the statute as we feel obliged to construe it will work considerable mischief. In testamentary cases where the contest relates to the competency of the testator, it will exclude evidence of physicians, which is generally the most important and decisive. In actions upon policies of life insurance, where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence, which is absolutely needed for the ends of justice. But the remedy is with the legislature, and not with the courts."

But it has also been held that this section did not apply to testamentary cases, but that even if it did the death of the testator left no one who was entitled to assert the privilege. *Allen v. Public Administrator*, 1 Bradf. 221; *Pearsall v. Elmer*, 5 Redf. 181; *Whelpley v. Loder*, 1 Dem. 308.

cretion will not be reversed except in cases of abuse applies in the case of nonexperts as well as experts who are called to express opinions upon an issue of insanity.

(Ellsworth, J., dissents.)

(September 24, 1910.)

APPEAL by contestants from a decree of the District Court for Bottineau County admitting to probate, upon appeal from the county court, the will of Mary Auld, deceased, and from an order denying a new trial. Affirmed.

The facts are stated in the opinion.

Messrs. Ball, Watson, Young, & Lawrence, with Messrs. Noble, Blood, & Adamson, for appellants.

An amendment to this provision was passed in 1893, providing that the privilege of the patient might be waived, where the validity of his will was in question, by the executors, the surviving husband, widow, or any heir or next of kin. See *Re Murphy*, infra, under section on "waiver of privilege."

But even since the passage of this statute, where there is no waiver an attending physician is incompetent to testify in a will contest as to the testator's mental capacity. *Re Preston*, 113 App. Div. 732, 90 N. Y. Supp. 312.

But under subd. 4 of § 4824 of the Colorado statute, it was held that after the death of the patient, the physician was competent in a will contest to testify as to facts ascertained during his attendance upon the testator. *Re Shapter*, 35 Colo. 578, 6 L.R.A. (N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688.

And it was held in *Olmstead v. Webb*, 5 App. D. C. 38, that the attending physician might testify in a will contest that a man suffering from the disease which the testator had was likely at times to lose his head, where such testimony was offered to weaken the effect of contrary testimony.

Waiver of privilege.

This section does not cover the question of what amounts to a waiver, but deals with whether a waiver may be made in will contests.

There is some difference of opinion as to whether the provisions creating a privilege between physician and patient may be waived in a contest of the latter's will, and also as to who may make such a waiver. It has been held in some cases that no waiver could be made by anyone after the testator's death.

Other cases have held that the privilege might be waived by the testator's personal representative, but not by the heir; while still other cases hold that both of these may waive the privilege. In New York the matter of waiver has been provided for by an express statute.
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Messrs. Weeks & Murphy and George A. Bangs, for respondent:

Mere suspicion, conjecture, possibility, or guess that undue influence or fraud has induced a will, or power, motive, and opportunity to exercise undue influence, is not sufficient to authorize the inference that such influence has been exercised.

Ginter v. Ginter, 79 Kan. 721, 22 L.R.A. (N.S.) 1024, 101 Pac. 634; *Re Shell*, 28 Colo. 167, 53 L.R.A. 387, 89 Am. St. Rep. 181, 63 Pac. 413; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Sheehan v. Kearney*, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41.

The rejection of the offer of proof of the attending physician was not error.

Under statutes providing that a physician "cannot, without the consent of his patient," be examined as to information obtained while attending in a professional capacity, which was necessary to enable him to prescribe, an heir attacking the testamentary capacity of a decedent cannot waive the privilege existing between decedent and his attending physician. *Re Flint*, 100 Cal. 391, 34 Pac. 863.

But a testator waives the privilege under this statute by making his physician a subscribing witness to his will. *Re Mullin*, 110 Cal. 252, 42 Pac. 645.

Where it is provided that physicians are not competent witnesses as to matters communicated to them by patients in the course of their professional business, or advice given in such cases, it has been held that an administrator *c. t. a.* may waive the privilege in a proceeding to contest a will on the ground of want of testamentary capacity. *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918.

And in *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261, there are *dicta* that the privilege may be waived in a will contest by the personal representative of the patient.

But under this statute, in a contest over the patient's will, it has been held that the heirs or devisees who seek to overthrow the will cannot waive the privilege which existed between the attending physician and his patient. *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. 129; *Heuston v. Simpson*, supra.

And under this statute, in an action to set aside one will and probate a subsequent one, the testator's physician is incompetent to testify as to matters learned in his professional capacity as to the testator's mental condition, and the executor of the first will cannot waive the privilege existing for the purpose of overthrowing that will. *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805.

And in a proceeding for the removal of an administrator, it was held that the suit was against him in his individual capacity, and that he could not under this statute waive the privilege, and render the testi-

Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 296, 36 Am. Rep. 617; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re Flint*, 100 Cal. 391, 34 Pac. 863; *Harrison v. Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Re Hunt*, 122 Wis. 460, 100 N. W. 874; *Boyle v. Northwestern*

Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351; *Re Brunendl*, 102 Wis. 45, 78 N. W. 109; *Re Van Alstine*, 26 Utah, 193, 72 Pac. 943; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005; *Storrs v. Scougale*, 48 Mich. 387, 12 N. W. 502; 3 *Wharton & S. Med. Jur.* § 576; *Davis v. Supreme Lodge, K. H.* 165 N. Y. 159, 58 N. E. 891.

Whether sufficient foundation be laid for admission of nonexpert testimony lies in the sound discretion of the trial court.

1 *Wigmore, Ev.* § 689; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Re Hull*, 117 Iowa, 738, 89 N. W. 979.

mony of the physician who attended the deceased, as to matters learned by him by reason of the relation, competent. *Scott v. Smith*, — Ind. App. —, 82 N. E. 550.

And under a similar provision, the mother of the deceased, who is his next of kin, is not his representative, and has no power in a will contest to waive the privilege existing between physician and patient, so as to render his testimony as to the patient's testamentary capacity competent. *Re Mansbach*, 150 Mich. 348, 114 N. W. 65.

But under a statute in effect the same as the foregoing, it has been held that when the dispute is between the devisees and heirs at law, all claiming under the deceased, either the devisees or heirs may call the attending physician to testify as to testator's testamentary capacity. *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

And under a statute providing in effect that physicians are not competent witnesses as to matters communicated to them by patients, which were necessary to enable them to prescribe, and providing further that such provisions shall not apply to cases where the party in whose favor the same were made waives the right, testimony of the testator's attending physician is held admissible in Iowa in a will contest involving the testator's competency, whether offered by the executor or the heirs. *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Re Walker*, — Iowa, —, 128 N. W. 387; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Kirsher v. Kirsher*, 120 Iowa, 337, 94 N. W. 846.

In *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184, the Indiana cases excluding such testimony when offered by an heir, and admitting it when offered by an administrator *o. t. a.* or an executor, were criticized. The court said: "The particular vice in the reasoning in these cases, in making the distinction between the heir at law and the devisee, is the assumption that the paper in dispute is the will of the deceased. The statutes are for the benefit of the patient while living and of his estate when dead. The very purpose of the con- 32 L.R.A. (N.S.)

test is to determine whether the deceased in fact made a will, who shall be his representative, and who is entitled to his estate. If he did not have testamentary capacity, then the paper was not his will, and it is not the policy of the law to maintain such an instrument. It is undoubtedly the policy of the law to uphold the testamentary disposition of property, but not until it is ascertained whether such a disposition has been made. The same presumptions are indulged in favor of the validity of the will as of other written instruments. The paramount purpose in the first instance should be to ascertain whether the instrument presented is in fact the will of the deceased. And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by establishing or defeating the instrument as the truth so ascertained may require. The testimony of the attending physician is usually reliable, and often controlling, and to place it at the disposal of one party to such a proceeding, and withhold it from the other, would be manifestly partial and unjust. Such testimony, ordinarily, relates to the capacity of the deceased, and could rarely be perverted to the injury of character. Should it ever be necessary, the court might well, in its discretion, prevent blackening the memory of the dead."

In New York, under a statute in effect providing that a physician shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to prescribe, in *Loder v. Whelpley*, 111 N. Y. 239, 19 N. Y. S. R. 631, 18 N. E. 874, decided before the passage of a provision expressly allowing a waiver, which is subsequently referred to, it was held that the attending physician was incompetent to testify as to testator's capacity, although he was offered as a witness by the executor, who was the proponent of the will.

And in *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320, it was held that a waiver of the privilege became impossible by the death of the testator.

Carmody, J., delivered the opinion of the court:

This litigation arose in the county court of Bottineau county, and involves the validity of the last will of one Mary Auld, deceased. Plaintiffs and appellants, Robert Auld and Bertha Johanna McGaffney, were respectively the husband and sister of said deceased. Defendant and respondent Cathro is the executor named in said last will. Defendants Laura M. and Gertrude G. Dana are two of the legatees named in said will. Respondent Cathro filed in such county court a petition praying for the probate of such will. Appellants filed written objections to admitting said will to probate, in which they allege, in substance, that the writing purporting to be the said will was

pretended to be made and executed on the 18th day of March, 1905; that on the said 18th day of March, 1905, and long prior thereto, said Mary Auld, by reason of unsoundness of mind, insanity, mental weakness, and imbecility, had been wholly incapable of making and executing her last will and testament, or any codicil to any will or testament, or any writing in the nature of a last will and testament; that said paper or writing purporting to be the last will and testament of the said Mary Auld was obtained by fraud and undue influence exerted over and upon her by said Cathro, H. C. Dana, and others, as follows: That said Cathro, Dana, and others, by reason of the unsoundness of mind, mental weakness, and imbecility of the said Mary

Under an amendment in this state providing that a physician or surgeon may, upon a trial or examination, disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of § 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question by the executor or executors named in said will, or the surviving husband, widow, or any heir at law, or any of the next of kin of such deceased, or any other party in interest, it has been held that the heirs at law and next of kin may waive the privilege in a contest of the will without the joinder of the executor. *Re Murphy*, 85 Hun, 575, 33 N. Y. Supp. 198; and this case was followed in *Pringle v. Burroughs*, 70 App. Div. 12, 74 N. Y. Supp. 1055.

And since the passage of this section, the testimony of the physician in chief of a sanatorium as to the physical and mental condition of a patient is admissible, where the privilege had been expressly waived by the contestants of the will; but its exclusion is not reversible error where it could not have substantially harmed the contestants. *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007.

And before the passage of this provision, it was held that where the contestant of a will demanded that the physicians who attended testatrix be produced as witnesses, and while they were being examined by the proponent under direction of the surrogate he failed to object to the examination, the statutory privilege was held to be waived. *Hoyt v. Hoyt*, 112 N. Y. 498, 20 N. E. 402. The court said: "The rule of evidence which excludes the communications between physician and patient must be invoked by an objection at the time the evidence of the witness is given. It is too late after the examination has been insisted upon, and the evidence has been received without ob-

jection, to raise the question of competency by a motion to strike it out."

In *Staunton v. Parker*, 19 Hun, 55, it was held, under a section providing that the statute relating to privilege should apply unless expressly waived by the patient, that in a will contest the privilege might be waived by the heirs of testator who were contesting the codicil because of want of testamentary capacity.

In *Parker v. Parker*, 78 Neb. 535, 111 N. W. 119, where the terms of the statute do not appear, it was held that the personal representative of the patient might waive the privilege, and render the attending physician's testimony competent as to testatrix's testamentary capacity.

Matter not "necessary to prescribe."

The cases are agreed that a physician may, in contests of the patient's will, testify as to matters learned from his patient where such matters were not necessary to enable him to prescribe for the patient.

Thus, under statutes containing provisions excluding testimony of physicians as to matters "necessary to enable him to prescribe" for his patient, an attending physician may testify in the contest of a will as to statements made to him by the decedent which were not necessary to enable him to act in his professional capacity. *Re Black*, 132 Cal. 392, 64 Pac. 605; *Re Halsey*, 2 Connoly, 220, 9 N. Y. Supp. 441; *Re Dargagh*, 15 N. Y. S. R. 452; *Re Loewenstine*, 2 Misc. 323, 21 N. Y. Supp. 931.

And if the information was such as any person might gain by observation, and was not of facts necessary to enable the physician to act, the attending physician's testimony as to the testator's competency may be admitted. *Staunton v. Parker*, 19 Hun, 55; *Burley v. Barnhard*, 9 N. Y. S. R. 587.

And under a statute excluding matters communicated to physicians, as such, by their patients in the course of professional business, a physician may testify concerning testator's mental capacity where the facts were learned in a conversation with him after his professional services were end-

Auld, exercised over and upon the said Mary Auld undue influence in varied and divers ways, and represented to the said Mary Auld that it would be necessary for her to place her property in the hands of a third person, or some person other than any of her relatives or heirs, to prevent the said Robert Auld from obtaining said property for himself; and the said writing is not the last will and testament of the said Mary Auld, deceased; that the said Robert Auld and the said Mary Auld were married in the county of Cavalier and state of North Dakota in August, 1892, and the said Mary Auld from the time of said marriage always represented to Robert Auld, and he always supposed, that they were lawfully married; that she was the wife of the said Robert Auld at the time of her death; that the said Mary Auld represented to him at the time of her marriage that her name was Mary Hitterdahl, but contestants now believe that her name was Mary Olson, and that at the time of her marriage with said Robert Auld she had a husband living, named N. K. Olson, from whom she was not at the time of said marriage divorced; and that all of the real property named by the said Mary Auld in said purported last will and testament is property given to her by Robert Auld in consideration of love and affection, and for the reason and under the belief that the said Mary Auld was his wife.

In addition to these objections, Robert Auld filed another objection as follows: "That the said purported last will and testament of the said Mary Auld, deceased, was not signed, sealed, and declared by her to be her last will and testament, and witnessed; that it was not executed by the said Mary Auld, deceased, as provided by the statutes of North Dakota." Respondents, replying to said written objections, deny each and every allegation contained therein, except as admitted or qualified. Deny that said Mary Auld on the 18th day of March, or at any time, was unsound of mind, in-

sane, mentally weak, or an imbecile, and allege that at all times prior to her death she was of sound mind and possessed of sufficient mental capacity to make and execute her last will and testament; deny that the will was obtained by fraud or undue influence, and allege that said will was duly and legally signed, executed, and witnessed; deny that any of the property named in said will was given to Mary Auld by said Robert Auld. The county court made findings of fact and conclusions of law sustaining the contentions of appellants, and found that the said Mary Auld at the time of her death had a sister, Bertha Johanna McGaffney, and a husband, Robert Auld, who are the plaintiffs in this action. An appeal from the order and decree denying the petition of F. W. Cathro asking for admission to probate of said instrument, was taken to the district court of Bottineau county, where the will was allowed by the jury. From an order denying their motion for a new trial, contestants appeal to this court.

In addition to the facts herein stated, the following are the facts necessary to a decision of this case: At the time of the marriage of testatrix with Robert Auld, she had a homestead of 160 acres of land in Rolette county, adjoining Bottineau county; also three horses, two cows, and a calf, and household goods. She afterwards traded her farm for city property in Bottineau. She and her husband, Robert Auld, did not get on very well together, and lived separately a considerable portion of their married life. At the time of her death, an action for divorce brought against testatrix by Robert Auld, in which issue had been joined, was pending. Appellant Robert Auld married within ten days after her death. Testatrix was quite eccentric, and lived largely alone. H. C. Dana, father of the two girls, had done testatrix some favors, which she appreciated. She had frequently advised with him during her life, and several times stated to him that she

ed. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

But where the attending physician of a testatrix is unable to separate the knowledge which he acquired while attending her in a professional capacity, and that acquired while paying a friendly visit, his testimony is privileged, and cannot be admitted in a will contest. *Re Darragh*, 52 Hun, 591, 5 N. Y. Supp. 58.

And a statement that he received no information as to testatrix except as a physician, to enable him to care for her, justifies the inference that the knowledge in question was necessary to enable him to "prescribe or act for her." *Re Redfield*, 116 Cal. 637, 48 Pac. 794.

Knowledge gained by a physician while 32 L.R.A. (N.S.)

making an examination for the purpose of determining the question of her mental competency, with a view of applying for a release from guardianship, is not "information necessary to enable him to prescribe for such patient as a physician," within the meaning of a statute containing such a provision; and he may testify as to her capacity in a will contest. *Re Bruendl*, 102 Wis. 45, 78 N. W. 169.

Where physicians were called to sign the will as witnesses, and to examine testatrix as to her mental capacity at the time she made her will, but did not attend her professionally, they are competent to testify, since the relation of patient and physician did not exist. *Re Freeman*, 46 Hun, 458, 12 N. Y. S. R. 175.

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was going to will him her property, as she did not want her husband, Robert Auld, to have any of it; said her people had not treated her right, and she did not want them to have any of her property. Dana each time protested, saying he did not want anything to do with it. She finally told him that she would will the property to his two little girls. This was in January, 1905. Dana then said to her: "I don't suppose there is any use in making your will; you are not going to die." He never talked with her again about the will until after the first will, hereinafter mentioned, was made. On the 4th day of February, 1905, testatrix made a will in which she devised all her property to respondents Laura M. and Gertrude G. Dana. After making the will of date February 4, 1905, and about the first part of March, her sister, appellant, came to live with her. Testatrix then informed Dana that appellant Bertha wanted testatrix to leave her (Bertha) something. Testatrix said it would be all right for her to leave Bertha something, and Dana said, "Sure." On the 18th of March, 1905, she made another will, in which she devised a house and lot in the city of Bottineau to appellant Bertha Johanna McGaffney, and the balance of her property equally to respondents Laura M. and Gertrude G. Dana. The will also contained the following provision: "I have knowingly and intentionally omitted from this, my last will and testament, Robert Auld, and any and all relatives of mine not mentioned herein." The property disposed of by the will consisted of two houses, and about six lots in the city of Bottineau, and about \$1,000 in money; in all of the value of about \$5,000. Both the Dana girls were born in one of these houses. Testatrix said she thought it would be nice for them to have the house they were born in. She died on the 29th day of March, 1905, and left surviving her, in addition to her husband, Robert Auld, and her sister Bertha Johanna McGaffney, her mother and a sister, Mrs. Bergen, and two brothers, living at Hitterdahl, Minnesota. She had been separated from them for a number of years. Appellant Bertha Johanna McGaffney lived with testatrix, and took care of her about fifteen days before her death. Testatrix was suffering from tuberculosis, from which she finally died.

Appellants assign twenty-three errors, which are divided in the brief into five subdivisions, as follows: (1) The refusal of the court to submit the question of undue influence to the jury. The court instructed the jury that there was not sufficient evidence to establish that the alleged will in controversy was executed as the result of

undue influence practised upon the said Mary Auld. (2) Rejecting the offer or proof of the attending physician, Dr. J. A. Johnson. (3) The action of the trial judge relative to the request of the jury to have the testimony of Mrs. Barnes read. (4) Exception to that portion of the charge of the court relating to the disposition a testator or testatrix can make of his or her property, under the laws of this state. (5) The admission of testimony of nonexperts as to deceased's competency. No claim is made in this court that the evidence is insufficient to justify the verdict. We will consider these questions in the order named.

A careful examination of the testimony in regard to undue influence upon the deceased convinces us that the trial court was right in refusing to submit that question to the jury, as there is not a *scintilla* of evidence that Cathro, Dana, or any other person exercised any undue influence over testatrix regarding the said will. Section 7304, Rev. Codes 1905, as far as material, reads as follows: "3. A physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Robert Auld, having been appointed special administrator of the estate of the said Mary Auld, deceased, made the following offer:

"The counsel for the contestants in open court and of record, acting in behalf of the personal representative of Mary Auld, deceased, and of the heirs at law of said Mary Auld, and with their consent and approval, do hereby waive any privilege that may have existed arising out of the relations of physician and patient between the deceased, Mary Auld, and Dr. Johnson, and offer to show and prove by the said Dr. Johnson the following facts, and by separate offers hereunder:

"(1) That on the night of March 18, 1905, upon the occasion of his visit to her residence, and in the presence of J. J. Weeks and others, and at the time the alleged will was made, did take the temperature of the said Mary Auld; that her temperature was 103½.

"(2) Counsel further offers to show by the testimony of Dr. Johnson that he made examination of Mary Auld on the occasion above stated, and that she was then seriously affected with toxemia.

"(3) Council further offer to show by the testimony of this witness that the effects of toxemia upon the human system to the extent the said Mary Auld was then afflicted is to produce mental and physical stupor and torpor, and render a person so affected and afflicted, incapable of coherent think-

ing, and of imperfect memory and impaired reasoning power; and that upon the occasion in question the said Mary Auld was thus afflicted and affected.

"(4) Counsel further offers to show by this witness that upon the night of the 18th of March, 1905, when the alleged will is said to have been executed, the said Mary Auld was not in possession or control of such mental faculties as she ordinarily possessed, and was wholly unable to reason or think consecutively, or exercise the power of memory.

"(5) Counsel further offers to show by the witness Dr. Johnson that he visited Mary Auld during her lifetime, observed her upon the following occasions, his calls and visits upon her, and her calls on him, varying in length from fifteen minutes to twenty minutes: October 31, 1904; February 16, 1905; February 22, 1905; March, 3, 1905; 9th, 11th, 15th, 16th, 18th, of March; three visits on the 20th of March, and one visit each on the 21st and 24th of March, 1905. That from the observations made upon the occasions above stated, the said Mary Auld in his opinion was not of sound mind."

To which offer the following objection was made: Respondents and proponents object to said testimony upon the grounds and for the reason that it appears that all proofs therein outlined consist of information derived by the witness from an examination made by him while acting as the physician of the deceased testatrix, and there has been no consent shown with respect to his testifying thereto, and by reason thereof the communication is privileged and must be excluded, under the provisions of § 7304 of the 1905 Code, which objection was sustained.

Appellants contend that the rejection of the offer of proof of the attending physician was error. While this question has not heretofore been passed upon by this court, and while some courts, notably Minnesota, Iowa, and Missouri, have held under certain circumstances that such testimony was admissible under statutes somewhat similar to ours, we, however, think the better rule sustains the ruling of the learned trial court. New York, Wisconsin, California, Utah, and other states hold such evidence inadmissible, holding that the privilege is personal with the patient, that it applies in testamentary matters, and cannot be waived by the heirs and personal representatives. *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 296, 36 Am. Rep. 617; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. 32 L.R.A. (N.S.)

Rep. 770, 9 N. E. 320; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26; *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351; *Re Hunt*, 122 Wis. 460, 100 N. W. 874; *Re Van Alstine*, 26 Utah, 193, 72 Pac. 943; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; *Supreme Lodge K. P. v. Meyer*, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. Rep. 754; *Re Flint*, 100 Cal. 391, 34 Pac. 863; *Harrison v. Sutter Street R. Co.* 116 Cal. 150, 47 Pac. 1019; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Re Bruendl*, 102 Wis. 45, 78 N. W. 169.

Section 834 of the Code of New York is as follows: "A person duly authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 836 provides that that section applies to every examination of a person as a witness, unless the provisions thereof are expressly waived by the patient. These sections have been construed by the New York courts several times.

In *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104, the court says: "The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by anyone, unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator."

In *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320, the court says: "But it is claimed that the statute should be held not to apply to testamentary cases. There is just as much reason for applying it to such cases as to any other, and the

broad and sweeping language of the two sections cannot be so limited as to exclude such cases from their operation. There is no more reason for allowing the secret ailments of a patient to be brought to light, in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry. An exception so important, if proper, should be ingrafted upon the statute by the legislature, and not by the courts."

In *Re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26, the court says:

"The petitioners introduced testimony tending to show that, at the time of the execution of the will, the testatrix was afflicted with paresis, which it was claimed deprived her of testamentary capacity. In order to supplement and support this evidence, the petitioners called two physicians, — Drs. Carlton and Townsend. The former had been the medical adviser of the testatrix's brother, and the latter of her mother. These witnesses testified that both the mother and brother of testatrix had been afflicted with what they termed 'general paresis,' that their knowledge of this condition was obtained while attending such persons in their professional capacity, and that such knowledge was necessary in order to treat them. The testimony was objected to as incompetent and privileged, under § 834 of the Code of Civil Procedure, and the ruling admitting it was properly excepted to, because it was inadmissible upon two grounds: 1. It is clearly within the provisions of § 834, which prohibits a physician from disclosing 'any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.' . . . By the express terms of § 836 the provisions of § 834 are made to apply to the 'examination of any person as a witness.' The fact that the testimony of these physicians related to patients who were not parties to the proceeding or interested therein, and who were, in fact, dead at that time, does not annul the prohibition of the statute. In *Davis v. Supreme Lodge*, K. H. 165 N. Y. 159, 58 N. E. 891, the defense sought to prove the cause of death of two aunts of the deceased by the testimony of their attending physicians. The evidence was excluded, and this court upheld the ruling. Judge O'Brien, in writing for the court, said (p. 163). 'This court has held that the statements of the attending physician for the purpose of establishing the cause of death, either of the insured himself or of his ancestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible. They are

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excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between the physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.'"

In *Re Flint*, 100 Cal. 391, 34 Pac. 863, the supreme court of California says: "The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York, § 836, provides that the privilege is present unless 'expressly waived by the patient.'" The court further says: "Who has the power to waive it? Can the heir waive it as against the objection of the devisee? That is the thing done in this case, and we think the action of the court cannot be sustained. It cannot be said that the heir is representing the deceased, for the heir is attempting to overthrow the will, and offers this evidence of the attending physician, over which the privilege rests, for the very purpose of attacking the mental soundness of the patient. Such is not the representative of the deceased referred to in the various decisions of the courts. This provision of law rests upon a sound public policy."

In *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351, the court says: "The question as to the admissibility of the evidence of the physicians, against the objection of the beneficiaries of the certificate, claiming under Mrs. Boyle, the deceased, is not one free from difficulty. There can be no question but that the information they severally acquired, and which enabled them to give their testimony, was acquired in attending Mrs. Boyle as a patient, and that it was necessary to enable them to advise her and to prescribe for her as physicians. Was this information privileged as to her, under Rev. Stat. § 4075, which provides that 'no person duly authorized to practise physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do

any act for him as a surgeon." By the common law, information thus obtained by a physician or surgeon was not privileged, but he was at liberty to disclose it, either in or out of court, whatever effect such disclosure would have upon the rights, reputation, or feelings of his patient. The contention in favor of the admissibility of the evidence is that the use of the word compelled' in the section shows that the information thus acquired is not privileged from disclosure as to the patient, whom such a disclosure may most seriously affect, but is privileged only as to the physician or surgeon, and that he may, at his option, disclose it in court, when all the injurious details may be publicly elicited under oath, or he may refuse to do so, in which event only the information is to be privileged, so that its disclosure will not be compelled.'

... The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes. It provides that the physician shall not be compelled to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was this provision intended? Clearly, for the benefit of the patient, whose interests, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom protection was so important, and not the physician, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be compelled to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent."

In *Re Hunt*, 122 Wis. 460, 100 N. W. 874, the court says:

"(2) Exclusion of attending physician's testimony and opinion as to mental competency, based entirely upon information derived from decedent's statements or physician's observation while treating her professionally, and for the purpose of such treatment. Our decisions upon the statute (§ 4075 Rev. Stat. [Wis.] 1898) giving privilege of secrecy to all information ac-

quired by physician from patient in attending latter professionally, necessary to enable prescription for such patient, have eliminated from consideration very many of the refinements and distinctions with which some other courts have limited, if not emasculated, similar statutes. Thus, the privilege under our statute is not confined to communications made by the patient, but extends to all information, however derived by the physician in the course of professional attendance, and for the purpose specified. *McGowan v. Supreme Court*, 1. O. F. 104 Wis. 173, 186, 80 N. W. 603; *Green v. Nebagamain*, 113 Wis. 508, 512, 89 N. W. 520; *Re Downing*, 118 Wis. 581, 590, 95 N. W. 876. Neither are the words 'necessary' or 'prescribe' to receive any technical or unduly restricted meaning. *Re Bruendl*, 102 Wis. 45, 47, 78 N. W. 169. Further, and more important to the present controversy, we have held that the privilege is created for the protection of the patient, and is personal to him; and have in the plainest terms repudiated the doctrine supported by some authority elsewhere that others can in any degree waive the privilege. In *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351, this construction was announced, although its application was merely to deny right of waiver to physician. In *Re Bruendl*, supra, right of waiver was contended for in behalf of the heirs of the decedent, who offered the physician's testimony, and the whole subject was argued and considered fully, whereupon it was said: 'The legislature has decided wisely that public policy requires such measure of restriction upon the freedom of the physician to testify, or of others, to demand testimony.' While the decision in this case turned on other considerations, the above remark was made with deliberation, and in response to full discussion. We adhere to that view, and hold that no one save the patient himself can effectively consent to withdrawal of this mantle of secrecy which the statute has cast about the information which the physician needfully acquired in and for professional treatment.

"Appellant contends further, however, that the statute has no application to a contest over the probate of a will, and cites quite an array of cases where courts have, on one theory or another, reached substantially that conclusion. While most of these cases relate to the testimony of attorneys as to the very transaction of preparing the will, a few of them either deal directly with physicians, or admit evidence of attorneys on grounds seemingly applicable to physicians. The great majority of these proceed on the ground that the right

to waive the privilege, personal to the testator while living, passes on his death to those who succeed to his estate. This doctrine grew up in dealing with communications to attorneys with reference to property, where, as said, the privilege was accorded as a protection merely to property interests; so that there was a measure of logic in the conclusion that those who succeed to the property rights succeeded also to the right of secrecy, and might waive it, at least so far as it affected their own interests. This view has never yet been approved, even as to attorneys, in Wisconsin, where such evidence, wherever admitted, has been justified on other grounds, as we shall see. As to physicians, however, the attitude of this court, as already pointed out, is adverse to any power to waive the secrecy of professional information, and is also adverse to the grounds asserted by other courts, notably Iowa (*Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184), *vis.*, that the 'statutes are for the protection of the patient while living, and of his estate when dead.' Whether this last idea may be correct as to communications to attorneys with reference to property transactions, it certainly is not true with reference to the sheltering of information acquired by attending physicians. The purpose of that statute is personal. It is to protect the patient himself from disgrace or chagrin. Its effect on property rights or estate is only incidental. *Boyle v. Northwestern Mut. Relief Assn.* 95 Wis. 322, 70 N. W. 351; *Green v. Nebagamin*, 113 Wis. 508, 89 N. W. 520; *Re Bruendl*, 102 Wis. 45, 47, 78 N. W. 169. Such reasons do not cease upon the death of the patient. His memory and good name are still subject to injury by publication of information necessary to proper treatment by his physician, and apprehension of such enforced publication after his death may well result in reluctance or unwillingness to make those disclosures necessary for preservation of life or health, which it is the policy of the statute to encourage by assurance of their secrecy."

In *Fraser v. Jennison*, a will contest (42 Mich. 206, 3 N. W. 882), the trial court permitted the physician who attended the testator to testify as to his condition. The supreme court sustained the ruling, holding that the statute is one of privilege for the protection of the patient, and he may waive it if he sees fit; and what he may do in his lifetime, those who represent him after his death may also do, for the protection of the interests they claim under him.

In later cases, the same court held that no one but the patient himself could waive

the privilege. *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005; *Storrs v. Scougale*, 48 Mich. 387, 12 N. W. 502.

In *Storrs v. Scougale*, *supra*, the court, in speaking of the evidence of a physician, says: "This evidence ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it. The statute (Comp. Laws, § 5943) provides that 'no person duly authorized to practise physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.' Every reputable physician must know of the existence of this statute; and he must know from its very terms, as well as from the obvious reasons underlying it, that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be allowed to violate; a privilege is guarded which does not belong to him, but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself."

In Indiana it is held that only one seeking to uphold the will may waive the privilege, and not one seeking to break it. *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. 129; *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303.

In *Towles v. McCurdy*, *supra*, the court says: "When the controversy is among heirs and devisees, the set of such heirs or devisees who strive to overthrow the will cannot for their own benefit, and against the wishes of the other set, who desire to sustain it, waive the objection to evidence otherwise incompetent, to the detriment of the interests of those who seek to establish the will."

The jury retired about 3 o'clock P. M. on the 10th day of August. The same afternoon the Hon. C. F. Templeton, the judge before whom the said action was being tried, left the city of Bottineau, at which place the jury was, and went to Lake Metigoshe, about 12 or 13 miles distant from the city of Bottineau, and did not return to Bottineau until about 10 A. M. of the morning of August 12th. That about 10:30 P. M. on said 10th day of August, the jury requested, through the bailiff, that the testimony of Mrs. E. E. Barnes, a witness in said action for contestants, be read to the jury, and the bailiff reported back

to the jury that he had not been able to reach said judge. At about 8 o'clock in the morning of August 11th, the jury had not arrived at a verdict, and another request was sent by the jury, through the bailiff, for the said testimony, and the said trial judge informed the jury that the testimony requested would be furnished at the opening of court at 10 o'clock A. M. on the morning of August 12th, August 11th being Sunday. That the jury arrived at a verdict at about 5 o'clock P. M. on the 11th day of August, without having read to them the portion of Mrs. Barnes's testimony they desired to hear before arriving at a verdict.

The action of the trial judge relative to the requests of the jury to have the testimony of Mrs. Barnes read appellants assign as error, and strenuously contend that such action of the trial judge tended to force the jury to arrive at a verdict. Appellants rely principally upon three cases: *State v. Place*, 20 S. D. 489, 107 N. W. 829, 11 A. & E. Ann. Cas. 1129; *Henderson v. Reynolds*, 84 Ga. 159, 7 L.R.A. 327, 10 S. E. 734; *Pierce v. Pierce*, 38 Mich. 412. None of these cases are in point.

In *State v. Place*, supra, after the case was submitted, the jury retired to consider the case at 9 o'clock P. M. on June 21, 1905, and after being out all night and all the next forenoon, without having agreed upon a verdict, they were brought into court, and asked by the court if they had agreed upon a verdict, to which they replied that they had not. The court thereupon asked, "What seems to be the matter?" To which the foreman replied, "We are shy on evidence." The court thereupon replied that he could not help them out any on the evidence; if it were matters of law he could give them further instructions. "But," said he, "you will have to agree in this case, for I will keep you together until you do agree." Defendant's counsel thereupon excepted to the court's statement to the jury that he would keep the jury together until they did agree, and to this the court replied in substance: "You may have an exception, but I will keep this jury together until they do agree upon a verdict." All of the foregoing took place in the presence and hearing of the jury. The court thereupon directed the jury to retire with the officer at the time of taking the noon recess, which they did, and when the court reconvened after recess, at 1:30 P. M. on June 22d, the jury was brought into court, and asked by the court if they had agreed upon a verdict, to which they replied that they had, whereupon the court asked them what their verdict was, and the foreman replied: "We, the jury, find the defendant guilty as charged in the information." The jury was then polled, and each

answered that that was his verdict. This verdict was set aside, the court saying: "In this enlightened age no one will contend that a verdict should stand which does not, at least presumptively, express the free and deliberate judgment of those who rendered it."

In the case of *Henderson v. Reynolds*, supra, the jury retired at about half past 8 on Saturday night. Some time before 12 o'clock the judge sent the sheriff to inquire of the jury if they were likely to agree. The sheriff reported that the jury told him that they were not. About half an hour after, the court ordered the jury brought in, and told them it was nearly 12 o'clock, and that, the next day being Sunday, they would have to cease their deliberations until after midnight of the next day; that during that time they were not to discuss the verdict, or anything connected with the case; that they would have to keep together during the entire day and night; that the sheriff would provide a place for them to sleep together; and that they would be furnished their meals, but that it would be at their own expense. The jury were then sent back to their room, and in a few minutes returned with a verdict. In setting the verdict aside, the court said: "The old idea of starving juries to coerce a verdict has passed away, and the judge is empowered to furnish refreshments at the expense of the county." We are not surprised that this jury should agree so quickly after being instructed by the judge that they would be kept together for more than twenty-four hours longer, and at their own expense. It may have been that the very jurors who were holding out against the proposed verdict were unable to pay for their meals, and therefore agreed to the verdict, rather than go without food until the court should meet again, the next Monday morning."

In *Pierce v. Pierce*, which was a will contest, the case was submitted to the jury on Tuesday afternoon. On Wednesday afternoon the officer in charge was requested to inform the judge that they could not agree. Thereupon the judge directed the officer to tell them: "The judge does not believe it yet, and you might say to them that it is essential they agree to-night, as I am going away, and won't be back until day after tomorrow, and they might not get discharged until I come back, as Judge Coolidge is going to be here." The verdict was returned within an hour thereafter. The court says: "We cannot but think the tendency of the message was to drive the jury into action which might not have been taken otherwise. . . . Jury trials can never be safe unless the verdict is made as

far as possible the unbiased and free conclusion of every juror. Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. It may be discretionary with the trial judge to keep a jury out until he is satisfied an honest and free agreement is not to be expected. But there is no legal propriety in keeping a jury confined unreasonably. After they have come to an agreement, and a verdict obtained by the suggestion of such an alternative, it is a verdict obtained by what it would be hard to distinguish from duress. It may be that the court is not bound to be present continually on the chances of an agreement; but any unusual and prolonged delay is not to be favored without giving an opportunity to find a sealed verdict."

There was no coercion in the case at bar. The jury were at liberty to and did return a sealed verdict. The first request made by the jury to have the testimony of Mrs. Barnes read was made about 10:30 P. M. Saturday night. The next request was made about 8 o'clock on Sunday morning. The judge then sent word to the jury that the testimony requested would be read at the opening of court on Monday morning. The jury, without waiting to have the testimony read, agreed upon a verdict at 5 o'clock in the afternoon of Sunday. The judge was not obliged to remain close to the jury during all their deliberations.

Section 6750, Rev. Codes 1905, as far as material, is as follows: "Courts shall not be open on Sundays or legal holidays, unless for the purpose of instructing or discharging a jury, or receiving a verdict." The court was not obliged to have the testimony read to the jury on Sunday even had he been in Bottineau, and he was not obliged to remain for the purpose of receiving a verdict, as the jury were allowed to return a sealed verdict, which they did.

Section 7027, Rev. Codes 1905, is as follows: "After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the parties or counsel."

Appellants insist that the failure to have the testimony of Mrs. Barnes read to the jury necessitates a reversal of the case. Assuming, without deciding, that the jury were entitled to have the stenographer's minutes of the testimony of Mrs. Barnes read, we cannot agree with appellants that the failure to have it read necessitates a 32 L.R.A. (N.S.)

reversal of the case. The learned trial court did not refuse the request of the jury, but sent word to them that the testimony would be read at the opening of the court on Monday morning. The jury, without waiting for the testimony to be read, returned a verdict.

In *Moore v. State*, 52 Tex. Crim. Rep. 364, 107 S. W. 355, which was a prosecution for burglary, the jury made a request to have read to them by the official stenographer a part of the testimony of the witnesses as to the location of the house alleged to have been entered, and as to how high the moon was. The court says: "It appears from the record that this request was made to the court at night, and that in response thereto, after some inquiry had been made, the court advised the jury that the stenographer had gone home, but that as he could get him he would have the testimony read to them as requested. A short time after this, and without additional or further request from the jury, a verdict of guilty was returned. It was, of course, clearly the right of the jury to have the testimony requested read to them; but where, as in this case, they returned a verdict without pressing further their request, it must be assumed that it was no longer desirable or necessary to have their memories refreshed by having the testimony read to them. We do not, therefore, believe there was any error in this action of the court."

In *People v. Warren*, 130 Cal. 678, 63 Pac. 87, which was a prosecution for grand larceny, the case was submitted to the jury about 8 o'clock P. M. After 11 o'clock P. M. the jury came into court, and asked to have the testimony of defendant read to them. The reporter informed the judge that it would take about two hours to read the testimony. The judge then announced to the jury that, owing to the lateness of the hour, it would be necessary to adjourn until the next day at 9 o'clock A. M., when the testimony would be read. A few minutes before 9 o'clock the next morning the jury came into court and announced that they had agreed upon a verdict. Counsel then objected to the verdict being received because the testimony called for by the jury had not been read. This objection was overruled, and such ruling was sustained on appeal.

Appellants cite in support of their contention that it was reversible error not to have the testimony of Mrs. Barnes read to the jury, the following cases: *State v. Perkins*, 143 Iowa, 55, 21 L.R.A. (N.S.) 931, 120 N. W. 62; *Roberts v. Atlanta Conol. Street R. Co.* 104 Ga. 805, 30 S. E. 960; *State v. Manning*, 75 Vt. 185, 54 Atl. 181;

People v. Shuler, 136 Mich. 161, 98 N. W. 986; *Drew v. Andrews*, 8 Hun, 23; *Moore v. State*, 52 Tex. Crim. Rep. 364, 107 S. W. 355; *Alexander v. Gardiner*, 14 R. I. 15; *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741; *Merritt v. New York*, N. H. & H. R. Co. 164 Mass. 440, 41 N. E. 667; *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20, 17 Mor. Min. Rep. 179; *State v. Hunt*, 112 Iowa, 509, 84 N. W. 525; *Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829. We have carefully examined these cases and find that they are not in point, and that most of them only go to the extent of holding that it is not error in the trial court, at the request of the jury, to direct the stenographer to read from his notes the testimony of the witnesses on a material issue in the case.

The cases of *State v. Manning*, 75 Vt. 185, 54 Atl. 181, and *People v. Shuler*, 136 Mich. 161, 98 N. W. 986, hold that it is in the discretion of the trial court to grant or deny a request of the jury to have certain evidence read.

In *Drew v. Andrews*, 8 Hun, 23, which was a civil action, after the case went to the jury and they had deliberated for about two hours, they requested of the court information as to what a witness for the defendant had testified in reference to a portion of the work claimed for. The counsel for the defendant, in the presence of plaintiff's counsel, asked the court to bring in the jury and state the evidence to them as requested. The court refused. A short time after the jury returned into the court and said they had agreed on a verdict for plaintiff. The appellate court held it was error for the trial court to refuse the request of the counsel for the defendant, made in the presence of plaintiff's counsel, to bring in the jury and state the evidence to them as requested. This case has no bearing on the case at bar, as in the case at bar the trial court sent word to the jury that he would have the requested testimony read to them on Monday morning, but the jury, without waiting to have such testimony read, returned a verdict.

Appellants assign as error the following portion of the court's charge: "The law of this state provides that every person of sound mind, being eighteen years of age or more, whether married or single, has a right to make disposition of his or her estate by will, and so distribute his or her estate as to devert those who would otherwise inherit it as his or her legal heirs, of their interest therein. Indeed, the object of the law in permitting a person to make a will is to enable a testator or testatrix to divide and distribute his or her property as to him or her may seem best, and no 32 L.R.A. (N.S.)

next of kin or relative, no matter how near they may be, can be said to have any legal or natural right to the estate of the testator or testatrix which can be asserted against the legally executed will of the latter. The law in this state has placed the estate of persons over the age of eighteen years wholly under the control of the owner, and to be divided or distributed by the latter as he or she may freely choose and direct in the last will and testament made by him or her. Neither husband, mother, sister, or brother has any natural right to the estate of the deceased wife, daughter, or sister, which can be exerted against any disposition of said estate which said wife, daughter, or sister, if of sound mind, may choose to make by will,"—saying "that it was unnecessarily charging as to the legal naked right to dispose of property by will, without stating that an unnatural disposition might be considered as evidence tending to establish mental incapacity or undue influence." As stated before, there was no evidence of any undue influence. We think the court stated the law correctly, and there was no error in the charge.

The last assignment of error argued is as to the admission of testimony of nonexpert witnesses, as to the mental soundness of the deceased, over the objection of appellants on the ground of an insufficient foundation. The rule is that a nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversation, or conduct which to some extent indicate sanity. In this class of cases the question of the competency of the witness to testify is one for the court, and is also a question lying within the sphere of judicial discretion; and the familiar rule that such discretion will not be reversed except in cases of abuse applies in the case of nonexperts as well as experts who are called to express opinions upon an issue of insanity. *State v. Barry*, 11 N. D. 428, 92 N. W. 809; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Re Hull*, 117 Iowa, 738, 89 N. W. 979; *Atkins v. State*, 119 Tenn. 458, 13 L.R.A. (N.S.) 1031, 105 S. W. 353; *Ryder v. State*, 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

In *Denning v. Butcher*, supra, the court says: "The right of a nonexpert witness to give an opinion based upon facts fully disclosed to the jury has always been recognized, but it is equally clear that the court has the right to determine whether such facts have been disclosed as to entitle the witness to express an opinion." See also 3 Wigmore, Ev. §§ 1917, etc., and note in *Ryder v. State*, supra.

It follows from what we have said that

the court did not err in denying appellants' motion for a new trial.

The order appealed from is affirmed.

Ellsworth, J., dissenting.

I am unable to agree in the holding of my associates that the trial court was justified, as a matter of law, in instructing the jury that there was not sufficient evidence to establish that the alleged will in controversy was executed as the result of undue influence practised upon the said Mary Auld. The testimony shows, quite conclusively I think, that at the time of the execution of the will Mrs. Auld was at the point of death and in a mental condition closely bordering on entire incompetency. In such a condition as this, the mind of the testator was peculiarly susceptible to the influence of a stronger will. An influence that at other times might be without effect, in this condition of mind and body, might have been regarded by the jury as "undue." I believe that all the circumstances attending the subscription of the will by the testator should have been submitted to the jury under a proper instruction. Neither the trial court nor this court could usurp the function of the jury to the extent of saying that it might not have found upon a consideration of these facts that undue influence was exercised; and, if it had so found, I believe there was sufficient competent evidence to sustain a holding of that kind.

I am of the opinion, therefore, that for error in this particular the judgment should be reversed, and a new trial granted.

Petition for rehearing denied December 14, 1910.

MONTANA SUPREME COURT.

TERRY A. JOHN, Respt.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.

(42 Mont. 18, 111 Pac. 632.)

Carrier — derailment of train — gratuitous passenger.

1. Mere proof of derailment of a train, to the injury of a gratuitous passenger, without anything to show the circumstances under which it took place, is not sufficient to show gross negligence sufficient to charge the carrier of such passenger with liability for his injury on that ground.

Evidence — burden of proof — negligence — derailment of train.

2. Where by statute a carrier is liable for injury to a gratuitous passenger through

its failure to exercise ordinary care, proof of derailment of train, to the injury of such passenger, raises the presumption that it occurred through ordinary negligence, and places upon the carrier the burden of showing that it occurred notwithstanding its exercise of ordinary care.

Same — passes to railroad men — validity.

3. The giving by railroad companies of passes even to employees of other railroad companies is prohibited by constitutional and statutory provisions that all individuals shall have equal rights to have persons transported on railroads, and no discrimination in charges shall be made, and that it is unlawful for any carrier to charge any person any greater sum for a ticket than is charged another for a similar ticket of the same class.

Same — passenger holding pass — right of.

4. Where by statute a carrier is required to transport a gratuitous passenger which it has accepted, one is not prevented from holding the carrier liable for injury to him by failure to use the care which the law requires in case of gratuitous passengers, by the fact that he was traveling on a pass which the carrier was prohibited, under penalty, from giving.

Pleading — theory of case — departure — effect.

5. A recovery against a railroad company for injury to a person on its train will not be refused because the complaint was based on the theory that he was a passenger for hire, while the trial court held that he was a gratuitous passenger, and submitted to the jury the question of the liability of the carrier to him as such, if a recovery was proper under the circumstances of the case, even though he was a gratuitous passenger.

Appeal — erroneous instruction — immateriality.

6. Error in defining gross negligence is not reversible in an action to hold a railroad company liable for injury to a gratuitous passenger, if, under the circumstances, defendant would be liable in case

Note. — That a limitation upon the liability of a common carrier for personal injuries received while traveling upon a pass issued in violation of law is void and cannot be relied upon by the carrier to escape responsibility for a personal injury to the holder of the pass, occasioned by its negligence, where, at the time of the injury, the carrier had not asserted the invalidity of the pass, and had not demanded of the holder his fare, is held by all the cases that have considered the question, including *JOHN V. NORTHERN PACIFIC R. CO.* For other cases passing upon the question, see *Bradburn v. Whatcom County R. & Light Co.* 14 L.R.A. (N.S.) 526, and note thereto. A search fails to disclose any other cases considering this question subsequently to that note.

of ordinary negligence, which was amply shown by the evidence.

Damages — personal injury — action.

7. The appellate court will not interfere with a verdict of \$25,000 for injury to a man in perfect health, thirty-nine years old, earning \$1,800 per year, where the injury partially paralyzed him, caused great pain, and rendered him a physical wreck, while the physicians state that the injuries are probably permanent and will eventually cause death.

On Petition for Rehearing.

Carrier — passes — right to give.

8. Under constitutional and statutory provisions forbidding discrimination in rates by carriers between the same classes of passengers, free transportation or special rates may be given to employees of the issuing road and their families; doctors, nurses, and helpers being hurried to wrecks; soldiers and sailors going to or coming from institutions for their keeping; ministers of religion and persons engaged in charitable and religious work; and children and persons who, by reason of physical injuries, defects, or deformities, or other misfortune, are unable to compete with mankind in general.

(Holloway, J., dissents.)

(October 11, 1910.)

APPEAL by defendant railway company from a judgment of the District Court for Silver Bow County, entered on a verdict for plaintiff, and from an order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. John G. Brown, R. F. Gaines, and William Wallace, Jr., for appellant:

The jury were charged not only by the acquiescence, but by the request, of plaintiff, upon the theory that the pass was free.

Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; State v. Dickinson, 21 Mont. 595, 55 Pac. 539; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; McAllister v. Rocky Fork Coal Co. 31 Mont. 359, 78 Pac. 595; Lander v. Sheehan, 32 Mont. 25, 79 Pac. 406; State v. Radmilovich, 40 Mont. 93, 105 Pac. 91; Bliss v. Wolcott, 40 Mont. 491, 135 Am. St. Rep. 636, 107 Pac. 423.

The common-law rule of public policy forbidding the limitation of liability for negligence applied only to the carrier for reward, as distinguished from the gratuitous carrier.

Muldoon v. Seattle City R. Co. 7 Wash. 528, 22 L.R.A. 798, 35 Pac. 422; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 32 L.R.A. (N.S.)

L. ed. 627; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; McCormick v. Shippy, 119 Fed. 220, 59 C. C. A. 568, 124 Fed. 48; Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A. (N.S.) 533, 71 C. C. A. 316, 139 Fed. 530; Greenwich Ins. Co. v. Louisville & N. R. Co. 112 Ky. 598, 56 L.R.A. 477, 99 Am. St. Rep. 313, 66 S. W. 412, 67 S. W. 16; Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461, 68 S. W. 165; Mann v. Pere Marquette R. Co. 135 Mich. 210, 97 N. W. 724; Cincinnati, N. O. & T. P. R. Co. v. Saulsbury, 115 Tenn. 402, 90 S. W. 626, 5 A. & E. Ann. Cas. 744; Woodward v. Ft. Worth & D. C. R. Co. 35 Tex. Civ. App. 14, 79 S. W. 898; Osgood v. Central Vermont R. Co. 77 Vt. 334, 70 L.R.A. 930, 60 Atl. 140; Stephens v. Southern P. R. Co. 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 17, 41 Pac. 783; 2 White, Personal Injuries on Railroads, § 852, p. 1258; Rose v. Northern P. R. Co. 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767; Higley v. Gilmer, 3 Mont. 100, 35 Am. Rep. 450; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Nelson v. Great Northern R. Co. 28 Mont. 321, 72 Pac. 642.

There was neither allegation nor evidence of gross negligence or recklessness.

Prosser v. Montana C. R. Co. 17 Mont. 384, 30 L.R.A. 814, 43 Pac. 81; Nelson v. Great Northern R. Co. 28 Mont. 321, 72 Pac. 642; Robinson v. Helena Light & R. Co. 38 Mont. 241, 99 Pac. 837; 6 Thomp. Neg. § 7900; Wilson v. Chippewa Valley Electric R. Co. 120 Wis. 636, 66 L.R.A. 912, 98 N. W. 536; Bertelson v. Chicago, M. & St. P. R. Co. 5 Dak. 313, 40 N. W. 531; Levin v. Memphis & C. R. Co. 109 Ala. 332, 19 So. 395; Missouri P. R. Co. v. Lowler, 3 Tex. App. Civ. Cas. (Willson) 38; Missouri P. R. Co. v. Shuford, 72 Tex. 165, 10 S. W. 408; Bailey v. North Carolina R. Co. 149 N. C. 169, 62 S. E. 912; Olsen v. Montana Ore Purchasing Co. 35 Mont. 400, 89 Pac. 731.

There was no presumption of negligence from derailment, and therefore no sufficient proof of even ordinary negligence.

Hoskins v. Northern P. R. Co. 39 Mont. 401, 102 Pac. 988; Hospes v. Chicago, M. & St. P. R. Co. 29 Fed. 763; Carroll v. Missouri P. R. Co. 88 Mo. 239, 57 Am. Rep. 394; Re California Nav. & Improv. Co. 110 Fed. 670; Pullen v. Butte, 38 Mont. 194, 21 L.R.A. (N.S.) 42, 99 Pac. 290; McPherson

son v. Pacific Bridge Co. 20 Or. 486, 26 Pac. 560; Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425; Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805; Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514; Chattanooga Cotton Oil Co. v. Shamblin, 101 Tenn. 263, 47 S. W. 496; Illinois C. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 298; Bracey v. Northwestern Improv. Co. 41 Mont. 338, 109 Pac. 706; Newell v. Nicholson, 17 Mont. 389, 43 Pac. 180.

Messrs. Roote & Murray and J. E. Healy, for respondent:

The defendant railway company is guilty.

Bradburn v. Whatcom County R. & Light Co. 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020; McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; State v. Southern R. Co. 122 N. C. 1052, 41 L.R.A. 248, 30 S. E. 133; National Car Advertising Co. v. Louisville & N. R. Co. 110 Va. 413, 24 L.R.A.(N.S.) 1010, 66 S. E. 88.

Plaintiff was a passenger, and entitled to the same degree of care as other passengers, and as if he had paid his fare.

Thomp. Neg. §§ 2633, 2720 et seq. 6425; 6 Cyc. Law & Proc. pp. 533-536, -538-544. note 59; Higley v. Gilmer, 3 Mont. 99, 35 Am. Rep. 450; Treadwell v. Whittier, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 286; People v. Douglass, 87 Cal. 281, 25 Pac. 417; Civil Code 2870, Rev. Codes, 4323, 5332, 5334; Gray v. Columbia River & O. C. R. Co. 49 Or. 18, 88 Pac. 297; Harvey v. Deep River Logging Co. 49 Or. 583, 12 L.R.A.(N.S.) 131, 90 Pac. 501; Philadelphia & R. R. Co. v. Derby, 14 How. 469-485, 14 L. ed. 502-509; The New World v. King, 16 How. 469, 14 L. ed. 1019; Waterbury v. New York C. & H. R. R. Co. 21 Blatchf. 314, 17 Fed. 671; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627.

The pass was not free, as it was issued in exchange of and for other passes, from which appellant derived benefit.

Boering v. Chesapeake Beach R. Co. 20 App. D. C. 500; Harris v. Puget Sound Electric R. Co. 52 Wash. 289, 100 Pac. 838; Dugan v. Blue Hill Street R. Co. 193 Mass. 431, 79 N. E. 748; Baker v. Boston & M. R. Co. 74 N. H. 100, 124 Am. St. Rep. 937, 45 Atl. 386, 12 A. & E. Ann. Cas. 1072; Galveston, H. & S. A. R. Co. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721; Nickles v. Seaboard Air Line R. Co. 74 S. C. 102, 54 S. E. 255; Dow v. Syracuse, L. & B. R. Co. 81 App. Div. 362, 80 N. Y. Supp. 941; Peterson v. Seattle Traction Co. 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543; St. Louis Southwestern R. Co. v. Wallace, 90 Ark. 138, 22 L.R.A.(N.S.) 379, 118 32 L.R.A.(N.S.)

S. W. 412; Eberts v. Detroit, Mt. C. & M. C. R. Co. 151 Mich. 260, 115 N. W. 43.

The contract of exemption is void and against the public policy of this state.

Bryan v. Missouri P. R. Co. 32 Mo. App. 228; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; Flint & P. M. R. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499; Gulf, C. & S. F. R. Co. v. McGown, 65 Tex. 643; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Alabama G. S. R. Co. v. Little, 71 Ala. 614; Rose v. Des Moines Valley R. Co. 39 Iowa, 246; Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Annas v. Milwaukee & N. R. Co. 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282; Pennsylvania R. Co. v. Henderson, 51 Pa. 315; Pennsylvania R. Co. v. Butler, 57 Pa. 335; Buffalo P. & W. R. Co. v. O'Hara, 12 W. N. C. 473; Camden & A. R. Co. v. Bausch, 4 Sadler (Pa.) 518, 7 Atl. 731; Burnett v. Pennsylvania R. Co. 176 Pa. 45, 34 Atl. 972; Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co. 102 Fed. 17; Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; Roesner v. Hermann, 10 Miss. 486, 8 Fed. 782; Flinn v. Philadelphia, W. & B. R. Co. 1 Houst. (Del.) 471; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Indiana C. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339; Louisville, N. A. & C. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Welsh v. Pittsburg, Ft. W. & C. R. Co. 10 Ohio St. 76, 5 Am. Dec. 490; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Knowlton v. Erie R. Co. 19 Ohio St. 261, 2 Am. Rep. 395; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133-136, 42 L. ed. 688-691, 18 Sup. Ct. Rep. 289; Inman v. South Carolina R. Co. 129 U. S. 141, 32 L. ed. 616, 9 Sup. Ct. Rep. 249; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; The Kensington, 183 U. S. 270, 46 L. ed. 193, 22 Sup. Ct. Rep. 102; Philadelphia & R. R. Co. v. Derby, 14 How. 486, 14 L. ed. 509; The New World v. King, 16 How. 469, 14 L. ed. 1019; Oscanyan v. Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Warnock v. Davis, 103 U. S. 775, 26 L. ed. 924; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Cancemi v. People, 18 N. Y. 128; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Missouri, K. & T. R. Co. v. Flood, — Tex. Civ. App. —, 70 S. W. 331; Norfolk & W. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721; Sherman v. Hannibal & St. J. R. Co. 72 Mo. 62, 37 Am. Rep. 423; Gradin v. St. Paul & D. R. Co. 30 Minn.

217, 14 N. W. 881; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Trinity Valley R. Co. v. Stewart, — Tex. Civ. App. —, 62 S. W. 1085; McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; Houtz v. Union P. R. Co. 33 Utah, 175, 17 L.R.A. (N.S.) 629, 93 Pac. 439; Galveston, H. & S. A. R. Co. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721; Eberts v. Detroit, Mt. C. & M. C. R. Co. 151 Mich. 260, 115 N. W. 43; Dugan v. Blue Hill Street R. Co. 103 Mass. 431, 79 N. E. 748; Dow v. Syracuse, L. & B. R. Co. 81 App. Div. 362, 80 N. Y. Supp. 941; Nickles v. Seaboard Air Line R. Co. 74 S. C. 102, 54 S. E. 255; Baker v. Boston & M. R. Co. 74 N. H. 100, 124 Am. St. Rep. 937, 65 Atl. 386, 12 A. & E. Ann. Cas. 1072; Missouri P. R. Co. v. Ivy, 71 Tex. 409, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346; Durgin v. American Exp. Co. 66 N. H. 277, 9 L.R.A. 453, 20 Atl. 328; St. Louis, O. M. & S. R. Co. v. Pitcock, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582; Yazoo & M. Valley R. Co. v. Grant, 86 Miss. 565, 109 Am. St. Rep. 723, 38 So. 502, 4 A. & E. Ann. Cas. 556; Starr v. Great Northern R. Co. 67 Minn. 18, 69 N. W. 632; Williams v. Oregon Short Line R. Co. 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991; Carstens Packing Co. v. Southern P. Co. 58 Wash. 239, 27 L.R.A. (N.S.) 975, 108 Pac. 613; Yeomans v. Contra Costa Steam Nav. Co. 44 Cal. 71.

An allegation of negligence lets in proof of gross negligence.

Abbott, Trial Brief on Pleadings, § 334, p. 1511; Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706; Shumacher v. St. Louis & S. F. R. Co. 39 Fed. 174; Louisville, N. A. & C. R. Co. v. Wurl, 62 Ill. App. 381; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; 29 Cyc. Law & Proc. p. 572; Philadelphia & R. R. Co. v. Derby, 14 How. 486, 14 L. ed. 509; Thomp. Neg. § 2617; Hart v. Western U. Teleg. Co. 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 645; Coggs v. Bernard, Ld. Raym. 909, 1 Smith, Lead. Cas. 9th ed. 354, 5 Eng. Rul. Cas. 247; Pierce v. Southern P. Co. 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302; Merrill v. Pacific Transp. Co. 131 Cal. 582, 63 Pac. 917; Nelson v. Great Northern R. Co. 28 Mont. 321, 72 Pac. 642; Valente v. Sierra R. Co. 151 Cal. 534, 91 Pac. 483; Kline v. Santa Barba Consol. R. Co. 150 Cal. 741, 90 Pac. 125; Osgood v. Los Angeles Traction Co. 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 170; Boyce v. California Stage Co. 25 Cal. 469; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Ryan v. Gilmer, 2 Mont. 525, 25 Am. Rep. 744; Kennon v. Gil- 32 L.R.A. (N.S.)

mer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 855; Pierce v. Great Falls & C. R. Co. 22 Mont. 446, 56 Pac. 867; Taillon v. Mears, 29 Mont. 169, 74 Pac. 423, 1 A. & E. Ann. Cas. 613; Hoskins v. Northern P. R. Co. 39 Mont. 394, 102 Pac. 989.

The defendant, having undertaken to defend, must show a satisfactory excuse for the derailment.

Wood v. Los Angeles Traction R. Co. 1 Cal. App. 474, 82 Pac. 548; Kerr's Cyc. Civ. Code, p. 1664, notes 101, 102; Walters v. Seattle, R. & S. R. Co. 48 Wash. 233, 24 L.R.A. (N.S.) 789, 93 Pac. 419; Rose v. Northern P. R. Co. 35 Mont. 78, 119 Am. St. Rep. 836, 88 Pac. 767.

Smith, J., delivered the opinion of the court:

This is an appeal by the railway company defendant from a judgment pronounced against it on the verdict of a jury in Silver Bow county, for \$25,000 and costs; also from an order denying it a new trial. The defendant Skones was released from liability on motion for a directed verdict.

The complaint charged that on August 11, 1907, at Butte, the railway company received plaintiff on its passenger train, "and undertook and agreed to transfer him from Butte to Miles City for a certain reward," and that it was its duty to carry him "in safety and with due and proper care." It further charged that, after he had retired into an upper berth of a sleeping car, the same was negligently, carelessly, and unskillfully derailed, while in rapid motion, and partly turned over, whereby he was thrown out of the berth and injured. The answer, besides a general denial, admits that, while plaintiff was riding in an upper berth in a car of its passenger train, the car was partly tipped over; but denies that he was received, or was riding, as a passenger, or for a reward; and avers that he boarded the train, intending to ride, and at the time of the derailment was riding, upon a certain annual pass which he had presented as his ticket and rights to carriage, which pass contained the following conditions: "The person accepting this pass agrees that the Northern Pacific Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same." It is further alleged "that plaintiff was riding and his rights upon said train were under and pursuant to the terms and provisions of said pass contract of carriage, and not otherwise." The reply admits that the plaintiff had and held this pass, but al-

leges that it was issued to him as agent of another railroad, the St. Louis & San Francisco Railroad Company, of which he was a general agent, and in consideration of the issuance by such other railroad of annual passes from the latter to certain agents of the defendant company; and avers that his rights were those of a passenger for hire, and not affected by the conditions stated in the pass.

There was no conflict in the evidence. Desiring to go to Miles City, the plaintiff, at about 12:40 A. M., August 12, 1907, at Butte station, boarded train No. 6 of the defendant company, having bought an upper berth in a sleeper from the Pullman Company. The subsequent derailment of the sleeper at a point about 7 miles east of Butte caused him to fall from his berth, whereby he was severely and permanently injured. The cause of the derailment could not be ascertained. There was no direct evidence of any negligence on the part of the defendant or any of its servants. The plaintiff was riding on the pass mentioned in the answer, the conditions of which had been by him accepted by signing his name thereto, adding the letters "G. A.," which meant "General Agent." The pass was what is known as an "interchange" pass, and was given to the St. Louis & San Francisco Railroad Company by the defendant company, at the request of the former company, and by it sent to the plaintiff, to be used in his business of soliciting passengers and freight for that company. No direct consideration passed for its issuance, but the two railroads were in the habit of exchanging passes for their respective employees, without regard to which company asked for the greater number. The inscription on the face read: "Pass Mr. T. A. John, General Agent St. L. & S. F. R. R." Plaintiff testified that, in his general work of soliciting passengers and freight for his road, certain other railroads, including the defendant company, would receive benefits, by virtue of the fact that such passengers and freight would be carried into and out of Montana over such other roads by connection with his road. He said he had frequently routed goods for his customers so that the shipments would go over the Northern Pacific Road, and that he gave most of the passenger business to that company because it furnished the best service. On the part of the defendant, there was testimony to the effect that there was no consideration for the issuance of such passes, no obligation to issue them, and that their exchange was simply a matter of courtesy between the roads.

At the close of all of the testimony, the defendant moved the court to direct a ver-

dict in its favor, for the following reasons:

(a) Because there was no proof that defendant undertook to carry plaintiff for a reward; (b) because mere proof of derailment of the train was no evidence of actionable negligence toward a person in plaintiff's situation; (c) because of variance between the allegation of the complaint to the effect that plaintiff was being carried for hire, and the proof that he was being carried gratuitously under special contract limiting the liability of the defendant; (d) because plaintiff had voluntarily agreed not to hold the defendant liable for injuries received; (e) because there is no allegation in the complaint of other than ordinary negligence, for which, under its contract, defendant was not liable. The court overruled the motion and instructed the jury, over defendant's objection and on motion of plaintiff, that "a common carrier cannot be exonerated by any agreement made in anticipation thereof from any liability for the gross negligence of himself or his servants." "Therefore," the court continued, "if you believe that the defendant corporation was guilty of gross negligence, or that its servants were guilty of gross negligence which proximately caused the derailment of the train, . . . then your verdict must be for the plaintiff." This was the court's instruction No. 1. The court, also over defendant's objection, further charged the jury as follows: "(2) You are instructed that 'gross negligence' is the want of slight care and diligence. 'Gross negligence' is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the rights and welfare of others. . . . (4) The court charges you that the pass on which the plaintiff, John, was riding, on the train of the defendant railway company, at the time of its derailment, was a free or gratuitous pass; that, on account thereof, the defendant railway company cannot be held liable in this case for what is called ordinary negligence; but, before the plaintiff can recover in this action, you must find, by a preponderance or greater weight of the evidence, that the derailment in question was caused by the gross negligence of the defendant railway company, on its agents or servants."

1. We think the district court was correct in charging the jury that John was riding on a free or gratuitous pass. The plaintiff, by tendering instruction No. 1, tacitly assented to this and adopted the court's theory that the only question in the case, aside from that of damages, was whether the defendant had been guilty of gross negligence. It is contended by the defendant that, as the pass was an interstate pass,

good over the lines of its road in six states, it was subject to the provisions of the act of Congress approved June 29, 1906, known as the "Hepburn act" (act June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149), and was therefore illegal and void if given in exchange for another pass, for the reason that the act prohibits the receipt of anything save money for transportation. Counsel cite an order of the Interstate Commerce Commission, under date September 15, 1909, and the case of *United States v. Chicago, I. & L. R. Co.* (C. C.) 163 Fed. 114, in support of their position. But we do not find it necessary to base our judgment on this consideration. We find no testimony in the record which would warrant the conclusion that any consideration passed for the giving of the pass, or that it was anything more, as defendant's witnesses testified, than a gratuitous courtesy extended by one railroad company to the other.

2. We are of opinion that the court was in error in submitting to the jury the question of fact whether defendant had been guilty of gross negligence. There is nothing in the record to support an affirmative finding of such negligence. As will be hereafter shown, gross negligence is a matter of proof. But plaintiff's counsel contend that there are, under our laws (1) no degrees of negligence, and (2) that any negligence by which a passenger is injured is gross negligence. We cannot assent to either of these propositions. That degrees of negligence are known to our laws is evidenced by an examination of §§ 5253, 5295, 5299, 5300, 5306, 5331, 5354, and 5355, Rev. Codes, and recognized in the cases of *Prosser v. Montana C. R. Co.* 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81; *Nelson v. Great Northern R. Co.* 28 Mont. 297, 72 Pac. 642; *Robinson v. Helena Light & R. Co.* 38 Mont. 222, 99 Pac. 837; and *Neary v. Northern P. R. Co.* 41 Mont. 480, 110 Pac. 226. That this is so is a matter to be deplored, but the conclusion cannot be avoided. Aside from any question of what the common law was on the subject, plaintiff's second contention is disposed of by the provisions of our statute (§§ 5299 and 5300, Rev. Codes, supra) which distinctly recognize the fact that a carrier owes a different and higher duty to a person who is carried for reward, from that owing to one who is carried without reward. Those Code provisions read as follows:

"Sec. 5299. A carrier of persons without reward must use ordinary care and diligence for their safe carriage.

"Sec. 5300. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide

everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

It being the law that a carrier of passengers without reward need only use ordinary care and diligence for their safety, and that a carrier for reward must use the utmost care, it seems to follow that if we should hold this defendant guilty of gross negligence on account of the fact alone that an accident happened, without any evidence as to the cause thereof, we should not only destroy the distinction between gross and ordinary negligence, and slight and ordinary care, but we should be indulging in judicial legislation by declaring that a carrier of passengers without reward must use the utmost care and diligence for their safe carriage, contrary to the expressed will of the legislature. In case of injury to a passenger, a presumption of negligence arises from the mere fact of an accident, when the injury is caused by some thing or agency for which the carrier is responsible. *Knuckey v. Butte Electric R. Co.* 41 Mont. 314, 109 Pac. 979. In the latter case the court said: "Proof of the derailment of the train is sufficient,"—citing *Pierce v. Great Falls & C. R. Co.* 22 Mont. 445, 56 Pac. 867, and *Hoskins v. Northern P. R. Co.* 39 Mont. 394, 102 Pac. 988. The learned trial judge was evidently of opinion that mere proof of derailment was not prima facie evidence of gross negligence, otherwise he would not have submitted the question whether there was any gross negligence. While it may be true, as contended by plaintiff's counsel, that mere proof of derailment or other accident to a train might, under certain circumstances, furnish an inference of gross negligence, there are no facts in this case to warrant such conclusion.

3. Plaintiff was a passenger. Not a passenger for reward, but a free passenger. Nevertheless, the defendant had undertaken to carry him. It sustained toward him the relation of a carrier without reward, and by virtue of § 5299, Rev. Codes, supra, it owed to him the duty of using ordinary care for his safe carriage. It would be liable for ordinary negligence. (This, of course, without consideration of the exemption conditions of the pass.) Section 5298, Rev. Codes, provides that a carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced his carriage. Plaintiff, then, was not a trespasser; nor was he a mere licensee. Having begun his journey with the permission of the defendant, his right to

carriage could not be arbitrarily and unconditionally revoked. Defendant was under express legal obligation to do one of the two things mentioned in the statute. At the time of the accident it was in the act of doing the first mentioned. Having determined that plaintiff was a passenger, and that the defendant owed him the duty to refrain from any act of ordinary negligence to his injury, it becomes necessary to ascertain whether a finding of ordinary negligence on the part of the defendant will be justified by the mere fact that the train was derailed.

What degree of negligence is it that is disclosed, as the law presumes, by the fact that a passenger train is derailed? Manifestly, ordinary negligence,—a lack of ordinary care. It cannot logically be said that the fact of derailment only raises a presumption of slight negligence, any more than it can be said to raise a presumption of gross negligence. Mr. Thompson, in his admirable and exhaustive work on Negligence, vol. 1, 2d ed. § 18, p. 19, refers to "the standard called 'ordinary care.'" He also says in the same connection, commenting upon the common-law duty of a common carrier of passengers to exercise a "very high, exact, and unremitting care and attention:" "But even here it has been often pointed out that the care required of the carrier is no more than reasonable care; that is to say, a care proportioned to the great risks attending his business."

The Supreme Court of the United States, in *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 509, and again in *The New World v. King*, 16 How. 469, 14 L. ed. 1019, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" In both of these cases the plaintiff was being carried gratuitously. While we may not, in the light of our statutes, go so far as to hold, in accordance with the above rulings, that any negligence by which a free passenger is injured may be called 'gross.'" In both of these cases the plaintiff is not only logical, but in accordance with the accepted notions of the profession, that the term "negligence," standing alone, as applied to a carrier of passengers, should, and does, refer to that common degree or standard of negligence known as "ordinary." And in so holding we do no vio-

lence to our statutes. Sections 5299 and 5300, Rev. Codes, supra. Those Code provisions in practical application deal not with presumptions, but with proof. While the presumption arising from the fact of derailment of a passenger train is that the carrier of passengers, both paid and gratuitous, has been guilty of ordinary negligence or a want of ordinary care, and such presumption will serve to make a prima facie case of actionable negligence for either class of passengers, yet when, in the absence of circumstances warranting such presumption, it becomes necessary to prove negligence, it is incumbent upon the free passenger to prove ordinary negligence, while the passenger for reward need only prove slight negligence. A plaintiff relying upon gross negligence must offer proof in supplement of the presumption arising from the fact of derailment; while, on the other hand, derailment being shown, a carrier of passengers without reward has the burden of proving the exercise of ordinary care on his part, and a carrier for reward must show that he exercised the utmost care, in order to escape liability.

Again quoting from Thompson, *Law of Negligence*, vol. 3, 2d ed. § 2754: "In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof in the first instance is, of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim *Res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him to the satisfaction of the jury, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a prima facie case for damages against the carrier by proving the contract of carriage, that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants, and that, in consequence of the accident, the plaintiff sustained damage." It will be

observed that the author employs the words "passenger" and "negligence" without any qualification. Again: "It is the essential nature of this presumption that it stands in the place of actual proof of negligence, until it is rebutted and overthrown. This presumption would not be a presumption—would not have any evidentiary value for the purpose of influencing the practical result of a trial—unless the court were allowed to explain it to the jury. The nature of the presumption is such that, unless rebutted to the satisfaction of the jury, it decides the case in favor of the plaintiff, upon his making proof of the damages sustained; or, to say the least, it takes the question of the negligence of the carrier to the jury. If there is no countervailing evidence, nothing to explain the accident consistently with due care on the part of the defendant, the plaintiff is plainly, by force of this presumption, entitled to a verdict, and no sound reason is perceived why the judge should not be allowed so to instruct the jury." 3 Thomp. Neg. § 2770.

This court in the case of *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 20, through Mr. Justice Holloway, said: "It may be conceded that, unaided by any presumption, the evidence offered by plaintiff is insufficient to charge the defendant with negligence. But counsel for respondent invoke the doctrine of the maxim *Res ipsa loquitur*, and insist that this case, as made by the plaintiff, presents an instance wherein the presumption of defendant's negligence arises from the proof of the accident. Of course, the general rule of law is that negligence is not inferable from the mere occurrence of the accident; but to this rule is the well-understood exception that, where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of ordinary care by the defendant. . . . Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised."

Section 5244, Rev. Codes, reads as follows: "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." In the *Hardesty Case*, *supra*, the court distinctly held that this section is directly applicable to cases arising between master and servant on account of personal injuries 32 L.R.A. (N.S.)

sustained by the latter in the course of his employment, and that an instruction embodying it was properly submitted to the jury. This being so, there can be no longer any question in this state that, where the doctrine of the maxim *Res ipsa loquitur* may be invoked to raise a presumption of want of care, it is want of ordinary care to which reference is made. A master owes the same duty to his servant that a carrier owes to an unpaid passenger; that is, to exercise ordinary care for his safety. The statutes so declare. Indeed, we find the following statement in the brief of counsel for the appellant: "Derailment never creates a presumption of gross, or of any other than ordinary, negligence." The supreme court of North Carolina, in *Wright v. Southern R. Co.* 127 N. C. 225, 229, 37 S. E. 221, 222, said: "This presumption [of negligence] extends to the occurrence, regardless of the party injured."

We therefore hold that the happening of the accident complained of by the plaintiff raised a presumption of want of ordinary care on the part of the defendant, and that the district court should have so charged the jury.

4. But it is contended by counsel for the appellant that a common carrier in this state may by agreement exonerate himself from liability for the ordinary negligence of himself or his servants. That such is the law is settled by the case of *Nelson v. Great Northern R. Co.* 28 Mont. 297, 321, 72 Pac. 642, 649, where this court, after quoting §§ 2876 and 2877 of the Civil Code of 1895 (now §§ 5338 and 5339, Rev. Codes), said: "These two sections, construed together, give to the carrier the right by special contract to provide against liability in all cases except when it arises from his gross negligence, fraud, or wilful wrong." See also *Rose v. Northern P. R. Co.* 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 707, and *Donlon Bros. v. Southern P. Co.* 151 Cal. 763, 11 L.R.A. (N.S.) 811, 91 Pac. 603, 12 A. & E. Ann. Cas. 1118.

It is further contended that, as to the plaintiff, the defendant was not a common carrier; and, further, that it had been expressly exonerated from liability from its negligence, by the contract on the back of the pass. But it is immaterial whether the defendant was technically a common carrier or not. If it was, and the pass-contract was valid, it was exonerated from liability for ordinary negligence, by virtue of the terms thereof; and, if it was not, it nevertheless owed to plaintiff the duty of exercising ordinary care for his safe carriage.

5. This brings us to a consideration of an important question: Is the giving of ab-

solutely free passes prohibited by the Constitution or statute of this state? The question is one of first impression, and, so far as we are advised, has never been raised in this jurisdiction. Indeed, it is matter of everyday knowledge that the idea has prevailed, since 1903 at least, that the practice has not been illegal, and that additional legislation was necessary in order to make it so. This is evidenced by the fact that measures designed to prohibit the giving of free transportation have since been often advocated and have been introduced in the legislative assembly, but have never been enacted into laws.

Section 7, art. 15, of the state Constitution, provides, in part, as follows: "All individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation, or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company, between persons or places within this state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons."

Mr. Justice Hunt, in the case of Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 526, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232, 239, commenting upon this constitutional provision, said: "This provision, when considered with . . . [§ 5 of article 15], demonstrates that the Constitution, in its letter, its spirit, and its policy as well, classes all railroads . . . as public highways, subject to use by the public of right, amenable to the laws governing common carriers, forever forbidding all obnoxious favoritisms between any who desire to use such highways. . . . This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preference which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitutional or other restrictions."

Section 4337, Rev. Codes, is entitled "Discrimination in Charges Forbidden," and reads, in part, as follows: "It is . . . unlawful for any . . . common carrier . . . to charge, demand, collect, or receive from, to sell, barter, transfer, or assign to, any person . . . any ticket . . . of any class whatever, entitling the purchaser or holder thereof to transportation by the common carrier issuing such ticket, . . . for a greater or less sum or price than is charged, demanded, collected, or received by . . . [such] com-

mon carrier . . . for a similar ticket . . . of the same class. Any . . . common carrier . . . who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum not exceeding \$1,000 for each offense."

In addition to the foregoing, under the title-heading, "Crimes against the Public Health and Safety," we have § 8524, Rev. Codes, which reads as follows: "Every person or corporation who owns, carries on, or has control of, a railroad, and fails to observe any of the . . . duties prescribed by law in reference to railroads, the penalty for which is not otherwise provided for in this Code, is punishable by a fine not exceeding \$5,000.

Stripped of those portions which are not directly material to this investigation, the constitutional provision reads as follows: "All individuals . . . shall have equal rights to have persons . . . transported on or over any railroad . . . in this state." We understand this to mean that all persons have equal natural rights to be carried on any railroad in the state. "No discrimination in charges . . . for transportation of . . . passengers of the same class shall be made by any railroad between persons . . . within this state." And the Code provision (§ 4337, Rev. Codes) reads thus: "It is . . . unlawful . . . for any common carrier . . . to . . . transfer . . . to any person . . . any ticket . . . of any class whatever entitling the . . . holder thereof to transportation . . . for a . . . less sum or price than is charged . . . by such . . . common carrier . . . for a similar ticket . . . of the same class." Or it may perhaps be read thus: "It is . . . unlawful . . . for any common carrier . . . to charge . . . any person (for) any ticket . . . of any class whatever entitling the purchaser . . . to transportation . . . a greater sum or price than is charged by such common carrier . . . for a similar ticket . . . of the same class." The phraseology is not to be commended, but the meaning and the principle involved are clear. This section is a part of the so-called "antiscalpers" law, passed in 1893 (Laws 1893, p. 152, § 7), and its purpose, as we understand it, was not only to benefit the railroad companies by driving the ticket brokers out of business, but to provide against loss, so far as possible, to the purchaser of an unused ticket, by requiring that it should, under certain circumstances, be redeemed by the seller; and so it was enacted that the railroad companies, being relieved of the pest of the ticket "scalpers,"

should themselves be prohibited from indulging in kindred practices, by pernicious discrimination between persons of the same class. To that end it was enacted that the offense should be a misdemeanor and punishable accordingly.

Recurring to the constitutional provision: It is not permitted to a railroad company to arbitrarily classify the patrons of its road. Even the legislative assembly in making classifications for taxation and license purposes must exercise a reasonable discretion in so doing. *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250. The idea of arbitrary and unreasonable classification for any purpose, when benefits are to be conferred or penalties imposed, is abhorrent to the principles of all American Constitutions, founded, as they are, upon the consideration that all men are equal before the law.

By the report of the case of *State v. Southern R. Co.* 122 N. C. 1052, 41 L.R.A. 246, 30 S. E. 133, it appears that the defendant was indicted for an unlawful discrimination in the transportation of passengers under a statute (Laws 1891, chap. 320, § 4) of which the following is a copy: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." The act then goes on to provide for certain exceptions from its general provisions. The particular offense charged against the defendant was that it issued an annual free pass to one Grant, a member of the North Carolina general assembly, and allowed him to ride thereon between points within the state. The court said: "The question presented for our decision is: Does the act prohibit and make indictable the giving of free transportation to passengers by common carriers?" This question is then, in an exhaustive opinion, concurred in by all the justices except Douglas, J., answered in the affirmative as to both propositions involved therein. Douglas, J., concurred in the opinion that the act prohibits the giving of free passes, saying: "Such a con-

struction is in strict accordance with the settled rules of judicial interpretation and with the highest principles of public policy." He, however, held to the view that the case was *sui generis*, and the defendant not liable to punishment for violation of the act, as long as the giving of free passes was only included therein by implication, and with this view the writer is personally inclined to agree.

We find no difference in principle between the North Carolina act and the provisions of the laws of Montana above quoted. The only difference of any kind is that the legislature of North Carolina to an extent classified the general public by providing that free transportation or reduced rates might be given to certain excepted persons and institutions, while our laws provide that there shall be no discrimination between persons of the same class, or in the transfer or sale of tickets of the same class; and as the persons to which this opinion relates, as will hereafter be shown, are all in the same class, such difference can have no bearing upon the result here. That the North Carolina decision is directly applicable to this case is evidenced by the fact that conditions here, upon which our laws are designed to operate, are the same as those set forth at length in the opinion of the North Carolina court. There is no greater justification for giving free passes to employees of other railroads than there is for giving like evidences of a right to free carriage to state officials, as such. It is matter of common knowledge in Montana that, in accordance with a custom that has obtained for many years, members of the executive, legislative, and judicial branches of the state government, and some county officers, are furnished by the railroad companies with that form of free transportation known as "passes," and in some cases by other transportation companies also. Why should this be so? The practice has popularly come to be known as the "pass evil," and the writer undertakes to say that public sentiment is almost universally opposed to it, and that for the very reason which courts have always felt justified in acting upon, to wit: that it involves an arbitrary, unwarranted, and unjust classification of persons who occupy the same relation toward the transportation companies. It is the constant and natural protest of the givers and receivers of these passes that no consideration is expected in return therefor. A judge who was thought to be influenced in his decisions by the fact that he had a free pass in his pocket would be promptly declared venal and unfit. The law provides ample remuneration, in the way of mileage, for those officers who are

obliged to travel on official business. Why should they be furnished with free passes? Honorable members of the legislative assembly would be greatly incensed by the suggestion that the free passes in their pockets influenced their action upon legislation in which the railroads were interested. Why, then, should they ride free of charge? Abundant provision is always made for the payment of their mileage in coming to and going from the capital. Indeed, the recipients of these passes have been often obliged to protest, of late years, since the subject has been agitated, that nothing is expected to be given or received in exchange therefor; in other words, that they are purely complimentary. This is no doubt true; it simply emphasizes the fact that such passes are gratuitous. And the whole system of free and unclassified pass-giving is made odious by a consideration of the fact that, so long as free passes are so generally given, any judge or public officer who refuses to accept one, or who ostentatiously returns it to the giver, invites the imputation of hostility towards the railroads. All public officers should be, as Caesar's wife should have been, above suspicion. What justification can there be for dividing the traveling public into free-pass-holding and non-free-pass-holding persons?

Our Constitution allows classification, but not unreasonable classification. In the absence of classification by the legislature, the railroads may themselves make reasonable classifications. But classification into public-office-holding and non-public-office-holding persons is clearly arbitrary, vicious, unreasonable, and therefore illegal and void; and we believe it will be conducive to a more healthy condition of the body politic to have this made plain without further delay. And if one pays full fare, and his neighbor no fare at all, is the discrimination not more pronounced than would be the case if the latter paid only half fare? We can find no warrant for holding that this constitutional provision and this statute (§ 4337, Rev. Codes) were intended to apply only to paying passengers, or to passengers using exactly the same kind of ticket. The evil sought to be counteracted was fundamental, not merely nominal. The Constitution seems to us too plain to require any interpretation. It distinctly says that all persons have equal rights to have themselves carried over railroads, and that no discrimination in charges for being so carried shall be made between persons of the same class. That this provision was intended to be of universal application, except in the case of excursion or commutation tickets, is evidenced by the fact that the sale of such

tickets is specially permitted. If I travel on a free pass, and my neighbor, who is in the same class with me except that he holds no public office, is obliged to pay fare, I should not welcome the task of convincing him that we were enjoining equal rights of carriage, or that our relative situations spoke no discrimination between us. And the ordinary layman who has a lawsuit against a railroad company may have some justification for feeling that he is not on equal terms with his opponent, if the judge who tries his case or hears his appeal has accepted a complimentary pass from the latter. We can see no difference between an unlimited pass and an unlimited ticket, or in effect between a pass and a limited ticket, except, perhaps, that the holder of the pass enjoys greater privileges than does the holder of the ticket. If there were any such difference, the statute could be nullified by a mere name. The fact that this construction has never before been placed upon the Constitution or statute law, or even the consideration that the lawmakers did not in terms prohibit that particular form of evil known as the giving of free "passes," is not of sufficient weight to change our views of the matter. It is never too late to put the right construction upon a law. That the framers of the Constitution and the members of the legislative assembly had in view the general purpose of prohibiting the giving of special privileges and unjust discrimination between individuals occupying the same relative situation towards railroad companies is clear; and if the giving of free passes is repugnant to this general purpose, then it is prohibited, although "passes" are not specifically mentioned, either in the Constitution or the statute. This same mischief existed at the time of the adoption of the Constitution and the passage of the statute; therefore we may indulge the inference that, being within the legitimate scope of the general purpose sought to be effected, the intention was to remedy it. "It is the duty of judges so to construe the act [remedial statute] as to suppress the mischief and advance the remedy. This injunction is simply to carry out the intention of the lawmaker, which is the cardinal aim with reference to all statutes. The intention in statutes which are for this purpose recognized as remedial or enacted *pro bono publico* is more liberally inferred, and to a greater extent dominates the letter, than is admissible in dealing with those which must be strictly construed. . . . Liberal construction is given to suppress the mischief and advance the remedy. For this purpose . . . it is a settled rule to extend the remedy as far as the words

will admit, that everything may be done in virtue of the statute in advancement of the remedy that can be done consistently with any construction." 2 Lewis's Sutherland, Stat. Constr. §§ 583, 606. It is true that there is a penalty attached to the violation of the statute (§ 4337, Rev. Codes), and in this regard it should be construed as are other penal statutes (§ 8096, Rev. Codes); but that portion which seeks to prohibit in general terms unjust discrimination between individuals should be liberally construed, with a view to carrying out the intention of the lawmaking body. A statute may be remedial in one part or purpose and penal in another. *Smith v. Townsend*, 148 U. S. 490-497, 37 L. ed. 533-535, 13 Sup. Ct. Rep. 634.

We conclude, therefore, that the giving of free passes, such as are referred to in this opinion, to the persons we have mentioned as not properly distinguishable by classification from the general public, is prohibited by the Constitution, and also under the penalties mentioned in the statutes above quoted and considered. It therefore follows that the carriage of the plaintiff by the defendant without compensation was an illegal act. The giving of the pass being prohibited by law, it, including the exemption contract on the back thereof, was a nullity.

6. But can this holding avail the plaintiff? Appellant earnestly contends that it cannot, and cites in support of its position the case of *Muldoon v. Seattle City R. Co.* 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995, wherein the court said: "It is maintained . . . that because the Constitution of the state (art. 12, § 20) forbids transportation companies to grant passes to public officers, when that prohibition was violated by the respondent, both the pass and the condition were void, and the parties were placed in the position that the street railroad company was carrying the appellant as though he were an ordinary free passenger, and was subject to its ordinary liabilities in such cases. . . . The appellant received the pass which he knew the corporation had no right to give him, and he availed himself of its privileges, and he ought to be estopped from saying that that which was the very means by which he occupied a place in the respondent's car was unlawfully given him. He was there under the license of the pass, and he cannot be heard to say that his relation to the respondent was any other than that which he voluntarily made it." The cases of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* 1 Tex. Civ. App. 553, 21 S. W. 32 L.R.A. (N.S.)

290, and *Duncan v. Maine C. R. Co.* (C. C.) 113 Fed. 508, are also cited to the same point. In the *Duncan Case* the court said: "Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The consequence, therefore, of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder, and to place him outside of those rules of law which give protection against the mere negligence of the servants of a common carrier."

But, as heretofore pointed out, under our statutes the plaintiff was neither an intruder nor a bare licensee. The defendant, having undertaken to carry him, owed him a certain statutory duty, to wit, to use ordinary care for his safe carriage. We doubt if it can properly be said that the parties were *in pari delicto*. At any rate, the plaintiff did not stand in the same relation to the railway company as would have been the case had the pass been issued to him personally for his own individual use. The courtesy extended was not to John, but to his employer, the St. Louis & San Francisco Railroad Company. He was on business for his company. The pass ran to him as general agent, and he so signed the agreement on the back thereof. It may be presumed that he was not an entirely free agent, but was required to travel on the pass. Under the circumstances, it must have been expected that he would do so. No penalty attached to receiving the pass or the free transportation; while, on the other hand, the act of the defendant was prohibited by law. It may well be considered that by the joint action of the defendant railway company and the St. Louis & San Francisco Railroad Company John was placed in the situation in which he found himself.

But we are able to place our decision on this branch of the case on other and higher grounds. Asserting again that John was a passenger: He was in the care and custody of the defendant. The law declares that no valid contract existed between them. The pass and its conditions were nullities,—in legal effect they had never existed. The duty which a carrier owes to its passengers is founded, not in contractual relation, but in public policy. The preservation of human life and the safety of human limbs are so highly regarded by the law that it has always been its policy to safeguard both when intrusted to the keeping of those who, as was so well said by Mr. Justice Grier, in *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 509, "undertake to convey persons by the powerful but danger-

ous agency of steam." John was in a situation created not by himself, but by the law. The legal relation which he bore to the defendant was created by the law. Being a passenger, he had not the power to place himself as an individual in a legal situation which would leave him outside the pale of those beneficent principles upon which is founded the public policy of the state. We quote from the opinion of the supreme court of North Carolina in the case of McNeill v. Durham & C. R. Co. (on rehearing), 135 N. C. 682, 67 L.R.A. 227, 47 S. E. 765: "The pass, issued in pursuance of an illegal contract, and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as, in its character as a contract, it never had any legal existence. Being without legal existence, it was equally void of legal effect, and, conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. . . . The pass itself being worthless, the conditions on the back thereof could have no application. . . . It is not the unlawful contract for free transportation which renders a railroad company liable to the penalty, but it is the transportation itself. . . . We must bear in mind that while the statute renders absolutely void any contract for free transportation, so that neither party thereto can acquire any rights thereunder, it imposes the penalty only upon the transportation company. The act of free transportation alone is criminal. The party accepting such transportation is not guilty of a criminal act, whatever moral blame may attach to the reception of unlawful favors. Therefore, in contemplation of law, the parties cannot be considered *in pari delicto*. . . . It is often said that one becomes a passenger by virtue of a contract. This is not always so. . . . But it may be said that the law raises an implied contract. Even if we accept that form of expression, it simply means that the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression, and say that those duties and liabilities are imposed by law upon common carriers upon considerations of public policy independent of contract, and arise from the nature of their public employment. . . . One such condition is the inherent liability of the carrier for all injuries proximately resulting from its own negligence or that of its servants. But, as 32 L.R.A. (N.S.)

we have already said, in the case at bar there was no legally existing contract, which is equivalent to saying there was no contract at all." In that case the plaintiff was injured by the negligence of the railroad company while riding on a pass which was void under the statute. On the pass were printed substantially the same conditions of exemption from liability as those we have considered in this case. It was held that plaintiff was a passenger and entitled to recover as such, not being *in pari delicto* with the company in the violation of the law.

7. As has been seen, the trial resulted, on account of the fact that the court held that plaintiff was not a passenger for hire, in a departure from the original theory of his counsel, as evidenced by his complaint; and the court gave to the jury a definition of "gross negligence," which is now claimed by counsel for the appellant to be erroneous. Neither consideration is sufficient to warrant a reversal. It is the policy of the law that immaterial variances between the allegations of a pleading and the proof should be disregarded by the courts unless the adverse party has been misled thereby to his prejudice. The defendant was, upon the record, liable in damages as a matter of law. No attempt was made to rebut the presumption of negligence arising from the fact of derailment. The court might properly have charged the jury that the only disputed questions of fact were the extent of plaintiff's injuries and the amount of damages sustained. See Consolidated Gold & Sapphire Min. Co. v. Struthers, 41 Mont. 565, 111 Pac. 152. As there arose a presumption of ordinary negligence from the fact of derailment, and plaintiff was entitled to recover, regardless of whether he was a passenger for hire or not, without proof of gross negligence, no prejudice could result to the defendant on account of the errors complained of, conceding them to have been such. And, in any event, a technically proper retrial would simply necessitate an amendment of the pleadings, with the same ultimate result. Under such circumstances, a new trial ought not to be ordered.

8. It is claimed that the damages are excessive. At the time of the injury plaintiff was thirty-nine years of age and in perfect health. His salary was \$1,800 per year. He now intermittently suffers from a pain in his head, he sleeps poorly, his right side is partially paralyzed, and he has lost the use of his voice. He testified that at the time of the first manifestation of paralysis he suffered "pain unbearable." One witness said: "He is a physical wreck now." The physicians testified that his injuries were

probably permanent and would eventually cause his death. In view of this evidence, we cannot say that the jury, with whom the matter primarily rested, rendered an excessive verdict.

The judgment and order appealed from are affirmed.

Affirmed.

Brantly, Ch. J., concurs.

Holloway, J., dissenting:

I am unable to agree with the conclusion reached by the majority of the court as announced above. If the pass upon which John was riding at the time he was injured is invalid for any reason, its invalidity must be determined by reference to § 7, art. 15, of the state Constitution, or § 4337, Rev. Codes, or both, for there are not any other provisions of law affecting the question, so far as my investigation discloses.

1. That the Constitution does not forbid a railway company issuing passes or giving free transportation seems to me beyond question. The Constitution declares that all persons shall have equal rights in transportation by common carriers. This does not mean anything more than that the common carrier cannot accept one person as a passenger, and refuse to accept another under like circumstances. The Constitution also declares: "No discrimination in charges . . . for transportation of . . . passengers of the same class shall be made by any railroad . . . company, between persons or places within this state." This does not prohibit discriminations between persons, but only forbids discriminations between persons of the same class. It is a clear recognition of the right of a railroad company, in the absence of any legislation on the subject, to make a classification of passengers and to deal differently with the different classes. There is not now any existing statute by which the legislature has sought to classify passengers; but there are statutes which recognize two distinct classes. Sections 5297, 5298, and 5299, Rev. Codes, refer to passengers without reward, or gratuitous passengers; while §§ 5300-5304 deal with passengers for reward, or passengers who pay fare. If, then, §§ 5297, 5298, and 5299 are in force and effect, it is not unlawful for a railway company to carry some passengers gratuitously. Who, then, are the passengers who may be lawfully carried without reward? The legislature has not designated them. In fact, it has not made any classification of passengers, as it might have done under the Constitution, but has contented itself with the recognition of the two classes above. That the legislature might classify passengers

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and provide that free transportation should not be given the members of one class, and leave the members of the other class free to accept passes, is beyond question. There is not any constitutional prohibition against such legislation, while § 5 of article 15 of the Constitution provides that the legislative assembly shall have power to regulate and control by law the rates for transportation of passengers from one point to another in this state. If the legislature had made such a classification as indicated above, the only question which could be raised would be: Is the classification so far unreasonable as to warrant the courts in holding the statute invalid?

Whether or not any classification is unreasonable depends upon a variety of circumstances. A legislative classification is presumed to be reasonable (*Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250), and the burden of showing that it is unreasonable is upon the person who asserts it (*State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, 1 A. & E. Ann. Cas. 579). If, then, the legislature of Montana had made the classification to which I refer above, and had provided that class A should be composed of the employees of the railways operating in this state, and the employees of other roads which exchange employees' passes with the roads in this state, and class B should comprise all other persons, and that the persons named in class A might be carried gratuitously, but that it should be unlawful for any railway company to give any pass, free transportation, or reduced rate to any member of class B, I am convinced that such a statute could not be successfully attacked on the ground that the classification is unreasonable. While I have not been able to find any decided case directly passing upon just such a statute, a reference to legislation upon the subject will indicate the view quite generally entertained by legislators, and, while legislative interpretation is not binding upon courts, it is at least entitled to very great consideration.

Const. Ala. 1875, art. 14, § 22; Const. Fla. art. 16, § 30; Const. Ill. art. 11, § 15; Const. Miss. art. 7, § 186; and Const. Neb. art. 11, § 7,—are in all essentials substantially alike, and provide that the legislatures of the respective states shall pass laws to prevent unjust discrimination in the rates for passengers traveling on railroads between points within the respective states. Const. Cal. art. 12, § 21, and Const. Wash. art. 12, § 15, provide that no discrimination in charges for transportation shall be made between places or persons by any railroad. Ark. Const. art. 17, § 3, and the Constitution of California above, pro-

vide that a railroad company shall not charge more for carrying any passenger a short distance than is charged for carrying another passenger a longer distance in the same direction. The Constitution of Arkansas also prohibits any unjust discrimination in charges for passengers by any common carrier. The Constitution of Idaho, in article 11, § 6, contains the same provision as that found in the Constitution of Montana in article 15, § 7, above. In every one of these states, excepting Illinois, there is in force a statute forbidding railroads giving passes to certain persons or to persons generally, with designated exceptions. Alabama permits passes to be given to railroad commissioners and their employees, to the officers of the Y. M. C. A., to the employees of the particular railroad issuing the passes, and to the employees of another road with which the first has exchanged employees' passes. A few other classes of persons are also excepted from the operation of the general antipass statute. Ala. Code 1907, §§ 7691, 7692. In Arkansas the statute first forbade railroads giving passes to any public officer. In 1895 this was amended so as to permit sheriffs to accept passes, and in 1903 it was again amended to permit the superintendent of public instruction to accept passes. Kirby's Dig. (Ark.) §§ 6694-6699. In California the statute only prohibits passes being given to state officers. Laws 1909, chap. 312. In Florida the provisions of the antipass law extend only to members of the legislature, salaried officers of the state, and to delegates to political conventions. Gen. Stat. 1906, §§ 3634-3636. In Idaho the antipass law reaches only to members of the legislature, members of the judiciary, to certain designated executive officers of the state, and to certain county officers. Laws (Idaho) 1909, p. 296. In Mississippi many classes of persons are excepted from the provisions of the general antipass statute, including the employees of the particular road issuing the passes, and the employees of another road with which the first one exchanges passes for employees, officers, etc. Passes are forbidden to certain public officers, to candidates for office, and to members of political committees, but are required to be furnished to the members and the secretary of the railroad commission, who can use them, however, only when traveling on official business. Miss. Code 1906, §§ 1306, 3727, 4844, 4850, and 4873. In Nebraska the antipass law excepts from its provisions several classes of persons, and permits passes to be given to the employees of the particular road issuing them, and to the employees of another road with which the first one ex-

changes employees' passes. Cobbey's Anno. Stat. (Neb.) 1907, § 10,664. In Washington the statute forbids any unjust discrimination in rates charged passengers by any railroad company, but from its provisions are excepted a number of classes to the members of which free transportation or reduced rates may be given. Among the classes are ministers of the Gospel, inmates of hospitals, students going to and returning from schools within the state, employees of the roads and their families, employees in search of work, and the families of employees killed while in the service of the roads. Rem. & Bal. Code (Wash.) 1900, § 8641. In Illinois they do not seem to have any antipass laws, but recognize the right of the roads to issue passes, for they have a statute making it a crime to fraudulently use or sell a pass. Starr & C. Anno. Stat. Supp. (Ill.) 1902, p. 408, ¶ 103.

The act of Congress of June 29, 1906, known as the "Hepburn bill," prohibits railroads engaged in interstate commerce from giving any pass, free ticket, or free transportation to any passengers except to certain classes of persons enumerated, and among the classes to the members of which passes may be given are included the employees of the road issuing the passes and their families, and the employees of other roads with which the first road exchanges employees' passes. Act June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149. Other states having antipass laws make similar exceptions.

I have not been able to find that the constitutionality of any of these statutes has ever been tested in the courts. Apparently, the right of the several legislative bodies to make the classifications of passengers disclosed in the statutes has never been questioned. Many of these laws have been in force for years, and their very existence is evidence of the fact that in making the classifications the several legislative bodies considered the classifications reasonable. If the legislature can thus classify passengers, and in one class include the employees of the particular road issuing the passes and also the employees of another road with which the first one exchanges passes for employees, and if such classification is reasonable when made by the legislature, it is not less reasonable when made by a railroad company itself, in the absence of legislative classification.

While our Codes recognize two classes of passengers,—gratuitous passengers, and (2) passengers who pay fare,—they do not designate the particular persons who shall compose either class. But if §§ 5297, 5298, and 5299, Rev. Codes, above, have any force or effect whatever, there are gratuitous pas-

sengers, or passengers who may lawfully be carried free by the railroads from point to point within this state.

If the legislation in any of the states referred to above, or the legislation by the Congress of the United States, is valid, then the legislature of Montana was clearly within its right and exercising legitimate legislative functions, when, in 1895, it enacted § 908 of the Civil Code, prohibiting the railroads from giving passes to any members of the legislative, executive, or judicial departments of this state. For the same reason our legislature might properly enact a general antipass law and except from its provisions the employees of every railroad in this state, and also the employees of any other road which exchanges employees' passes with the roads operating in this state. If the legislature can make this classification, then I insist that, in the absence of such legislation, the railroads themselves can make it.

At the time of his injury, John was employed by the St. Louis & San Francisco Railroad Company, a company which exchanged employees' passes with the Northern Pacific Railway Company, and John was riding upon his employees' exchange pass. In putting the employees of the St. Louis & San Francisco road in a class, in issuing passes to them,—to John among the rest,—I insist that the Northern Pacific Company was not guilty of any unjust discrimination between persons of the same class; that the pass John used was not unlawfully issued; that its use by him was not forbidden by the Constitution or the laws of this state; that he was bound by the contract indorsed on the pass; that it was incumbent upon him to show something more than ordinary negligence on the part of the railway company; and, as he failed to do so, he is not entitled to recover upon the record presented here.

2. Section 4337, Rev. Codes, does not prohibit the giving of passes or the free transportation of passengers. It only prohibits a railway company from charging one person more than it charges another person for the same class of ticket. This section is § 7 of an act entitled, "An Act to Regulate the Sale and Redemption of Transportation Tickets of Common Carriers," approved March 13, 1893, and carried forward into the Revised Codes, as § 4337, above. The act was popularly known as the "anticscalper act," and was designed to deal with the evil of the so-called "scalpers' tickets." There is not a suggestion in the act anywhere that it was meant to prohibit the giving of passes or free transportation, and, since it is a highly penal statute, it should be construed according to the fair import of 32 L.R.A. (N.S.)

its terms. In other words, if the legislature intended that it should prohibit the giving of free passes or free transportation, then such intention should be carried into effect; but, unless such intention can be gathered from the language employed, its terms should not be extended by implication, and thereby the street and steam railroads of this state held liable for the payment of a heavy fine for every passenger carried on a pass or gratuitously from point to point within this state within the last year. It is a cardinal rule of interpretation of statutes that the intention of the legislature in enacting them shall be ascertained, if possible, and when ascertained, shall be given force and effect. To my mind there is not anything in the anticscalpers' act to indicate that the legislature intended to prohibit the giving of passes, while there are surrounding it circumstances which tend strongly to indicate that such was not the intention. Two years after the anticscalpers' act was passed, the legislature enacted what are now §§ 5297, 5298, and 5299 above,—all dealing with the subject of carriage of passengers without reward. These are general provisions applicable to common carriers of passengers. Now, if § 4337 was intended to prevent the free transportation of a person by a common carrier, then the legislature simply made itself ridiculous by enacting §§ 5297, 5298, and 5299. At the same time (1895) the legislature also passed § 908 of the Civil Code of 1895, which, among other things, provides: "If any railroad corporation within this state . . . shall give to any member of the legislative, executive, or judicial department of this state any ticket, pass, or privilege other than is given to other patrons of its road generally . . . [it], shall be deemed guilty of a misdemeanor." etc. This section remained upon the statutes until 1903, when it was amended by eliminating the provision prohibiting the giving of passes. By an act approved February 26, 1907 (Laws 1907, chap. 37), the legislature provided that free transportation shall be furnished the railroad commissioners and their official employees when traveling on official business (Rev. Codes, § 4369). These statutes are cited for two purposes only: (a) To show that the legislature recognized the fact that it is not unlawful for a common carrier to transport some passengers gratuitously; and (b) to demonstrate that, when the legislature intended to prohibit the giving of passes, it was able to command language by which to express its intention,—language so plain and forceful as to leave no doubt as to its meaning.

Of course, it is the giving of free transportation, not the piece of cardboard called

a pass, against which publicists have inveighed. If, then, the giving of passes or free transportation was prohibited altogether by § 4337 above, it follows as a matter of course that there cannot be any such thing known to the law as a passenger without reward or gratuitous passenger, for the legislature did not enact §§ 5297, 5298, and 5299 for the benefit of those people only who violate § 4337. If the giving of free transportation is prohibited at all by § 4337, it is prohibited altogether, except to the members and employees of the railroad commission, and a railway company is guilty of a crime in carrying one of its own employees as a free passenger. If it could be said that the sections of the Code dealing with gratuitous passengers were superseded by the antiscalpners' act of 1893, carried forward by the omnibus bill (Pol. Code 1895, p. 468), then we do not have any statutes defining the duty of a carrier to a gratuitous passenger, and we do not need any, for the reason that it is impossible in the eye of the law for anyone to be a gratuitous passenger, if the antiscalpners' act prohibits the giving of free transportation altogether.

If the sections dealing with gratuitous passengers were superseded by the antiscalpners' act, then John was not a gratuitous passenger, and he was not a passenger for hire, for he did not pay, or offer to pay, or intend to pay, any fare.

As was said before, § 4337 only prohibits a railway company from charging one person more than it charges another person for a ticket of the same class. The courts of this state cannot take judicial notice of the different classes of tickets issued or used by any railway company. Section 7888, Rev. Codes, enumerates the facts of which courts may take judicial notice, and the different classes of railroad tickets is not one of them. We have held repeatedly that the courts cannot enlarge the provisions of § 7888, but are restricted by its terms. *McKnight v. Oregon Short Line R. Co.* 33 Mont. 42, 82 Pac. 662; *Bowen v. Webb*, 34 Mont. 65, 85 Pac. 740. There is not any evidence in this record upon the subject of the different classes of tickets issued by the Northern Pacific Railway Company; and, as § 4337 deals only with different classes of tickets, it cannot have any bearing upon this case. In the absence of evidence, it is impossible to say that the pass upon which John traveled was in effect a first-class ticket, or a second-class ticket, or that it belonged to any class other than a class *sui generis*,—the class of gratuitous passes,—and there is not a word in this record to show that this pass was given to John upon any different terms or conditions

than attached to every other gratuitous pass issued by the Northern Pacific Railway Company.

While the act of 1907 above would seem to indicate that there is not any public sentiment against the use of passes by public officers, yet, assuming that there is, the same reason for the existence of that sentiment is absent when the holder of the pass is an employee of the road issuing it, or an employee of another road with which the first road exchanges employees' passes. John is not a public officer, but is an employee of another road with which the Northern Pacific exchanges employees' passes; and at the time he was injured he was using his employees' pass.

3. In *State v. Southern R. Co.* 122 N. C. 1052, 41 L.R.A. 246, 30 S. E. 133, cited in the majority opinion, the statute there considered prohibits discrimination by the railroads as between persons for services rendered "under substantially similar circumstances and conditions." The court says in the opinion that the crucial point in the case arises from the contention of counsel for the railway company that the services rendered Grant, the legislator who was riding on a pass, and the services rendered other passengers who were compelled to pay full fare, were not necessarily rendered under "substantially similar circumstances and conditions;" but, as the only difference which counsel could show in the circumstances and conditions of Grant and the paid passenger was that Grant was a member of the legislature and the paid passenger was not, the court very readily reached the conclusion that such a distinction did not take Grant out of the prohibited class, that the legislature never intended to divide the people of North Carolina into two classes, one composed of office holders and influential persons, and the other composed of the rest of her citizenship, and permit the members of the first class to be carried free, while the members of the second were required to pay full tariff rates. But had the North Carolina court been considering the case of *Terry A. John*, riding over the Southern Railway in North Carolina on a pass such as the one he was using at the time of his injury,—that is, a pass given him by the Southern Railway Company as an exchange pass for an employee of the St. Louis & San Francisco Road,—it would have reached exactly the opposite conclusion from the one it did, for the reason that the statute of North Carolina, considered in that case, make it lawful for a railway company to give passes to its own employees or to the employees of another road with which the first road exchanges employees' passes.

But the decision of the North Carolina court cannot have any application to this case for another reason. The statute of North Carolina considered in that case is entitled: "An Act to Provide for the General Supervision of Railroads, Steamboats, or Canal Companies, Express and Telegraph Companies, Doing Business in the State of North Carolina," approved March 5, 1891. It provides for the creation of a railroad commission and defines its duties and powers. It then prohibits unjust discrimination between persons and defines what is meant by "unjust discrimination." Then, as if to emphasize the intention of the legislature in enacting the statute, to prohibit the giving of passes or free transportation except in certain cases, the act, in § 25, enumerates three certain classes of persons who are exempted from its provisions. Class 1 includes destitute and homeless persons transported by charitable societies, and the agents of such societies while engaged in such transportation. Class 2 includes ministers of religion, destitute persons when transported by municipal governments, inmates of homes for disabled soldiers, and inmates of soldiers' and sailors' orphan homes. And class 3 includes railway employees. To class 1 free transportation may be given. To class 2 reduced rates only may be given. While, as to class 3, the act provides: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees." The supreme court of North Carolina, in applying this statute to the case of Grant, the legislator who was carried by the railway company gratuitously upon a pass, said: "The question presented for our decision is: Does the act prohibit and make indictable the giving of free transportation to passengers by common carriers? Upon its face clearly it does not in all cases, because in § 25 the giving of such free transportation, or transportation at reduced rates, to certain classes of persons therein particularly specified, is allowed; but the person who received free transportation in this case did not come within either of the exceptions of the statute." And then held that, in thus carrying Grant upon a pass, the railway company was guilty of unjust discrimination as defined in § 4 of the act; and with that decision I agree fully, but I insist that it cannot be applied to the facts of this case, for I fail to perceive any resemblance what-

ever between the North Carolina statute and § 4337 of our Revised Codes, above.

4. The complaint alleges that John was a passenger for hire. This allegation is denied in the answer. Upon the trial, counsel for the railway company took the position that, if the evidence failed to show that John was a passenger for hire, the result would be such a variance between the pleading and proof as to amount to a failure of proof. This view was urged upon the trial court in a motion for a directed verdict and also in a requested instruction, No. 7. The court denied the motion and refused to give the requested instruction, but gave instruction No. 4, in which the jury was told that John was riding gratuitously upon his pass. Instruction No. 4 must correctly represent the views of the trial court. It must be held to represent the views of both parties, for neither objected to it. Under such circumstances, the court should have directed a verdict for the defendant, for an allegation that John was a passenger for hire is not sustained by proof that he was a gratuitous passenger. In *Schuyler v. Southern P. Co.* — Utah, —, on rehearing, 109 Pac. 464, it is said: "If the duties imposed by law for the carriage of a passenger for hire were other than or different from those imposed for the carriage of a gratuitous passenger, or if a different of higher degree of care was required in the one than in the other, it can readily be seen that no recovery could be had under an averment that the injured person was a passenger for hire on proof that he was a mere gratuitous passenger." The language is particularly applicable here, for our Codes do make a distinction between the duty which the carrier owes to the gratuitous passenger and the duty which it owes to the passenger for hire. Sections 5299 and 5300, Rev. Codes, above.

It is a part of the history of this state that since 1903 repeated efforts have been made to have the legislature of this state enact some kind of an antipass statute,— a statute that will at least prohibit public officers from being carried gratuitously. These efforts have all failed, for reasons which appealed to the members of the legislature as sufficiently cogent. However desirable it may be that such legislation be had, I insist that it shall be enacted by the legislature, in terms which will disclose the intention so plainly that there will not be left any room for a difference of opinion as to what is meant; and, until that is done, I insist that there is not any legislation in this state upon the subject, and that any man who accepts the benefit of a pass,

as John did, shall likewise bear the burden which it imposes, and to which he assents when he signs his name to the contract indorsed on the back.

A motion for rehearing having been filed, Smith, J., on November 10, 1910, handed down the following response:

The appellant in this case has filed a motion, supplemented by a printed argument, for a rehearing. We are satisfied with the correctness of the conclusions heretofore announced. However, it is stated in the printed argument that the former decision suggests certain questions which should be answered in order to clear up any uncertainty as to the rights of the appellant and other railroad companies, in the matter of free transportation or reduced rates.

We are unable to answer some of the questions propounded because of the fact that they do not affect the public, but only the railway companies themselves; and we are not sufficiently advised as to the circumstances attendant upon the particular cases instanced. Other questions, however, involve matters of common and everyday knowledge as to the conditions surrounding the persons mentioned; and we have no hesitancy in holding that a railroad company may lawfully issue free transportation, or sell tickets at reduced rates, as the case may warrant, to the following classes of persons: (1) Employees of the issuing road, and the members of their families. (2) Doctors, nurses, and helpers being hurried to wrecks. (3) Soldiers and sailors going to or coming from institutions for their keeping. (4) Ministers of religion and persons engaged in charitable and religious work. Members and employees of the Railroad Commission should be allowed to ride free only when traveling on official business. Section 4369, Rev. Codes, so provides. The state and the railroad companies are alike interested in the speedy physical inspection of the subject-matter of investigation by such officers. When on private business, they should pay fare. See § 4394, Rev. Codes. No reason exists why children, and persons who, by reason of physical defects, injuries, or deformities, or other misfortune, are unable to compete with mankind in general, should not be placed in classes by themselves and carried free or at reduced rates.

The motion for a rehearing is denied.

Brantly, Ch. J., concurs.

Holloway, J., having dissented from the original opinion, takes no part in this.

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UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

RE JAMES LINGAFELTER, Bankrupt.

JOSEPH N. PUGH, Receiver of Homestead Building & Savings Company,

v.

JAMES F. LINGAFELTER.

(104 C. C. A. 38, 181 Fed. 24.)

Dower — release — setting aside instrument — effect.

A release of dower cannot be enforced after the instrument embodying it, which was given to secure the debt of the husband alone, has been set aside in a bankruptcy proceeding against him, as a voidable preference under the bankruptcy act.

(June 7, 1910.)

Note. — Right to dower upon avoidance of conveyance as against creditors.

Where the legal title is never in husband during coverture.

Upon the theory that the husband had no seisin during coverture, it has been held that the wife is not entitled to dower in lands conveyed by the husband before the marriage, although the conveyance is void as against his creditors. *Whithed v. Mallory*, 4 Cush. 138; *Adkins v. Adkins* (Tenn.) 52 S. W. 728.

While, for most purposes, the results of the avoidance by the husband's creditors of a conveyance which he fraudulently procured to be made to a third person, the legal title never having vested in him, are the same as those of the avoidance of his conveyance of property in which he held the legal title, the fact that in the first situation there never was any seisin by the husband presents a difficulty in establishing the wife's right of dower that does not exist in the second.

Thus, it has been held that where the purchaser of land causes the title to be taken in the name of a third person who, after the former's marriage conveys to the wife and the children, and thereafter the deeds to and from such third person are set aside as a fraud upon the husband's creditors, the wife cannot maintain a suit for dower against a purchaser at a sale ordered for their benefit, for the reason that the husband was never seised thereof during coverture. *Gross v. Lange*, 70 Mo. 45. The court said that the avoidance of the conveyance gave the wife no additional right to dower, since the property did not thereupon become assets of the husband's estate, and that the avoidance did not affect the conveyance as against the grantee, and that he was entitled to any residue after the creditors were satisfied.

The case of *King v. King*, 61 Ala. 479, also denies the right of the wife to claim dower in proceedings instituted by her upon the ground that the conveyances were in

PETITION by the receiver of the mortgagee for a revision of a decree of the District Court of the United States for the Eastern Division of the Southern District of Ohio, in bankruptcy, restoring to the wife of the bankrupt mortgagor her right of dower in the mortgaged property. Affirmed.

The facts are stated in the opinion.

SATER, District Judge, delivered the following opinion:

A mortgage given by the bankrupt to secure his valid pre-existing debt, in which his wife released her inchoate right of dower in the premises conveyed, was heretofore in these proceedings voided as against his creditors. Thereafter the trustee in bankruptcy sold the bankrupt's real es-

tate. The wife prayed the computation and payment to her in cash of the value of her dower right. The Homestead Building & Savings Company, the mortgagee, asked that the value of her dower be paid to it. The referee found in its favor. The bankrupt's estate is hopelessly insolvent.

Bigelow on Frauds, vol. 1, p. 253, and vol. 2, p. 67, holds that, because a conveyance in fraud of creditors, though it be without consideration, is good as between the grantor and grantee, the wife's release of dower, if she is not also a victim of the fraud, remains good against her in favor of the grantee, although the conveyance be voided as against the husband's creditors, and all of the estate, except the wife's dower, be

fraud of creditors, where it appeared that no objection had been raised by the creditors, and that the land in controversy had been purchased by the husband, but the title thereto was taken in the name of third persons in trust for his children. The court said that there was neither an equitable nor a legal estate in the husband out of which dower could be carved, and also said, at another point in its opinion, that although the conveyances might have been voidable by creditors, they were not voidable by the husband, and that there was no use or equity in the husband in which the wife was dowable.

And in *Miller v. Wilson*, 15 Ohio, 108, it was held that where one purchased land and procured it to be conveyed to his children in whose name the title stood at the time of his death, such conveyance, although void as to creditors, vested a legal estate of inheritance in the children, and was incontrovertible by him, and that therefore he had neither the seisin of, nor the equitable interest in, the property during coverture, which by statute would entitle his wife to dower, and that therefore she was not entitled to claim dower as against creditors seeking to avoid the conveyance.

It is held in *Mann v. Edson*, 39 Me. 25, that a purchaser of land who, in fraud of his creditors, causes it to be conveyed to a third person from whom he accepts a lease, has no such seisin as entitles his wife to dower. A recital in this case discloses that it was the wife herself who asserted the fraud upon the creditors and the court said that even though the deed was void as against creditors, it was valid as between the husband and the nominal grantee, and that therefore the wife was not entitled to assail it.

In *Efland v. Efland*, 96 N. C. 488, 1 S. E. 858, it was held that, as to a tract of land purchased and paid for by the husband, but taken in the name of his son at the former's direction, and to the detriment of his creditors, the wife was not entitled to maintain a suit for dower against the son, for the reason that, although the husband was in possession of the land after it was 32 L.R.A. (N.S.)

taken in the name of the son, he was not seised thereof so as to entitle her to dower. But it was held that, as to a tract of land of which the husband was seised during his lifetime, and which was sold under execution against him, and purchased with his money and for his benefit, the title being taken in the name of his daughter to the prejudice of his creditors, the wife was entitled to maintain her suit against the daughter. It is to be inferred that the ground of the latter part of this decision is that the sale under execution against the husband did not operate to deprive the wife of dower in the first instance, and if this is so the fact that the transaction was held fraudulent as against creditors is of little importance in this case.

So, it has been held that where the conveyance was made to the wife, and it did not appear that there was any seisin in the husband or in any other person to his use, she would not be allowed dower after the avoidance of the conveyance to her, in proceedings by creditors instituted upon the ground that the property was purchased with the husband's money and the conveyance to the wife was in fraud of their rights. *Grant v. Sutton*, 2 Va. Dec. 149, 22 S. E. 490.

On the other hand, it was held in *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155, that where the wife took title to property purchased with the husband's money, in fraud of his creditors, she would be declared a trustee for the husband for the benefit of creditors, and that, as no actual fraud was imputed to the wife, her interest in the property as against the husband's creditors would be secured to her to the extent of the value of her dower in case the title had been vested in the husband, subject, however, to encumbrances created voluntarily by herself.

Where, however, the husband is seised during coverture, but a conveyance is made by which the grantee is vested with the dower right in the first instance, the question is presented as to the effect upon the dower right of the avoidance of the conveyance as a fraud upon creditors. This

taken by them to satisfy their claims. The view there expressed is that, having solemnly parted with her interest in the estate conveyed by her husband, her release operates as an estoppel, though not as a grant. The author concedes that courts have not hesitated to hold to the contrary, and that, while *Woodworth v. Paige*, 5 Ohio St. 70, on which the savings company relies, does not decide the point, the inclination of the court was toward the widow's right to her dower. The direct question at issue in that case was whether or not a wife, who, in a deed executed and delivered without any consideration and to defraud creditors, releases dower, is thereby estopped to claim against a purchaser for a valuable consideration from the fraudulent grantee. Judge

Thurman in his opinion said: "It would seem obvious that, if the deed of the husband and wife was executed for a sufficient consideration, and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies."

Considering all that is disclosed by the statement of facts and the opinion, the above-quoted passage rests, in my judgment, on the assumption and fact that the deed had not been set aside. If this be incorrect, the utterance is *obiter dictum*, because there was no issue involved in that case which called for an expression of opinion as to whether or not a wife who has joined her husband in a fraudulent conveyance by releasing her inchoate right of dower

question may perhaps be termed a triangular one, since it may involve the right to claim the portion representing the dower, as between (1) creditors and grantee, (2) wife and creditors, and (3) wife and grantee. It has been found that few of the cases expressly treat all three aspects of this question. For a case involving the right as between creditors and grantee, see *Lockett v. James*, *infra*, under "Right as between wife and grantee."

Right as between wife and creditors or purchasers or privies—generally.

The case of *Bond v. Bond*, 16 Lea, 306, involved a statute which provided that the widow should be dowerable in land of which the husband died seised or was the equitable owner, and this statute was made the basis of a distinction of the cases holding the wife dowerable in land conveyed in fraud of creditors, it being held that the wife was not entitled to an award of dower in a suit against her and others, brought by creditors after the husband's death, to avoid a conveyance by the husband to her for life, remainder to their children. The court pointed out that the husband, at the time of his death, had neither a legal nor an equitable estate in the land, and that, while the deed was void as to creditors, it was valid and subsisting as between the parties. It should also be noted that the case does not yield a fair inference that if the creditors had set aside the deed before the husband's death, the decision of the court with respect to dower would have been any different. In *Hopkins v. Bryant*, 85 Tenn. 520, 3 S. W. 827, the same statute is relied upon, and it is held that the wife cannot maintain a bill for dower against a creditor who purchased at a sale for his benefit, in proceedings to avoid a conveyance of the land by the husband to the wife. In this case the bill to set aside the conveyance was filed before the husband's death, but the decree of avoidance was not rendered until after he died.

The two cases just cited are exceptions because of the statute controlling them. 32 L.R.A. (N.S.)

It will be noted that under that statute the wife is dowerable only in land of which the husband died seised or was the equitable owner, whereas, apparently, in most jurisdictions the wife is dowerable in lands of which he was seised during coverture.

In *Woodworth v. Paige*, 5 Ohio St. 70, the court makes reference to the unreported case of *Winship v. Lamberton*, previously decided by it, and says that it was therein held that the wife was entitled to dower in land in the conveyance of which she had joined the husband in fraud of creditors, as against one who claimed under execution purchasers, upon whose bill the conveyance had been avoided, it being pointed out that the defendant was claiming not under, but in opposition to, the fraudulent conveyance.

So, it has been held that since the wife is a party to the deed only for the purpose of releasing her dower, and the dower right is inseparable from the principal estate, when the deed becomes inoperative as against creditors to convey the estate of the husband, it becomes inoperative to release or bar her right to dower. *Frederick v. Emig*, 186 Ill. 319, 58 Am. St. Rep. 283, 57 N. E. 883. In this case the husband and wife conveyed the property to a third person who immediately reconveyed to the wife, and these conveyances were set aside as in fraud of creditors, and the wife brought suit for dower against the purchaser at the sale for the benefit of creditors. The question as to the merger of dower in the principal estate, by reason of the conveyance by the third person to the wife, seems to have been raised neither in this case nor in *Jefferson v. Jefferson*, 90 Ill. 551, holding that a conveyance by a husband and wife to a third person who immediately reconveyed to the wife, such conveyances being held inoperative as against the plaintiff, to whom the husband had previously contracted to convey the premises, did not operate to cut off the wife's right of dower, and that a decree against the wife for the conveyance of the lands to the plaintiff should protect her right of dower.

As an example of cases involving the

er may assert such right against the fraudulent grantee, in case the conveyance is voided and the premises thereafter sold to pay creditors. *Munger v. Perkins*, 62 Wis. 499, 503, 22 N. W. 511, 512, cites, among other authorities, *Woodworth v. Paige*, to sustain the point that "the joining with the husband in his conveyance is but a release by the wife of a contingent future right, and operates against her by way of estoppel. 'And inasmuch as the release of dower, to be operative, must be in conjunction with the conveyance or other instrument which transfers title to the real estate, it follows that if the conveyance or instrument is voided, or ceases for any reason to operate, and no title has passed, or none remained, the release of dower does not

after that operate against the wife, and she is again clothed with the right which she had released.' [*Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335]."

In *Black v. Kuhlman*, 30 Ohio St. 196, it appears that the husband had given two mortgages in which the wife had not joined. He gave a third mortgage in which she released her contingent right of dower. In foreclosure proceedings the property was sold, and the third mortgagee was, on distribution, awarded the money value of the wife's contingent dower interest, although the proceeds of the sale were insufficient to satisfy in full the two preceding mortgages, executed by the husband alone. This case is claimed to be analogous to and decisive of the case at bar. The answer is that the

question whether a conveyance to the wife in lieu of dower in other property, which is attacked as fraudulent against creditors, should be disturbed so far as it does not exceed the value of dower, attention is directed to *Quarles v. Lacy*, 4 Mumf. 251; *Blanton v. Taylor*, *Gilmer* (Va.) 209, which answer the question in the negative.

In *Hyatt v. Dusenbury*, 12 N. Y. Civ. Proc. Rep. 152, there was merely a direction that a judgment setting aside a mortgage as a fraud upon the husband's creditors, and directing a sale of the land, should be made subject to the dower right. It appeared in this case that the land was deeded to the wife and that the mortgage set aside was executed by her.

So, it has been held that, as against creditors avoiding the conveyance, the court may make provision for the dower right. *Wilkinson v. Paddock*, 57 Hun, 191, 11 N. Y. Supp. 442, affirmed in 125 N. Y. 748, 27 N. E. 407. This result has been reached upon the theory that after the conveyance by the husband and wife has been avoided, there is no estate left in the grantee, upon which the relinquishment of dower can operate. *Bohannon v. Combs*, 97 Mo. 446, 10 Am. St. Rep. 328, 11 S. W. 232; *Horton v. Kelly*, 40 Minn. 193, 41 N. W. 1031.

This, also, was the theory in *Robinson v. Bates*, 3 Met. 40, where the wife was allowed to maintain a writ of dower against the husband's assignee in bankruptcy, who had avoided the conveyance.

A distinction was made in *Hoppin v. Hoppin*, 96 Ill. 265, where the decree did not set aside, but subjected to all debts, deeds of trust and a mortgage executed by the widow, who was in fact administratrix of her husband's estate, to and for the benefit of certain persons who had advanced money to her for the payment of debts held against the estate, and the trustee in the deeds became a purchaser for the benefit of the creditors intended to be secured by the execution of the instruments. It was held that the decree and the sale under it did not operate to render nugatory the deeds of trust and mortgage, so as to ren-

der them inoperative as a bar on the wife's dower, the court saying that the result was merely to deny the conveyances their full intended effect as exclusive security for particular creditors. There was another feature of the case which the court said was conclusive against the claim for dower. It was held that the widow was estopped by the covenant of warranty in the conveyances by herself and the heirs, from claiming dower as against the grantees and those claiming under them. It will be observed that the answer to the inquiry whether there is any difference so far as practical results are concerned between the setting aside of a conveyance as in fraud of creditors, and the ordering that a conveyance to certain creditors shall not be held solely for their benefit, but for the benefit for all creditors alike, will determine the value of the distinction upon which the result of this case is made largely dependent.

A case somewhat similar to that just cited is *Cantrill v. Risk*, 7 Bush, 160, where it appeared that the husband's conveyance, in which the wife joined, had been adjudged to be within the operation of a statute providing that certain assignments should inure to the benefit of the assignor's creditors. The decree ordering the sale of the land for distribution under that statute pronounced the conveyance void, and the parties to it reinstated to the position which they occupied before it was made. The court held that the latter portion of the decree was *obiter dictum*, for the reason that there was no authority for making such decree, and that the legal effect of the judgment was that the conveyance was valid and binding as an assignment to all creditors, and that for this reason it did not restore the right of dower, which had been alienated by it. It will be observed that the statute referred to does not provide for the avoidance of the conveyance, but provides rather for its subsistence, inferentially at least, by the provision that it shall inure to the benefit of all creditors. Of course, the question whether, if the deed had been set aside by the creditors for as-

third mortgage was not void and had not been so declared. The default decree, on which the property was sold, was based on it as a valid subsisting mortgage. The mortgagee was, and in fact remained, the husband's bona fide grantee in the conditional conveyance. In the present case, the title to the bankrupt's real estate was in the trustee in bankruptcy at the time the mortgage was voided. The title passed from him to the purchaser by the sale conducted under the bankrupt act, and, had the wife not waived her contingent right of dower and asked to be paid its money value, the purchaser would have taken the title encumbered by it. *Ridgway v. Mastling*, 23 Ohio St. 294, 13 Am. Rep. 251. The savings company was adjudged to have ac-

quired its lien or conditional conveyance wrongfully. The position of grantee is not occupied by it, but by the purchaser at the trustee's sale. It is not entitled to the value of her dower interest, because no one can avail himself of a wife's release of dower other than the person who claims under the very title which was created by the conveyance with which the release was joined, and, if the conveyance is set aside, a grantee cannot retain the dower interest of the grantor's wife. *Bump*, Fraud. Conv. §§ 478, 637.

Light is thrown on the point here in issue by *Lockett v. James*, 8 Bush, 28. The husband and wife executed a conveyance to *Lockett*, which was set aside because in fraud of the husband's creditors. The wife,

tual fraud, the right of dower would have revived, is left open by this case, as well as in *Hoppin v. Hoppin*, supra.

For a case which, although somewhat analogous, is not strictly within the scope of this note, and which illustrates the length to which the courts sometimes go in upholding the dower right, attention is directed to *Taylor v. Fowler*, 18 Ohio, 567, 51 Am. Dec. 469, holding that where, after a considerable delay in selling land under the foreclosure of a mortgage given by a husband in which the wife joined to relinquish dower, a subsequent judgment creditor caused the land to be sold on execution upon his judgment, the wife was entitled to dower as against the purchaser at the execution sale, notwithstanding the court, upon confirmation of the sale, directed that the mortgage first be paid out of the proceeds. The court, while conceding that the wife would have been barred of dower if the sale had been made under the mortgage, held that the order in the execution proceedings, directing that the mortgage first be paid out of the proceeds, was insufficient to bar this right. While it is not absolutely clear in this case whether the court intended to hold that the computation of the dower claim to be asserted against the execution purchaser was to be made upon the basis of the entire estate, or upon the basis of the residue after payment of the mortgage debt as directed, it is to be gathered from the opinion of the court, as well as from a strong dissenting opinion, that the wife was regarded as entitled to dower in the entire fund.

But for the theory in some of the foregoing cases, that, upon the avoidance of the conveyance, there is no estate left in the grantee upon which the relinquishment of dower can operate, one might raise a query whether, in the mind of the court, a decree in favor of the wife was justified upon that ground, or upon the ground that, as the creditors are not entitled to claim the dower right, it may be saved to the wife without prejudice to the grantee afterward to claim it from her. In either event, the cases negative that any right thereto

exists in the creditors. This query may well be raised in respect of the following cases, upholding the right of the wife to assert dower against the creditors or their representatives or privies:

—affirmative rights of wife.

See also supra, *Gross v. Lange*; *Bond v. Bond*; *Hopkins v. Bryant*; *Frederick v. Emig*; and *Robinson v. Bates*.

Without discussing the question, the court in *Meyer v. Mohr*, 1 Robt. 333, held that the wife, by joining in her husband's fraudulent conveyance to one who transferred the property to her, thereby divested herself of her inchoate right of dower. This case, however, was in effect overruled in *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335, where the court held that where the husband's deed was set aside by a receiver on behalf of creditors, the wife was not, by reason of her having joined therein, estopped to bring an action for dower against one claiming through the receiver. The court said: "The third ground taken by the defendant is that, by joining with her husband in the conveyance to *Malloney*, the plaintiff released all her right of dower in the premises. And though it is suggested, in answer thereto, that, the deed having been declared void as against the creditors of the husband, and adjudged to be canceled of record, thereby the title is restored to the husband and the right of dower may again arise; it is replied to this, that a deed, though fraudulent as against third persons, and subject to be set aside as void therefor, is yet good and valid as between the fraudulent parties to it, and that the fee of the lands has passed by it, so that the grantor cannot call it back. And if the grantor, the husband, cannot recall the fee, and it has passed from him, then, as it is claimed, has the wife, by joining in the conveyance, effectually and forever released her right of dower. If it should be conceded that the wife by such act has effectually released her right of dower to the fraudulent grantee and his assigns, it is not yet determined

as in this case, was not liable for any of his debts, nor was she a party to the suit. Lockett defended, claiming the lands as a bona fide purchaser. The proceeds, including the value of the wife's contingent dower right, was, by the trial court, awarded to creditors. Lockett claimed that though the deed of the husband and wife to him had been adjudged fraudulent and void as against creditors, and for that reason only had been annulled as to him, it was nevertheless effectual as a conveyance to him of the wife's dower interest. On that point (the husband having died), it was said that "The absolute invalidity of the deed as a conveyance of the legal title being judicially established and admitted, we are of the opinion that, upon its avoidance at the in-

stance of the creditors, . . . it was no longer effectual, as between the appellant and the surviving widow, as a bar to her right of dower, either as a conveyance or an estoppel. 1 Scribner, Dower, 610; 1 Washb. Real Prop. 213; Robinson v. Bates, 3 Met. 40."

This is in accord with the *per curiam* in Ridgway v. Masting, supra. A fraudulent mortgage and deed in which the wife had released her inchoate right of dower had been set aside in a proceeding to which the wife was not a party. The premises were, by order of court, conveyed to the defrauded party; but there was no release of dower. It was held that, because the fraudulent instruments had been declared void, the plaintiff took no title from the hus-

that she is debarred of her right, as against one claiming the premises from a source other than him or them, and indeed in hostility to him and to them. For what is the effect and operation of a release by a wife of her inchoate right of dower? She cannot, nor can a widow, until admeasurement, convey or assign her dower. The joining with the husband in his conveyance is then but a release by the wife of a contingent future right, and operates against her but by way of estoppel. . . . And it is said that she cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person. . . . The release must at all events accompany or be incident to the conveyance of another. And the right of dower again attaches upon a reconveyance of the real estate to the husband, or upon his becoming in any other manner vested in his own right with the title thereto. . . . And inasmuch as the release of dower, to be operative, must be in conjunction with a conveyance or other instrument which transfers a title to the real estate, it follows that, if the conveyance or instrument is void or ceases for any reason to operate, and no title has passed or none remained, the release of dower does not after that operate against the wife, and she is again clothed with the right which she had released. . . . The principle which governs is this: The release of an inchoate right of dower, which a married woman makes by joining in a conveyance with her husband, operates against her only by estoppel. An estoppel must be reciprocal, and binds only in favor of those who are privy thereto. A release of dower can be availed of, then, only by one who claims under the very title which was created by the conveyance with which the release is joined. A release to a stranger to that title does not extinguish the right of dower. . . . When a creditor of the husband pursues him to judgment, and attacks as fraudulent, and sets aside as void, the deed from him, joining in which the wife has released her right of dower, he does not connect

himself with the title which that deed has created, and with which the release of dower is connected. He sets up the title of the husband as it existed before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release or in privy with it, he may not set it up in bar of dower." It further appeared in this case that the fraudulent grantee conveyed to the wife, and that such deed was also set aside as in fraud of creditors, but the court refused to hold the wife deprived of her dower by the application of the doctrine of merger of estates.

Discussing the doctrine of merger of estates, but holding that there can be no merger where the greater estate has been avoided, the court, in Humes v. Scruggs, 64 Ala. 40, held the wife entitled to dower upon a bill filed by her against the husband's assignee in bankruptcy, after he had avoided a previous conveyance of the premises from the husband to the wife.

The conveyance by the husband to the wife and their subsequent joint conveyance to a third person do not operate to prevent the wife from claiming dower as against a creditor of the husband who is seeking to subject the land conveyed to his debt upon the ground that the conveyances were fraudulent. Wyman v. Fox, 59 Me. 100. And the Maine court, in subsequently passing upon the same state of facts, expressly held that the wife's right of dower was barred neither by the joint deed of the husband and wife, which was void as to creditors, nor by the deed from the husband to the wife, upon the theory that the lesser estate merged in the greater; the court saying that there can be no merger when the greater estate has been avoided. Richardson v. Wyman, 62 Me. 280, 16 Am. Rep. 459.

It was further held in Malloney v. Horan, supra, that the fact that the wife is made a party to the proceedings to avoid the deed, and that she appears and answers, does not preclude her from subsequently asserting dower, where her right thereto was not put in issue; and that she was not bound to assert her right in such proceedings, as

band of the petitioner (the widow), and that her rights in the property remained in the exact state they would have occupied had the fraudulent conveyance never been made.

Lockett v. James is cited in a note in *Scribner on Dower*, p. 646, to the point that it is well established by later cases that a widow may have dower where a conveyance fraudulent as to creditors is set aside as to them, and that the whole conveyance under such circumstances falls. The doctrine of estoppel by reason of the wife's joinder in the deed is not, in such cases, regarded as applicable.

The nature of the inchoate right of dower supports the view above expressed. It is a legal, contingent, valuable right or inter-

est in the husband's lands; but it is not an estate. *McArthur v. Franklin*, 15 Ohio St. 509, and 16 Ohio St. 201; *Jewett v. Feldheiser*, 68 Ohio St. 523, 67 N. E. 1072; 1 Ballar's Ohio Law of Real Prop. § 265; *Kennedy v. Nedrow*, 1 Dall. 415, 1 L. ed. 202. It is not the result of contract, but is a creature of positive law, founded on reasons of public policy, and subject, while it remains inchoate, to such modifications and qualifications as legislation, for like reasons of public policy, may see proper to impose. *Weaver v. Gregg*, 6 Ohio St. 547, 549, 67 Am. Dec. 355. The wife alone cannot legally convey or transfer it (*Black v. Kuhlman*, 30 Ohio St. 199, 202); or assign it to a stranger to the title (*McArthur v. Franklin*, 15 Ohio St. 509); nor can it be

such a matter would not be a defense to the suit for avoidance, but could at most have resulted only in the insertion into the judgment of an ancillary provision protecting her dower right.

So, a judgment in favor of a husband's assignee for creditors, avoiding a conveyance by him in which the wife joined, and in terms divesting the wife of all right, title, and interest in the land, is not, although she was a party to the proceeding, *res judicata* as to her, and does not therefore estop her to claim dower against the assignee, where the right to dower was not presented or litigated in that proceeding. *Huntzicker v. Crocker*, 135 Wis. 38, 115 N. W. 340, 15 A. & E. Ann. Cas. 444. See, however, *Dugan v. Massey*, *infra*, under "Affirmative rights of creditors, etc."

It has been held that, irrespective of the wife's intent to participate in fraud by joining the husband in the conveyance of his land, the doctrine that one who comes to equity must come with clean hands cannot be invoked against the wife in her suit for dower against the husband's assignee for creditors, who has avoided the conveyance. *Ibid*.

In *Rupe v. Hadley*, 113 Ind. 416, 16 N. E. 391, the court held the wife entitled to maintain a suit for dower against creditors who had purchased in satisfaction of their claims, after avoiding the conveyance in proceedings to which the wife had been made a party.

The avoidance of the conveyance restores to her the dower right, and she will be entitled to maintain a bill therefor against purchasers under a decree rendered for the benefit of such creditors. *Summers v. Babb*, 13 Ill. 483.

So, in *Munger v. Perkins*, 62 Wis. 499, 22 N. W. 511, where the deed had been set aside as a fraud upon creditors by the husband's assignee in bankruptcy, the wife, notwithstanding having joined therein, was held entitled to maintain a suit for dower against purchasers at the assignee's sale. To the same effect is *Mattill v. Baas*, 89 Ind. 220, where the assignee had compromised his suit for avoidance by accept-

ing a conveyance from the alleged fraudulent grantee.

In *Ridgway v. Masting*, 23 Ohio St. 294, 13 Am. Rep. 251, a wife who had joined her husband in a conveyance of land was held entitled to maintain a suit for dower against the obligee in a previous contract of purchase, who had avoided the conveyance upon the ground of fraud, and procured a decree of the conveyance of the premises to himself.

So, in a *dictum* in *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711, involving a suit for dower against a purchaser at a sale under a mechanics' lien, it is said that, by the sale under the mechanics' lien, which operated to defeat the title of a subsequent grantee of land under a conveyance by the husband, who was joined by the wife, the wife's right of dower revived.

A case sometimes cited as supporting this view is *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49, holding that where a man, joined by his wife, conveyed his land after the levy of an attachment thereon, with full covenants of warranty, and the grantee thereafter recovered damages from him for breach of warranty due to the existence of the attachment, the wife was entitled to claim dower as against a purchaser under execution in the proceedings in which the attachment was effected, the apparent ground of the decision being that the action for breach of warranty by the grantee was a declaration that nothing passed by the deed, and that therefore the deed, being inoperative to pass the grantor's title to him, was inoperative to bar the wife's right of dower.

In *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7, denying the right of the wife to maintain a suit for dower as against persons claiming under purchasers at execution sale of land previously conveyed by the husband and the wife, the court distinguishes its decision from earlier Illinois decisions, upon the ground that the husband and wife, by joining in the deed, conveyed a perfectly indefeasible title, it appearing that the execution creditors of the husband were entitled to levy upon the

sold under execution (*Summers v. Babb*, 13 Ill. 483). Where no lands are conveyed by a deed from the husband in which the wife releases her contingent right of dower, the right of dower does not pass as a separate substantive estate, for the law will not permit the alienation of such contingent interest. *Douglass v. McCoy*, 5 Ohio, 522, 527. It is but an incident to the principal estate, and cannot be separated from, but falls and perishes with it. *Bohannon v. Combs*, 97 Mo. 446, 10 Am. St. Rep. 328, 11 S. W. 232. When the mortgage given by the bankrupt became inoperative as against his creditors to convey his estate, it became inoperative to release or bar his wife's contingent right of dower. *Frederick v. Emig*, 186 Ill. 319, 78 Am. St. Rep. 283, 57 N. E. 883; *Ballard's Law of Real Prop.* § 275.

Other authorities supporting the views above expressed are *Cox v. Wilder*, 2 Dill. 45, Fed. Cas. No. 3,308; *Rodgers, Dom. Rel.*

§ 405; *Kerr, Real Prop.* §§ 1066, 1075; *Love-land, Bankr.* 3d ed. 482.

The referee is reversed.

Argued before Severens, Warrington, Knappen, Circuit Judges.

Messrs. Kibler & Montgomery, for petitioner:

The wife can claim no part of her dower from the proceeds of the sale, until full payment of the mortgage debt.

McArthur v. Franklin, 16 Ohio St. 193; *Baker v. Feters*, 16 Ohio St. 596; *Re Forbes*, 7 Am. Bankr. Rep. 42; *McArthur v. Franklin*, 15 Ohio St. 485; *Black v. Kuhlman*, 30 Ohio St. 1906.

Mr. Roderic Jones for respondent.

Warrington, Circuit Judge, delivered the opinion of the court:

The question presented in this proceeding is whether a wife's release of dower, con-

property only by reason of the laches of the grantee in the deed in failing to have his conveyance recorded.

—affirmative rights of creditors, etc.

Consistently with the foregoing cases holding the wife entitled to affirmative recourse against the creditors or their representatives, etc., other cases recognize her right where affirmative relief has been sought by or for creditors, or purchasers at a sale for their benefit.

The view has been taken where the rule is that dower can be relinquished only by the wife joining with the husband in a conveyance, that dower does not exist as a separate right, dissociated from the interest or estate of the husband, and that therefore, while the wife is estopped by her deed to claim dower as against the grantee, the estoppel cannot operate in favor of or be claimed by a third person not claiming under the conveyance. Thus, the Federal court, invoking the rule in Missouri that the wife must join with the husband in order to extinguish dower, held that, since an assignee in bankruptcy of the husband, in proceedings against the husband and wife to set aside their conveyance as a fraud upon creditors, was necessarily claiming not under the conveyance, but adversely to it, he was not entitled to a decree divesting the wife of dower. *Cox v. Wilder* (C. C. E. D. Mo.) 2 Dill. 45, Fed. Cas. No. 3,308.

In *Bank of Upper Canada v. Thomas*, 2 U. C. Err. & App. 502, the court, while saying that it was unnecessary to decide as to whose benefit a release of dower in fraudulent conveyance inured (probably meaning as between the wife and the grantee), held that the dower right could not be claimed by a creditor for whose benefit the conveyance was set aside.

So, upon avoiding a conveyance in which the wife joined, the court cannot order a 32 L.R.A. (N.S.)

sale of the dower right and vest title in a purchaser at the sale. *Bradshaw v. Halpin*, 180 Mo. 606, 79 S. W. 685; *Lowry v. Smith*, 9 Hun, 514. To the same effect is *Lowry v. Fisher*, 2 Bush, 70, 92 Am. Dec. 475, where the court took the pains to state that that it was unnecessary to determine the respective rights of the wife and the grantee. In this connection it is well to note the Kentucky case of *Lockett v. James*, cited, *infra*, under "Right as between wife and grantee," upholding a decree vesting the dower right in the creditors as against the grantee, where no claim thereto had been made by the wife. This case, together with *Lowry v. Fisher*, just cited, and *Dugan v. Massey*, *infra*, goes to establish the rule in Kentucky that the wife may claim dower against the grantee, at least where, as in the *Lockett* Case, the grantee claims only the naked dower right.

In *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477, where a mortgage by the husband and wife was defeated by a sale on execution under a prior judgment, and after the husband's death the execution purchaser conveyed to the widow, and the mortgagee thereupon sought to foreclose the mortgage in a suit against the widow, it was held that the mortgage was destroyed by the execution sale, and that it could not thereafter be converted into a mortgage of the widow's dower, the court saying that if, on the execution sale, there had been a surplus applicable to the mortgage, it might very well be that the widow could not be endowed therein except after the mortgage had been satisfied.

In *Dugan v. Massey*, 6 Bush, 81, the court, while recognizing the doctrine that a fraudulent deed set aside at the instance of creditors cannot bar the wife of dower as against the creditors or purchasers under a decree of sale, held that where, after the husband's death, it was ordered in a suit against the widow that the deed be set

tained in a mortgage executed by her husband and her, for his benefit and upon his property, can be enforced by the mortgagee after the husband has been adjudicated a bankrupt, and the mortgage has been adjudged to be null and void as constituting a preference under the bankruptcy act.

The referee in bankruptcy held that the receiver of the mortgagee could recover the estimated value of the contingent right of dower, and made an order accordingly. Upon a petition for review, the district court reversed this order. Upon a petition to revise in matter of law and reverse the order of the district court, the case is pending here.

On May 11, 1903, Lingafelter, the bankrupt, executed and delivered a mortgage on his property in which his wife released dower to the Homestead Building & Savings Company of Newark, Ohio, to secure the payment of \$50,000. A deed of trust

conveying less property than that covered by the mortgage had been executed by Lingafelter alone, and delivered to the Homestead Company prior to the giving of the mortgage. Lingafelter was secretary and manager of the Homestead Company, and the object of the mortgage, as well as that of the deed of trust, was to indemnify the company against shortages with which the secretary and manager was charged. The mortgage was not recorded until May 11, 1904, one year after its execution, and it is claimed that the reason for this delay was forbearance to expose the mortgagor, also to avoid financial trouble in the affairs of the Homestead Company itself and likewise of the Newark Savings Bank Company, of which Lingafelter was cashier.

On September 6, 1904, within four months after the mortgage was placed of record, an involuntary suit in bankruptcy was commenced against Lingafelter, and on March

aside, and that she be debarred of dower, her failure to appeal from the judgment within the time allowed therefor precluded her from asserting dower, although the judgment was erroneous. See, however, *supra*, under "Affirmative rights of wife," *Huntzicker v. Crocker* and the paragraph which precedes it.

It has been seen that the courts have not only declared generally that the wife is entitled to dower as against creditors, their representatives, or one claiming through them, but also have held on the one hand that she may have affirmative recourse against them, and on the other hand that they have no affirmative rights as against her. These cases leave it beyond doubt that the creditors can lay no claim to the dower right. Whether the cases negative any right in the grantee is less clear. However, it will be remembered that some of the cases recognize the right in the wife expressly upon the theory that, upon the avoidance of the conveyance, there is left in the grantee no estate upon which the relinquishment of dower can operate. Whether the other cases recognizing the affirmative rights of the wife necessarily negative any right in the grantee upon the theory just mentioned, or any other theory, or whether they leave that question open upon the theory that, since the creditors cannot lay claim to the dower right, it will be saved to the wife, in the absence of any objection by the grantee,—is a question for nice speculation.

Right as between wife and grantee.

This branch of the question presents two aspects: (1) The right of the wife, as against the grantee, to assert a claim for dower after the avoidance of the conveyance by creditors; and (2) the right of the wife to sue the grantee for dower upon the ground that the conveyance was fraudulent, when it has not been attacked by creditors.

In *Wells v. Estes*, 154 Mo. 291, 55 S. W. 255, the court sees a distinction where the wife joins in the deed without consideration and without actual participation in the fraudulent intention, and it is held that in such circumstances she is not estopped, by merely having joined in the conveyance, to maintain a suit for dower against the grantee after the conveyance has been avoided by the husband's creditors.

In *Lockett v. James*, 8 Bush, 28, the creditors, in proceedings to which the wife was not a party, procured a decree setting aside a previous conveyance by the husband and wife, and subjecting the land to sale for their benefit, without any reservation of dower in favor of the wife, and the grantee appealed upon the ground that, although the conveyance was void as against creditors, it was, nevertheless, effectual to convey to him the dower interest. While the court affirms the decree, and holds that upon the avoidance of the conveyance it was no longer effectual, either as a conveyance or an estoppel, as between the wife and the grantee, it is careful to point out that there was no contest between the creditors and the wife as to their relative rights, and therefore no decision on that point was necessary. Other Kentucky cases cited, *supra*, under "Affirmative rights of creditors, etc.," uphold or recognize the wife's right of dower as against the creditors, and therefore, as has been pointed out under that title, those cases, together with *Lockett v. James*, tend to establish the rule in Kentucky that the wife is entitled to dower as against the grantee after the conveyance has been avoided by creditors, at least where, as in *Lockett v. James*, the grantee claims only the naked dower right.

But the view was taken in *Manhattan Co. v. Evertson*, 6 Paige, 457, that although a deed by a husband and wife may be void as between his creditors and the grantee, so

25, 1905, he was adjudged a bankrupt. The business of the Homestead Company was placed in the hands of a receiver, who presented for allowance proofs of a secured claim against the bankrupt's estate. The referee found the amount due to the receiver to be \$81,843.65, growing out of shortages in the assets of the company, and caused an issue to be made up between the receiver and the trustee on the question of whether this sum should be allowed as a secured claim. Mrs. Lingafelter was not a party to the proceeding involving this issue. The referee found that the mortgage (as well as the deed of trust) was a "preference within the bankruptcy act, and as such is null and void and of no effect," and thereupon declared it to be "null and void" and ordered that it be "set aside as against

creditors" of the bankrupt's estate; and at the same time ordered the trustee to sell the real estate "free and clear of . . . the dower interest" of Mrs. Lingafelter, but reserved the question of who was entitled to the "dower interest" for future decision. This order of the referee was affirmed by the district court, and no proceeding to review that order was ever taken.

Mrs. Lingafelter filed an answer in the proceeding to sell, stating that she had "never assigned, transferred, or sold her dower interest in the property," except by the mortgage in question; that, under the bankruptcy act, the mortgage was "invalid as a preference" to the Homestead Company, and of "no avail" to the company or to the general creditors for any purpose. The prayer was that in the sale of the

as to entitle the creditors to assert their claims against the property conveyed, it is valid as between the grantor and the grantee, and operates, so far as the husband and wife are concerned, to vest title in the grantee, and to preclude the wife from asserting dower as against the grantee, who claims the residue after the payment of the claims of creditors benefited by the avoidance of the conveyance. It should be noted that it was not objected for the wife that she was entitled to dower as against the creditors, but the question arose upon the objection by the grantee that the wife was erroneously allowed dower as against him.

A possible ground of distinction between *Manhattan Co. v. Everton* and the two cases which immediately precede it may, perhaps, be found in the doctrine that dower is not a separate estate apart from the husband's interest, and that it cannot be assigned or conveyed except in conjunction with an alienation of the principal estate. Now, it will be noted that in the *Everton* Case the grantee claimed a residue after the creditors had been satisfied, whereas in the other cases the grantee was apparently claiming merely the dower right, the principal estate having gone to satisfy the creditors. The possibility of making a distinction upon the ground suggested is recognized in *Hinchliffe v. Shea*, cited, *supra*, under "Affirmative rights of creditors, etc."

See also *supra*, *Efland* and *Efland*.

The right of the wife as against the grantee to assert the fraud upon creditors, by way of claiming dower, has been denied and conveys land to another without con in cases passing upon the question.

Thus, it has been held that where the husband, and the wife joins therein with knowledge that its object is to defraud creditors, but the deed is never set aside upon that ground, she cannot maintain a bill for dower against one who purchased from their grantee without notice. *Woodworth v. Paige*, 5 Ohio St. 70. 32 L.R.A. (N.S.)

So, in *Kitts v. Willson*, 130 Ind. 492, 29 N. E. 401, it is held that where the wife joins in the conveyance with knowledge that it is made by the husband for the purpose of avoiding certain of his liabilities, equity will leave her in the position in which it finds her, and refuse to restore to her any interest in the property. In this case the wife was the person seeking to avoid the deed as against transferees of the alleged fraudulent grantees. It, perhaps, should also be noted that before the court reached the foregoing point in its decision, that is, before it considered the effect of the wife's participation in the fraud, it pointed out that the wife was claiming an interest in the property in a dual capacity,—first, as heir of the husband, and, second, as widow. The court said that since the heirs of a fraudulent grantor can no more question the validity of the conveyance than he can himself, the widow was without right to assert her claim in her capacity as heir; but that, although she may join with him in executing the conveyance, if she has no knowledge of the intended fraud, she is not thereby affected as to dower.

See also *King v. King*, 61 Ala. 479, and *Mann v. Edson*, 39 Me. 25, turning upon a want of seisin in the husband.

In *Den ex dem. Stewart v. Johnson*, 18 N. J. L. 87, the court, in refuting the contention that the wife was incompetent, because of her individual interest, to testify that a deed by the husband in which she joined was executed in fraud of creditors, in a contest between the grantee and a purchaser at an execution sale under a subsequent judgment, declared, without discussing the question, that the deed barred her right of dower, and that, if she proved the deed fraudulent as to creditors, she would not thereby restore her right to dower for the reason that, as against the grantors, the conveyance would be perfectly valid in any event.

In *Alley v. Carrol*, 6 Heisk. 221, the husband conveyed in fraud of creditors, and the conveyance was subsequently set aside by

property her dower rights be protected, and that "the said property may be ordered sold subject to her said dower rights, or that the value of her said dower rights in said real property be ascertained and ordered paid to her in money by the trustee herein, or ordered invested for her use and benefit." The trustee sold the real estate free of dower, and the court determined the value of her dower right to be \$849.21, and this sum is held by the trustee.

The single issue is whether this money shall be paid to Mrs. Lingafelter or to the receiver of the Homestead Company. It is insisted on behalf of the receiver that, as between the Lingafelters and the Homestead Company, the mortgage is valid, and that the wife can claim no part of the proceeds of sale until the mortgage is paid.

creditors, and, upon a sale of the land for the benefit of a judgment creditor, it was purchased by a third person under an arrangement between the purchaser and the husband which was in furtherance of the scheme to defraud the creditors, the purchase price at the judicial sale ultimately being furnished by the husband. A creditor, after the death of the husband, filed a suit making the grantee a defendant, to set aside the latter transaction as a fraud upon his right, praying for a sale of the land for his benefit, but subject to the dower right, and the widow filed a cross bill for dower. The court, while saying that, if the purchase at the judicial sale by the third person was made with an understanding that the land was to be thus saved for the husband, without a fraudulent purpose as to creditors, the purchaser would hold the legal title in trust for the husband or his heirs, and the widow would be dowerable in the land, held that, inasmuch as the conveyance was fraudulent as against the creditors seeking to avoid it, the wife was not entitled to dower. Inasmuch as the creditor prayed a sale of the land subject to the dower right, the real contest as to that right seems to be between the widow and the purchaser at the judicial sale, and it is difficult to see why, if the wife would have been entitled to avoid the conveyance as against the purchaser, and to demand an assignment of dower, in the absence of a fraud upon creditors, she was deprived of that right by the avoidance of the conveyance by a creditor who made no claim to the dower right.

Attention is directed to *Follansbee v. Follansbee*, 1 App. D. C. 326, holding that where the wife does not further participate in the fraud upon creditors than by joining in a deed to trustees to secure a fictitious debt, the evidences of which are thereafter surrendered to the grantor by the ostensible creditor, who disclaims all interest in the deed as security, she may maintain a bill to vacate the deed, and have dower assigned out of the property as against persons claiming as, and for the benefit of, heirs of the husband's estate.

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The theory is that the mortgage was no more than a voidable preference, and that this was simply a name, unless avoided at the instance of creditors. This seems to us to overlook the necessary effect of the order vacating the husband's conveyance, upon his wife's release of dower. The transaction concerned the husband's debt, and, as regards the present question, his property alone. The Homestead Company demanded the mortgage, and Lingafelter and his wife yielded to the demand. The object manifestly was to apply the whole property free of dower, exclusively to the payment of the debt due to the company. The very contention that the mortgage is still valid as between the Lingafelters and the company impliedly concedes that the purpose of the mortgage could not have been accomplished

One conclusion to be drawn from the cases is that, as between the wife and the creditors who have avoided the conveyance, the former is entitled to claim the dower right, and the latter are not. It seems also safe to say that, as against the grantee, the wife is not entitled to avoid the conveyance upon the ground that it is fraudulent as to creditors, where the creditors themselves have not attacked it. But whether the wife or the grantee is entitled to the dower right after the creditors have avoided the conveyance is a question that has not been settled, at least by cases involving a contest between the wife and the grantee. In this connection, however, it is desired again to urge the plausibility, at least, of the distinction between the cases of *Manhattan Co. v. Everton and Lockett v. James*,—the one involving a claim by the grantee of the residue after the satisfaction of creditors, or, in other words, a claim of a portion of the principal estate, and holding the grantee entitled to the dower right,—the other involving a claim by the grantee of the naked dower right, and denying him that right. So, also, attention is again directed to the discussion of those cases under the title, "Right as between wife and grantee," where it is pointed out that the case of *Hinchliffe v. Shea* clearly recognizes that this may well be made the basis of a distinction. So, it is suggested, as a last conclusion to be drawn from the cases, that where the creditors have avoided the conveyance, and the contest as to the dower right is being waged between the wife and the grantee, the latter is entitled to the dower right if he is also entitled to any part of the principal estate to which the dower right can attach; but that he is not entitled to claim the dower right where the creditors exhaust the principal estate, and there is nothing left to which the dower can attach, or, in other words, where he merely claims the naked dower right.

L. A. W.

except by the joint action of the husband and wife. Plainly the husband could have conveyed his estate in the land through his own separate act taken independently of any act of his wife; but it is not claimed that the wife could have acted in a corresponding manner with respect to her right of dower.

In the order of affirmance of the district court, adjudging the mortgage to be null and void and setting it aside as against creditors, it was also adjudged that the proceeds of the "property mentioned in said mortgage be distributed by the trustee equally between the general creditors of said bankrupt." Thus, whatever estate of the husband may be said to have passed to the mortgagee, it was as effectually diverted from the original object of the mortgage as if the instrument had never been executed at all. The result of the contention of learned counsel therefore comes to be that recovery can be maintained on the hypothesis that the wife's right of dower belongs to a stranger to the estate of her husband. We think the principle underlying the release of dower is so far ignored in this contention that it will not be amiss to notice and keep in mind some of the Ohio decisions bearing upon the subject.

In *Douglass v. McCoy*, 5 Ohio, 523, 527, the plaintiff, who was in possession of land purchased by him at judicial sale, had filed a bill to quiet title against claims set up by defendants. The judgment under which the sale had been made antedated a certain deed that the judgment debtor and his wife had executed, conveying the land to another. It was, in substance, urged against plaintiff that, since the dower interest had not been acquired at the judicial sale, the grantee in the deed could set it up as a bar to the plaintiff's suit. Judge Lane, speaking for the court, said: "Although the deed from Findlay and wife to McCoy extinguished the right of dower in the land conveyed, it was not intended to pass, nor did it pass, the right of dower as a separate substantive estate, if no lands were conveyed by the deed, for the law will not permit the alienation of such possible contingent interests. 4 Kent, Com. 254; *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49. Neither can it be aliened before assignment, so as to enable the grantee to maintain a suit in her own name, for it lies in action only. *Jackson ex dem. Clowes v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 378."

In *Miller v. Woodman*, 14 Ohio, 518, 521, in speaking of a dower interest vested in a widow, Hitchcock, J., said: "It is not in the power of the widow to transfer any interest in it, until it has been actually assigned. When the dower is assigned,

when it is aperted and set off to her by metes and bounds, then she may sell and convey, not before. The right, the chose in action, if I may so speak, is not assignable. It may be relinquished to him who has the next estate of inheritance in the land out of which it is to be carved, but cannot be transferred to a third person."

In *Weaver v. Gregg*, 6 Ohio St. 547, 551, 67 Am. Dec. 355, where a question arose touching the right of dower under certain statutory proceedings in partition, Brinkerhoff, J., said of the wife's right of dower in her husband's undivided interest in the land: "She has a contingent possibility of interest in it, which may be released, but no property, no actual interest in it, which is the subject of grant or assignment. *Miller v. Woodman*, 14 Ohio, 518."

In *McArthur v. Franklin*, 15 Ohio St. 485, 509, White, J., had occasion to say: "Although the right of a wife to dower is contingent upon her surviving her husband, nevertheless it is a right or interest in the land created by the law for her benefit and vested in her. . . . It is true she cannot assign to a stranger." In 2 *Scribner on Dower*, 2d ed. p. 307, ¶ 40, it is said: "It is well settled that it is no defense to an action for dower that the widow has released her dower to a stranger." See also *Rice on Modern Law of Real Property*, p. 147; 1 *Washb. Real Prop.* 6th ed. §§ 423, 483.

While it is held in *Mandel v. McClave*, 46 Ohio St. 407, 5 L.R.A. 519, 15 Am. St. Rep. 627, 22 N. E. 290, that a contingent right of dower is property, and of ascertainable value according to mortality tables, etc., it is nowhere held in Ohio that it is susceptible of grant or assignment. The logic, however, of the argument made on behalf of the Homestead Company, is that a wife's right of dower may be withheld from her under conditions in which it could not have been acquired. The endeavor to work out this result is of a twofold character. One claim is that, while the inchoate right of dower cannot be assigned, it may be released, but to insist that the release is operative after the husband's conveyance is annulled is in effect to give to the release the attributes of an assignment. The other claim is sought to be maintained upon the familiar distinction between voidable and void instruments, but we think it comes to the same end concerning the release. For the idea is that, since the mortgage was merely voidable, the release of dower was good when made, and remained so in spite of the annihilation of the mortgage, so far at least as it affected the estate of the husband.

One vice, if there be any in such claims,

is that they ignore the necessity of continuously sustaining the release of dower, as well as of acquiring it, as part of the estate and as an incident of a conveyance of the husband. The estate and conveyance of the husband are the essential foundation of the release, no matter how the latter is effected. It is therefore most difficult, after annulment of the husband's conveyance actually happens, to perceive anything, and nothing is stated, upon which the release can any longer rest or operate. The last suggestion is that it is sustainable by estoppel; but, as said by Mr. Rice when speaking of a release of an inchoate right of dower (175): "Such a release can be availed of only by one who claims under the very title created by the conveyance with which the release is joined." And Scribner observes: "Her renunciation of dower is to attend the conveyance of her husband; to endure while that endures, and no longer." 2 Scribner, Dower, 2d ed. p. 313, ¶ 49.

Illustration of the need of continuing the primary support of the release of dower may be found in *Black v. Kuhlman*, 30 Ohio St. 196, relied on by the Homestead Company. There the validity of the third mortgage, in which alone the wife had joined, was not questioned. Hence the only thing to prevent the third mortgagee from recovering more than the value of the dower interest was simply the circumstance that the property did not sell for enough to pay the claims of the first and second mortgagees and also the claim of the third mortgagee. Another illustration may be seen in the language of Earl, C., in *Elmendorf v. Lockwood*, 57 N. Y. 322, 325: "But in all cases, when the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against her husband, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished, for all purposes and as to all persons." The difficulty confronting the Homestead Company is inherent in the subject-matter. When the mortgage was vacated and set aside, the title of the trustee under § 70a (4) of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3451), and his right to administer the property of the husband for the equal benefit of all the creditors, became absolute. The release being thus completely severed from the only support it ever had, it ought to follow that the right of dower attached again to the wife; and that too without regard to the cause of annulment of the husband's conveyance. It is, however, insisted that decisions relating to instruments

which are by statute denounced as void, and not merely as voidable, are not pertinent to the solution of the present question. The objection is that they proceed upon the theory only that the instruments were void *ab initio*. But we think the better considered decisions are also, if not chiefly, grounded upon the principle before discussed, that a wife's release of dower can survive only so long as it attends the estate and conveyance of her husband; or, stated in another way, that, when the principal estate falls, the incident must fall with it.

Ridgway v. Masting, 23 Ohio St. 294, 13 Am. Rep. 251, we think may fairly be said to have recognized this principle; for, while the person there resisting the dower claim was the one at whose instance the deed containing the release of dower was set aside, yet the release was not allowed to operate after the deed was avoided and the husband's estate declared to belong to a stranger to the deed. In that case Mrs. Masting sought dower in lands which her husband had in his lifetime agreed to sell to Mrs. Ridgway and of which he had given her possession. Afterward, Masting and wife mortgaged the land to one Carpenter, and subsequently joined in a deed to the wife of Carpenter conveying the premises absolutely. In an action brought by Mrs. Ridgway against the husband, Masting, and Carpenter and his wife, but to which the wife of Masting was not a party, the mortgage and deed were declared fraudulent and void, and were set aside as against Mrs. Ridgway. It is stated in the syllabus: "A release of dower by a married woman who joins her husband for that purpose in a deed to defraud purchasers is binding only as against the releasee and his privies; and where such fraudulent conveyance is set aside at the suit of the party injured, and a transfer of the premises, as against her husband, is decreed to the plaintiff, the wife, in the event of her surviving the husband, is entitled to dower as against such owner."

In the excellent work of Scribner before cited, the learned author said: "A wife who joins with her husband in a conveyance of his lands is not a party thereto, except for the purpose of relinquishing her dower. She is not to be regarded as alienating a real subsisting estate, but as releasing a future contingent right. Her renunciation of dower is to attend the conveyance of her husband; to endure while that endures, and no longer. Hence, if the conveyance of the husband be inoperative, or if it be set aside or avoided, the right of dower remains unimpaired. It is upon this principle that dower is restored where a

conveyance in which the wife has joined is set aside as fraudulent as to the creditors of the husband." 2 Scribner, Dower, p. 313, ¶ 49. See also opinion of Maxwell, J., in *Dubois v. Ebersole* (common pleas, Ham. Co., O.) 20 Ohio L. J. 401. In *Bohannon v. Combs*, 97 Mo. 446, 448, 10 Am. St. Rep. 328, 11 S. W. 232, Sherwood, J. cited quite a number of decisions, which we refer to, but do not set out, and from them he deduced this rule: "Although there are authorities to the contrary, the better opinion is that when a conveyance of the husband in which the wife joins is set aside as being fraudulent as to creditors, this will result in reviving the wife's right of dower, for that, the deed of the husband being void, there is no estate left in the grantees upon which the relinquishment of dower can operate; hence, the wife is restored to her former rights." After allusion to the overthrow of the deed as fraudulent, the learned judge continued (page 449, 97 Mo.): "The grant of the inchoate right of dower fell with it, as it was not the alienation of an estate, but the mere incident of the principal thing, the conveyance of the fee by the husband, and of course perished with its principal, because there was no estate left to support it, and because there was no one in whom the bare relinquishment of dower could vest. *Moore v. Harris*, 91 Mo. 616, 4 S. W. 439." That decision was approved in *Wells v. Estes*, 154 Mo. 291, 297, 55 S. W. 255. In *Elmendorf v. Lockwood*, supra, it is said (page 325, 57 N. Y.): "Hence, when the deed of the husband is for any reason void, or is set aside or superseded, so as to become inoperative, the wife's dower, although she joined in the conveyance, is not barred."

In *Frederick v. Emig*, 186 Ill. 319, 322, 78 Am. St. Rep. 283, 57 N. E. 883, 884, it was decided in respect of a release of dower, where the deed in the execution of which the wife had joined her husband was set aside: "She was a party to the deed only for the purpose of releasing her dower, and her right to dower could not be separated from the principal estate, so that, when the deed became inoperative as against creditors to convey the estate of her husband, it became inoperative to release or bar her right to dower. As against creditors, the deed conveyed no estate of the husband, and in such a case a deed is not allowed to operate to release or bar the dower, but the wife may assert it after the death of the husband. *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Stowe v. Steele*, 114 Ill. 382, 2 N. E. 169." See also 1 *Rice on Modern Law of Real Property*, pp. 174, 175; 1 *Washb. Real Prop.* 6th ed. 32 L.R.A. (N.S.)

p. 214, § 426; *Matthews v. Thompson*, 186 Mass. 14, 19, 20, 66 L.R.A. 421, 104 Am. St. Rep. 550, 71 N. E. 93; *Munger v. Perkins*, 62 Wis. 499, 22 N. W. 511; *Lockett v. James*, 8 Bush, 28, 30; *Sanford v. Ellithorp*, 95 N. Y. 48, 51; *Cox v. Wilder*, 2 Dill. 45, 48, Fed. Cas. No. 3,308; *Kennedy v. First Nat. Bank*, 107 Ala. 170, 188, 191, 36 L.R.A. 308, 18 So. 396.

The claim that Mrs. Lingafelter received a consideration for her release of dower is not tenable. The only consideration suggested is alleged forbearance in recording and so publishing the mortgage. Conceding, for the purpose of the question, that this might be a sufficient consideration, still it does not appear that Mrs. Lingafelter made any request for, or received any promise of, any such forbearance, or that she had anything to do with the custody or control of the mortgage. Nor are we impressed with the claim that the Homestead Company's rights were enhanced by the fact that Mrs. Lingafelter, in her answer in the proceeding of the trustee to sell the bankrupt's property, consented that the property might be sold free of dower. She expressly claimed her right to dower or its equivalent in money. All the objections that have been pointed out against releasing dower to a stranger in title to the property of the husband apply to this claim.

We are therefore constrained to hold that the order of the district court, from which no proceeding to review was ever instituted, vacating and setting aside the mortgage as null and void, and directing the mortgaged property of Lingafelter, the husband, to be distributed equally among his creditors, operated to restore to his wife her right of dower in the property, regardless either of the claim urged under the bankruptcy act concerning voidable preferences (act July 1, 1898, chap. 541, § 60b, 30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445, as amended by act Feb. 5, 1903, chap. 487, § 13, 32 Stat. at L. 800, U. S. Comp. Stat. Supp. 1909, p. 1314), or that might have arisen under any statute of Ohio (particularly §§ 6343 and 6344; *Loudenback v. Foster*, 39 Ohio St. 203, 206; *Robertson v. Desmond*, 62 Ohio St. 487, 497, 57 N. E. 235) relating to mortgages which may be declared void as to creditors (see also paragraph "e," § 67, bankruptcy act, 30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449, and amendment, 32 Stat. at L. 800, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1316); and that she has in no wise waived or lost that right.

The action of the court below must be affirmed, with costs.

OREGON SUPREME COURT.

OREGON RAILROAD & NAVIGATION
COMPANY, Appt.,
v.

HECTOR McDONALD et al., Respts.

(— Or. —, 112 Pac. 413.)

Grant — condition — completion of
railroad.

1. A condition which must be complied with to hold the property is created by a grant of a right of way to a railroad company "on condition" that the line will be completed within a specified time.

Railroad — power — purchasing right
of way — condition.

2. A railroad company, in purchasing its right of way, may bind itself by a condition to complete the road within a specified time.

Estoppel — conditional grant — per-
mitting partial performance. •

3. One who has granted a right of way to a railroad company on condition that it complete its road within a specified time is

*Note. — Character and effect of provision
in deed to railroad for construc-
tion of road within a specified time.*

As to when provision in conveyance as to erection of building or other structure is regarded as condition subsequent, see notes to *Hawley v. Kafitz*, 3 L.R.A.(N.S.) 741, and *Shreve v. Norfolk & W. R. Co.* 23 L.R.A.(N.S.) 771, in which are found several cases dealing with provisions regarding erection of depots and other structures by railroad companies. As to specific performance of contract to establish or maintain railroad station, see note to *Taylor v. Florida East Coast R. Co.* 16 L.R.A.(N.S.) 307.

Whether a provision in a deed is a condition precedent or subsequent, or is a covenant, is not to be determined solely by the use of certain technical terms, but the test is that of intention, which is to be gathered from the context of the instrument read in those lights which are properly employed in the construction of writings. See *Rannels v. Rowe*, 74 C. C. A. 378, 145 Fed. 296; *Nicoll v. New York & E. R. Co.* 12 N. Y. 127; and *Peterson v. Atlantic & B. R. Co.* 120 Ga. 967, 48 S. E. 372.

An agreement with a railroad company for the conveyance of a right of way stands on the same footing as any other contract for the conveyance of land. *Littlejohn v. Chicago, E. & L. S. R. Co.* 219 Ill. 584, 76 N. E. 840; *OREGON R. & NAV. Co. v. McDONALD*.

Where deed expressly provides for reversion.

A condition subsequent requiring a re-entry by the grantor or some equivalent act to consummate a forfeiture on nonfulfillment of the condition, and not a condition

not estopped from enforcing the condition by permitting the railroad company to enter and construct its grade, if that is done within the time specified.

Equity — eminent domain proceedings
— power to convey.

4. Equity may, in a suit by a railroad company to enjoin one from whom it has purchased a right of way from interfering with its enjoyment thereof, after it has forfeited it because of breach of condition subsequent, assess the damages and transfer the title to the railroad company as in an eminent domain proceeding, if, under protection of a temporary injunction, the road has been completed and put in operation so that refusal of the injunction will interfere with public convenience.

(December 20, 1910.)

APPEAL by plaintiff from a decree of the Circuit Court for Willowa County in defendants' favor in a suit to enjoin them from interfering with the construction and operation of plaintiff's branch railway over their land. Modified.

precedent, is created in a deed of land to a railroad company which recites that it is given in consideration of a certain sum of money payable in stocks and bonds of the company, and "in consideration of the building and completion of said railroad in three years from the date hereof," and which contains at the end of the habendum clause the words: "Provided that said railroad shall be built and completed within three years after date hereof," and at the end of the warranty clause, the words, "subject only to the conditions that if said railroad be not built and completed within three years from date hereof, said lands shall revert to . . . [grantor], and this deed to be void." *Rannels v. Rowe*, 74 C. C. A. 378, 145 Fed. 296.

In *Waldron v. Toledo, A. A. & G. T. R. Co.* 55 Mich. 420, 21 N. W. 870, in construing a deed of land to a railroad company given in consideration of the company's building a side track within a certain time, for the use of the grantor, at a place to be designated by him, and containing after the habendum clause the words: "Provided, further, if the side track above mentioned is not built within the time specified, this grant shall be null and void," the court treated such proviso as a condition subsequent, but held that where the grantor did not notify the railroad company where to build the side track, he could not enforce the forfeiture, as the railroad company was not in default.

In *Schlesinger v. Kansas City & S. R. Co.* 152 U. S. 444, 38 L. ed. 507, 14 Sup. Ct. Rep. 647, it was held that where the roadbed, etc., of a railroad was conveyed to a construction company on condition that the company should build a certain portion of the road within a certain time, or the property should revert to the grant-

Statement by McBride, J.:

This is a suit in equity brought by plaintiff to enjoin defendants from interfering with plaintiff in the construction of its branch line of railway from Elgin to Joseph, where the same crosses defendants' land in Wallowa county. On September 18, 1905, plaintiff purchased of defendants the right of way for the railroad over their land, the amount so purchased comprising in all about 20 acres and the price paid being \$600. Defendants, however, declined to sell this land until the following clause was inserted in the deed: "This conveyance is made on the condition that the Oregon Railroad & Navigation Company will construct its line of road over the above-described premises within two years from the date hereof." Plain-

tiff took possession of the land, and had completed its grade along the whole of it by October, 1907, and thereafter ceased work upon the road. Thereupon defendants fenced the land at each end, inclosing it with their other fields, and in August, 1908, when work had been resumed on other portions of the road, they posted notices warning all persons, particularly plaintiff, its agents, and employees, to keep off the premises, and declaring themselves to be the owners and in possession thereof. Plaintiff brought this suit and secured a preliminary injunction, under the protection of which it proceeded to complete the construction of its line. On the trial the court rendered a decree for defendants. Plaintiff appeals.

or, such company forfeits all interest in the property by its failure to perform such condition, and the property reverts to the grantor; and hence that a judgment creditor who became such after the deed of grant cannot subject to the payment of his judgment the said property, after such property has reverted. This case impliedly holds that the condition was subsequent.

Where a deed to a railroad company recites that the consideration is the benefits to accrue to the grantor from the construction of the railroad, and after the habendum clause contains the following words: "Provided that, if the party of the second part shall fail and neglect for a period of five years to construct its line of railway over the premises hereby granted, then, and in that event, the title to said lands shall revert to the parties of the first part,"—a failure to construct the road in the time stipulated will cause a forfeiture of the estate. *McDowell v. Blue Ridge & A. R. Co.* 144 N. C. 721, 57 S. E. 520; *Thomas v. Blue Ridge & A. R. Co.* 144 N. C. 729, 57 S. E. 523.

Where, accompanying a deed and executed simultaneously with it as part of the same transaction, was a written obligation signed by the grantee in the deed, acknowledging that the land had been conveyed as terminal grounds of a railroad, and reciting that "if the said land . . . shall not, within three years from the date of said deed, be so taken, occupied, and used by said railway company, in whole or in part, for such terminal purposes, then said" grantees in the deed will reconvey to the grantors on demand, the deed and the obligation will be construed as one instrument, and, being so construed, the condition contained in the obligation is a condition subsequent, and not a condition precedent. *Chute v. Washburn*, 44 Minn. 312, 46 N. W. 555.

But in *Sullivan-Sanford Lumber Co. v. Reeves*, — Tex. Civ. App., 125 S. W. 96, where a deed of land for the right of way of a railroad, after the habendum clause, contained the following words: "This conveyance, however, is made upon the con-

sideration and with the understanding that a railroad shall, within two years from the date of this instrument, be chartered and incorporated under the laws of the state of Texas, and will construct and operate a line of railroad over, on, and along said right of way; and should no such railroad be incorporated within two years from the date hereof, or should it fail to construct and operate a railroad across the same within two years from the date hereof, then this conveyance is to be void,"—it was held that these words created a condition precedent, and that, as the railroad was not built in the time specified, no title ever passed.

Where a consolidated company has the same name as one of its constituent companies, and supersedes it, a deed naming such company as grantee will be construed as referring to the consolidated company; and hence when the deed conveyed land "to be used by it for railroad purposes," and was conditioned that "if work is not commenced on said road in two years, then said property is to revert to" the grantor, the deed will be construed as being conditional not upon the commencement of work on the constituent company within two years, but upon commencement of work anywhere on the line of consolidated company within said period; and this will be sufficient to prevent reversion to the grantor. *Lester v. Georgia, C. & N. R. Co.* 90 Ga. 802, 17 S. E. 113.

Where deed does not expressly provide for reverting.

A proviso in a deed of land to a railroad company, that such grant is upon the express condition that the company shall construct its road within the time prescribed by the act incorporating it, is a condition subsequent. *Nicoll v. New York & E. R. Co.* 12 N. Y. 121.

In a deed of a right of way to a railroad company to have and to hold "so long as the same shall be used for the operation of a railroad, provided, nevertheless, and these presents are upon the express condi-

Messrs. W. W. Cotton, Arthur C. Spencer, and T. H. Crawford, for appellant:

The clause in the deed, "This conveyance is made on the condition that the Oregon Railroad & Navigation Company will construct its line of road over the above-described premises within two years from the date hereof," is a covenant, and not a condition subsequent.

Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; Hawley v. Kaftz, 148 Cal. 393, 88 Pac. 248, 3 L.R.A. (N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248; Ashuelot Nat. Bank v. Keene, 74 N. H. 148, 9 L.R.A. (N.S.) 758, 65 Atl. 826; St. Peter's Church v. Bragaw, 144 N. C. 126, 10 L.R.A. (N.S.) 633, 56 S. E. 688; Minard v. Delaware, L. & W. R. Co.

139 Fed. 60; Eskroyd v. Coggeshall, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260; Rawson v. School Dist. No. 5, 7 Allen, 125, 83 Am. Dec. 670; Raley v. Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890; Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90; Wier v. Simmons, 55 Wis. 637, 13 N. W. 873; Bain v. Parker, 77 Ark. 168, 90 S. W. 1000; Shreve v. Norfolk & W. R. Co. 109 Va. 706, 23 L.R.A. (N.S.) 771, 64 S. E. 972; Krueger v. St. Louis, St. C. & W. R. Co. 185 Mo. 227, 84 S. W. 898.

The building of the grade of the roadbed over the lands granted within the two years, followed up by the completion of the road with diligence, was such a part performance of the covenant or condition in good faith as to bring "the construction of the line of

tions: First. That the party of the second part . . . shall construct and complete said railroad on or before" a named date,—the condition as to date of completion of the railroad is a condition subsequent, and not a covenant, and hence the land reverts on a failure to build the road at the time specified. Reichenbach v. Washington Short Line R. Co. 10 Wash. 357, 38 Pac. 1126.

Under a deed reciting that in consideration of \$1, the grantor conveyed to the grantee, a railroad company, "a right of way through any and all lands owned by me" in a certain county, and that, "in consideration of the above sum paid, I agree to allow said . . . [railway company] the exclusive privilege to build and operate a railroad over any and all lands owned by me in said county, provided said railroad is built to said land by" a named date, the right of the railroad company to locate and construct its road upon the property described in the deed is dependent upon its having built a railroad to the land by the time named in the deed; and upon its failure to do so, its right to locate a right of way over the land is lost. Peterson v. Atlantic & B. R. Co. 120 Ga. 967, 48 S. E. 372.

In Krueger v. St. Louis, St. C. & W. R. Co. 185 Mo. 227, 84 S. W. 898, the grantors in a deed given in consideration of \$1, "and in further consideration of the conditions, covenants, and agreements hereinafter mentioned [and contained]," conveyed "a right of way for railroad purposes only, . . . upon condition, however, that the grantees herein . . . shall construct and maintain a . . . railroad, . . . and upon the failure or abandonment of said enterprise by the grantee herein, . . . the privileges herein and the property hereby conveyed shall revert to and be fully vested in the grantors, . . . and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." The construction of the road was begun in January, 1901, and continued through January and February of that year, in which latter 32 L.R.A. (N.S.)

month the grantors notified the grantee that they declared that the land had reverted for failure to complete the road in the time stipulated. It was held that, as the words of forfeiture followed only after the clause relating to building and maintaining a railroad, and not after that relating to completing it by the year 1900, the former should be construed as a condition subsequent, and the latter as a covenant merely, especially as this would be the only way to give effect to both the words "conditions" and "covenants," which were the consideration of the deed.

In Polk v. Givens, 44 Ind. App. 667, 90 N. E. 19, a deed of conveyance of a right of way for a railroad was in consideration of a sum of money, "and in further consideration of the conditions hereinafter named," among which conditions was one that the grantees should construct, equip, and operate said railroad over and along said described right of way within one year from June 1, 1902, or, upon failure to do so, said instrument be void and of no effect. In an action by the grantor for breach of the covenants contained in the deed, the court said: "The provision in the contract that the lease should be void upon the failure of the grantees to construct, equip, and operate the railroad over and along the right of way within one year from June 1, 1902, was for the sole benefit of the appellee, the grantor, and the contract would become void on the failure of the grantees to perform their covenant at the election of the grantor, and not otherwise," thus treating the provision as a covenant, at least where the grantor did not elect to consider the contract as void.

And in Bain v. Parker, 77 Ark. 168, 90 S. W. 1000, it was held that where a deed recited that the grantors in consideration of \$1, "and in further consideration of the building, equipping, and putting into operation a line of railroad" between two named points, "to be completed by January 1, 1899, have granted," etc., the words requiring the completion of the road by the date named import nothing more than a covenant which, upon the acceptance of the deed

road over the premises" within the time limited.

13 Cyc. Law & Proc. p. 687; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247; *Mead v. Ballard*, 7 Wall. 290, 19 L. ed. 190; *Chute v. Washburn*, 44 Minn. 312, 46 N. W. 555; *Lester v. Georgia, C. & N. R. Co.* 90 Ga. 802, 17 S. E. 113.

Plaintiff having entered into the possession of this right of way over defendants' lands, with their consent and acquiescence, they could not thereafter enter and oust the plaintiff of its possession.

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Lexington & O. R. Co. v. Ormsby*. 7 Dana, 277; *Harlow v. Marquette, H. & O. R. Co.* 41 Mich. 336, 2 N. W. 48; *Cairo & F. R. Co. v.*

Turner, 31 Ark. 494, 25 Am. Rep. 564; *Pettibone v. La Crosse & M. R. Co.* 14 Wis. 443; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282, 53 Am. Rep. 622.

Equity has jurisdiction to relieve against a forfeiture for breach of a condition subsequent, and to decree compensation in its stead, where the breach has not been wilful.

2 Washb. Real Prop. 17; *Marwick v. Andrews*, 25 Me. 525; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Carpenter v. Westcott*, 4 R. I. 225; *Henry v. Tupper*, 29 Vt. 358.

Mr. Turner Oliver for respondents.

McBride, J., delivered the opinion of the court:

Plaintiff's principal contention is that the

by the grantee, became binding upon him, and for the breach of which the grantor may recover damages suffered thereby; but they do not create a condition subsequent whereby the estate will revert on nonperformance on the day stipulated.

Agreement to allow building tracks on road.

In *Detroit & B. Pl. Road Co. v. Detroit Suburban R. Co.* 103 Mich. 585, 61 N. W. 880, a plank-road company, in consideration of \$3,000, agreed in writing to allow its contractees to build an electric road on the side of its road between certain points, which contract contained the stipulation that "the construction of said railroad shall be commenced within one year and completed within five years, otherwise this agreement shall be null and void." The building of the electric road was begun within the year and completed within one year, except a distance of $\frac{1}{2}$ mile. On the contractees attempting to complete their line after the expiration of five years, it was held that they could be restrained from doing so. The court speaks of the stipulation allowing the company to construct its road, as a license which must be regarded as revoked because not exercised in the time agreed in the contract. The court said: "Equity is not invoked to declare a forfeiture or to divest defendants of possession, but to prevent an entry and the construction of the railway."

Agreement to give deed.

In an agreement whereby the owner of land agrees to give a warranty deed to a railroad company for its right of way: "Provided said railroad shall be constructed and in operation . . . within one year. . . . Deed to be delivered when road is built and in operation, but said company may enter upon said premises at once upon its acceptance of this proposition, for the purpose of constructing and operating said railroad,"—the conditions are conditions precedent, not conditions subsequent, and when not complied with, no title passes. 32 L.R.A. (N.S.)

es. *Littlejohn v. Chicago, E. & L. S. R. Co.* 219 Ill. 584, 76 N. E. 840.

Waiver of condition.

A condition subsequent in a deed requiring the construction of a railroad by a certain date is waived where the time named was so short that it was impossible for the road to be constructed in time, and the grantee was permitted without objection to go to expense in completing the road after the date fixed for its completion. *Cain v. Parker*, *supra*.

When time for completion not fixed.

Where a deed to a railroad company is upon condition that the company will construct a railroad thereon, without fixing a time within which the condition is to be performed, the law will construe it to mean within a reasonable time. *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23; *Bouvier v. Baltimore & N. Y. R. Co.* 65 N. J. L. 313, 47 Atl. 772, affirmed in 67 N. J. L. 281, 60 L.R.A. 750, 51 Atl. 781; *May v. Atlantic Coast Line R. Co.* 151 N. C. 388, 66 S. E. 310.

A deed of land to a railroad company on which to locate and construct its road, giving it a right of way so long as it continues to be used as a railroad, implies an obligation on the part of the railroad company to construct the road within a reasonable time; and if this is not done, it reverts to the vendor. *Pollock v. Maysville & B. S. R. Co.* 103 Ky. 84, 44 S. W. 359 (holding thirty-four years longer than a reasonable time).

Eminent domain proceedings after forfeiture.

Where an estate granted to a railroad company on condition that it will construct its road within a stipulated time is forfeited because of failure to construct it in time, the railroad company may still acquire title by eminent domain proceedings. *McDowell v. Blue Ridge & A. R. Co.* 144 N. C. 721, 57 S. E. 520; *Bouvier v. Baltimore & N. Y. R. Co.* 69 N. J. L. 149, 53 Alt. 1040.

R. A. E.

limitation in the right of way deed from defendants is in legal effect a covenant, and not a condition. Forfeitures are not favored in law, and the decisions abound in many subtle distinctions indulged in by the courts to avoid their frequently harsh consequences.

Before discussing the various and frequently unreconcilable decisions on this subject, it may be well to recur to elementary definitions: Littleton defines a condition as follows: "Also, divers words (amongst others) there be, which by virtue of themselves make estates upon condition; one is the word '*sub condicione*.'" And Coke, commenting upon this, says: "This is the most expresse and proper condition in deed, and therefore our author beginneth with it." Co. Litt. § 328. Sheppard says: "Amongst these words there are three words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as '*proviso*,' '*its quod*,' and '*sub condicione*.'" Touch. *122. Tested by these definitions, the language employed in the deed at bar would clearly seem to indicate an intent to create a conditional estate; defeasible on the failure of the grantee to perform the condition. It is true that the courts in the cases cited by counsel have held that similar language constitutes a covenant, and not a condition, but in most, if not all, of these cases the words of condition were held to be modified or qualified by other language used in the same connection. Thus, in *Post v. Weil*, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145, where the restriction read: "Provided always, and these presents are upon this express condition," that no part of the granted premises shall ever be used or occupied as a tavern," the court held that the language used should be construed as a covenant running with the land, placing this construction upon the ground that the original grantor owned adjoining property which might be depreciated in value by the erection of a tavern in the vicinity. But in that case the grantor had an adequate remedy in equity to protect his estate from the erection of the obnoxious building, while in the case at bar defendants would have no such remedy to compel plaintiff to build its road. *Hawley v. Kaftz*, 148 Cal. 393, 3 L.R.A. (N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248, was a case where plaintiff executed to defendant a conveyance which contained the following clause: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six

(6) months from the date hereof a dwelling house to cost not less than fifteen hundred (\$1,500) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." This was held by the court as a mere covenant, and not a condition subsequent; the court saying: "There is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that, for non-compliance with the stipulation to build, it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no language that would create a condition subsequent, but the language actually employed, 'this deed is . . . upon the express agreement,' implies a personal covenant, and not a condition." The distinction between the case cited and the one at bar is obvious. In *Ashuelot Nat. Bank v. Keene*, 74 N. H. 148, 9 L.R.A. (N.S.) 758, 65 Atl. 826, the restriction clause in the deed was as follows: "Provided, however, and this deed is made upon the express condition, that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon, and for utilizing so much thereof as is not used for library purposes for a public park, and for no other purpose whatever; said grantee to take and enjoy the rents and income therefrom until such reasonable time as the same shall be devoted to the purposes aforesaid." There had been some prior negotiations between the parties, which were in writing, and the court, taking into consideration these negotiations, and the fact that the city was to have the use of the property and the rents and profits therefrom for a reasonable time, held that the language used was intended to create and define a trust, rather than to impose a condition subsequent. The fact that the land was conveyed to the city to be used for a public purpose, and therefore as a public trust, was dwelt upon by the court as a circumstance indicating that a forfeiture was not intended.

It is impossible to discuss within the limits of this opinion all the cases cited by counsel, but, as before observed, it will be found in all that either in the conveyance itself, or in some other instrument leading to it, there is language qualifying, modifying, or tending to alter the significance of the alleged words of condition. There is no case cited, and it is believed that none can be found, where a bald single condition, standing alone as this, has been perverted into a covenant. The case of *Blanchard v.*

Detroit, L. & L. M. R. Co. 31 Mich. 43, 18 Am. Rep. 142, is an instructive one. In that case a deed was made in consideration of \$500 and the covenant to build a depot "hereafter mentioned." Thereafter it was set forth that the conveyance "is made upon the express condition" that the company shall erect and maintain on the land conveyed a station house "suitable for the convenience of the public," and that one train "each way shall stop at such depot or station each day, . . . and that freight and passengers shall be regularly taken at such depot." The company failed to build such depot, and the grantor attempted to compel a specific performance, claiming, as plaintiff does here, that the clause quoted constituted a covenant. The court says: "The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant or something capable of operating both ways, frequently becomes very perplexing, in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind, and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate. Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant." So in the case at bar. We have an instrument in which the clause in controversy is couched in the exact language of a condition subsequent, plain, unambiguous, and unqualified, and we would pervert both law and language to hold that these apt words mean something different from their ordinary import.

The case of *Gray v. Blanchard*, 8 Pick. 284, is in point. Gray conveyed a parcel of land adjoining his dwelling house, by a deed containing this restriction: "Provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof." It will be noticed that the contingency pro-

vided against was of trivial character; the only possible effect of placing a window on the north wall being that such window might overlook the grantor's premises and invade his privacy. But the court held the condition good, and declared a forfeiture, saying: "The words are apt to create a condition. There is no ambiguity, no room for construction, and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word 'provided' alone may constitute a condition, but here the very term is used which is often implied from the use of other terms. 'This conveyance is upon the condition' can mean nothing more nor less than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into covenants."

Nor do we see any ground either in law or reason for holding that a railway company cannot bind itself by conditions subsequent. It is true that it may acquire a fee in the land by condemnation, but when it goes into the market to buy as an ordinary purchaser, it would seem that it ought to be permitted to make its own terms. *Mills v. Seattle & M. R. Co.* 10 Wash. 520, 39 Pac. 246; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; and *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142, are railroad cases, and in each of them a contract containing conditions subsequent is held valid. In the case at bar the plaintiff, having induced defendants to execute the conveyance, which they otherwise declined to execute, by writing in the provision in question, is not in a position to urge that such provision was one which they had no right to accept.

It is urged that defendants are estopped from urging a forfeiture by reason of the fact that they voluntarily permitted plaintiff to enter upon the land and construct its grade, and the case of *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756, is cited, among others, in support of this contention. It is true that where one stands idly by and permits a railway corporation to enter upon his land and make valuable improvements thereon, he will be held to have acquiesced in their act, but this only applies to cases where the entry was not under a specific agreement. Here the entry was made under a contract which by its terms practically authorized a re-entry by the grantors at the expiration of two years, if a road was not constructed within that period. There was no misleading plaintiff to its prejudice. Both parties knew from the beginning the possible consequences of delay. Defendants were unwilling to sell a strip of land across their

farm, and allow the railroad company to hold it indefinitely to the detriment of the balance of their holdings and to the possible exclusion of some other line of road. They wanted the road built within two years, or they wanted their land back. Plaintiff, feeling confident that it could complete the road within that time, took the deed with the condition annexed to it. Owing, primarily, to the money panic, and, secondarily, to weather conditions, they failed to comply with the conditions, which no doubt seemed reasonable enough when the deed was made. Financial stringency has caused many people in this country to forfeit profitable contracts, but the courts cannot compel the beneficiaries of such contracts to be generous and extend the time for performance. We find no reason for holding that defendants have in any way waived this condition. After plaintiff had ceased work, defendants built a fence across that part of the field which had been opened for the purpose of constructing the grade, and, before plaintiff ever attempted to begin work at this point again, they warned the company and its agents that they had taken possession. In this we think that they were within the legal rights and waived nothing.

So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous. Plaintiff has constructed its road and has it in operation, thereby performing an important public function for a large and increasing population. It is reasonable to suppose that it is transporting freight and passengers, and, as is the custom of the country, the United States mail. It is to the interest of the public that it should continue to do so, and that the defendants should not be allowed to acquire a portion of its roadbed to the detriment of public travel. The condemnation of land for railway purposes is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once and forever. The pleadings show that this land is needed for the purposes of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity, and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract, and all those things which are usually shown in an action to condemn for a railroad right of way.

Having jurisdiction of this case, we have concluded to assume it for all purposes, and to so modify the decree that plaintiff shall

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take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at \$700, and the costs and disbursements of this suit; and that, upon payment of such sum and costs to the clerk of this court, plaintiff be decreed to be the owner in fee for railway purposes of such strip of land.

OREGON SUPREME COURT.

ZIMMERMAN, WELLS-BROWN COMPANY
NY

v.

SUNSET LUMBER COMPANY, Appt.

(— Or. —, 111 Pac. 690.)

Set-off — sale — suit for possession — counterclaim for damages.

Where the distinction between actions at law and suits in equity is maintained, a counterclaim for damages for breach of contract in the sale and shipment of machinery cannot be set up in an action by the vendor to recover possession, in accordance with the terms of the contract, for failure to pay the purchase price, if the amount of the counterclaim does not equal the amount unpaid, so that the right of possession is in the vendor.

(November 29, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Lane County in favor of plaintiff in an action brought to recover possession of certain property for breach of the purchase contract. Affirmed.

Statement by Eakin, J.:

This is an action by plaintiff to recover the possession of two roading engines—one 11x14, the other 12x12—of the alleged value of \$3,425; plaintiff alleging ownership thereof and right of possession, which allegation the answer denies, alleging affirmatively that defendant purchased from plaintiff the 12x12 engine on June 7, 1907, for the consideration of \$3,925, of which it paid in cash \$1,350, that the balance of the price was to be paid in three and six months, that it purchased from plaintiff the 11x14 engine on July 29, 1907, for the price of \$3,200, payable in three installments, in one, three, and six months, and that each of the purchases were made upon the following agreement, viz.: "It is agreed that title to the property mentioned

Note. — Right in replevin to recoup damages growing out of same transaction, see note to Dearing Water Tube Boiler Co. v. Thompson, 24 L.R.A. (N.S.) 748.

above shall remain in the consignor until fully paid for in cash, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after ten days from shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty, express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of Zimmerman, Wells-Brown Company." And further pleads three defenses: Three items of damage, which it seeks to recoup against the balance due on the purchase price, which, it alleges, exceeds such balance, and therefore defeats plaintiff's right to the possession of the engines, viz: (1) That the 11x14 engine should have been shipped to Hyland Siding, Oregon, but was, by plaintiff, negligently shipped to Springfield, Oregon, and that defendant was compelled to, and did, pay \$38.22 freight to reship it to Hyland Siding. (2) That defendant purchased the 11x14 engine for the express purpose of logging defendant's timber adjacent to its sawmill, which plaintiff well knew, at the time of the purchase; that, because of such delay in not receiving the engine according to the agreement, defendant was compelled to, and did, shut down his sawmill for six days; that the capacity of the mill at that time was 38,000 feet of lumber per day, worth \$14 per thousand at Hyland Siding, and defendant's net profits would have been \$7 per thousand thereon; and that defendant was damaged thereby in the sum of \$1,596. (3) That on October 8, 1908, while defendant was using the 11x14 engine for logging purposes, the drum of the engine broke, without any fault of defendant, which rendered it useless; that defendant was compelled to and did buy a new drum, which cost \$550, which is pleaded as damages; that, by reason of such breakage, defendant was compelled to and did shut down the mill for twelve days; that the capacity of the mill at that time was 34,000 feet of lumber per day, worth at that station \$9.50 per thousand; that the cost of manufacturing it was \$7 per thousand, leaving a profit of \$2.50 per thousand, whereby defendant was damaged in the sum of \$1,050. Plaintiff demurred to the new matter in the answer, which demurrer was sustained by the court. Defendant refused to plead further, and, upon a trial, findings and judgment were rendered in favor of plaintiff, from which judgment defendant appeals.

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Mr. G. F. Skipworth for appellant.
Messrs. Cake & Cake and Woodcock & Potter, with Mr. W. M. Cake, for respondent.

Eakin, J., delivered the opinion of the court:

The contention of plaintiff is that this action, being in the nature of replevin, is not subject to a counterclaim for damages, and upon that question we find there is some conflict in the authorities. See 34 Cyc. Law & Proc. p. 1416. Section 73, Bellinger & C. Anno. Codes & Statutes, provides that the answer shall contain, among other things: "(2) A statement of any new matter constituting a defense or counterclaim." Section 74 provides that "the counterclaim mentioned in § 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action and arising out of one of the following causes of action: (1) A cause of action arising out of the contract, or transaction set forth in the complaint as the foundation of the plaintiff's claim; (2) in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." The earlier cases quite uniformly refused to permit a plea of set-off in an action of replevin; but at this time the rule seems to be greatly modified, being, however, much more liberal in some states than in others. Some courts permit the pleading of a counterclaim, and, if defendant prevails, allow judgment in his favor for the excess, if any. *Deford v. Hutchison*, 45 Kan. 318, 11 L.R.A. 257, 25 Pac. 641; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 544, 79 S. W. 745. But in both of these states and others, where the same rule is followed, by the terms of the statute equitable defenses may be pleaded at law. In Oregon, where the distinction between actions at law and suits in equity is still maintained (*Zeuske v. Zeuske*, — Or. —, 103 Pac. 648), equitable relief cannot be obtained in an action of replevin. The action of replevin generally sounds in tort; at least it is so in case the possession of the property by defendant was obtained otherwise than by virtue of some contract, and probably in such a case no element of set-off would be available as a defense. *Cobbey, Replevin*, § 791; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 544, 79 S. W. 745; *Deford v. Hutchison*, 45 Kan. 318, 11 L.R.A. 257, 25 Pac. 641; *Clement v. Field*, 147 U. S. 467, 37 L. ed. 244, 13 Sup. Ct. Rep. 358; *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584. But, if the action is to recover possession of property, the right to which arises upon

contract, such as upon chattel mortgage, which in terms authorizes the mortgagee to take possession upon default in payment of the debt secured, any matter tending to defeat plaintiff's right of possession may be pleaded as a set-off, as plaintiff's right, in such a case, being for the purpose of foreclosure, is not based on title, but right of possession; and if there is no debt there is no right of possession in the mortgagee. This is recognized in *Nunn v. Bird*, 36 Or. 515, 59 Pac. 808, and *Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077. But to defeat the action the set-off must equal the debt. *Cobbey, Replevin*, § 791; *Wells, Replevin*, § 581.

Most of the cases discussing this question grow out of chattel mortgage or some other character of lien, and it seems that the same rule applies to cases in which the vendor retains the title until full payment of the purchase price, as in the case before us. In such a case, if the debt is canceled, his title is terminated without other act. This is recognized in *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. 1063, and *Cobbey on Replevin*, § 791.

The complaint here does not allege the contract out of which plaintiff's right grew; but the answer sets up the facts showing that defendant's possession was by virtue of a contract for the purchase of the engines, which, for the purpose of this demurrer, must be taken as true, the plaintiff cannot recover without proof of default by defendant. Therefore defendant is entitled to allege and prove any facts that will defeat plaintiff's right to possession, such as payment of the debt or counterclaim equal to it, provided it is such as may be pleaded under § 74, *Bellinger & C. Anno. Codes & Statutes*; but any set-off less than the whole amount due will be unavailing for that purpose, as plaintiff is entitled to possession if any part of the price is unpaid.

There is practically no defense pleaded to plaintiff's right to the 12x12 engine. The items of set-off relate to a breach of the contract for the 11x14 engine. Without determining whether defendant's third item of set-off states facts sufficient to constitute a defense, in the face of the provisions of the contract that "a retention of the property forwarded, after ten days from shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty, express or implied," or whether the facts of the second and third defenses are sufficiently pleaded,—it is plain that the whole amount of such dam-

ages is not equal to the purchase price of the 11x14 engine,—\$3,200,—with interest to the date of the filing of the answer, viz., \$3,615; the whole amount of damages claimed being only \$3,234.22.

The demurrer was properly sustained. Judgment affirmed.

WASHINGTON SUPREME COURT.

DAVID COLE, Respt.,
v.

HUNTER TRACT IMPROVEMENT COMPANY, Appt.

(— Wash. —, 112 Pac. 368.)

Specific performance — race of purchaser — effect.

Specific performance of a contract to sell a lot in a tract of high-class residence property will not, in the absence of fraud, be refused on the ground of mistake, merely because, unknown to the vendor, the purchaser was a negro, and his ownership of the lot will depreciate the value of the tract as residence property and result in material loss to the vendor.

(December 29, 1910.)

Note. — Specific performance as affected by vendor's ignorance of race or character of purchaser.

In view of race prejudice and the susceptibility of residence sections to adverse influence from that source, it is somewhat surprising that no other case has been discovered passing upon the right of the vendor to resist specific performance of an executory contract to convey, because of his ignorance of the race or character of the purchaser. A few cases somewhat analogous are subjoined.

A specific performance will not be decreed where it would be attended with inequitable loss to defendant by impairing the value of adjoining lands. The bill in this case was filed by plaintiff to enforce an alleged agreement on the part of the person deceased to give it a lot for site of an Episcopal church and for burying ground, to contain one acre. *Church of the Advent v. Farrow*, 7 Rich. Eq. 378.

Evidence that a purchaser of land intends to use the premises in the conduct of a business lawful in itself, such as a variety theater, in an immoral or unlawful manner, is admissible to defeat a suit by him for specific performance of the contract to convey. *Hamilton v. Bell*, 37 Tex. Civ. App. 456, 84 S. W. 289.

The terms of a lease which provides that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," are vio-

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in a suit to compel specific performance of a contract for the sale of real property. Affirmed.

The facts are stated in the opinion.

Messrs. Hughes, McMicken, Dovell, & Ramsey, for appellant:

The court erred in granting respondent specific performance of the contract and in denying appellant relief in the form of cancellation prayed for.

Calhoun v. Teal, 106 La. 47, 30 So. 288; 20 Am. & Eng. Enc. Law, 2d ed. p. 811; 24 Am. & Eng. Enc. Law, 2d ed. p. 618; and cases cited in note 8; 4 Am. & Eng. Enc. Law, Supp. 2d ed. p. 687, note 8; Fifer v. Clearfield & C. Coal & Coke Co. 103 Md. 1, 62 Atl. 1122; Morgan v. Owens, 228 Ill. 598, 81 N. E. 1135; Bower v. Bagley, 9 Wash. 642, 38 Pac. 164; 6 Pom. Eq. Jur. 3d ed. § 785; Hart v. Brown, 6 Misc. 238, 27 N. Y. Supp. 74; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Western R. Corp. v. Babcock, 6 Met. 346; Clarke v. Rochester, L. & N. F. R. Co. 18 Barb. 350; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550.

Mr. Andrew R. Black, for respondent:

Relief in equity will only be granted on the ground of such a mistake as affects the substance of the contract, and not a mere incident, or the motive for entering into it, or the process of reasoning.

Dambmann v. Schulting, 75 N. Y. 55; Sankey v. First Nat. Bank, 78 Pa. 48; Comer v. Grannis, 75 Ga. 277; Henderson v. Dickey, 35 Mo. 120; Philpot v. Gruninger, 14 Wall. 570, 20 L. ed. 743; Stettheimer v. Killip, 75 N. Y. 282.

This court is powerless to prevent any person, either white or black, from any legitimate and legal use of his property, and it has no power to force him to accept any price that may be offered for his property.

Richmond Cemetery Co. v. Walker, 29 Ky. L. Rep. 1252, 7 L.R.A. (N.S.) 155, 97 S. W. 34.

lated, and specific performance of an agreement to renew will not be decreed where the assignee of the lease has allowed the premises to be used as a boarding house, although the lessor has consented to his using them for sleeping rooms in connection with a girls' school. Gannett v. Albree, 103 Mass. 372.

It is no defense against the specific performance of one's contract to sell an undivided interest in his land, that his vendee might sell the interest to some undesirable person, entailing probably a disastrous suit to sell the whole property because of its indivisibility. Moayon v. Moayon, 114 Ky. 32 L.R.A. (N.S.)

Parker, J., delivered the opinion of the court:

This is a suit to enforce specific performance of a contract for the purchase of real property. A trial resulted in a decree of specific performance in the plaintiff's favor, and the defendant has appealed therefrom.

The facts affecting the rights of the parties may be summarized as follows: The appellant is the owner of a large addition to the city of Seattle, which is generally regarded as high-class residence property. The respondent is of the negro race. The appellant claims, and introduced evidence tending to show, that if sales of lots in this addition were made to people of that race, it would depreciate the value of the addition as residence property, and result in material loss to appellant, and that for that reason appellant has refrained from selling to negroes. In 1907 appellant entered into a contract for the sale of one of the lots to respondent. The contract was executed by appellant by its president and secretary, and was executed by respondent by A. R. Black, his agent and attorney. Appellant did not know that respondent was a negro, until after all payments had been made upon the purchase price, and he was entitled to a deed under the terms of the contract, a year or more after its execution. There is no evidence that respondent purposely concealed from appellant that he was a negro, nor that he knew that the fact of his being a negro would have induced the appellant to refrain from selling him the lot. The consummation of the sale in respondent's behalf by others was evidently because of the fact that his business rendered it more convenient to have the matter attended to in that way. We may also add that the evidence does not show that any of the persons dealing with appellant for respondent knew that the fact of his being a negro would have induced appellant to refrain from selling him the lot. Upon discovering that respondent was a negro, appellant offered to refund to him the purchase money, with interest, and refused to give him a deed, upon the sole ground that

855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33.

It is no defense for refusing specific performance of a contract to purchase a house stated to be an "eligible freehold property for investment," that, without the knowledge of either party, the house was being used as a disorderly house. Hope v. Walter [1899] 1 Ch. 879, 68 L. J. Ch. N. S. 359, 47 Week. Rep. 479, 80 L. T. N. S. 355.

For false statements as to present intention as to use to which property is to be put as ground for rescission of deed, see note to Adams v. Gillig, post, 127.

J. D. C.

he was a negro, and that appellant did not know that fact at the time the contract was made, nor until after the purchase price was paid.

The substance of appellant's contention is that these facts show such a mistake on its part as will entitle it in equity to rescind this contract, and avoid specific performance thereof. We cannot agree with this contention. It seems to us that this mistake is not of the essence of the contract. It may have to do with the motive of appellant in making sales of lots in the addition; but we are unable to see how, in principle, this mistake differs from a mistake in value of a thing which may be the subject of a sale. It is not claimed that there was any fraud in this transaction. Of course, there could not be, because both parties were ignorant of facts which would have induced appellant not to make the sale. Both parties were not ignorant of the same facts, it is true; but appellant not knowing that respondent was a negro, and respondent not knowing that such fact would influence appellant not to make the sale, it is the same in effect as if they were both ignorant of some single fact affecting appellant's motive,—such, for instance, as both being ignorant of and mistaken as to the real market value of the lot. If there is any difference here as to the obligation resting upon the respective parties to inform themselves as to the facts which would induce appellant not to make the sale, it would seem more just to require appellant to inform itself as to the race of respondent, than to require respondent to inform himself as to appellant's desire not to sell to negroes. Appellant certainly had more reason to pay attention to facts affecting its own motives, than respondent had to suppose that such motives would be affected by the mere fact that he was a negro.

It may well be argued that there was no mistake on the part of appellant as to the person of respondent. There was no mistake as to his ability to perform his contract, but only as to his color, which in no way affected the rights of either party, as expressed by the terms of this written contract. While respondent's color would have induced appellant not to make the sale, had it known that fact, that was not of the essence of the contract, but related to a supposed influence that such a contract would have upon other interests of appellant. It seems to us that this mistake does not come as near being related to the rights of the parties under the contract as a mistake in the value of the thing sold would, and it seems clear that a mistake of that nature, in the absence of fraud, with the parties standing at arm's length, would not entitle

either party to rescind. *Sankey v. First Nat. Bank*, 78 Pa. 48; *Dambmann v. Schulting*, 75 N. Y. 55; *Stettheimer v. Killip*, 75 N. Y. 282; *Comer v. Granniss*, 75 Ga. 277.

We have not had any decisions of the courts called to our attention involving a mistake of this exact nature; but we think the cases above cited are applicable to the principle here involved. We are of the opinion that the decree of the learned trial court should be affirmed.

It is so ordered.

Rudkin, Ch. J., and Mount, Gose, and Fullerton, JJ., concur.

NEW YORK COURT OF APPEALS.

CATHERINE ADAMS, Resp't.,

v.

ALEXANDER L. GILLIG, Impleaded, etc.,
Appt.

(199 N. Y. 314, 92 N. E. 670.)

Fraud — purchase of city lot — misrepresentation of intended use.

A false statement of present intention as to the use to which the lot should be put, made for the purpose of inducing the sale of a city lot, when the use to which the lot is actually to be put will greatly depreciate the value of the remaining property of the grantor, is such fraud as will justify cancellation of a deed made in reliance thereon.

(October 11, 1910.)

Note.—False statements as to use to which property is to be put as ground for rescission of deed.

The general subject, "future promise as a fraud," is treated at length in the note to *Cerny v. Paxton & G. Co.* 10 L.R.A. (N.S.) 640, and the supplementary note to *Miller v. Sutliff*, 24 L.R.A. (N.S.) 735. The purpose of the present note is merely to bring together the cases showing how the principles on that subject have been applied concretely, where a rescission of a conveyance of real property has been sought upon the ground of false statements as to the use to which the property was to be put. These cases as a whole sustain the decision in *ADAMS v. GILLIG*.

So, a rescission and reconveyance were decreed in *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729, although the vendors received a fair price and would suffer no direct pecuniary loss from the contemplated use, where, by falsely pretending that the property was desired for a private residence by a desirable neighbor, defendants procured a conveyance, with the intention immediately carried out of conveying it to one who desired it for a boarding

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment entered in the office of the clerk of Erie County upon the report of a referee in plaintiff's favor, in an action brought to procure the cancelation of a deed of conveyance of certain premises, executed by plaintiff to defendant, and for a reconveyance of said property. Affirmed.

Statement by Chase, J.:

The defendant Gillig is the person to whom the deed hereinafter mentioned was given. The defendants Frank C. Kempf and Nicholas Kempf are contractors, who, at the time of the commencement of this action, were under contract with the defendant Gillig to do certain work upon the real property described in said deed.

house,—a use which they knew was objectionable to the vendors, and contrary to a tacit understanding with other owners to exclude uses rendering the neighborhood less desirable as a residential section.

In *Troxler v. New Era Bldg. Co.* 137 N. C. 51, 49 S. E. 58, it is held that a contract for the sale of land to a corporation will be rescinded where vendor is induced to sell upon the false representation that it would erect buildings thereon, but fails to do so. The court said: "A fraud consists in the fact, found by the jury, that the defendants, at the time of making the representation and promise which constituted an inducement to make the deed, did not intend to make good such representation and promise."

But in *State v. Blize*, 37 Or. 404, 61 Pac. 735, a suit to determine an adverse claim to real estate, although the alleged failure of the state to comply with its agreement to use the land in question for public purposes only was wholly immaterial in this suit, the court decided that where the state purchased land, paying full value therefor, the grantor was not entitled to have the deed set aside on the ground that the state officials falsely and fraudulently represented that the state would build an insane asylum thereon. Bean, Ch. J., said: "An executed contract between competent parties, founded on a valuable consideration, not immoral or prohibited by statute or against public policy, is not void as between the parties, however fraudulently obtained."

And a deed will not be rescinded for fraud on the broken promise of the vendors, made without the intention of performance, that they would build a bridge and hotel, and grade certain streets. *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014.

In *Barrow v. Nashville & C. Turnp. Co.* 9 Humph. 304, it was held that the vendor was not entitled to a rescission of the deed, where a turnpike company purchased land for 32 L.R.A. (N.S.)

When the defendant is hereinafter referred to, the defendant Gillig is intended.

On and prior to June 2, 1908, the plaintiff was the owner in fee simple of a lot of land 100 feet front and about 160 feet in depth, situated on the east side of Elmwood avenue in the city of Buffalo, and also of two other lots of land fronting on Highland avenue in said city, and which run back to and adjoin the first-mentioned lot. The lots fronting on Highland avenue had houses on them, and the lot fronting on Elmwood avenue was vacant. The immediate neighborhood of said lots, so far as the same have been built upon, is devoted exclusively to residences. The defendant sought to purchase a portion of the plaintiff's lot fronting on Elmwood avenue, and stated that he desired to purchase the same for residence purposes. The negotiations

purpose of placing a tollgate thereon, but after the execution of the deed substituted a blacksmith's shop for the tollgate, to the injury and annoyance of complainant, the deed being accepted unconditionally. The court said: "We readily comprehend the inconvenience and annoyance the change of occupants in this house must occasion to the complainant, and we cannot but wish that relief could be afforded without breaking down well-established principles of equity jurisprudence. But in the first place, although it is true the complainant doubtless believed that the gate was to be permanently kept at the place he was selling, yet it does not appear that the defendants did or said anything to induce that belief, except the mere fact of proposing to buy for that particular purpose, and the knowledge of complainant that they had no right to hold land for any other purpose."

A contract for the sale of land will not be rescinded by reason of an unfulfilled promise by vendor to a prospective buyer of such land, to run a street railroad through a certain section of the city then undergoing a real-estate boom, there being no fraud, such promise referring only to future acts. *Day v. Ft. Scott Invest. & Improv. Co.* 153 Ill. 293, 38 N. E. 567.

In *Parsons v. Detroit & M. R. Co.* 122 Mich. 462, 81 N. W. 343, it is held that a deed to a railroad company of a right of way absolute upon its face will not be set aside where neither fraud nor mistake as to its terms is shown, on account of the company's moving its depot to a point some distance from the land conveyed, though the grantor's belief that a depot would be maintained near by was the principal reason for his giving the deed. In such a case the deed controls.

As to specific performance as affected by vendor's ignorance of race or character of purchaser see *Cole v. Hunter Tract Improv. Co.* ante, 125. J. D. C.

were carried on with the plaintiff's agents, and the defendant stated to the representative of the plaintiff's agents, and also to the agents themselves, that he intended to build dwellings upon the lot, if purchased. The plaintiff's agents communicated to her the statement of the defendant and his offers, and she asked her agents if they were sure the sale would not affect the value of the remaining vacant lot, and she was told by her agents that the defendant would build either single or double houses upon the lot so to be purchased. The representations of the defendant that he intended to build dwellings on the lot to be purchased by him were false and fraudulent, and made with the intent to deceive the plaintiff. The plaintiff relied upon the representations of the defendant that he intended to build dwellings upon the lot when purchased, and, believing such statements to be true, executed and delivered to him a deed of 65 feet front and 160 feet in depth, in consideration of \$5,525. During all the time that the defendant was negotiating for the purchase of the lot in question, he intended to build a public automobile garage thereon, which fact was unknown to the plaintiff, and which the defendant fraudulently concealed from her. On the day following the purchase of said lot, the defendant instructed his architect to prepare plans for a garage to be built thereon to cover substantially the entire lot, and in less than two weeks thereafter he entered into a contract for the erection of such garage.

The plaintiff, without delay, communicated with the defendant and offered to procure another site for his garage, pay all the expenses he had incurred up to that time, and restore the consideration he had paid for the property, if he would reconvey the property to her. This the defendant refused to do. The plaintiff was deceived by said misrepresentations of the defendant, and the construction of the proposed garage will greatly damage the remaining property belonging to the plaintiff. It will decrease the value of the remaining vacant lot on Elmwood avenue about one half, and the value of her lots with houses fronting on Highland avenue, about one fourth. The referee found in favor of the plaintiff, and directed a reconveyance of the property. From the judgment entered upon the report of the referee, an appeal was taken to the appellate division of the supreme court, where it was affirmed by a divided court.

Mr. Horace McGuire, with Messrs. V. H. Riordan and Paul J. Batt, for appellant:

The plaintiff, having voluntarily omitted 32 L.R.A. (N.S.)

the alleged restrictive covenant from the contract and deed, cannot now resort to equity for a rescission of the contract and deed, or to reform them by inserting this alleged restriction.

Wilson v. Deen, 74 N. Y. 531; Dyar v. Walton, 79 Ga. 466, 7 S. E. 220.

The plaintiff is not entitled to a rescission of the contract and deed, because the alleged false representation related not to an existing fact or past event, but to an intention or promise on his part to do something in the future, a breach of which cannot be made the basis for a charge of fraud.

Gray v. Palmer, 2 Robt. 500; Lexow v. Julian, 21 Hun, 577, affirmed in 86 N. Y. 638; Gallagher v. Brunel, 6 Cow. 346; Taylor v. Commercial Bank, 174 N. Y. 184, 62 L.R.A. 783, 95 Am. St. Rep. 504, 66 N. E. 726; Wilson v. Deen, 74 N. Y. 531; Gage v. Lewis, 68 Ill. 604; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Kerr, Fr. & Mistake, § 88; State v. Blize, 37 Or. 404, 61 Pac. 735.

The promise or expressed intention of the defendant to erect nothing objectionable upon the premises was collateral to the contract, and constituted no part of the contract or deed.

Wilson v. Deen, 74 N. Y. 538; Lexow v. Julian, 21 Hun, 577, affirmed in 86 N. Y. 638; Gage v. Lewis, 68 Ill. 604; Gallagher v. Brunel, 6 Cow. 346.

Mr. Adelbert Moot and Miss Helen Z. M. Rodgers, with Mr. James W. Persons, for respondent:

Plaintiff was entitled to a rescission of the contract and deed. A representation of a present intention is a representation of an existing fact, and one that is peculiarly within the knowledge of the defendant.

Hennequin v. Naylor, 24 N. Y. 139; Old Colony Trust Co. v. Dubuque Light & Traction Co. 89 Fed. 794; Edgington v. Fitzmaurice, L. R. 29 Ch. Div. 479, 55 L. J. Ch. N. S. 650, 53 L. T. N. S. 369, 33 Week. Rep. 911, 50 J. P. 52; Meldrum v. Meldrum, 15 Colo. 478, 11 L.R.A. 65, 24 Pac. 1083; De Lissa v. Fuller Coal & Min. Co. 59 Kan. 319, 52 Pac. 886; Horton v. Lee, 106 Wis. 439, 82 N. W. 360; American-Hosiery Co. v. Baker, 18 Ohio C. C. 604, 10 Ohio C. D. 219; Ilgenfritz v. Ilgenfritz, 116 Mo. 429, 22 S. W. 786; Dowd v. Tucker, 41 Conn. 197; Langley v. Rodriguez, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 400; Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Butler v. Watkins, 13 Wall. 456, 20 L. ed. 629; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508;

Rogers v. Virginia-Carolina Chemical Co. 78 C. C. A. 615, 149 Fed. 1; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; Brooks v. United States, 76 C. C. A. 581, 146 Fed. 223.

Chase, J., delivered the opinion of the court:

Any contract induced by fraud as to a matter material to the party defrauded is voidable. There are many rules as to what constitutes an inducement by fraud, and also affecting the general statement that any contract will be set aside for fraud, that have been established as necessary to protect the rights of all the parties to a contract, which need not be stated in this discussion, except so far as they affect the particular transaction under consideration. It may be assumed that promises of future action that are a part of the contract between the parties, to be binding upon them, must be stated in the contract. An oral restrictive covenant, or any oral promise, to do or refrain from doing something affecting the property about which a written contract is made and executed between the parties, will not be enforced, not because the parties should not fulfil their promises and their legal and moral obligations, but because, the covenants and agreements being promissory and contractual in their nature, and a part of or collateral to a principal contract, the entire agreement between the parties must be deemed to have been merged in the writing. The value of a writing would be very seriously impaired if the rule mentioned in regard to including the entire agreement in such writing is not enforced.

A strict enforcement of such rule tends to greater security and safety in business transactions, and leaves less opportunity for dishonesty and false swearing, induced, perhaps, by a change of purpose, or a failure to obtain the result that was anticipated when the transaction was originally consummated and reduced to writing. Such rule makes it necessary for the parties to a written contract to include everything therein pertaining to the subject-matter of the principal contract, and if, by mistake or otherwise, an oral agreement, a part of the transaction, is omitted from the writing, it can only be made effective and enforceable by a reformation of the writing, so that the same shall include therein the entire agreement between the parties. The rule is quite universal that statements promissory in their nature, and relating to future actions, must be enforced, if at all, 32 L.R.A. (N.S.)

by an action upon the contract. It is unnecessary to decide or discuss the question whether under some possible circumstances the courts will not in equity lay hold of false statements that are contractual in their nature, to prevent the consummation of a fraud.

It is not claimed on this appeal that the defendant made promises which became a part of the contract, or that the deed could be reformed by including therein restrictive covenants. The rule in regard to including the entire agreement between the parties in the writing does not take away or detract from the general rule by which a contract can always be set aside for fraud affecting the transaction as to a material fact that is not promissory in its nature. Any statement of an existing fact material to the person to whom it is made, that is false and known by the person making it to be false, and which is made to induce the execution of a contract, and which does induce the contract, constitutes a fraud that will sustain an action to avoid the contract, if the person making it is injured thereby.

We have in this case findings by the trial court sustained by the record, which show that the defendant purposely, intentionally, and falsely stated to the plaintiff that he desired to purchase a portion of her vacant lot for the purpose of building a dwelling or dwellings thereon. He must have known that if he thereby induced her to convey to him such portion of the lot, and his intention to build a garage thereon was carried out, it would injure her to an extent in excess of the full consideration to be paid by him to her for such lot. The plaintiff relied upon the defendant's honesty and good faith in the purchase, and was apparently willing to take her chances of a subsequent change in his intention, or of his selling the lot to another whose intentions and purposes might be entirely different.

The simple question in this case is therefore whether the alleged intention of the defendant to build a dwelling or dwellings upon the lot which he sought to purchase is such a statement of an existing material fact as authorizes the court to cancel the deed because of the fraud. The distinction between a collateral agreement as a part of a contract to do or not to do a particular thing, and a statement and representation of a material existing fact made to induce the contract, may be further profitably considered. A promise as such to be enforceable must be based upon a consideration, and it must be put in such form as to be available under the rules relating to contracts, and the admission of evidence re-

lating thereto. It may include a present intention, but as it also relates to the future it can only be enforced as a promise under the general rules relating to contracts. A mere statement of intention is a different thing. It is not the basis of an action on contract. It may in good faith be changed without affecting the obligations of the parties. A statement of intention does not relate to a fact that has a corporal and physical existence, but to a material and existing fact, nevertheless not amounting to a promise, but which, as in the case under discussion, affects and determines important transactions. The question here under discussion is not affected by the rules relating to the admission of testimony. As it was not promissory and contractual in its nature, there is nothing in the rules of evidence to prevent oral proof of the representations made by the defendant to the plaintiff. In an action brought expressly upon a fraud, oral evidence of facts to show the fraud is admissible. Pom. Eq. Jur. § 889. This case stands exactly as it would have stood if the plaintiff and defendant, before the execution and delivery of the deed, had entered into a writing by which the defendant had stated therein his intention as found by the court on the trial, and the plaintiff had stated her acceptance of his offer based upon her belief and faith in his statement of intention, and it further appeared that the statement was so made by the defendant for the purpose of inducing the plaintiff to sell to him the lot, and that such statement was so made by him falsely, fraudulently, and purposely, for the purpose of bringing about such sale.

Intent is of vital importance in very many transactions. In the criminal courts it is necessary in many cases for jurors to determine as a question of fact the intent of the person charged with the crime. Frequently the life or liberty of the prisoner at the bar depends upon the determination of such question of fact. In civil actions relating to wrongs, the intent of the party charged with the wrong is frequently of controlling effect upon the conclusion to be reached in the action. The intent of a person is sometimes difficult to prove, but it is nevertheless a fact, and a material and existing fact, that must be ascertained in many cases, and, when ascertained, determines the rights of the parties to controversies. The intent of Gillig was a material existing fact in this case, and the plaintiff's reliance upon such fact induced her to enter into a contract that she would not otherwise have entered into. The effect of such false statement by the defendant of his intention cannot be cast aside as

immaterial, simply because it was possible for him in good faith to have changed his mind, or to have sold the property to another who might have a different purpose relating thereto. As the defendant's intention was subject to change in good faith at any time, it was of uncertain value. It was, however, of some value. It was of sufficient value so that the plaintiff was willing to stand upon it, and make the conveyance in reliance upon it. The use of property in a particular manner changes from time to time, and restrictive covenants of great value at one time may become a source of serious embarrassment at a later date. The fact that restrictive covenants cannot ordinarily be drawn to bend to changed conditions has made many purchasers disinclined to accept conveyances with such covenants. A restrictive covenant in a deed may be of sufficient importance to justify a refusal by a contractee to accept a conveyance subject to such conditions. A person in selling property may be quite willing to execute and deliver a deed thereof without putting restrictive covenants therein, and in reliance upon the good faith of express, unqualified assurances of the present intention of the prospective purchaser. In such case the intention is material, and the statement of such intention is the statement of an existing fact.

Unless the court affirms this judgment, it must acknowledge that, although a defendant deliberately and intentionally, by false statements, obtained from a plaintiff his property to his great damage, it is wholly incapable of righting the wrong, notwithstanding the fact that by so doing it does in no way interfere with the rules that have grown up after years of experience to protect written contracts from collateral promises and conditions not inserted in the contract. We are of the opinion that the false statements made by the defendant of his intention should, under the circumstances of this case, be deemed to be a statement of a material, existing fact, of which the court will lay hold for the purpose of defeating the wrong that would otherwise be consummated thereby. We have not overlooked the many authorities called to our attention by the appellant. In *Wilson v. Deen*, 74 N. Y. 531; *Kley v. Healy*, 127 N. Y. 555, 561, 28 N. E. 593; *Gray v. Palmer*, 2 Robt. 500, affirmed in 41 N. Y. 620; *Lexow v. Julian*, 21 Hun, 577, affirmed in 86 N. Y. 638; *Gallager v. Brunel*, 6 Cow. 346; *Gage v. Lewis*, 68 Ill. 604; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153, and many other cases in this and other states, the court had under consideration representations that were prom-

issory and contractual in their nature, and which, if enforced at all, could only be enforced under the rules relating to contracts.

We are unable to find authorities where the exact question considered herein has been directly discussed by the court, but the principle herein annunciated finds support in *Hennequin v. Naylor*, 24 N. Y. 139; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794; *Edgington v. Fitzmaurice*, L. R. 29 Ch. Div. 479, 55 L. J. Ch. N. S. 650, 53 L. T. N. S. 369, 33 Week. Rep. 911, 50 J. P. 52; *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618; *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; *Butler v. Watkins*, 13 Wall. 456, 20 L. ed. 629, and other cases. Equity will interfere to grant relief where necessary to prevent the consummation of a fraud. *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657. It is said that this decision will open the door to other litigation. If that is the effect of it, then, so far as the decision asserts power in the court to prevent dishonesty, false dealing, and bad faith in business transactions, it should be welcomed. It is not the intention of the court to extend the effect of this decision by implication, or to a case other than one where the facts are clearly found against the defendant. The courts will be vigilant to prevent the rescission for fraud of a contract deliberately made, unless the fraud is admitted or proven by most satisfactory evidence. 6 Cyc. Law & Proc. p. 336. We do not concede the accuracy of the statement made before us on behalf of the defendant, to the effect that false statements similar to the one made by the defendant to induce the execution of the deed by the plaintiff are common in business transactions; but, if true, and controversies arise over the retention of the fruits of such frauds, and the fraudulent inducement is conceded or proven beyond reasonable controversy, the transactions will not have the approval and sanction of the courts.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Gray, Vann, Werner, Willard Bartlett, and Hiscock, JJ., concur.

WISCONSIN SUPREME COURT.

FRANK PHILLIPS, by Guardian *ad Litem*, Resp't,

v.

FRED EGGERT et al., Appts.

(— Wis. —, 129 N. W. 654.)

Sheriff — escape — duty to follow beyond state limits.

That a vessel which escapes from the custody of a sheriff who has taken it under an attachment process passes beyond the confines of the state does not relieve him of his statutory duty to repossess himself of it.

tody of a sheriff who has taken it under an attachment process passes beyond the confines of the state does not relieve him of his statutory duty to repossess himself of it.

(January 31, 1911.)

APPEAL by defendants from a judgment of the Circuit Court for Manitowoc County in favor of plaintiff in an action on a sheriff's official bond to recover the amount of a judgment held by plaintiff against a vessel taken by the sheriff, under an attachment process, which was alleged to have escaped from his custody through his negligence. Affirmed.

Statement by Siebecker, J.:

September 28, 1906, the plaintiff brought suit against the Portage Transit Company, a foreign corporation, to recover damages for personal injuries. A writ of attachment was issued out of the Brown county circuit court on the same day, and an alias writ, with the affidavit and undertaking required by law, was delivered to the sheriff

Note. — Duty of sheriff to pursue property which escapes from his custody.

This note does not cover the general question as to the care a sheriff is bound to exercise over property in his possession, but is confined strictly to the question as to his duty to pursue property after it has escaped from his control.

The authorities seem agreed that sheriffs are bound to follow property which has escaped from their possession, whether the escape was with or without their fault.

Thus, it has been held that, notwithstanding the fact that a sheriff had used proper diligence to care for property which he had attached, he was guilty of negligence rendering him liable, in failing to pursue the property where it had been taken away by a constable who had levied upon it. *Wood v. Bodine*, 32 Hun, 354. The court said: "It may be conceded that up to the end of the contest over the possession, the sheriff acted with the greatest diligence, activity, and propriety; that he summoned the bystanders to his assistance, and they refused to aid him in retaining possession of the property and resisting the action of the constable. The sheriff's duty, however, did not end on a capture of the goods by the stronger hand of the constable. The goods were not lost nor destroyed, and from the evidence it is fair to assume that they remained in the hands of the constable and within the sheriff's bailiwick. . . . After the sheriff was deprived of his possession, he remained passive, and did no act whatever, with a view of regaining the custody of the property. Therein, he was guilty of a breach of duty, which constituted actionable negligence. As the goods were not destroyed, and remained within his jurisdiction, he had ample power and authority to regain the possession. Al-

of Manitowoc county for service. The bond of indemnity demanded by the sheriff was furnished, and the writ was then served and an attachment made. The property attached was "The Steamship Portage," then lying at the wharf in the harbor of the city of Manitowoc. No watchman or custodian was placed on the boat by the sheriff, and no bond for the release of the boat was furnished by the defendant. The sheriff testified that, when he spoke to plaintiff's counsel about putting a custodian in charge of the boat, he was told that it would not be necessary. Clearance papers were obtained from the custom-house officer, and a few days after the service of the writ the boat left the harbor during the nighttime without the knowledge of the sheriff. On the morning of the day after the disappearance, the sheriff learned of the boat's departure. It appears that the boat cleared for Duluth, Minnesota. Soon after learning

that the boat had left the harbor, the sheriff informed the attorney of the plaintiff at Green Bay of its disappearance. The attorney informed the sheriff that the plaintiff had no course to take, but to hold the sheriff and his bondsmen for the plaintiff's damages, in the event that the plaintiff recovered judgment against the defendant transit company. The attorney for the plaintiff also wrote the sheriff to the same effect. The sheriff, on the day following the disappearance, learned by inquiry from the custom-house officer that the boat had cleared for Duluth, Minnesota. He took no steps to regain possession of the boat. On November 27, 1906, the plaintiff recovered judgment against the Portage Transit Company for \$2,537.72 and costs. Execution issued on this judgment, which the sheriff of Manitowoc county returned, showing that he was unable to find any property belonging to the defendant. The plaintiff brought

though he had been deprived of the actual possession, the goods remained in the custody of the law, and the levy under the attachment continued. It has never been held, by any court, as I can find, that a rescue of the property by a claimant, unless the claim was well founded, was a good and a sufficient return to a process in the hands of a sheriff. The sheriff had the power to raise the *posse comitatus* and reseize the property. He could have done it on the spot and gone in hot pursuit, or acted with more deliberation and organized a force on a later day. No one can doubt if he had done this, that he would have regained the possession of the property."

And it was held in *Lovell v. Sabin*, 15 N. H. 29, that it was no defense to a sheriff that another officer got possession of property which had been attached, and removed and sold it. The court said: "But the taking of the property attached, from the possession of the officer who made the attachment, by one who has no authority to seize it, is not within the reason which may excuse the nonproduction on the ground of inevitable accident, and it furnishes no security for the debt. We are not aware of any authority that the sheriff is excused from his duty to retain and apply the property, because it had been taken from him by a trespasser. It might be very mischievous to hold that this furnished any excuse, except it should be for delay until the sheriff could pursue the trespasser to judgment."

And the same result was reached in *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 395, as to property which had been levied upon.

In *Lovejoy v. Hutchins*, 23 Me. 272, in an action against a sheriff for the loss of logs which had been attached, it was held that evidence was properly excluded that the logs were carried down the river and into another county by the force of the wind and water in spite of all the force he could command, and that the parties in pos-

session of the logs successfully resisted his attempt to hold possession of them. The court said: "It was offered to be proved by the defendant that, by reason of the current in the water, in which the property attached, *vis.*, mill-logs, lay, and the resistance of the owners of it, he was unable to keep it within his precinct. The judge at the trial did right in rejecting such evidence. No such occurrence could excuse him from liability. He had his remedy against anyone who might wrest it from his possession. The conveyance of it out of his precinct did not absolve him from liability. He could have pursued it, and have reclaimed it, anywhere. By the attachment he acquired a special property in it, the right to which he might have vindicated."

It has been held that the fact that a boat which a constable had levied upon was taken from a guard which he had placed over it, and carried away, will not relieve him from liability, since he has the power of summoning the *posse comitatus* to prevent a rescue, and is liable if one is effected. *State use of Boone County v. Lowry*, 8 Mo. 48.

And it was held in *Mildmay v. Smith*, 2 Wms' Saund. 343, that a sheriff could not excuse himself from producing goods seized under execution, by showing a rescue of the goods from him.

In *Bridges v. Perry*, 14 Vt. 261, where the sheriff placed cows attached on mesne process in the custody of one who put them in a pasture from which they were driven by their owner, and later attached by other creditors, it was held that, in caring for property taken on mesne process, the sheriff was bound only to use ordinary care, and that if they were taken from him without any want of such care on his part he would not be liable therefor. The question of his duty to retake the property does not, however, seem to have been considered in this case.

J. T. W.

this action against the sheriff and his bondsmen to recover the amount of the judgment he held against the Portage Transit Company, on the ground that the boat which was attached in the action against the Portage Transit Company had been allowed to escape through the negligence of the sheriff, and on the ground that the sheriff had been negligent in not attempting to retake the boat after it had escaped. The court instructed the jury, in submitting the case, as follows: "The burden of proof is likewise upon the defendants to satisfy and convince you by a preponderance of the evidence that the defendant Eggert exercised due care and diligence to again possess himself of the boat." The jury found that the sheriff was not guilty of negligence in losing possession of the boat, but that he was guilty of negligence in not repossessing himself of it. This is an appeal from the judgment in plaintiff's favor, entered upon the verdict.

Messrs. Burke & Craite and Hougén & Brady, for appellants:

Where the attached property was, under instructions from the plaintiff, not taken into actual possession by the sheriff, he is not liable.

Hubbell v. Root, 2 Allen, 185; State ex rel. Clement v. Rainey, 99 Mo. App. 218, 73 S. W. 250; Muir v. Orear, 87 Mo. App. 38; Abbott v. Edgerton, 30 Vt. 208; Willard v. Goodrich, 31 Vt. 597; Freiberg v. Johnson, 71 Tex. 558, 9 S. W. 455; Wheeler v. McDill, 51 Wis. 356, 8 N. W. 169.

Mr. John E. Tracy, with Mr. M. E. Davis, for respondent.

Siebecke, J., delivered the opinion of the court:

There is no issue in the case as regards the issuance of an attachment and the levy made on the boat in pursuance thereto by the defendant Eggert as sheriff. The controversy arises respecting the sheriff's conduct as to the disappearance of the boat after having taken possession of it under his writ of attachment, and in not repossessing himself thereof after such loss of possession. The rule is well established that a sheriff who has property in his custody, pursuant to a levy thereon, is liable for its loss whenever it is caused by his failure to exercise reasonable care and diligence to preserve such custody (35 Cyc. Law & Proc. p. 1668), and, in case of a loss of possession through any cause, it is his duty to exercise reasonable care and diligence to repossess himself thereof. Subsection 3, § 2749, Stat. 1898, provides: "If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or

converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the writ of attachment." It is obvious from this provision that the duty devolves upon a sheriff having property in his official custody to repossess himself thereof whenever it shall have passed out of his hands, subject, of course, to the condition that he may release the property in the manner provided by law, or with the consent of the attaching creditor. In the light of the foregoing statute, the proposition is also reasonably clear that, when a sheriff avers a justification for the release or loss of property taken into his possession under an attachment, he assumes the burden of showing that he is relieved from the obligation of having the property forthcoming pursuant to the attachment.

The court instructed the jury that, under the facts and circumstances of the case, the burden rested on the defendants to show that the sheriff exercised reasonable care and diligence to repossess himself of the boat. This instruction is assailed on the ground that it was error to so direct the jury, because the evidence shows, as the jury found, that the sheriff was not negligent in losing possession and custody of the boat held by him under the levy. The claim is that the sheriff acted under the direction of the plaintiff's attorney in not placing a custodian in charge of the boat, and hence that he was not responsible for its disappearance from the harbor under the circumstances shown. It must be assumed, under the verdict found, that the plaintiff's attorneys consented that the sheriff need not employ a custodian to take charge of the boat, and that this exonerates him from the imputation of negligence in losing possession of the property. This phase of the case, however, does not embrace his whole duty in the matter, and there remains to be considered the question whether the sheriff fulfilled his legal duty to repossess himself of it under the statute declaring that, whenever property so held shall pass from the sheriff's hands, "he shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the writ of attachment." It is manifest that the consent of the plaintiff's attorney that the sheriff need not employ a custodian to take charge of the boat while lying at the wharf in the harbor was not also a direction or understanding that the sheriff was not to take all the steps reasonably necessary to repossess himself of it after it cleared and passed out of his possession for other parts. The duty rested on the

sheriff, on the morning after he learned of the boat's disappearance, to do everything that reasonable care and diligence demanded to repossess himself of the property.

Appellants aver that the sheriff did all that reasonable care and diligence required of him under the circumstances in the matter, and that the jury's finding that he was guilty of negligence in this regard is not supported by the evidence. We do not find this claim supported by the record. An examination of the evidence discloses that the sheriff did nothing to ascertain the whereabouts of the boat after learning of its disappearance from its place in the harbor. It appears that the boat cleared for Duluth, Minnesota. The sheriff admits that he made no attempt to find it there, or to search for it at any other place. Does this conduct show that he performed his duty to have the property forthcoming in the attachment, and is it justifiable as an exercise of reasonable diligence to accomplish that end? We cannot perceive how the jury could have drawn the inference from the facts and circumstances, that the sheriff acted with reasonable diligence to repossess himself of the boat, since he admittedly did practically nothing in this respect. Nor is the claim that the plaintiff's attorney acquiesced in his nonaction in this matter sustained by the record, for it affirmatively appears that the attorney at once informed him that the plaintiff would hold him responsible for the satisfaction of any damages he might recover in the action.

It is suggested that, since it appears that the boat passed beyond the confines of this state, the sheriff is relieved of the duty of pursuing and retaking it. We find no support for this claim. Under the circumstances shown, it has been held that a sheriff is obligated to use reasonable diligence to ascertain the whereabouts of the property and to follow it, and that his special interest therein, acquired by the levy, authorizes him to retake it or recover it in legal proceedings for the purpose of satisfying the demand of the attaching creditor. In some of the following cases such rights were upheld though the property had been taken into foreign jurisdictions, and the sheriff was held responsible as in other cases: *Rhoads v. Woods*, 41 Barb. 471; *Lovejoy v. Hutchins*, 23 Me. 272; *Newman v. Wilson*, 1 La. Ann. 48; *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 395; *Lovell v. Sabin*, 15 N. H. 29; *Drake, Attachm.* § 291. We consider that the jury are supported in this finding; that the sheriff did not exercise reasonable diligence to repossess himself of the boat.

We find no error in the record. The court properly awarded judgment on the verdict. 32 L.R.A. (N.S.)

VERMONT SUPREME COURT.

CREAMERY PACKAGE MANUFACTURING COMPANY

v.

JAMES E. RUSSELL

and

JOSEPH PRENEVOST, Trustees.

(— Vt. —, 78 Atl. 718.)

Building contract — promise to pay extra compensation — enforceability.

1. One who contracts to construct a house in a workmanlike manner, according to specifications which call for a cellar wall properly laid, is bound to provide a concrete foundation, if the excavation shows that it will be necessary to support the building, although the parties did not contemplate the necessity of so doing when they made the contract; and an agreement by the owner to pay him extra compensation for such service is without consideration, and cannot be enforced.

Same — work not called for by specifications.

2. One who, having contracted to construct a house in a workmanlike manner, according to specifications showing the dimensions and manner of laying the cellar wall, may, in case, at the direction of the owner, he enlarges the wall, lays it in cement, and lines the underpinning with brick, in view of conditions of soil disclosed by the excavation, hold the owner liable for the extra work, and may therefore recover on his promise to pay extra compensation, although a wall laid in mortar, as called for by the specifications, would not have held the building.

(January 4, 1911.)

EXCEPTIONS by the trustees to rulings of the Rutland County Court made during the trial of an action brought to reach extra compensation alleged to be due under a building contract, in satisfaction of a

Note. — The general question whether performance of an existing contract obligation constitutes a consideration for a new promise is treated in the note to *Abbott v. Doane*, 34 L.R.A. 33.

And the specific question whether the promise of additional compensation for completing an executory contract other than for the payment of money is discussed in the notes to *Linz v. Schuck*, 11 L.R.A. (N.S.) 789, and *Shriner v. Craft*, 28 L.R.A. (N.S.) 450.

The allied question whether payment of part of a liquidated and undisputed debt is a consideration for the discharge of the whole debt is treated in notes to *Fuller v. Kemp*, 20 L.R.A. 785; *Melroy v. Kemmerer*, 11 L.R.A. (N.S.) 1018; and *T. T. Haydock Carriage Co. v. Zeigler*, 21 L.R.A. (N.S.) 1005.

claim against the contractor, which resulted in a judgment in plaintiff's favor. Reversed.

The facts are stated in the opinion.

Mr. T. W. Moloney, for defendant trustee:

By the terms of the contract the defendant was bound, absolutely, to erect the building and foundations in a good and workmanlike manner. A promise by a party to do what he is bound in law to do is not a sufficient consideration to sustain a contract.

Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Rowell v. Vershire, 62 Vt. 405, 8 L.R.A. 708, 19 Atl. 990; Chase v. Soule, 76 Vt. 353, 57 Atl. 754.

A contractor who undertakes to construct a building and furnish materials therefor, for an entire price, must take the risk of a defect in the soil.

Public Schools v. Bennett, 27 N. J. L. 513, 72 Am. Dec. 373; Adams v. Nichols, 19 Pick. 275, 31 Am. Dec. 137; 2 Parsons, Contr. 184; 1 Chitty, Contr. 568; Dermott v. Jones, 2 Wall. 1, 17 L. ed. 763.

Messrs. Lawrence, Lawrence, & Stafford for plaintiff.

Rowell, Ch. J., delivered the opinion of the court:

The defendant contracted in writing with the trustee to provide the material and commence the construction of a house for the trustee on his lot in West Rutland by such a time, and to complete it in a workmanlike manner by such another time, according to the specifications therein contained, and a plan signed by the parties and made a part thereof. By the specifications the cellar was to be dug by the defendant, and the cellar wall was to be so high, and 2 feet wide at the bottom and 18 or 20 inches at the top, properly laid, and plastered on both sides. The underpinning was to be laid 18 inches high above the cellar wall, and finished in mortar. The price for the whole work was \$1,600, payable in instalments as the work progressed, but the entirety of the contract was not thereby severed and the price apportioned to the different parts of the work, but the whole price remained as the consideration for complete performance by the defendant. When the cellar was dug and a dry wall started, the trustee's attention was called to the wet, sandy, and clayey condition of the soil; and, after the character and condition of the soil had been considered by him and the defendant and the mason doing the work, he inquired of the mason if a dry wall pointed on both sides with mortar would stand to hold the building, and, on being told that it would

not on that soil, and that a foundation of grouting or cement would have to be constructed, and the cellar wall laid in cement, he directed the defendant to build the wall so it would stand, regardless of cost, whereupon the defendant, acting under that direction, made a grout foundation for the cellar wall, at an increased expense of \$45, for which the trustee was charged below. This was error, for both parties accepted as true what the mason said, and so it must be taken as true, and, being thus taken, it appears that the wall called for by the contract would not have held the building on that soil. It was therefore the duty of the defendant under the contract, which was not waived nor modified in this respect, to make the foundation he did, and without extra compensation, for he was bound by implication to do everything necessary to enable him to perform his contract. Thus, in *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373, a builder agreed with the owner of land to erect and complete a building thereon for a certain entire price, and the building fell wholly by reason of latent defects in the soil, and it was held that the builder must bear the loss. The court said that if a man agrees to erect a house on a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building; that if the difficulties are apparent on the surface, he must overcome them; if not, but become apparent by excavation or the sinking of the building, the rule is the same, that he must overcome them and erect the building simply because he has agreed to do so,—to do everything necessary for that purpose. *Stees v. Leonard*, 20 Minn. 494, Gil. 448, is precisely to the same effect.

So, in *Dermott v. Jones*, 2 Wall. 1, 17 L. ed. 762, it is said that if a man by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party, and that unforeseen difficulties, however great, will not excuse him. These cases follow a long line of cases that have come down to us from *Paradine v. Jane*, Aley, 26, Style, 47. There the defendant had taken a lease, covenanting to pay rent. He pleaded that such an one, an alien born, enemy to the King and the kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession and him expel, whereby he could not take the profits. On demurrer the plea was adjudged insufficient, and that the defendant ought to pay his rent. And this difference was

taken, that where the law creates a duty or imposes a charge, and the party is disabled to perform it without his fault, and has no remedy over, there the law will excuse him. But where a party by his own contract creates a duty or imposes a charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if a lessee covenants to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it. And the case ends by saying that when there is a covenant to pay, though the land be gained by the sea or made barren by wildfire, yet the lessor shall have his whole rent; and judgment went accordingly. And though the trustee had promised to pay extra for the subfoundation, the promise would be void for want of consideration, the defendant being already legally bound to build it without such compensation.

But the enlargement of the cellar wall and the laying of it in cement, instead of pointing it with mortar, stand different, for the defendant was not bound by the contract to do that, as it specified just how the wall should be built, but, having done it at the direction of the trustee, he is entitled to the extra cost of it, and in this respect the judgment is right. It is also right in respect of the brick lining of the underpinning, as that was not called for by the contract as a thing known to be necessary to make the house habitable in this climate nor otherwise.

Judgment against the principal defendant affirmed. Judgment against the trustee reversed, and judgment against him for \$274.09, with interest thereon from the proper time.

WISCONSIN SUPREME COURT.

ATLANTA & WALWORTH BUTTER &
CHEESE ASSOCIATION, Resp.,
v.

FRANK M. SMITH, Impleaded, etc., Appt.

(141 Wis. 377, 123 N. W. 106.)

Corporation — purchase of stock — prejudice of creditors.

1. As a general rule, in case a corporation purchases its own stock, paying therefor by corporate assets, subsequent creditors cannot be regarded, judicially, as prejudicially affected.

Same — validity of purchase.

2. As a general rule, unless plainly pro-

hibited by statute or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith pursuant to authorization by its governing body; and its officers, acting in like good faith, may do so as to stockholders actually or impliedly consenting and as to past or future creditors.

Same — trust fund doctrine.

3. The trust fund doctrine, that under all circumstances the assets of a corporation constitute a trust fund for creditors, does not prevail in this state.

Fraud — transfer of property — impeachment.

4. In general, under § 2320, Stat. 1898, a transfer of property cannot be impeached for fraud upon subsequent creditors of the transferrer unless there was at the time of the occurrence mutual intent to defraud them.

Corporation — purchase of stock — insolvency — effect.

5. If a stockholder of a corporation, by agreement with it or any of its officers, sells his stock to the organization in exchange for corporate assets, knowing, actually or constructively, that the result will be to render the corporation insolvent, all parties to the transaction contemplating that it will continue in business and incur indebtedness as before, the creditors relying upon appearance of the previous solvent condition continuing, to result to them must be presumed to have been mutually intended, supplying the element of bad faith essential to condemn the transfer.

Same — stockholder — estoppel to deny relation.

6. In the circumstances stated in No. 5, the stockholder, co-operating in creating the delusive appearance, as to subsequent creditors, is estopped from claiming that his relations to the corporation were severed by the transaction, so far as their continuance is necessary to preserve statutory liability under § 1773, Stat. 1898.

Same — validity.

7. A transaction in the circumstances stated in No. 5 is void as to subsequent creditors by the law of estoppel, and by § 2320, Stat. 1898, as well.

Fraud — invalid transfers — remedy of creditors.

8. Where a transaction involving a transfer of property is void as to creditors of the transferrer, and equity jurisdiction is not necessary to remove a cloud on title, or for some other relief within the peculiar field of equity jurisdiction, the creditors may proceed at law, treating such transaction as if it never occurred, it being void as to them, and the bringing of an action

Note. — As to right of corporation to purchase its own shares of stock, see notes to *Hall v. Henderson*, 61 L.R.A. 621, and *McGregor v. Fitzpatrick*, 25 L.R.A. (N.S.) 50, and *Tiger v. Rogers Cotton Cleaner & Gin Co.* 30 L.R.A. (N.S.) 694.

inconsistent with validity of the transfer being a sufficient election.

(October 6, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Douglas County in plaintiff's favor in an action brought to hold stockholders of a corporation personally liable for an indebtedness incurred by it in business carried on before one half of its capital stock had been subscribed for, in violation of a statute. Affirmed.

Statement by Marshall, J.:

Action by a creditor of the Superior Produce Company, a Wisconsin corporation, to recover of its stockholders, upon the ground of their being personally liable, for indebtedness incurred by the corporation in business carried on before one half of its capital stock was subscribed for.

The complaint contained two causes of action, one on an account for \$115.44, and on a note for the same amount, both account and note having been duly assigned to the plaintiff, and the other for \$549, a balance of account which accrued in plaintiff's favor. Defendant Frank M. Smith, who only answered, claimed that he became a stockholder January 15, 1906, and ceased to be such July 14, 1906, and otherwise put in issue all allegations of the complaint.

The cause was tried by the court, resulting in this decision as to facts: The Superior Produce Company is a Wisconsin corporation organized in 1905, with an authorized capital of 100 shares of \$100 each. Shortly after such organization thirty-one shares were subscribed for, as follows: W. H. Cloud sixteen shares, J. K. Stephens ten shares, and C. K. Stephens five shares. The stock so subscribed for was fully paid. No other stock was taken. The corporation, however, commenced doing business and incurring indebtedness as soon as organized. About January 15, 1906, Smith became the owner of fifteen shares of stock, purchased of J. K. and C. K. Stephens. Except as hereafter stated, he continued such owner down to the time of the trial. About June 26, 1906, the corporation incurred the indebtedness of \$115.44, mentioned in the complaint. Thereafter it gave to the creditor a note for such amount, and subsequently, before this action was commenced, plaintiff became the owner of the indebtedness and the note. July 1, 1906, the corporation was indebted to Smith for money loaned to it in the sum of \$1,300, at which time he and the president, W. H. Cloud, knew the business had proved a failure financially. July 14, 1906, by an agreement between Smith and Cloud, the

latter without express authority assuming to act for the corporation, its property, in the main, valued by them at \$3,607.80, was transferred to Smith for his stock at its par value, his account to the extent of \$900, his assumption of a mortgage indebtedness on the property of \$832, and other indebtedness on such property of \$107.80, he at the same time drawing from the corporation in money \$327.92, as the balance of his account. They then owned all the corporate stock outstanding. Before the transfer the value of the assets of the corporation, at a somewhat overappraisal, was in excess of its liabilities to the extent of \$794.75. The result of the transaction was to leave the corporation with indebtedness greatly in excess of its assets. Its business, after such transfer, was continued as before, according to the contemplation of the parties, during which time, and in October, 1906, it became indebted to plaintiff in the sum of \$550.78, all without any knowledge on its part of the transfer aforesaid, or of the fact that sufficient stock had not been subscribed to give the corporation legal capacity to transact business without incurring personal liability of its stockholders. Smith did not intend to act in fraud of creditors of the corporation, past or future, but his conduct resulted in placing an ostensibly solvent concern before the public, which was in fact insolvent. It failed November 1, 1906, with liabilities of some six times its assets.

Upon such facts the court held that the purchase, in form by the corporation, of the fifteen shares of stock, was fraudulent as to plaintiff, rendering Smith, notwithstanding such purchase, a stockholder as to the claims in suit. Judgment was therefore awarded against Smith and Cloud as claimed in the complaint, and against C. K. Stephens, who became a stockholder prior to the accruing of the indebtedness of \$550.75, for that amount, and against all for costs. Smith appealed.

Mr. S. M. Marsh, with Mr. G. O. Linderman, for appellant:

A contract which is objected to as fraudulent is voidable merely, and that defense could be interposed only by one who had rights which were injured at the time of the transaction complained of.

28 Am. & Eng. Enc. Law, p. 474; Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744; Bromley v. Goodrich, 40 Wis. 140, 22 Am. Rep. 685; Crocker v. Bellangee, 6 Wis. 645, 70 Am. Dec. 489; Anderson v. Roberts, 18 Johns. 527, 9 Am. Dec. 225; Terrill v. Auchauer, 14 Ohio St. 89.

Even if the transaction were shown to be

ultra vires, it would still be subject to ratification.

John V. Farwell Co. v. Wolf (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109.

The Superior Produce Company was a corporation *de facto*.

10 Cyc. Law & Proc. p. 253; John V. Farwell Co. v. Wolf, *supra*.

A corporation not prohibited by its charter may purchase its own capital stock.

Calteaux v. Mueller, 102 Wis. 525, 78 N. W. 1082; Shoemaker v. Washburn Lumber Co. 97 Wis. 585, 73 N. W. 333; Pabst v. Goodrich, 133 Wis. 43, 113 N. W. 398, 14 A. & E. Ann. Cas. 824; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226; Slack v. Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51; South Bend Chilled Plow Co. v. George C. Cribb Co. 97 Wis. 230, 72 N. W. 749.

Cloud was authorized by implication to make contracts for the company.

McElroy v. Minnesota Percheron Horse Co. 96 Wis. 317, 71 N. W. 652; Clark, Corp. 196; Meating v. Tigerton Lumber Co. 113 Wis. 379, 89 N. W. 152; Slocum v. Head, 105 Wis. 435, 50 L. R. A. 324, 81 N. W. 673.

An action could not be maintained on the account after accepting the note, until the note became due, and so long as plaintiff held the note, he should not be permitted to maintain an action on the book account.

Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390; 8 Cyc. Law & Proc. p. 24 note; Fitch v. Bogue, 19 Conn. 285; Porter v. Chicago, I. & D. R. Co. 99 Iowa, 351, 68 N. W. 724; 1 Cyc. Law Proc. p. 451; Eisenhouer v. Stein, 37 Kan. 281, 15 Pac. 167; Bragg v. Gaynor, 85 Wis. 468, 21 L.R.A. 161, 55 N. W. 919; Mills v. Parkhurst, 126 N. Y. 89, 13 L.R.A. 472, 26 N. E. 1041; Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; Bowman v. Van Kuren, 29 Wis. 209, 9 Am. Rep. 554; Body v. Jewsen, 33 Wis. 402; Weed Sewing Mach. Co. v. Oberreich, 38 Wis. 329.

Mr. G. E. Dietrich, of counsel, also for appellant.

Messrs. Luse, Powell, & Luse, for respondent:

The attempted purchase of stock was invalid.

Calteaux v. Mueller, 102 Wis. 525, 78 N. W. 1082; Shoemaker v. Washburn Lumber Co. 97 Wis. 585, 73 N. W. 333; 1 Cook, Stockholders, 3d ed. § 312; Graham v. La Crosse & M. R. Co. 102 U. S. 148, 26 L. ed. 106; 10 Cyc. Law & Proc. p. 545; Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68; Hospes v. 33 L.R.A. (N.S.)

Northwestern Mfg. & Car Co. 48 Minn. 174, 15 L.R.A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; Tait v. Pigott, 32 Wash. 344, 73 Pac. 364; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70.

The transfer of the property by the corporation to Smith is within the condemnation of § 2320 of the statutes, being made with intent to hinder, delay, or defraud creditors.

Zimmerman v. Bannon, 101 Wis. 407, 77 N. W. 735; Sommermeyer v. Schwartz, 89 Wis. 66, 61 N. W. 311; Lilienthal v. Drucklieb, 34 C. C. A. 657, 92 Fed. 757; 20 Cyc. Law & Proc. pp. 427, 462; Hutchinson v. Lord, 1 Wis. 312, 60 Am. Dec. 381; Doherty v. State, 84 Wis. 156, 53 N. W. 1120; Powers v. Hamilton Paper Co. 60 Wis. 23, 18 N. W. 20; Vernon v. Upsou, 60 Wis. 421, 19 N. W. 400.

Marshall, J., delivered the opinion of the court:

The ground, in the main, upon which the trial court decided that plaintiff was entitled to recover, is that a corporation cannot lawfully, under any circumstances, buy in its own stock, paying therefor by assets of the company. It may be that this states too broadly the learned circuit court's view of the law, but it is warranted, it is thought, by the language of the decision, and is certainly warranted by the argument of counsel for respondent in support of the judgment, citing authorities from foreign jurisdictions supposed to directly or inferentially so hold, and deducing by construction the same doctrine from our statutes, and criticizing decisions of this court so far as they directly or substantially hold otherwise.

True, under some circumstances a purchase by a corporation of its own stock would be a fraud on stockholders, and under other circumstances a fraud on present or future creditors, and so void or voidable at the instance of one or more of them in an appropriate judicial proceeding, though the circumstances under which such a transaction may be impeached by future creditors must be quite special. So much so that it is often found stated generally by text-writers that, in case a corporation buys in some of its own stock, a subsequent creditor cannot complain. 1 Cook, Corp. 5th ed. § 311.

By a long line of decisions here, in the absence of a plain statutory prohibition to the contrary, and we have none, or such prohibition in the articles of organization of the corporation, a corporation may in general, so long as it acts in good faith by authorization of its governing body, law-

fully purchase its own stock, either as to stockholders or present or future creditors; and without such authorization its officers may, acting in good faith, do so as regards consenting stockholders or such creditors. The court spoke decisively on the subject in *Shoemaker v. Washburn Lumber Co.* 97 Wis. 594, 73 N. W. 333; *Calteaux v. Mueller*, 102 Wis. 525, 78 N. W. 1082; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Pabst v. Goodrich*, 133 Wis. 43, 113 N. W. 398, 14 A. & E. Ann. Cas. 824; and *Gilchrist v. Highfield*, 140 Wis. 476, 123 N. W. 102, 17 A. & E. Ann. Cas. 1257.

While it must be conceded that the common law of England and the judicial rule in a number of states is contrary to the foregoing, it has support in the decisions of many state and Federal courts, significant among them being *Dupee v. Boston Water Power Co.* 114 Mass. 37; *Leland v. Hayden*, 102 Mass. 542; *Tuttle v. Batchelder & L. Co.* 170 Mass. 315, 49 N. E. 640; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L.R.A. 328, 25 N. E. 680; *First Nat. Bank v. Peoria Watch Co.* 191 Ill. 128, 60 N. E. 859; *Blalock v. Kernersville Mfg. Co.* 110 N. C. 99, 14 S. E. 501; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Rollins v. Shaver Wagon & Carriage Co.* 80 Iowa, 380, 20 Am. St. Rep. 427, 45 N. W. 1037; *West v. Averill Grocery Co.* 109 Iowa, 488, 80 N. W. 555; *Eggmann v. Blanke*, 40 Mo. App. 318; *City Bank v. Bruce*, 17 N. Y. 507; *Strong v. Brooklyn C. T. R. Co.* 93 N. Y. 426; *Taylor v. Miami Exporting Co.* 6 Ohio, 176; *Lowe v. Pioneer Threshing Co. (C. C.)* 70 Fed. 646; *First Nat. Bank v. Salem Capital Flour Mills Co. (C. C.)* 39 Fed. 89.

The doctrine here stated is said by the Federal court, in *First Nat. Bank v. Salem Capital Flour Mills Co.* supra, to be well settled in the United States.

Many cases cited by text-book writers as following the English rule will be found on examination to be based on the fraudulent nature of the transaction involved, not want of corporate power. Many other cases cited will be found grounded on the general doctrine that all assets of a corporation, whether a going institution or not, constitute a trust fund for creditors, which has no support in this jurisdiction. *Hinz v. Van Dusen*, 95 Wis. 503, 70 N. W. 657; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51; *Marvin v. Anderson*, 111 Wis. 389, 87 N. W. 226.

In general, where the doctrine heretofore declared as stated, and now approved, obtains, it is held that, in case an insol-

vent corporation buys its own stock, or the effect of such a purchase is to render it insolvent, the transaction is void as to existing creditors. *German Sav. Bank v. Wulfskuhler*, 19 Kan. 60; *Clapp v. Peterson*, 104 Ill. 26; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 153; *Currier v. Lebanon Slate Co.* 56 N. H. 262, 13 Mor. Min. Rep. 559; *Alexander v. Relfe*, 74 Mo. 495; *Hamor v. Taylor-Rice Engineering Co. (C. C.)* 84 Fed. 392; *Augsburg Land & Improv. Co. v. Pepper*, 95 Va. 92, 27 S. E. 807. So far as such decisions are grounded solely on the trust fund doctrine alone, as applied in some jurisdictions to a going corporation, they might not apply here. Such doctrine does not rule this case, inasmuch as the corporation at the time of the transaction in question was a going concern, and it satisfactorily appears that the purpose of the controlling power left in the organization was that it should continue in business as before, indefinitely, and there was no actual intent to defraud.

Counsel for respondent argue that the transaction in question, upon legal principles in general on the subject of remediable fraud upon the rights of creditors, was voidable at respondent's election, and that bringing the action constituted such an election; that though there was no actual intent to hinder or delay, effectually or otherwise, existing or future creditors, such was the necessary effect of what occurred, which is equivalent to actual fraud. The court concurs in that view as applied to the facts of this case.

The facts found, in the light of the evidence, indicate pretty clearly that appellant Smith must have known, if he paid reasonable attention to the matter, when he received the greater proportion of the assets of the corporation in exchange for his stock, contemplating that the company would continue to do business notwithstanding its impoverished condition, that suspension was quite liable to occur, resulting in creditors suffering loss. What he ought to have known under the circumstances, he must be held chargeable with having known, and the natural and probable effect of the conditions, of which he must be held to have had at least constructive knowledge, he must be held to have intended, and the corporation to have intended as well. If this goes further than the general rule as to transactions in fraud of present and future creditors, it seems that the doctrine is a just one, and a necessary limitation upon the right of a corporation and its stockholders to deplete its assets by exchanging the latter for its corporate stock, in order to prevent such

right being exercised in a manner highly prejudicial to the public.

A transaction, as in this case, where by treaty the corporation is at once changed from a solvent to an insolvent concern, to the manifest advantage of a stockholder over existing creditors, the parties concerned contemplating that it may and probably will incur other indebtedness while having the semblance of solvency as before, should be regarded, as to all creditors prejudiced thereby, characterized by bad faith, and so as not having the essential necessary to uphold it under the decisions of this court to which we have referred. In other words, a purchase by a corporation of its own stock, known by the parties to the transaction, or which ought to be known by them, to render it insolvent, is not a purchase in good faith as to existing creditors, and not such as to future creditors if the parties to the transaction contemplate that the corporation will continue to do business and incur indebtedness as before, on the faith of its previously supposed solvency continuing. In such a case the stockholder surrendering his stock is to be regarded as having acted fraudulently, at least constructively, as to existing creditors, and subsequent creditors as well, and held, as to the latter, estopped by his conduct from denying his continuance as a stockholder so far as such denial, to effect, would prejudice such creditors trusting the corporation upon the appearance of solvency, and such continuance is necessary to liability to the corporation for the benefit of creditors, or to statutory liability to them.

We are not unmindful that the rule, in general, as to avoidance of a transfer of property in fraud of future creditors, applies only in case of actual intent to defraud them. *Sommermeier v. Schwartz*, 89 Wis. 66-71, 61 N. W. 311; *Case v. Phelps*, 39 N. Y. 164. That rule as stated is out of harmony with some adjudications, but is supported by the great weight of authority under statutes similar to our § 2320, Stat. 1898, as indicated by the text in 1 Moore on Fraudulent Conveyances, at page 191, and authorities cited in note 23, and Bump on Fraudulent Conveyances (4th ed.) § 292, and cases cited. It is too restrictive as generally stated, to apply to the situation we have here, and should, it is thought, be extended to include it, upon the theory that the duty of a stockholder not to deplete for his advantage corporate assets below the subscribed capital, and become a party to a continuance of solvent appearance, supplies the need for actual

intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent, condemning the transaction for want of that good faith necessary to sustain a purchase by a corporation of its stock, while at the same time, so far as necessary to fully protect the rights of creditors, the doctrine of estoppel applies to prevent the stockholder from claiming, to effect, that his relations as such holder were terminated by such transaction.

Counsel for appellant contend that, since this action is grounded on the statutory liability of stockholders to creditors of a corporation whose credits accrue in the course of its business transactions, in violation of § 1773, Stat. 1898, limiting such liability as to obligations thus incurred to the signers of the articles "and the subscriber or subscribers for stock transacting such business, or authorizing the same, or having knowledge thereof, consenting to the incurring of the" liability, "as well as the stockholders then existing," that there was no liability of Smith here, except upon the first cause of action, because his transfer of stock must be held to have terminated his relations to the corporation as a stockholder, till such transfer shall have been set aside by some judicial determination. That is wrong for several reasons: First, respondent was entitled to the benefit of the law of estoppel to bar the claim of severance of such relations; second, the transaction was void at law under the circumstances, by force of § 2320, Stat. 1898; third, where a transaction is voidable as to creditors, and they do not need the use of equity jurisdiction to remove a cloud on title or for an accounting or some other relief within the peculiar field of such jurisdiction, they may treat it as a nullity, and proceed at law as if such transaction had never occurred. Of the latter the following are illustrations: *Bates v. Simmons*, 62 Wis. 69, 22 N. W. 335; *First Nat. Bank v. Knowles*, 67 Wis. 373, 28 N. W. 225; *Leslie v. Keepers*, 68 Wis. 123, 31 N. W. 486.

In the last case cited an accord and satisfaction, in form, pleaded as matter of defense to an action on the original claim, was met by proof, under objection, that the settlement was obtained by fraud. It was contended on appeal that the settlement could only be avoided in equity. The decision of the court was otherwise.

Counsel for appellant misapprehend the nature of this action in making the assertion that it is to set aside the purchase of the stock as fraudulent, and mis-

apprehend the law in supposing that such an action is necessary in order to charge Smith with statutory liability. The action is against him upon the theory that, as to plaintiff, the stock was never transferred, just as in *Leslie v. Keepers*, supra, the action was commenced upon the theory that no accord and satisfaction had occurred except one effectually voidable at plaintiff's election, and that the commencement of the action was a sufficient election, the circumstances of the transaction not requiring any restoration as a condition of recovery.

What has been said sufficiently, it is thought, deals with all objections advanced to the judgment, and all reasons given by counsel for its affirmance, to indicate that, although the major ground for the judgment stated in the Circuit Court's decision and urged upon our attention in support thereof cannot be approved, it is right and must be affirmed.

So ordered.

Timlin, J., concurring:

In addition to the ground for affirmance consisting of constructive fraud upon future creditors in the transaction by which it is claimed Smith ceased to be a stock holder prior to the incurring of the debt in question, I desire to rest my concurrence also upon another ground, going to lack of power in the embryo corporation to purchase in its own shares and so release from that status the persons who had theretofore become shareholders. The corporation never had 50 per centum of its capital stock subscribed, consequently there could be no first meeting, no directors, and no officers; but the signers of the articles of incorporation were by law intrusted with the direction of the affairs of the corporation. Section 1773, Stat. 1898, as amended by chapter 507, p. 938, Laws 1905. The signers of the articles did not, for the corporation, buy in Smith's shares. Who else at this stage had authority to represent the corporation for this purpose? *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452. If the corporation was not represented in the transaction, how could the transfer have any effect whatever? Is the corporation, even through the signers of its articles, at this stage of its existence, empowered to dispose of its assets to a shareholder in purchase of his shares? I think not. The following sections of the statute may be of interest in connection with these queries: § 1774-1776, 1767, 1751.

Petition for rehearing denied February 1, 1910.
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OKLAHOMA CRIMINAL COURT OF APPEALS.

ETHEL GRAY, Plff. in Err.,
v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 111 Pac. 825.)

Indictment — perjury — sufficiency.

1. An information for perjury which alleges that the defendant wilfully, corruptly, and falsely testified to a certain stated fact; that said statement was then and there not true, but false; and was not then and there believed by the defendant to be true, but was by the defendant believed to be false,—sufficiently negatives the truth of the alleged false testimony, without setting out the true facts by way of antithesis.

Same — allegation of jurisdiction.

2. Under § 8711, Snyder's Comp. Laws 1909 (Okla.), an allegation in an information for perjury that the clerk of the court

Headnotes by **RICHARDSON, J.**

Note.—*Sufficiency of averment in indictment or information for perjury as to jurisdiction or authority to administer oath.*

At common law, prior to the statute of 23 George II., chapter 11, in England, great prolixity and detail were required in indictments for perjury in averring the authority of the officer to administer the oath upon which perjury was predicated, and the jurisdiction of the tribunal over the cause or proceeding in which perjury was alleged to have been committed; and it was necessary to set out in full the commission or other authority of the officer, and all facts essential to the jurisdiction of the tribunal. But under the English statute and similar statutes now in force in nearly every state, substantially like the Oklahoma statute set out in *GRAY v. STATE*, jurisdiction and authority are sufficiently averred by setting forth the substance of the offense, in what court or before whom the oath was taken, and that such court or person had competent authority to administer the oath.

Jurisdiction.

Cases holding to the same effect as *GRAY v. STATE*, that under such statutes the court's jurisdiction of the cause in which the perjury is alleged to have been committed is sufficiently averred by an allegation that the clerk of the court before whom the false oath was taken had authority to administer it, are: *Smith v. State*, 103 Ala. 57, 15 So. 866; *McClerkin v. State*, 105 Ala. 107, 17 So. 123; *Thompson v. People*, 26 Colo. 496, 59 Pac. 52; *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *State v. Douette*, 31 Wash. 6, 71 Pac. 556.

And an allegation that the judge or other judicial officer before whom the false oath

before whom the false oath was alleged to have been taken had authority to administer it is a sufficient averment that the court had jurisdiction of the cause in which the perjury was charged to have been committed.

Evidence — charge of perjury — finding against testimony.

3. In a prosecution for perjury, alleged to have been committed in the trial of a certain criminal case in testifying in behalf of the defendant therein, it is ordinarily not competent for the state to prove that such trial resulted in a conviction.

Trial — instruction — failure to request.

4. Where, in a prosecution for perjury charged to have been committed in testifying in behalf of an accused in the trial of a certain criminal case, the state proves

was taken had competent authority to administer such oath is a sufficient averment of his jurisdiction over the proceeding in which such oath was administered. *Lavey v. Reg.* 17 Q. B. 496, 5 Cox. C. C. 269, 2 Den. C. C. 504, 21 L. J. Mag. Cas. N. S. 10, 16 Jur. 36; *Reg. v. Lawlor*, 6 Cox C. C. 187; *Walker v. Reg.* 3 Jur. N. S. 1259, 8 El. & Bl. 439, 27 L. J. Mag. Cas. N. S. 43; *People v. DeCarlo*, 124 Cal. 462, 57 Pac. 383; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *State v. Newton*, 1 G. Greene, 100, 48 Am. Dec. 367; *Com. v. Combs*, 125 Ky. 273, 101 S. W. 312; *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *State v. Keel*, 54 Mo. 192; *State v. Davis*, 69 N. C. 495; *State v. Roberson*, 98 N. C. 751, 4 S. E. 511; *State v. Green*, 100 N. C. 419, 5 S. E. 422; *Halleck v. State*, 11 Ohio, 400; *Rich v. United States*, 2 Okla. 146, 37 Pac. 1083; *People v. Greenwell*, 5 Utah, 112, 13 Pac. 89; *Fitch v. Com.* 92 Va. 824, 24 S. E. 272.

So, in an indictment for perjury at an election, before one of the judges thereof, an allegation that such judge had full power and authority to administer the oath as judge of the election is a sufficient averment that the election board was legally organized according to law to receive votes, etc. *Johnson v. People*, 94 Ill. 505.

But in *People v. Howard*, 111 Cal. 655, 44 Pac. 342, it is held that in a complaint for perjury alleged to have been committed before a city recorder in falsely swearing to a criminal complaint against another, the recorder's jurisdiction of the subject-matter of the action in which the oath was taken is not sufficiently averred without an allegation that the offense involved was committed within the territorial jurisdiction of such recorder, although his official character and competency to administer such oath are alleged.

And in *Com. v. Pickering*, 8 Gratt. 628, 56 Am. Dec. 158, the materiality of the defendant's evidence, depending upon the court's jurisdiction of the offense of which he gave evidence, was held not sufficiently shown in an indictment for perjury which did not allege that the offense of which the defendant gave evidence was committed 32 L.R.A. (N.S.)

without objection that such trial resulted in a conviction, it is proper for the court to instruct the jury that such evidence may be considered by them only as tending to show that the alleged perjured testimony was given in a judicial proceeding, as alleged, and not as tending to show the falsity of such testimony. But it is not error for the court to omit to give such instruction if no request therefor is made.

Same — verbal inaccuracies.

5. An instruction must be considered as a whole; and when so considered, if it properly and intelligibly states the law, mere verbal inaccuracies will not vitiate it.

Witness — perjury — impeachment — similar indictment.

6. In a prosecution for perjury, alleged to have been committed in the trial of a

within the territorial jurisdiction of the court, although it did allege that defendant appeared in open court and was sworn by the court, "having then and there competent authority to administer the oath,"— which it would not have had to swear a witness to give evidence of an offense committed outside of such jurisdiction.

In an indictment for perjury alleged to have been committed on an examination of defendant as bail for one committed on a criminal charge, allegations that the latter was lawfully before the court upon a complaint charging him with a crime, and that it was lawfully ordered that he recognize with sureties, etc., sufficiently show that the court had jurisdiction of the matter in which the perjury is alleged to have been committed. *Com. v. Butland*, 119 Mass. 317.

And in an indictment for perjury at an inquiry arising before a judge upon the return to a writ of habeas corpus, jurisdiction is sufficiently shown by averments that a certain judge, by virtue of the authority vested in him by the Constitution and laws, ordered a writ of habeas corpus to be issued, etc., returnable immediately before said judge, and that the writ did issue as directed, and the sheriff, in obedience to it, did produce before the said judge the body of the person detained, together with the cause of his detention and confinement. *Deckard v. State*, 38 Md. 186.

In an indictment for perjury upon an examination before a court upon application for the benefit of insolvency laws, the jurisdiction of the court is sufficiently shown by the allegation that there was a regular and legal hearing before a competent court, upon such application of defendant, without setting out the manner in which the court obtained jurisdiction. *State v. Ludlow*, 5 N. J. L. 772.

And an indictment is sufficient which expressly avers that the court had jurisdiction of the case in which perjury is alleged to have been committed, without showing how the court acquired such jurisdiction. *State v. Wise*, 3 Lea, 38.

But an allegation that defendant was

certain criminal case, it is not error for the state to ask a defendant's witness if he too is not under indictment for perjury committed in the trial of that same criminal case.

Evidence — perjury — former testimony.

7. In a prosecution for perjury, where the whole of the defendant's testimony, in giving which the perjury is charged to have been committed, is read to the jury by the court reporter who took it in the former trial, and where the defendant in the perjury trial does not take the stand in his own behalf, the court should not, at the defendant's request, instruct the jury that they shall consider his former testimony as read to them as his testimony in the instant case.

(November 23, 1910.)

duly and lawfully sworn before referees in a certain case, and "took his corporal oath before the said referees, having jurisdiction of the action," does not sufficiently aver jurisdiction. *State v. Plummer*, 50 Me. 217.

And in an indictment for perjury alleged to have been committed at a hearing upon a request of defendant to have his name added to and inserted or included in a list of legal voters of a town, made before a board sitting to hear and determine challenges to the qualifications of persons whose names were on such list, an allegation that such board was "legally constituted and organized to hear and determine all alterations to be made in said list" is not a sufficient averment that the board was constituted or had authority to make additions to the list, and does not sufficiently show its jurisdiction of the matter in which the perjury is alleged to have been committed. *State v. McCone*, 59 Vt. 117, 7 Atl. 406.

Jurisdiction of an action in which perjury is alleged to have been committed is sufficiently averred if it appears from the facts set out; and where it is averred that such case was pending before a certain court, which is the same court in which the prosecution for the perjury is brought, the court is authorized to take judicial cognizance of its own jurisdiction in said case. *State v. Schlessinger*, 38 La. Ann. 564; *State v. Grover*, 38 La. Ann. 567.

So, in an indictment for perjury committed in a land contest before a United States land office, an allegation that in said contest a certain person sought to have defendant's homestead entry canceled is a sufficient averment of jurisdiction to try the matter, as the court will take judicial notice that the land office has jurisdiction to try such cases. *Peters v. United States*, 2 Okla. 138, 37 Pac. 1081.

In an indictment for perjury alleged to have been committed before an assessor, allegations that defendant was a resident of the township for which the assessor was duly elected and acting, that the oath was administered in the matter of the assessment of the defendant's property for taxes, 32 L.R.A. (N.S.)

ERROR to the District Court for Muskogee County to review a judgment convicting defendant of perjury. Affirmed.

The facts are stated in the opinion.

Messrs. J. E. Wyand, DeRoos Bailey, and Thomas Marcum, for plaintiff in error:

The information was not sufficient.

2 Bishop, Crim. Proc. 3d ed. § 918; *Rohrer v. State*, 13 Tex. App. 167; *Gabriel-sky v. State*, 13 Tex. App. 437.

The information must affirmatively charge or show jurisdiction; and this information, failing to do so, does not allege a crime against the defendant.

Rich v. United States, 1 Okla. 359, 33 Pac. 804; 2 Bishop, Crim. Proc. § 910a; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Pettibone*

and that the assessor was legally authorized and empowered by law to administer the oath to defendant, sufficiently aver such assessor's jurisdiction and authority. *State v. Cunningham*, 66 Iowa, 94, 23 N. W. 280, 6 Am. Crim. Rep. 551.

But an indictment for perjury does not sufficiently aver jurisdiction and authority by an allegation that defendant committed perjury on an examination before one named as a commissioner of the United States, duly appointed according to law, and having competent authority and power to conduct such examinations and to administer oaths and examine witnesses therein and in the particular matters involved, without stating how or by whom or under what statute or for what purpose such commissioner was appointed,—"a commissioner of the United States," in the ordinary sense of the term, not having the powers alleged to have been possessed by this commissioner. *United States v. Wilcox*, 4 Blatchf. 391, Fed. Cas. No. 16,692.

Under a statute providing that no indictment shall be deemed invalid by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, an allegation in an indictment for perjury by an insolvent debtor in an oath to a petition in statutory insolvency proceedings, made before a city recorder that the recorder had lawful and competent power and authority to administer the oath, is a sufficient averment that the recorder had jurisdiction of the proceedings. *People v. Phelps*, 5 Wend. 9.

And in an indictment for perjury upon an examination to justify as surety for another, jurisdiction is shown by reciting the proceedings had, and averring that defendant was sworn before a supreme court commissioner "having sufficient and competent power and authority to administer the said oath to him." *People v. Tredway*, 3 Barb. 470.

So, in an indictment for perjury at an election before a board of inspectors of elections "duly authorized and empowered to administer an oath" to defendant, such gen-

v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *Anderson v. State*, 18 Tex. App. 17.

The court erred in not instructing the jury that the evidence introduced by the state, showing the trial and conviction of John Cieloha, was introduced only for the purpose of showing that the evidence was given in a judicial proceeding.

Washington v. State, 23 Tex. Crim. Rep. 338, 5 S. W. 119; *Littlefield v. State*, 24 Tex. Crim. Rep. 169, 5 S. W. 650; *Davidson v. State*, 22 Tex. Crim. Rep. 382, 3 S. W. 662.

Messrs. Charles West, Attorney General, and Smith C. Matson, for defendant in error:

The information was sufficient.

People v. Ah Bean, 77 Cal. 12, 18 Pac.

815; *People v. Ennis*, 137 Cal. 263, 70 Pac. 84.

Richardson, J., delivered the opinion of the court:

Plaintiff in error demurred to the information in this case on the ground that the facts alleged were insufficient to constitute an offense. The deficiencies complained of were two: First, that the information did not properly negative the truth of the alleged false testimony; and, second, that it did not allege that the court before which the perjury was charged to have been committed had jurisdiction of the cause in which the alleged false testimony was given, nor did it state facts showing jurisdiction in such court. The court

eral allegation of the jurisdiction to administer an oath is sufficient, without stating in detail the names or the number of the inspectors who constituted the board, for the purpose of showing that the board was legally constituted. *Burns v. People*, 59 Barb. 531.

And in an indictment charging perjury committed before a referee, an averment that the referee was duly and legally appointed in an action then pending in a certain court of general jurisdiction, naming the parties, is a sufficient statement to show that the court had jurisdiction of the parties. *Eighmy v. People*, 79 N. Y. 546.

Under a statute requiring only that there shall be "sufficient matter alleged to indicate the crime and person charged," jurisdiction is sufficiently averred in an indictment for perjury before a constable, upon the trial of a certain issue respecting the right to certain personal property, by showing that the constable had competent authority to try the case and to administer the oath, and that defendant was duly sworn, the oath being administered to him by the constable, having competent authority therefor. *State v. Belew*, 79 Mo. 584.

And in an indictment for perjury before a police court, jurisdiction and authority are sufficiently averred by alleging in general terms the creation of the court, and its authority to try the complaint upon the trial of which the perjury is alleged to have been committed, and the authority of the clerk to administer oaths, and by referring, by their number, to the ordinances creating the police court and authorizing the appointment of the clerk, without setting out in full the provisions of such ordinances. *State v. Dineen*, 203 Mo. 628, 102 S. W. 480.

In *St. Clair v. State*, 11 Tex. App. 297, the court said: "This great writer and philosopher [Mr. Bishop] maintains that the rules contained in 23 George II. were, prior to this act, the true doctrine, and that this statute merely declares that to be law which was in fact (not practice) the law, and that the provisions of that statute, not by virtue of the act, are binding

upon the courts of this country as common law. This state has placed herself in line with others of these United States, and holds the doctrine enunciated by Mr. Bishop. This is no longer an open question in this state, for it has been discussed at great length, and we hope put to rest." And in this case it was held that an indictment for perjury before a grand jury need not show by direct and affirmative allegation that the court was in session at the date of the alleged offense, nor show the organization of such grand jury or the appointment as foreman of the one who administered the oath as such, nor allege that the grand jury was in session when the oath was administered by him or when the alleged false statements were made.

So, an allegation that the prosecution in which perjury was committed was by indictment or information is not necessary in an indictment for perjury which alleges in general terms that the court had jurisdiction to try the case, "though, perhaps, it would be as well if not better practice for the pleader to show how jurisdiction was acquired,—that is, whether by indictment or information." *Powers v. State*, 17 Tex. App. 428.

And an allegation that defendant personally appeared before the duly organized grand jury for a certain county which was then in session, and of which one named was the legally appointed foreman, sufficiently avers jurisdiction. *Flournoy v. State*, — Tex. Crim. Rep. —, 59 S. W. 902.

But an indictment for perjury alleged to have been committed in a corporation court of a certain city, whose jurisdiction in criminal cases is confined by statute to those arising within the territorial limits of the city, is fatally defective if it does not allege that the offense concerning which the alleged false testimony was given was committed within the territorial limits of the city. *Moss v. State*, 47 Tex. Crim. Rep. 459, 83 S. W. 829, 11 A. & E. Ann. Cas. 710.

And an indictment for perjury before a justice of the peace is fatally defective which does not allege that the justice of

overruled the demurrer, and its action in so doing is assigned as error.

The information, omitting formal parts, was as follows: "Now comes W. J. Crump, the duly qualified and acting county attorney in and for Muskogee county, state of Oklahoma, and gives the district court of Muskogee county, state of Oklahoma, to know and be informed that Ethel Gray did, in Muskogee county, and in the state of Oklahoma, on or about the 23d day of October, in the year of our Lord one thousand nine hundred and eight, and anterior to the presentment hereof, commit the crime of perjury (for which she has had a preliminary examination before an examining magistrate in said county and state) in the manner and form as follows, to wit: That

the peace had jurisdiction of the cause in which the perjury was alleged to have been committed, or aver sufficient facts to show affirmatively and distinctly that he had jurisdiction, but which merely charges that the perjury was committed before a justice of the peace in a criminal case wherein one was charged with "unlawfully carrying a pistol," where there is more than one offense included within such terms, and one of them is not within the jurisdiction of a justice of the peace to try. *Anderson v. State*, 18 Tex. App. 17.

Under a Code provision that the offense must be set forth in plain and intelligible words, an indictment was held defective, in *State v. Oppenheimer*, 41 Tex. 82, for failure to show jurisdiction, which omitted to state the name of the judge, court, or officer before whom the trial was had when the alleged perjury was committed, and omitted the statement whether it was during an examination or on a trial of an indictment, although it charged that defendant was duly and legally sworn by one named as the deputy district clerk of the county.

And in *State v. Webb*, 41 Tex. 67, an indictment for perjury was held defective for failure to state that any indictment had been found against the parties upon whose trial the perjury was alleged to have been committed, or that the court had cognizance of the offense by reason of its being committed within its territorial jurisdiction, or that it was one over which the court had jurisdiction, although it was alleged that defendant was duly and legally sworn by the clerk, "being then and there the officer authorized under the law to administer oaths."

Authority to administer oath.

Authority to administer an oath upon which perjury is predicated may be sufficiently shown in an indictment by averring generally that the court or officer named had competent authority to administer such oath, without setting out or specially alleging the officer's commission or the facts

the said Ethel Gray, in the county of Muskogee, state of Oklahoma, on the 23d day of October, 1908, in the district court for the third judicial district, sitting at Muskogee, the Hon. John H. King, the regularly elected, qualified, and acting judge for said district, then and there presiding and acting, wherein the case of the State of Oklahoma v. John Cieloha, charged with murder, being No. 129 on said court docket, was then and there being tried and heard before the court aforesaid, and the said Ethel Gray was then and there produced as a witness in said case on behalf of the defense, and was then and there duly sworn to testify truly in said case by E. A. Coker, the duly acting and qualified deputy clerk of the district court aforesaid, who was

upon which his authority is based. *Rex v. Callanan*, 9 Dowl. & R. 97, 6 Barn. & C. 102, 5 L. J. Mag. Cas. 39; *United States v. Boggs*, 31 Fed. 337; *Barnard v. United States*, 89 C. C. A. 376, 162 Fed. 618; *State v. Maxwell*, 28 La. Ann. 361; *State v. Woolridge*, 45 Or. 389, 78 Pac. 333; *Com. v. O'Neill*, 5 Pa. Co. Ct. 209; *Bradberry v. State*, 7 Tex. App. 375; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *Flournoy v. State*, — Tex. Crim. Rep. —, 59 S. W. 902.

So, in an information under a statute providing that "every person who shall fully, corruptly, and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit, or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor," an allegation that defendant, being complainant before a justice of the peace in an action of unlawful detainer, made oath before said justice, "duly authorized by law to administer oaths," and having "full and competent jurisdiction of said cause," is a sufficient averment of authority to administer the oath, without setting out facts which would authorize the justice of the peace to act as such. *State v. Marshall*, 47 Mo. 378.

And authority to administer the oath is sufficiently averred in an indictment for perjury by the allegation that defendant was duly sworn by or before a certain court, in a matter of which it had jurisdiction. *State v. Mercer*, 101 Md. 535, 61 Atl. 220; *Schlumbohm v. State*, — Okla. Crim. Rep. —, 113 Pac. 235.

Allegations that defendant was duly sworn by the "court," at and during the trial upon which the perjury was committed, and that said "court" had full power and authority to administer the oath, are sufficient, without setting out the name of the person administering the oath. *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385.

So, an allegation that a false oath was taken in a certain court, before a named person who had competent power and authority to administer an oath to the defendant, sufficiently avers jurisdiction and

then and there duly authorized and empowered to administer oaths in such cases, and to administer said oath in that case, in manner and form as was then and there done as aforesaid. That then and there it became a material question in said case whether John Cieloha, the defendant in said case, and Ethel Gray, the witness in said case, where in Muskogee at a certain carnival show on the evening of June 11, 1908; that then and there being a witness as aforesaid, the said Ethel Gray did knowingly, wilfully, corruptly, feloniously, and falsely testify, depose, and say in substance and effect that she and the said defendant, John Cieloha, were in Muskogee together on the evening of June 11th, 1908, at the carnival show, in all which particulars the

testimony, statements, and declarations so testified and deposed unto by the said Ethel Gray were then and there material matter in and to said case of the State of Oklahoma v. John Cieloha, charged with murder, as aforesaid, instituted, begun, and heard, as aforesaid, and were then and there not true, but false, and were then and there by said Ethel Gray not believed to be true, but were then and there by said Ethel Gray believed to be false, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The first contention is that, in addition to the averments contained in the information as to the falsity of the testimony upon which the perjury was predicated, it was

authority without stating that such person was the judge of said court. State v. Bryson, 4 N. C. (1 Car. Law Repos. 503).

And in an indictment for perjury, alleging that the oath was administered in a certain court by one named as deputy clerk, no proof of his appointment as deputy clerk is necessary, as it appears that the person named acted under the superintendence of the court, and the oath was as obligatory as if it had been administered by one of the judges. Server v. State, 2 Blackf. (Ind.) 35.

When an information for perjury alleges facts showing that the oath was one which the officer administering it had authority to administer, it is not essential that such authority should be expressly averred. Reg. v. Callaghan, 19 U. C. Q. B. 364; Masterson v. State, 144 Ind. 240, 43 N. E. 138; State v. Thibodaux, 49 La. Ann. 15, 21 So. 127; State v. Peters, 42 Tex. 7.

And an allegation that defendant, after being sworn upon a certain trial in a certain court, made as a witness the alleged false statement to the jury, is a sufficient averment that the oath was administered by one authorized to administer it. Com. v. Kane, 92 Ky. 457, 18 S. W. 7.

In an indictment for perjury alleged to have been committed in a forcible detainer proceeding before a justice of the peace, it is not necessary to allege the jurisdictional fact that the premises in dispute were situated within the justice's county, where he is authorized to administer oaths generally, and the subject-matter of the controversy is one concerning which defendant could legally be sworn, and about which he was required to be sworn, although the justice may not in fact have jurisdiction to render final judgment. Com. v. Weingartner, 16 Ky. L. Rep. 221, 27 S. W. 815.

And it has even been held that the allegation in an indictment that defendant "committed the crime of perjury" is a sufficient averment that he was sworn by a person legally qualified to administer the oath, as "perjury" implies an oath lawfully administered. State v. Webber, 78 Vt. 463, 62 Atl. 1018.

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But in State v. Eddens, 52 La. Ann. 1461, 27 So. 742, it was held that an allegation in an indictment that defendant committed perjury in a certain suit pending in a court of competent jurisdiction, having authority to try the cause and administer oaths to the witnesses, is not a sufficient averment that defendant was sworn by one legally qualified to administer the oath, as no oath is directly alleged to have been taken, and no person named before whom defendant was sworn.

Where the court in which the indictment is found is bound to take judicial notice of the powers of the court in which the perjury is alleged to have been committed, and of the authority of its clerk to administer oaths, an averment in an indictment for perjury that the defendant appeared and was sworn by the clerk in a matter before the court is a sufficient allegation that the oath was administered by one authorized to administer it. United States v. Lehman, 39 Fed. 49; State v. Harter, 131 Iowa, 199, 108 N. W. 232, 9 A. & E. Ann. Cas. 765.

And the authority of the officer to administer the oath is sufficiently shown in an indictment for perjury by an allegation that defendant, as a witness in a certain action on trial before a certain court which had jurisdiction thereof, was duly sworn by a duly appointed, qualified, and acting deputy county clerk, an officer authorized by law to administer oaths, who then and there had power, authority, and jurisdiction to administer said oath,—a deputy county clerk in fact being *ex officio* a clerk of such court, and, as such, empowered, upon the trial of an action therein, to administer oaths. People v. Collins, 6 Cal. App. 492, 92 Pac. 513.

So, an averment in an indictment for perjury that the oath charged to have been wilfully and corruptly taken was taken before a certain special examiner of the United States Pension Bureau, "then and there a competent officer, and having lawful authority to administer said oath," is, in connection with a statute expressly giving such officer authority, a sufficient averment of

also necessary to negative the truth of such testimony by setting out the true facts by way of antithesis; in other words, that the information should have further negatived the truth of plaintiff in error's testimony wherein she swore that she and John Cieloha were in Muskogee together on the evening of June 11, 1908, at a carnival show, by charging that, "whereas, in truth and in fact, the said Ethel Gray and the said John Cieloha were not in Muskogee together on the evening of June 11, 1908, at a carnival show." Such is the usual and better way of assigning the perjury, and some text writers and many adjudged cases hold that such an allegation or its substantial equivalent is indispensable. While we commend the form contended for, and think

it better pleading than that used in this case, yet, under our statutory provisions, we do not regard it as absolutely essential. Section 6704, Snyder's Comp. Laws, provides that the indictment is sufficient if "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." This information alleges explicitly that plaintiff in error "knowingly, wilfully, corruptly, feloniously, and falsely" swore that she and John Cieloha "were in Muskogee together on the evening of June 11, 1908, at a carnival show, in all which particulars the testimony, statements, and declarations so tes-

his authority to administer the oath. *Markham v. United States*, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. Rep. 288.

And in an indictment for perjury in an affidavit made before a receiver of a United States land office for the purpose of purchasing lands under the United States timber and stone act, which requires statements to be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated, the allegation that defendant appeared before and was duly sworn by such receiver, "who was then and there authorized by the laws of the United States to administer said oath," sufficiently shows his authority, as the courts will take judicial notice of his qualification under a statute providing that he is authorized to administer any oath required by law in connection with the entry or purchase of any tract of public land. *United States v. Eddy*, 134 Fed. 114.

Likewise, in an indictment for subrogation of perjury in procuring others to make false affidavits for the purpose of purchasing United States timber lands, the authority of the officers before whom the false oaths are alleged to have been taken is sufficiently averred by allegations that they were each "then and there an officer competent to administer said oath, that is to say,"—one, the register of a United States land office, and the other, a deputy county clerk. *Boren v. United States*, 75 C. C. A. 531, 144 Fed. 801.

And in *Babcock v. United States*, 34 Fed. 873, it was held that an indictment for subornation of perjury in procuring false affidavits for obtaining entries in a United States land office sufficiently avers the authority of the officer before whom the false oaths are alleged to have been taken, by alleging that the oaths were taken before the register and receiver of such office, and no specific averment that they are officers competent to administer oaths is necessary, as the court will take judicial notice that they are authorized by statute in such proceedings.

So, in an indictment for perjury alleged 32 L.R.A. (N.S.)

to have been committed at an election, in an affidavit made and sworn to before an inspector of election, for the purpose of enabling another to vote, an allegation of the fact that one offered to vote and was challenged, and that, for the purpose of enabling him to vote, defendant made the affidavit set out in the indictment, before the inspector of the election, is a sufficient averment of the latter's authority to administer the oath, where a statute confers upon inspectors of election the authority to administer all oaths where one appearing to vote is challenged. *State v. Hopper*, 133 Ind. 460, 32 N. E. 878.

But an indictment for perjury alleged to have been committed in an affidavit made before the clerk of a certain court—the authority of clerks of such courts to administer oaths being given by statute and limited to certain specified cases—must show that the oath upon which it is founded was one which the clerk was competent to administer; and a general averment that the clerk had lawful and competent power to administer the oath is not sufficient, being only an inference of law to be drawn from the facts stated. *McGragor v. State*, 1 Ind. 232.

So, the authority of the officer to administer the oath is not sufficiently averred in an indictment for perjury by allegations that defendant appeared as a witness before a judge of the superior court of a certain city and county, sitting as a magistrate in the examination of a certain charge, and that a certain duly appointed, qualified, and acting deputy county clerk of such city and county—an officer authorized by law to administer oaths and to administer an oath to defendant—administered to him an oath in due form of law, where such superior court judge, when sitting as a magistrate, has no right to call upon the county clerk or a deputy to administer oaths before him, and the county clerk and his deputies have no right to perform that function before such judge, thus sitting as a magistrate. *People v. Cohen*, 118 Cal. 74, 50 Pac. 20.

And an allegation in an indictment for perjury on a coroner's inquest, that the

tified and deposed unto by the said Ethel Gray . . . were then and there not true, but false, and were then and there by said Ethel Gray not believed to be true, but were then and there by said Ethel Gray believed to be false." And we think that any person of common understanding would know from this allegation that it was intended thereby to charge that in truth and in fact Ethel Gray and John Cieloha were not in Muskogee together at a carnival show on the evening of June 11, 1908. The information alleged that said statement was false in every particular, and that it was corruptly and falsely made, and the addition of the clause suggested would have constituted in effect a mere repetition of that averment,—a thing declared by the statute to be unnecessary. Section 6705 of Snyder's Comp. Laws also provides that "no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." And we think that the defect complained of, if it be a defect, under the circumstances of this case, where the perjury was assigned upon only one statement, and that short and plain, was one of form merely; and this record shows affirmatively that it in no manner tended to the prejudice of the substantial rights of the accused on the merits. She knew exactly what was intended to be charged, and the evidence introduced in her behalf went squarely to that issue.

Also § 2176, Snyder's Comp. Laws, defines perjury as follows: "Every person who, having taken an oath that he will

testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states any material matter which he knows to be false, is guilty of perjury."

And in *People v. Ennis*, 137 Cal. 263, 70 Pac. 84, the supreme court of California, construing this same statute in passing upon this same question, said: "The averment that the defendant did 'wilfully, unlawfully, and contrary to said oath' make certain specified statements, and that 'said statements so made as aforesaid were then and there, and are, false and untrue, and were at the time of the making thereof by the said defendant, Arthur Ennis, known by the said defendant to be false and untrue,' sufficiently shows that the defendant testified falsely."

In *Lawson v. State*, 3 Lea, 309, the indictment alleged that "Edward Lawson feloniously, wilfully, deliberately, absolutely, and corruptly swore then and there before the grand jury aforesaid, that he, the said Edward Lawson, had bought one pint of whisky from one Fanny Chambers, and that he, the said Edward Lawson, had paid her, the said Fanny Chambers, 50 cents for said pint of whisky, and which said swearing was material to the point under investigation by the said grand jury, and was knowingly, maliciously, feloniously, wilfully, deliberately, absolutely, and corruptly false, and the said Edward Lawson then and there well knew the same to be false in point of fact when he deposed it." On appeal the sole point relied upon for a reversal was that the indictment did not properly or sufficiently negative the truth of the testi-

oath was administered by a named justice of the peace, "then and there having sufficient power and authority to administer said oath" to defendant in that behalf, in the immediate presence and at the request and direction of the coroner, is not sufficient, where a justice of the peace has no authority, in his official capacity, to administer an oath in such a case,—the coroner, and he alone, having the power and authority to administer the oaths to the witnesses examined before him on an inquisition,—though it seems that an allegation that the oath was administered by the coroner would have been sustained by proof that defendant was in fact sworn by any other person, in the immediate presence and at the request and direction of the coroner, and merely as his instrument. *State v. Knight*, 84 N. C. 789.

But an indictment for perjury is fatally defective in its averment as to authority to administer the oath, which alleges that the defendant was sworn before one acting as a coroner and a jury of inquest, said acting 32 L.R.A. (N.S.)

coroner "then and there having sufficient and competent power and authority to administer said oath" to defendant in that behalf, where, under the law of the state, there is no such office as that of coroner, but justices of the peace discharge the duties of coroner. *Stewart v. State*, 6 Tex. App. 184. In this case the court said, however, that an allegation that the one who administered the oath was a justice of the peace, and that, at the time, he, as justice of the peace, was acting in discharge of the duties of a coroner, would have been sufficient without setting out the facts which conferred the authority; "it being sufficient as to his authority to administer the oath to allege that he was a justice of the peace, and, in his discharge of the duties of coroner, had jurisdiction of the matter under investigation."

As to the effect upon perjury of the invalidity of the proceedings in which testimony is taken, see note to *Morford v. Territory*, 54 L.R.A. 513. A. C. W.

mony upon which the perjury was assigned. To this the supreme court of Tennessee, in holding the indictment sufficient, said: "At the common law, the general averment that defendant swore falsely would not be sufficient, it being deemed essential that the words of the false swearing should be expressly and in terms contradicted. 3 Am. Crim. Law, § 259. But we have statutory enactments intended to simplify and abbreviate the prolixity of the common-law form of indictments. Experience has shown how difficult it is, in the hurry of the duties of his office, for the attorney general to avoid mistakes, especially in drawing an indictment for perjury in the common-law form. Our Code provides (§ 5114) as to all indictments, that the facts constituting an offense shall be charged in concise language, without prolixity or repetition. And as to perjury, it specially provides that it is sufficient to give the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the false oath was taken; and that the court or person before whom it was taken had authority to administer it, 'with proper allegations of the falsity of the matter on which the perjury is assigned.' Section 5130. This, we think, has been all done 'in ordinary and concise language,' and as explicitly and intelligibly expresses a charge of perjury as the most prolix and technical common-law indictment could do. And while we do not recommend a hasty departure from long used and approved forms, our experience satisfies us that cautious and well-considered changes which simplify and at the same time preserve the substance of such forms are subservient to the ends of justice. We think, therefore, the indictment in this case is a substantially good one, containing, as it does, proper and distinct allegations of the falsity of the matter which is set out as constituting the false swearing."

In *Johnson v. State*, 76 Ga. 790, the court held that, "where the indictment alleged that 'by her own act and consent, and of her most wicked and corrupt mind, in manner and form aforesaid, she wilfully, knowingly, absolutely, and falsely did commit wilful perjury,' this was a sufficient allegation that her testimony was false, without setting out in opposition to it what was the truth."

Again, in *People v. Williams*, 50 Hun, 601, 18 N. Y. S. R. 403, 2 N. Y. Supp. 382, the court said: "Section 291 of the Code of Criminal Procedure provides that an indictment for perjury shall contain 'proper allegations of the falsity of the matter on which the perjury is assigned.' 32 L.R.A. (N.S.)

The indictment in this case contains the allegation that the defendant 'wickedly, knowingly, designedly, corruptly, falsely, and feloniously' testified to certain matters specified, and it does not otherwise allege the falsity of the testimony given. For that reason the indictment was held insufficient. Section 684 of the same statute provides that no departure from the form or mode prescribed by the Code in respect to any pleading . . . renders it invalid, unless it has actually prejudiced the defendant, or tends to his prejudice, in respect to a substantial right. The two sections cited must be read together, as bearing upon the sufficiency of the indictment in question. And, first, is not the allegation of the indictment a substantial compliance with the requirement of § 291? Is it not an allegation of the falsity of the matter upon which perjury is assigned? It charges that the matter was falsely testified. Is not that equivalent to the charge that the matter testified was false? But, second, if it be held that the allegation is not in full compliance with the requirement of § 291, is the departure anything more than a matter of form? and, if not, has it prejudiced the defendant, or does it tend to his prejudice, in respect to a substantial right? We think the two sections, read together, uphold the form of pleading adopted by the district attorney. The allegation that certain testimony, specified, was falsely given, differs only in form from the allegation that the testimony given was false. A man cannot falsely testify to that which is true. Even though he intend to falsify, if what he testifies to is in fact true, he does not testify falsely. In the case of the *People v. Clements*, 107 N. Y. 205, 13 N. E. 782, the court of appeals held that an allegation that the defendant well knew the matter sworn to be false was a sufficient allegation of its falsity; and the court (by Rapallo, J.) says: "The objection to this indictment, if there be any, was that the falsity of the statement sworn to was only argumentatively alleged. But that it was fairly and even necessarily to be implied from the facts stated is very clear. The objection was only to the form of the allegation." And the indictment in that case was justified under the provisions of § 285 of the same statute, which declares that no indictment is insufficient . . . by reason of imperfections in matters of form which do not tend to the prejudice of the substantial rights of the defendant on the merits. The provisions of § 684, supra, seem to be even more directly applicable to those cases than those of § 285. The latter section is general in its application, and is intended to cure de-

fects in form under the general rules of criminal pleading. Section 684 more specifically cures deviations from the particular forms prescribed by the statute itself, of which the section forms a part, including the special requirements of § 291 in respect to indictments for perjury. The defect in this indictment, if any, being merely in the form of the allegation of the falsity of the testimony specified, and such defect of form not being such as to prejudice or tend to prejudice the defendant in respect to a substantial right, we must hold it to be immaterial, and the indictment good. The judgment sustaining the demurrer must be reversed, the demurrer overruled, and the case remitted to the court of sessions to proceed upon the indictment." See also *People v. Clements*, supra.

We are in accord with the decisions quoted, and therefore hold that the information sufficiently averred the falsity of the testimony alleged to have been given.

In support of the contention that the information failed to aver that the court had jurisdiction of the proceeding in which it is alleged the perjury was committed, it is urged that the information contained no direct allegation that the court had jurisdiction, and no averment that the cause then in hearing was being prosecuted by an indictment or information; one or the other of which was necessary to give the court jurisdiction of the cause. It is true that the court must have had jurisdiction of the cause in hearing before perjury could have been committed therein, and that the fact of such jurisdiction must be averred in some proper manner. Under the common law it was necessary that the facts essential to the jurisdiction of the court be pleaded, and that with considerable particularity; but under our statute, and in the great majority of the states, as well as in England now, that is no longer necessary, it being sufficient if the accusation contains the allegation that the court then and there had jurisdiction of said cause, or any other allegation substantially its equivalent in effect and meaning. We, and nearly all of the other states, have a statute (§ 6711, Snyder's Comp. Laws [Okla.]) prescribing the requisites of an indictment for perjury, which reads as follows: "In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken; and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the

matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed."

This statute has been construed by the highest courts of many states, and so far as we are able to find, it has been uniformly, and, we think, correctly, held that under the statute an allegation that the court or person before whom the false oath was charged to have been taken had authority to administer it is an allegation, and a sufficient one, that the court or tribunal then and there had jurisdiction of the matter pending and is equivalent to an averment of every fact essential to the court's jurisdiction. Thus it is said in *Eighmy v. People*, 79 N. Y. 546: "It is not necessary, even in an indictment for perjury committed before an inferior court, to set out all the facts to show authority of such court of limited jurisdiction, and it is sufficient to aver that it had sufficient and competent authority to administer the oath. *Reg. v. Lawlor*, 6 Cox, C. C. 187; *Lavey v. Reg.* 5 Cox, C. C. 269, 17 Q. B. 496, 2 Den. C. C. 504, 21 L. J. Mag. Cas. N. S. 10, 16 Jur. 36. Much less is so great a degree of exactness required where the averment relates to a court of general jurisdiction."

Again, in *State v. Douette*, 31 Wash. 6, 71 Pac. 556, it was said: "It may be admitted that, under the technical rules of pleading at common law, this information would be defective and insufficient. But the common-law forms of pleading have been changed and simplified by statute in this state, and it is not necessary here to specifically allege that the court had jurisdiction of the cause of action in which the alleged perjury was committed. *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *State v. Newton*, 1 G. Greene, 160, 48 Am. Dec. 367. 'A direct allegation of authority to administer the oath is sufficient to show the jurisdiction of the court or officer.' 16 Enc. Pl. & Pr. p. 326. It is provided in § 6857 of Ballinger's Anno. Codes & Statutes [Pierce's Code, § 2110] that 'in an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, rec-

ord, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.' It is apparent that, under the provisions of this section of the statute, it is sufficient, so far as the question of jurisdiction is concerned, to set forth in the information in what court or before whom the alleged false oath was taken, and that the court or person before whom it was taken had authority to administer it. And an examination of this information will disclose that it contains all the averments necessary under the statute. It alleges, in substance, that upon the trial by a jury of the case of *State v. Vance*, 29 Wash. 435, 70 Pac. 34, for murder in the first degree, in the superior court of Pierce county, the appellant was then and there duly sworn as a witness by Samuel Walker, who was then and there deputy clerk of said court, and had competent and sufficient power and authority to administer said oath in that behalf. The information does not expressly allege that the superior court of Pierce county had jurisdiction of the case in which the alleged perjury was committed, but that the court had in fact jurisdiction of the *Vance* Case is, we think, necessarily implied from the averments that it was a case of felony, and was tried in that court. Our superior courts are vested by the Constitution with jurisdiction 'in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law.' Const. art. 4, § 6. The averment in the information that the oath alleged to be false was taken in a certain superior court shows *prima facie* that the court had jurisdiction of the proceedings in which the oath was administered. The question here under consideration was presented to and determined by the supreme court of Colorado, in *Thompson v. People*, 26 Colo. 496, 59 Pac. 52, under a statute similar in substance to ours. And in that case the court, after quoting the statute, said: 'It will be observed that by the provisions of this section it is sufficient to aver in the information that the court or authority before which the oath was taken had full power to administer the same. This section is substantially the same as the statute 23 George II, chap. 11. Under that statute the English decisions are that it is only necessary to state the substance of the offense, the name of the court, and aver the court's authority to administer the oath. To the same effect are the decisions in this country, under similar statutes. . . . While it is true that the information does not contain an express averment that the district court of El Paso county had jurisdiction of the case in which

the alleged false testimony was given, it does aver that upon the trial of a certain criminal case, of which that court *prima facie* had cognizance, the plaintiff in error was duly sworn as a witness by the deputy clerk, and that he had sufficient authority to administer the oath. We think, therefore, that in this particular the information not only conforms to the requirements of the statute, but by necessary implication states that the proceeding in which the oath was administered was one over which the district court had jurisdiction. Nor is the information defective because of the failure to set forth how or in what way the evidence alleged to be false was material to the issue. It is well settled that it is sufficient if its materiality appears either from the facts alleged, or by direct averment.' The objection that it does not appear from any averment in the information that the superior court of Pierce county had jurisdiction of the case of *State v. Vance* is not tenable, and the court below committed no error either in denying the motion to set aside the information or in overruling the demurrer to the information interposed by the appellant."

Also, in *Fitch v. Com.* 92 Va. 824, 24 S. E. 272, the court held likewise, saying: "The effect of this statute was to dispense with the necessity of setting out the record or the facts to show the jurisdiction of the tribunal, or of alleging in terms that it had jurisdiction over the cause or proceeding in which the false testimony was given. It was thereafter held by the courts of England to be sufficient to set forth the substance of the offense and the name of the court before which the oath was taken, to aver that it had competent authority to administer the same, and to falsify by proper averments the defendant's assertions. 3 Russell, Crimes, 59; 2 Chitty, Crim. Law, 287; Archibold, Crim. Pl. & Pr. 1719; Lavey v. Reg. 17 Q. B. 496, 5 Cox, C. C. 269, 2 Den. C. C. 504, 21 L. J. Mag. Cas. N. S. 10, 16 Jur. 36; and 2 Bishop, Crim. Proc. § 914. Many of the states have enacted the same or a like statute, and the same effect has been given to it by their courts as was done by the courts of England. 2 Bishop Crim. Proc. § 848. See also *People v. Phelps*, 5 Wend. 9; *Campbell v. People*, 8 Wend. 636; *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *State v. Ledford*, 28 N. C. (6 Ired. L.) 5; *State v. Davis*, 69 N. C. 495; and *State v. Stillman*, 7 Coldw. 345. . . . It follows, therefore, that it is now unnecessary in this state to set forth the record of the case upon the trial whereof the false testimony was given, or to aver the jurisdiction of the tribunal over it; but only nec-

cessary, instead thereof, 'to state the substance of the offense charged against the accused, in what court or by whom the oath was administered which is charged to have been falsely taken, and to aver that such court or person had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned.'"

To the same effect is *Halleck v. State*, 11 Ohio, 400, in which the court said: "The objection to the indictment is that it does not show that Crosby, before whom the perjury is alleged to have been committed, had any jurisdiction to administer the oath, inasmuch as it does not set forth that a complaint, in writing, on oath or affirmation, was made before him. The indictment charges that the plaintiff's offense was committed before David Crosby, a justice of the peace for Saybrook, in the county of Ashtabula; and, it avers that said Crosby had full power and authority to administer the oath; that it was taken on the hearing of a complaint against said Southwick, for perjury, which complaint had been made in due form of law, and was then on hearing before said Crosby, as such justice. It may be admitted that this general form of allegation would be bad by the rules of common law, without it necessarily following that the court of common pleas erred in refusing to arrest judgment in this case, for, by recurring to § 11 of the act providing for the punishment of crimes (*Swan's Stat.* p. 231) it will be seen that, in this state, the common law has been modified by express legislation. Section 11 provides 'that, in an indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have had full power to administer the same, without setting forth any part of any record or proceeding, in law or equity,' etc. A careful comparison of this indictment with the section of this statute (parts of which I have given) will convince the mind that it contains all the averments which our statute requires, and that the court of common pleas could not have pronounced it defective without disregarding the law, and requiring of the prosecutor something beyond what it had made sufficient."

In *People v. Phelps*, 5 Wend. 10, it was held that "in an indictment for perjury by an insolvent debtor, in the oath taken by him on presenting his petition and the inventory of his estate, required by the statute, it is not necessary to set forth the facts which gave jurisdiction to the officer, as is done in pleading a discharge in a civil

suit; it is enough to aver that the officer had lawful and competent authority to administer the oath."

And again, in *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035, the court said: "An averment in an indictment for perjury, that the accused was duly sworn before the clerk of the court in which the trial was had, and that the clerk 'had full power and authority to administer the oath,' is, in legal effect, an averment that the court had jurisdiction of the subject-matter."

To the same effect, also, are *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383; *State v. Newton*, 1 G. Greene, 160, 48 Am. Dec. 367; *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *State v. Keel*, 54 Mo. 182; *Burns v. People*, 59 Barb. 531; *State v. Green*, 100 N. C. 419, 5 S. E. 422; *State v. Roberson*, 98 N. C. 751, 4 S. E. 511; *People v. Greenwell*, 5 Utah, 112, 13 Pac. 89; *State v. Belew*, 79 Mo. 584.

The information in question charged that plaintiff in error "was then and there duly sworn to testify truly in said cause by E. A. Coker, the duly acting and qualified deputy clerk of the district court aforesaid, who was then and there duly authorized and empowered to administer oaths in such cases, and to administer said oath in that case, in manner and form as was then and there done as aforesaid." And under the statute and its uniform construction this was a sufficient allegation of the court's jurisdiction. The demurrer was therefore properly overruled.

The next assignment is that "the court erred in not instructing the jury that the evidence introduced by the state, showing the trial and conviction of John Cieloha, was introduced only for the purpose of showing that the evidence was given in a judicial proceeding as alleged in the information, and limiting its effect to such purpose only." The only evidence in the record tending to show the conviction of John Cieloha is to be found in the cross-examination of W. H. Hohimar, one of the witnesses for the defendant, wherein the county attorney asked the question, "You know that they have all been convicted?" To which the witness answered, "Yes, sir." No objection was made to this question or answer, nor was any request made to the trial court for an instruction limiting the effect of this testimony. The question and answer were both incompetent; but as plaintiff in error did not see fit to object to the same, and inasmuch as she requested of the court no instruction limiting the purpose for which the testimony could be considered, she is not now in a position to

complain that the court did not give such instruction. Such an instruction, though proper, would have been merely adjective and collateral to the main issue, and it is not one of that character which the court was bound to give without a request therefor.

It is next urged that the court erred in instructing the jury as follows: "The testimony complained of as given by the defendant must not only have been false and material to the issue, but must have been wilfully and corruptly false. It was wilfully false if the defendant and John Cieloha were not present in Muskogee at the carnival show on the evening of June 11, 1908, yet she testified that they were present, she knowingly and intentionally testified to what was untrue." It is contended that this instruction was misleading and prejudicial to the defendant, in that it was subject to be interpreted as stating as a fact that plaintiff in error testified that she and John Cieloha were present in Muskogee on the occasion in question, and that she thereby knowingly and intentionally testified to what was untrue. The instruction was not happily framed, but we are satisfied that the jury could not have misinterpreted it; we think it apparent to anyone that the court meant to tell the jury that the testimony was wilfully false, if the defendant and John Cieloha were not present in Muskogee at the carnival show on the evening of June 11, 1908, and if she nevertheless testified that they were present, and in so doing knowingly and intentionally testified to what was untrue. This further appears from a consideration of the whole instruction, which proceeds: "You should ask this: Was the testimony false, and did Ethel Gray know that it was false? Again, the law says it must have been corruptly false. If a person, in order to help a friend or harm an enemy, testifies falsely for the purpose of misleading the court or the jury, you may well believe and find that her purpose was a corrupt one. If, however, the false testimony is given by mistake, or by inadvertence, and with no purpose of wrongly influencing a court or jury, you cannot convict." The instruction must be considered as a whole; and when so considered, it properly and intelligibly states the law, and mere verbal inaccuracies will not vitiate it.

Next, it is contended that the court erred in permitting the prosecution to ask certain of plaintiff in error's witnesses if a charge of perjury was not then pending against them in that court. It was held in *Slater v. United States*, 1 Okla. Crim. Rep. 275, 98 Pac. 110, that it is error to ask a witness if he has been indicted, arrested, or

imprisoned before conviction for any offense. In this case, however, it appears from the answers to the questions objected to that these particular witnesses at the time of their testifying stood charged by information with perjury alleged to have been committed in the trial of this same case against John Cieloha; and we think that these circumstances would constitute an exception to the rule, and that the questions and answers were competent for the purpose of permitting the jury to judge to what extent, if any, these witnesses were interested in the result of this particular case. If two persons are indicted for the same offense, or for different offenses, and it should appear from the evidence that from the acquittal or conviction of one even a slight inference of the guilt or innocence of the other could be drawn, or that the fate of one could have any probable bearing, however remote, upon that of the other, and one should testify either for or against the other,—under such circumstances it would not be error for either party to ask the witness and require him to answer whether he was then under indictment for that same or such different offense; and we think that rule applicable in the present case.

Plaintiff in error did not testify in this case; and after each side had rested, and after the court had instructed the jury, she made the following request: "By Mr. Marcum: The defendant requests that the testimony of defendant in her former trial stand as her testimony now. The testimony as read by the stenographer. Mr. Crum: The state objects. By the court: The objection will be sustained. Mr. Marcum: The defendant excepts. By the court: Let the record show that the court also offers to allow the defendant's attorney to put the defendant on the stand at this time."

There was no error in the court's refusing to tell the jury that the testimony of Ethel Gray, given in the trial of the case of John Cieloha, which had been read by the stenographer, should be considered by them as her testimony in this case. The request was a very peculiar one, and is not supported by either reason or authority. If plaintiff in error desired the court and jury to have the benefit of her testimony in this case, it was her duty to take the stand and testify under oath. The court did instruct the jury that the defendant was presumed to be innocent, that this presumption abided with her until it was overcome by competent evidence which established her guilt beyond a reasonable doubt, and that the burden of proof was upon the prosecution to establish each and every material

allegation in the information by competent evidence, beyond a reasonable doubt, before a verdict of guilty was warranted; and from this charge the jury were bound to presume, until the evidence established the contrary, beyond a reasonable doubt, that the testimony given by Ethel Gray in the former trial was true. But that presumption was one of law only, and if plaintiff in error desired it reinforced by her personal testimony in this trial, it was necessary that she take the stand and testify.

The judgment of the lower court will be affirmed.

Furman, P. J., and Doyle, J., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARIANNA W. MANNING et al., Pliffs.
in Err.,
v.

NEW JERSEY SHORT LINE RAILROAD COMPANY.

(— N. J. —, 78 Atl. 200.)

Eminent domain — railroad track — lateral support.

A railroad company, authorized by § 13 of the general railroad law (P. L. 1903, p. 652) to condemn lands required for its right of way, having taken proceedings under the eminent domain act of 1900 (P.

Headnotes by TRENCHARD, J.

Note. — Condemnation or grant of land for railroad right of way as carrying right to lateral and adjacent support.

As to removal of lateral support as constituting damage or injury within meaning of constitutional provision against taking, damaging, or injuring property for public use without compensation, see *Farnandis v. Great Northern R. Co.* 5 L.R.A. (N.S.) 1086, and note appended thereto.

As to the duty of abutting owner to preserve lateral support to highway, see *Havestraw v. Eckerson*, 20 L.R.A. (N.S.) 287, and note appended thereto.

And as to the liability of a railway company in constructing its roadway, for removal of lateral support to adjacent property, see *Pettit v. Jamestown & F. R. Co.* 21 L.R.A. (N.S.) 318 and note.

It is well settled that the conveyance of land for a railroad right of way carries the right of lateral support; at least, in the absence of a reservation of the right to interfere therewith. And in the United States it may not be doubted but that such a reservation would be held void, as being against public policy. In England, however, the owner of the fee is allowed to interfere even 32 L.R.A. (N.S.)

L. p. 79), the condemnation carries with it every right necessary to enable the company to use the land for the special purposes of a railroad, including the right to lay as many tracks and as near the line of its right of way as the overhang of its engines and cars will admit, and to run over its tracks rolling stock, passengers, baggage, and freight of any weight and at any speed practicable in the operation of a railroad according to present or future lawful methods, and all this weight must be supported laterally by the remaining land.

Same — instructions.

2. On the trial of an appeal taken by a landowner from an award in condemnation proceedings had by a railroad company formed under the general railroad law (P. L. 1903, p. 645), by virtue of the eminent domain act of 1900 (P. L. p. 79), for part of the right of way of the condemning company, an instruction by the trial judge that "the plaintiff is bound to support laterally the defendant's land to the extent only that the latter remains in its natural condition, and not for any superimposed weight by the defendant," is erroneous.

(November 14, 1910.)

ERROR to the Middlesex County Circuit of the Supreme Court to review a judgment granting inadequate relief to plaintiffs in a proceeding for the condemnation of land. Reversed.

The facts are stated in the opinion.

Mr. Alan H. Strong, for plaintiffs in error:

The plaintiffs were bound to support the

with the ballast and surface soil, provided the railway company does not compensate him for underlying minerals. In other respects the early English law on the subject is in accord with the decisions of the American courts, but the later English cases are dependent entirely upon the construction of certain statutes regulating the matter, and are of little value as authority in cases not construing such statutes.

In accordance with the ruling in *MANNING v. NEW JERSEY SHORT LINE R. Co.*, it is held in *Dilts v. Plumville R. Co.* 222 Pa. 516, 71 Atl. 1072, that a condemnation of land for a railway right of way carries the right to support of the surface, and that both the owner of underlying coal and the owner of the surface (the former having been conveyed) were entitled to compensation. The court said: "In condemnation proceedings, a railroad company, in the exercise of its right of eminent domain, secures not only the surface of the land, but also so much of the underlying minerals as may be necessary to support the surface. The company's entry upon the land is an appropriation of the subjacent strata of coal or other minerals so far as necessary to support the surface for any purpose to which it may be put for railroad uses. . . .

railroad company's land with the tracks on it and the use to which they may be put.

Hudson County v. Woodcliff Land Improv. Co. 74 N. J. L. 355, 65 Atl. 844; *Caledonian R. Co. v. Sprot*, 1 Paterson, Sc. App. Cas. 633, 2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623, 4 Week. Rep. 659, 17 Eng. Rul. Cas. 686; *North Eastern R. Co. v. Elliott*, 1 Johns. & H. 145, 29 L. J. Ch. N. S. 808, 2 De. G. F. & J. 423, 30 L. J. Ch. N. S. 160, 10 H. L. Cas. 333, 32 L. J. Ch. N. S. 402, 2 New Reports, 87, 9 Jur. N. S. 555, 8 L. T. N. S. 337, 11 Week. Rep. 604; *Currie v. New York Transit Co.* 66 N. J. Eq. 318, 105 Am. St. Rep. 647, 58 Atl. 308.

Mr. Ephraim Outter also for plaintiffs in error.

The owner of the surface had, prior to the appropriation of the land, conveyed the coal underlying the surface, with sufficient mining rights to enable the grantee to remove all the coal, regardless of its effect upon the surface. If any part of the coal was necessary for the support of the surface occupied by the appellant company, the owner of the coal is entitled to compensation. When, therefore, the company entered and appropriated the land for its right of way, it was required to compensate both the owner of the surface and the owner of the coal for the damages resulting from the appropriation. The owner of each is entitled to damages to the extent of his holdings, and it is apparent that the amount of damages to which the owner of the surface is entitled will depend upon the interest she has in the land. The extensive mining rights which she granted to the purchaser of the coal might affect the interest or estate which she has in the land. Those rights belong to the owner of the coal, and must be considered as a part of his property in estimating the damages done him by the company in appropriating the right of way."

And a similar conclusion may be deducted from the decision rendered in the case of *Searle v. Lackawanna & B. R. Co.* 33 Pa. 57, 5 Mor. Min. Rep. 363, wherein it was held that the full value of unworked coal lands as coal lands sought to be condemned for a railway right of way may be considered in estimating the damages, although the railway company gets no title to the coal further than is needed to support the surface; but that evidence of the value of the coal necessary to be left for the support of the road could not be considered in arriving at such estimate.

In *Connecticut & P. River R. Co. v. Holton*, 32 Vt. 43, where the owner of land through which a railway right of way had been condemned, among other things, filled the ditches along the sides of the roadbed, thereby damming back the water to such an extent as to saturate the embankment upon which the track was laid, impairing its solidity and permanency, the 32 L.R.A. (N.S.)

Mr. Linton Satterthwait for defendant in error.

Trenchard, J., delivered the opinion of the court:

This writ of error is prosecuted by Marianna W. Manning and Andrew Junker, her tenant, to reverse a judgment entered upon the verdict of a jury in the Middlesex circuit court, in their favor, against the New Jersey Short Line Railroad Company, a corporation formed under the general railroad law, on an appeal from an award in condemnation proceedings under the eminent domain act of March 20, 1900 (P. L. p. 79), for part of the right of way of the condemning company.

The land taken is a strip containing

court, in holding the railway company entitled to maintain trespass, said: "Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community, and the public safety, require that their possession of the land so taken should be absolute and exclusive against the adjacent landowner, so far as to secure fully every purpose for which the railroad is made and used. . . . The very purpose for which his land was taken and his damages appraised was to establish a railroad for the safe transportation of passengers and freight; and he has no right reserved in the land, the exercise of which may, in the most remote manner, make such transportation unsafe. His convenience must yield to the public welfare. We consider all these acts which the defendant has done under a claim of right to be wrongful. They endanger the safety of all who travel; and in deciding upon the questions here involved, the public safety is the paramount consideration."

And in *Kansas C. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190, the court said that the owner of the fee over which a railroad right of way is obtained by condemnation proceedings cannot in any mode or for any purpose interfere with the use of the property taken for railroad purposes; "The company has the free and perfect use of the surface of the land, so far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed."

And in *Philadelphia & R. R. Co. v. Lawrence*, 10 Phila. 604, it was held that a railway company which had obtained a right of way over coal lands by proper proceedings in court and by release from the owners might enjoin subsequent lessees of such underlying coal from removing same, to the impairment of the support of the right of way. And in *Lawrence's Appeal*, 78 Pa. 365, 7 Mor. Min. Rep. 542, a similar conclusion was reached.

In *Kings County Elev. R. Co. v. Cocks*,

about 2 acres, through a tract of about 75 acres. At the trial there was evidence tending to show that practically the whole tract was underlaid with a deposit of clay, and it was contended by the plaintiffs that such deposit of clay constituted the principal element of value in the property, and to this the testimony was mainly directed. At the close of the testimony the defendant company requested the learned trial judge, to charge as follows: "The plaintiff is bound to support laterally the defendant's land to the extent only that the latter remains in its natural condition, and not for any superimposed weight by the defendant." This the court charged without any qualification. Exception was duly

50 N. Y. S. R. 736, 22 N. Y. Supp. 1017, where defendants, for a valuable consideration, consented to the construction of an elevated railway in the street adjoining their property, the court, in holding the railway company entitled to restrain such owners from excavating in the street so as to interfere with the supports of the railway, said: "Wherever a general power to do a thing is given, every particular power necessary for doing it is included. The columns must have both lateral and perpendicular support, and as against the defendants the plaintiff is entitled to both, because both are essential to the enjoyment of the right conferred by the consent, and are therefore, in contemplation of law, included in it. Moreover, it is necessary that both should be undisturbed and unlimited. It was to secure a permanent and continuous right that the plaintiff obtained the consent, and paid therefor; and if now it has no greater rights than an adjoining owner to support, and is obliged to protect its columns whenever the defendants desire to excavate beneath their base, then, indeed, is the consent a delusion and its procurement a folly. If now the defendants can excavate at pleasure, as if no consent had been given, and cause the subsidence of the elevated structure with impunity, then the procurement of the consent was an idle ceremony, and the plaintiff paid its money for naught. Such cannot be the case. Equity will permit no such result. The consent must have the full force of its signification and intention."

In *Silver Springs, O. & G. R. Co. v. Van Ness*, 45 Fla. 559, 34 So. 884, it was held that under a reservation of the minerals and of the right to mine same in a voluntary grant of a railroad right of way, the latter right must be so exercised as not to undermine the surface support of the tracks, where the right to let down the tracks was not reserved by express words or by necessary implication, general words of reservation not being sufficient.

Pertinent to the question as to the right of the owner of the fee to compensation in condemnation proceedings upon the basis 32 L.R.A. (N.S.)

taken, and the charge so given is assigned for error.

We think the proposition so charged was erroneous. It is true that ordinarily the duty of lateral support of a neighbor's land is limited to the support of the land in its natural condition. *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Schultz v. Byers*, 53 N. J. L. 442, 13 L.R.A. 509, 26 Am. St. Rep. 435, 22 Atl. 514; *Pullan v. Stallman*, 70 N. J. L. 10, 56 Atl. 116; *Hudson County v. Woodcliff Land Improv. Co.* 74 N. J. L. 355, 65 Atl. 844. But if land is conveyed with buildings on it, or "expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied

that his remaining land will owe the duty of lateral and subjacent support to the railroad right of way, are cases involving the extent of his right to remove underlying minerals, etc., where such right depends upon the question whether or not such removal would interfere with the use of the surface; since, if he be allowed to take subjacent minerals only to the extent of not interfering with the surface support, the right to such support must be regarded as having been acquired by the railroad company, and if so acquired, it would seem that the owner would be entitled to compensation on that basis especially where the affording of such support would necessitate leaving valuable minerals, etc., unworked.

Thus, in the following cases it has been held that if land be underlaid with stone, coal, or other mineral, the owner may quarry or mine the same, provided that can be done without interfering with the use of the surface by the railway company: *Southern P. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 70 L.R.A. 221, 106 Am. St. Rep. 36, 79 Pac. 961, 2 A. & E. Ann. Cas. 962 (*dictum*); *Haslam v. Galena & S. W. R. Co.* 64 Ill. 353 (*dictum*); *Eldorado, M. & S. W. R. Co. v. Sims*, 228 Ill. 9, 81 N. E. 782; *Hollingsworth v. Des Moines & St. L. R. Co.* 63 Iowa, 443, 19 N. W. 325 (*dictum*); *Missouri, K. & N. W. R. Co. v. Schmuck*, 69 Kan. 272, 76 Pac. 836; *Northern P. & M. R. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571.

In *Missouri, K. & N. W. R. Co. v. Schmuck*, 69 Kan. 272, 76 Pac. 836, the court said: "The value of the land occupied depended upon the minerals therein found below grade line. By the condemnation, the railroad company obtained no right to remove or appropriate any portion of them; they all remained the property of the owner of the fee. The company not only obtained the right to construct its road over the land, making such cuts and embankments as were necessary for that purpose, but it also obtained the right to surface support. To this end the owner of the fee may not remove any of the subjacent strata necessary thereto,

grant of such support as the actual state or the contemplated use of the land would require." Per Lord Selborne in *Dalton v. Angus*, L. R. 6 App. Cas. 740, 792, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, 10 Eng. Rul. Cas. 98.

In *Hudson County v. Woodcliff Land Improv. Co.* 74 N. J. L. 355, 65 Atl. 844, where defendant conveyed the land to plaintiff for the purpose of a road to be built according to the grade shown upon a map referred to, it was held that the adjoining land of the defendant was burdened with the lateral support of a road built in accordance with the terms of the deed. In that case the supreme court refers to the case of *Caledonia R. Co. v. Sprot*, 1

Paterson, Sc. App. Cas. 633, 642, s. c. 2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623, 4 Week. Rep. 659, 17 Eng. Rul. Cas. 686, where it was held by the House of Lords that the grantor, in a conveyance to a railroad company, by implication conveyed to the company the right to all necessary support of the line of their railway, and he could not derogate from that conveyance by working mines and removing that support, although he had by the conveyance reserved the mines to himself and his heirs, with full liberty to win and work minerals. In the *Woodcliff Land Co. Case* the opinion also refers to *North Eastern R. Co. v. Elliot*, 1 Johns. & H. 145, 29 L. J. Ch. N. S. 808, 2 De G. F. & J. 423, 30 L. J. Ch. N. S. 160, 10 H. L. Cas. 333, 32 L. J. Ch. N. S.

but, subject to this right of surface support, he may remove all of such subjacent matter."

And in *Hasson v. Oil Creek & A. River R. Co.* 8 Phila. 556, 12 Mor. Min. Rep. 547, it was held that the owner of the fee may drive pipes under a railway for the conveyance of oil, where it appears that such use will not interfere with or imperil the easement of the railroad company, thus impliedly holding that the railroad company, by taking the land, also acquired a right to the undisturbed use of the surface for the purpose taken.

In *Greasy Creek Mineral Co. v. Ely Jellico Coal Co.* 132 Ky. 692, 116 S. W. 1189, it was held that one building a railroad so near the tracks of a railroad of another as to weaken the support of the latter's roadbed, which was upon a higher grade, must build a retaining wall for the support thereof.

In *Pennsylvania R. Co. v. Edgewood*, 220 Pa. 45, 69 Atl. 60, a borough which had condemned for a street a strip of land constituting a part of a railroad right of way, including a culvert built by the company, was held bound to maintain the culvert, irrespective of whether the company was vested with a fee estate or a mere easement by the original conveyance to it.

In *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142, where one railway company condemned a right of way through the right of way of another railway company, necessitating a cut through a high embankment of the latter, it was held that the latter was entitled to full damages for destruction of the support for its track, including the cost of erecting and maintaining a bridge, as well as damages for incidental loss and inconvenience.

And in *New York, N. H. & H. R. Co. v. New Haven*, 81 Conn. 581, 71 Atl. 780, where a city extended a street under railroad tracks, thereby necessitating the erection of retaining walls or other support for the soil under the tracks, it was held that the city was bound to provide such support or pay the expense thereof, as part of the compensation for taking the land. 32 L.R.A. (N.S.)

In England.

In *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623, 4 Week. Rep. 659, 17 Eng. Rul. Cas. 808, where land contiguous to a railway was voluntarily conveyed to the railway company for railway purposes, with a reservation to the grantor of all minerals and full rights to work and remove them, but subject to a special act of Parliament (act 7 Geo. IV., chap. 103) providing that no proprietor conveying land to the railway company with a reservation of a right to minerals should work such minerals without previous notice and security for damage to the railway company, it was held that such grant by implication carried the right to all subjacent and adjacent support necessary to enable the grantee to maintain and work its railway.

And *Caledonia R. Co. v. Belhaven*, 3 Macq. H. L. Cas. 56, 3 Jur. N. S. 573, and *Great Western R. Co. v. Cefn Cribbwr Brick Co.* [1894] 2 Ch. 157, 63 L. J. Ch. N. S. 500, 8 Reports, 178, 70 L. T. N. S. 279, 42 Week. Rep. 493, are to the same effect.

And according to *Mew's English Case Law Digest* (Vol. 2, col. 2,000 of the 1898-1907 Supp.), it was held in *North British R. Co. v. Turners*, 6 Faculty Collection of Court of Sessions Decisions, 900, that a grant of lands specifically for use as a railway in the absence of a contrary contention appearing on its face, carries with it by implication a right to reasonable and necessary support for the railway works by the subjacent and adjacent lands of the grantor.

And in *Elliot v. North Eastern R. Co.* 10 H. L. Cas. 333, 32 L. J. Ch. N. S. 402, 2 New Reports, 87, 9 Jur. N. S. 555, 8 L. T. N. S. 337, 11 Week. Rep. 604, affirming an order of the lord chancellor (reported in 2 De G. F. & J. 423, 30 L. J. Ch. N. S. 160) which affirmed 1 Johns. & H. 145, 29 L. J. Ch. N. S. 808, where a railway company was empowered by a special act of Parliament (Act 1834, 4 Will. IV., chap. 57) to take land, with the minerals reserved to the vendor, together with the right to work them without causing damage to

402, 2 New Reports, 87, 9 Jur. N. S. 555, 8 L. T. N. S. 337, 11 Week. Rep. 604, where a like conclusion was reached in a similar case, and Mr. Justice Swayze, speaking for the court, says: "We think the view taken by the English courts is based upon a correct principle." In that statement we concur.

Now, by § 13 of the general railroad law of 1903 (P. L. p. 652), under which the New Jersey Short Line Railroad Company is organized, it is authorized to take by condemnation any of the land required for its right of way, etc., and proceedings are directed to be pursuant to the eminent domain act of 1900 (P. L. p. 79), by which latter act it is provided (§ 7) that the commissioner's report, together with

the railway, the act also providing that when within a certain distance of any building or masonry, the owner of the minerals might require the company to purchase the minerals underlying its property, and that in case of the failure so to purchase, the minerals could be worked in the usual and ordinary manner, doing no avoidable damage, and purchased lands for the purpose of erecting a bridge, it was held that the railroad company was not only entitled to an order restraining the working of minerals within the prescribed distance from its bridge abutment, where the owner had not complied with the provisions as to allowing the railroad company to purchase, but that it was entitled by way of necessary incident to the grant of the land, to such lateral support from the adjacent land not within the specified distance as might be necessary to support the bridge, and therefore to an injunction restraining the working of minerals beyond the specified distance in any manner that would affect the stability of the bridge. In this case the owner of the minerals admitted the right to lateral support in the case of a voluntary conveyance (as in the preceding cases), but contended that the rule was inapplicable where the conveyance was compulsory under an act of Parliament. This contention was answered in the lower court by the lord chancellor in the following manner: "Can it be supposed that the legislature intended that, when the owner of the land had so sold and conveyed it for a particular purpose, he could, in derogation of his grant, deprive it of lateral support, without which it must be wholly unfit for the purpose for which it was sold and conveyed? The conveyance, which refers to the act of Parliament, coupled with the plan shown upon it denoting the part of the land on which the abutment of the bridge was to be constructed, clearly indicated the purpose to which the land was to be applied; and can it be supposed that the vendor, when the bridge was erected, should be at liberty to withdraw from it the lateral support, without which it could not stand? He suffers no hardship from the restraint, for when the 32 L.R.A. (N.S.)

the petition and orders, or certified copies thereof, with proof of payment or tender, "shall at all times be considered as plenary evidence of the right of the petitioner to have, hold, use, occupy, possess, and enjoy the said land." The same words, occurring in § 12 of the former general railroad law, were held by this court in *Currie v. New York Transit Co.* 66 N. J. Eq. 313, 318, 105 Am. St. Rep. 647, 58 Atl. 308, to vest in the condemning company all present estate, right, title, and interest in the land, so long, at least, as its corporate life continues to exist, and so long as it continues to devote the lands to the uses which its charter prescribes. The court, in that case, gives to the condemnation proceedings the same effect as a convey-

value of the land on which the bridge was to be erected was estimated, the possible deterioration of the adjoining land, by reason of the support required from it, would necessarily be taken into consideration." And in the House of Lords, by Lord Kingsdown as follows: "There can be no doubt that Mr. Boulcott, having sold the land for the bridge and the railway, could not so use the property which he had reserved, either the minerals under the land sold, or the surface of or minerals under the adjoining land, as to prejudice the use of that which he had granted for the purpose for which it was known to have been granted. He could not have taken away either from under the land sold, or from the adjoining land, minerals, the abstraction of which would have the effect of interrupting the railway or endangering the bridge. That this would be so at common law in the case of a private contract was not disputed, but it was said that the law is different when a compulsory sale is made under an act of Parliament; in which case it was argued that the purchaser takes nothing but what the act of Parliament gives in terms. It is extremely difficult to understand what difference there can be for this purpose between the effect of a conveyance when the contract is entered into under the authority of an act of Parliament, and when it is made by private bargain. In either case the conveyance must pass the property described in the deed, with its legal incidents. There may indeed be, either in the conveyance or in the act of Parliament, provisions which exclude from the conveyance of the land its ordinary legal incidents, but unless something to this effect be shown, the ordinary legal incidents will attach to the land."

And in *North Eastern R. Co. v. Crossland*, 2 Johns. & H. 565, affirmed in 4 De G. F. & J. 550, 32 L. J. Ch. N. S. 353, 1 New Reports, 72, 7 L. T. N. S. 765, 11 Week. Rep. 83, under a similar act, the railway company's unqualified right to support as an incident to the grant of the land for railway purposes was recognized.

So, in *R. v. Leeds & S. R. Co.* 3 Ad. & El. 683, 5 Nev. & M. K. B. 246, where a railway

ance of the land for railroad purposes, and the present chief justice, speaking for the court, remarks that, "whether the land be acquired by the one method or the other, when the company enters upon and takes possession thereof, it does so for the purpose of subjecting it to the uses which its charter authorizes."

The condemnation, therefore, is a legal substitute for a voluntary conveyance, and carries with it every right that is necessary to enable the company "to have, hold, use, occupy, possess, and enjoy" the land for the special purposes of a railroad. The land owner can no more derogate from the condemnation than he can from an express grant. The company is entitled to lay as many tracks and as near the line of its right of way as the overhang of its engines and cars will admit, and to run over its tracks rolling stock, passengers, baggage, and freight of any weight and at any speed

which may be practicable in the operation of a railroad, according to present or future lawful methods. All this weight must be supported laterally by the remaining land of plaintiffs. The soil adjacent to the right of way, and to such distance therefrom as may be required for such support, cannot be removed, and the clay therein cannot be mined, so as to materially impair such support; or, if it is, the owner must artificially, at her own expense, support not only the right of way in its natural state, but any weight which the railroad use may add to it.

It follows, therefore, that the landowner must be compensated in the award or verdict for the burden so imposed upon the remaining land. Such compensation was denied to the plaintiffs in the present case by the charge affirming the defendant's request, and therefore the judgment must be reversed and a venire de novo awarded.

company was empowered by special act to take lands for railway purposes, the right being reserved to the owners of mines over which the road passed to work them, doing no damage to the works of the railway company, it was held that an owner of mining land who had sold a portion thereof to the company without taking his mine into account could neither recover compensation from the railway company for repairing the right of way which had been injured by working the mine, nor compensation for interruptions to the working of the mine.

In 1845, certain Parliamentary acts were enacted for the purpose of regulating generally such public undertakings as the acquiring of lands for railway purposes, etc. These were the lands clauses consolidation act 1845 (8 and 9 Vict. chap. 18) and the railways clauses consolidation act 1845 (8 and 9 Vict. chap. 20). There is a provision in the lands clauses act for the taking of lands either compulsorily or by agreement, and a form of conveyance is given. The salient provisions of the railways clauses act are in substance as follows: § 77, providing that the company shall not be entitled to any "mines of coal, ironstone, slate, or other minerals" under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly furnished; and that all such mines, except as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby; § 78, providing that if, upon notice to the company of an intent to work mines under its railway, it appears to the company that such working is likely to damage the works of the railway, the owner shall not work them; and if the owner and the company do not agree as to the amount of compensation, the same is to be settled as in other cases of disputed compensation; and § 79, providing

that if, upon such notice, the company does not state its willingness to purchase such minerals, it shall be lawful for the owner to work the mines or any part thereof which the company has not agreed to purchase, provided that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the locality.

These acts are still (1911) in force, and have been explained and construed in numerous decisions.

Thus it has been held that they do not apply to rights acquired before their enactment. *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623, 4 Week. Rep. 659, 17 Eng. Rul. Cas. 686, *Great Western R. Co. v. Cefn Cribbwr Brick Co.* [1894] 2 Ch. 167, 63 L. J. Ch. N. S. 500, 8 Reports, 178, 70 L. T. N. S. 279, 42 Week. Rep. 493.

Nor under these acts is a railway company, compulsorily purchasing a right of way, entitled to a conveyance of the mines and minerals thereunder, unless they have been expressly purchased. *Re Metropolitan Dist. R. Co.* 45 L. T. N. S. 103.

And in *Great Western R. Co. v. Fletcher*, 5 Hurlst. & N. 689, 29 L. J. Exch. N. S. 253, 6 Jur. N. S. 961, 2 L. T. N. S. 803, 8 Week. Rep. 501, affirming 4 Hurlst. & N. 242, 28 L. J. Exch. N. S. 147, 12 Mor. Min. Rep. 521, in holding the railway company not entitled to subjacent or adjacent support to land purchased for its way, where the deed was in the form prescribed by lands clauses act, and did not expressly convey the minerals, and the company was not willing to purchase the minerals after notice of the owner's intention to work them pursuant to § 78 of the railways clauses act, but that the owner was entitled to mine the minerals, although the working them might cause the surface to subside, Cockburn, Ch. J., explained the acts involved as follows: "Now, what the act of Parliament means is this: All that the railway company requires

is the surface soil; it may be that the minerals will never be worked by the landowner, in which case the company ought not to be subject to any expense; and therefore the legislature interposes and says that the company shall be under no obligation to pay the landowner for that which may never be required; but if the mines come to be worked, and the company require them as necessary for the support of the surface, they must make compensation to the landowner. In accordance with that view, the legislature has provided that when a man has a mine which he is about to work, lying under or near to a railway, he shall give the company thirty days' notice of his intention, and they must then take measures to discover whether that proposed working will injure their works, and act accordingly. The very fact that provision is made in the 78th section for possible injury to the railway works shows that the legislature intended to reserve the question of support and compensation. The legislation would be incomplete if it were not applicable to the case of a landowner who, having parted with the surface soil, to be used by a company, for the purpose of putting an additional weight upon it, as a railway company must necessarily do, shall afterwards entertain the idea of working the mines under or in the neighborhood of the railway. If the legislature had not so intended, they would have framed the 78th section in a more special manner, instead of in the general terms in which it is now framed. The 77th section reserves the minerals, and to my mind it is clear that the two clauses must be read together. The minerals are reserved to the landowner, and the railway company is under no obligation to make him any compensation in respect to them until the necessity for it arises from his desire to work the mines. In such case the company are to consider whether the working is likely to damage their railway, and then, if they are willing to make compensation for the mines, the owner is not to work them. The mines may never be worked, and it would be a great hardship on railway companies if, upon a speculative possibility, they were bound to make compensation for not working the mines." The decision itself was upon the ground that, as the proceeding was entirely statutory, the common-law principles have no application.

And in *Great Western R. Co. v. Bennett*, L. R. 2 H. L. 27, 36 L. J. Q. B. N. S. 133, 16 L. T. N. S. 186, 15 Week. Rep. 647, 17 Eng. Rul. Cas. 706, it was held that a purchaser under the railways clauses act cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, as the rights of the parties must be regulated by the statutes (§§ 77-79, railways clauses acts) specifically regulating the matter, which in effect, do not entitle the railway company to the mines under their land, unless expressly conveyed or purchased upon notice. In explaining § 78, the lord chancellor said: "This section appears to me to leave

the mine owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation." And of the act as a whole, Lord Cranworth said: "It was obviously the intention of the legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company) that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with whenever the time for working the mine should arrive. It is plain to me upon the construction of that clause of the statute, that that was the intention of the legislature; and that intention is fully carried into effect by giving to the mine owner, in this case, the respondent, Mr. Bennett, that which the court below has given to him; namely, the full right in all the mines which he worked, just as if he had not sold the surface."

And in *London & N. W. R. Co. v. Ackroyd*, 8 Jur. N. S. 911, 31 L. J. Ch. N. S. 588, 6 L. T. N. S. 124, 10 Week. Rep. 367, where the railway company claimed sufficient subjacent and adjacent support for its right of way, which had been obtained by purchase under the railways clauses act, and sought to restrain the removal of underlying and supporting seams of coal, the grant was held not to give the company such a right to support for their way as to warrant prevention of the grantor, acting duly in accordance with the railways clauses acts, working mines under and adjacent to the way, the court saying: "The legislature split the ownership into two parts, for the object of facilitating the making of railways; and they said, with regard to the ownership of the surface, the company shall purchase that, with all its consequences, except as to minerals,—i. e., except as to minerals to be worked under the following clauses. The company buys

the right to support, and every other right which can be given to them, except with respect to that mineral support, they purchase no such right; and therefore whenever requiring land for the purposes of the railway, they will be governed by the wish or absence of wish, on the part of the owner of the minerals, to work his mines, as to whether they will pay anything for that particular species of support."

And the railway company can stop the working of the underlying mines at any time after the statutory notice is given it of the mine owner's intention to work his mine. In other words, the mine owner is not entitled to work his mine without being subject to stoppage by notice of election to make compensation therefor, merely because such notice was not given within thirty days (the period which must elapse after notice before the mine owner can work his mine) after the mine owner's notice of intent to work the mine, the act not expressly providing that such counter notice must be given within any specified time. *Dixon v. Caledonian & G. & S. W. R. Co. L. R. 5 App. Cas. 820, 43 L. T. N. S. 513, 29 Week. Rep. 249, 45 J. P. 105.* construing railways clauses consolidation (Scotland) act 1845 (8 and 9 Vict. chap. 33), §§ 70, 71, 72, which are similar to the sections of the act under discussion in the preceding cases.

And in *Errington v. Metropolitan Dist. R. Co. L. R. 19 Ch. Div. 559, 51 L. J. Ch. N. S. 305, 46 L. T. N. S. 443, 30 Week. Rep. 663*, it was held that §§ 77, 78, and 79 of the railways clauses act do not deprive a railway company of the right to purchase mines compulsorily, subsequently and apart from the purchase of surface within the time limited by the lands clauses act for the exercise of the compulsory powers, although such acts do not expressly so provide, it being said that the words "expressly purchased" in § 77 cannot be confined to "purchased by agreement;" and such lands or minerals need not be absolutely essential to the support of the right of way, it being sufficient if the demand therefor is bona fide. From this it may be noted that had a contrary conclusion been reached, a railway company purchasing the surface alone would have been thereafter precluded from compulsorily purchasing any underlying minerals, no matter how essential they might have become to the support of the way and works.

And see *Great Western R. Co. v. Bennett. L. R. 2 H. L. 27, 36 L. J. Q. B. N. S. 133, 16 L. T. N. S. 186, 15 Week. Rep. 647, 17 Eng. Rul. Cas. 706*, wherein it was said that if the railroad company desires to postpone the purchase of the mines until it is known that they are to be worked, it is enabled to do so with perfect safety from the protection afforded by § 78 of the railways clauses act, which compels the mine owner whose mines lie under the railway or within a certain distance of it, who is desirous of working the same, to give notice, 52 L.R.A. (N.S.)

of his intention, in which case, if it appear that the working of the mine is likely to damage the railway, and if the company be willing to make compensation for the mines to the owner, he shall not work or get the same.

But in *Pountney v. Clayton L. R. 11 Q. B. Div. 820, 52 L. J. Q. B. N. S. 566, 49 L. T. N. S. 283, 31 Week. Rep. 664*, relying on *Great Western R. Co. v. Bennett, supra*, it was held that a landowner who had worked mines underlying lands which had been compulsorily taken for railway purposes without such mines and minerals, without having given any notice under the railways act of his intention to do so, thereby causing the surface lands to subside, had not interfered with any right of the surface owner. The court, in this case, however, seems to have overlooked the fact that in the *Bennett Case* the railway company was held protected by its option subsequently to purchase upon notice (see the *Bennett Case* as set out in the preceding paragraph).

The question of the right to surface support has also arisen in cases involving the question as to what falls within the meaning of the terms "mines of coal, ironstone, slate, or other minerals," as used in § 77 of the railways clauses act, since, if a particular formation or substance was not within the act, it would be deemed for purposes of support to have passed by the conveyance of the surface.

Thus, in *Midland R. Co. v. Haunchwood Brick & Tile Co. L. R. 20 Ch. Div. 552, 51 L. J. Ch. N. S. 778, 46 L. T. N. S. 301, 30 Week. Rep. 640*, the word "mines" in § 77 of the railways clauses act, was held to include a bed of clay worked from the open, as distinguished from an underground excavation, so as to permit the digging and working thereof unless the company make compensation therefor, pursuant to the act.

And in *Ruabon Brick & Terra Cotta Co. v. Great Western R. Co. [1893] 1 Ch. 427, 62 L. J. Ch. N. S. 483, 2 Reports, 237, 68 L. T. N. S. 110, 41 Week. Rep. 418*, it was held that a bed of clay reserved in lands which had been conveyed for railway purposes could be worked by the owner only after failure of the company to purchase upon notice given pursuant to the railways clauses act, notwithstanding such working would require a removal of the railway ballast and surface soil lying above the clay.

And in *Loosemore v. Tiverton & N. D. R. Co. L. R. 22 Ch. Div. 25, 51 L. J. Ch. N. S. 570, 47 L. T. N. S. 151, 30 Week. Rep. 628*, a bed of clay was recognized as being within the act.

And in *Midland R. Co. v. Robinson, L. R. 15 App. Cas. 19, 59 L. J. Ch. N. S. 442, 62 L. T. N. S. 194, 38 Week. Rep. 577, 54 J. P. 580, 17 Eng. Rul. Cas. 516*, the same was held of a bed of limestone which could be worked only by open or surface operations.

G. J. C.

NEBRASKA SUPREME COURT.

K. B. WARD, Appt.,

v.

CITY OF LINCOLN.

(87 Neb. 661, 128 N. W. 24.)

Municipal corporation — special assessment — neglect to collect — personal liability.

L., a city of the first class, entered into a valid contract for the construction of a sidewalk, the cost thereof to be paid by a special assessment to be levied on the lots abutting the improvement. The sidewalk was constructed according to the contract, and the city levied a special assessment

Headnote by BARNES, J.

Note — General liability of municipality which is unable or has failed to enforce assessments for local improvements.

This note presupposes that the contract for the improvement, either by virtue of its own terms or by force of the statute or ordinance under which it is executed, contemplates that the contractor or the holders of the obligations issued in payment of the contract price shall look primarily to the fund to be raised by assessment from the property benefited; and is therefore confined to cases which assume that primarily the liability was solely that of the property, and in which the general liability of the municipality is sought to be predicated upon its inability or failure to carry out the scheme of compensation by assessment, contemplated by the contract.

Illustrations of a class of cases in which the municipality is held generally liable, but which are in general excluded for the reason just stated, are *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524 (where there was an express provision for payment out of any funds not otherwise appropriated, if not paid out of the special fund within a certain time); *Guthrie v. Louisville*, 6 B. Mon. 575 (where there was an express guaranty of the lien of the assessment); *Knapp v. Hoboken*, 38 N. J. L. 371; *Dime Sav. Inst. v. Hoboken*, 42 N. J. L. 283 (where there was an express agreement of the municipality to pay, if the assessment was not collected within a given time); *Payne v. Brooklyn*, 52 Hun. 390, 5 N. Y. Supp. 281 (where the city had power to anticipate the collection of an assessment fund, and there was an express promise to pay the fees of court commissioners immediately upon the confirmation of their report by the court); *Frush v. East Portland*, 6 Or. 281 (holding that an agreement "to pay the amount found due by warrants to be drawn on the fund to be collected and paid into the city treasury for that purpose" did not amount to a stipulation that the contractor was to be paid out of a fund arising from the tax collected from the

upon the abutting lots to pay for the same. Thereafter the city failed and neglected to collect the assessment, and entered into an agreement with the owner of the lots by which it attempted to release them from the lien of the special assessment, and caused the same to be canceled and discharged of record. Held that such conduct on the part of the city rendered it liable in an action to recover the contract price of the improvement.

(Rose and Sedgwick, JJ., dissent.)

(October 22, 1910.)

APPEAL by plaintiff from the judgment of the District Court for Lancaster County dismissing an action brought to recover the amount alleged to be due on

owners of the property benefited, and that the city was primarily liable; *Belton v. Sterling*, — Tex. Civ. App. — 50 S. W. 1027 (holding that a statute which makes a city responsible for one third of the cost of grading streets, and the abutting owners liable for two thirds of the cost, means that the city is primarily responsible to the contractor for the entire contract price, and the abutting owner responsible to the city for two thirds thereof).

For the same reason, cases like *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Hunt v. Utica*, 18 N. Y. 442; *Baker v. Utica*, 19 N. Y. 326, holding the city not primarily liable, are excluded.

The question whether mandamus is a proper remedy is also excluded; but the question whether the remedy by mandamus is exclusive of the remedy by action to hold the municipality liable is within the scope of the note.

The effect of a constitutional provision limiting the indebtedness of a municipal corporation upon its liability for failure to collect a special assessment is also omitted as beyond the scope of this note. See *Ft. Dodge Electric Light & P. Co. v. Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7; *Little v. Portland*, 26 Or. 235, 37 Pac. 911; *Addyston Pipe & Steel Co. v. Corry*, 197 Pa. 41, 80 Am. St. Rep. 812, 46 Atl. 1035; *Gable v. Altoona*, 200 Pa. 15, 49 Atl. 367.

There is a hopeless conflict among the cases falling within the scope of the note. The difficulty of the subject is enhanced by the changing combinations of elements entering into the question as the cases are approached. For this reason, broad generalizations based on the ultimate results in the cases are of little value, and are apt to be misleading.

In some of the cases the decisions turn, to a considerable extent, upon the question whether or not it was within the power of the municipality to pay for the improvements out of its own funds. This is a point which, though of considerable importance, is so combined with other elements that it does not lend itself readily

certain special assessment certificates. Reversed.

The facts are stated in the opinion.

Mr. H. Rosenthal, for appellant:

When a municipal corporation contracts to pay a debt out of a certain fund to be raised by special assessment, it is liable for the payment of the debt, whether it succeeds in creating the fund or not.

Heller v. Garden City, 58 Kan. 263, 48 Pac. 841; Belton v. Sterling, — Tex. Civ. App. —, 50 S. W. 1027; O'Brien v. Concordia, 2 La. Ann. 355; Jones v. Portland, 35 Or. 512, 58 Pac. 659; Commercial Nat. Bank v. Portland, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532; Kearney v. Covington, 1 Met. (Ky.) 345; Bucroft v. Council Bluffs, 63 Iowa, 646, 19 N. W. 807; Bar-

ber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336.

The city is liable to the full amount of the certificates, although the amount accepted in settlement may not have been sufficient to cover all taxes assessed against the lots.

O'Hara v. Scranton City, 205 Pa. 142, 54 Atl. 713; Denny v. Spokane, 25 C. C. A. 164, 48 U. S. App. 282, 79 Fed. 719; McEwan v. Spokane, 16 Wash. 212, 47 Pac. 433; Lyon v. District of Columbia, 19 Ct. Cl. 649; Sheafe v. Seattle, 18 Wash. 298, 51 Pac. 385; Palmer v. Brooklyn, 10 Misc. 592, 11 Misc. 459, 32 N. Y. Supp. 739; Warner v. New Orleans, 31 C. C. A. 238, 59 U. S. App. 131, 87 Fed. 829.

to a separate classification, and is therefore considered in the subsequent subdivisions, which are based upon a different classification.

As affected by terms of contract, generally.

It is apparent from the very scope of the note that those cases, properly included therein, which under any circumstances hold the municipality liable, do so in spite of general provisions either in the contract, or in the statute or ordinance under which the contract is executed, which contemplate that the contractor shall look solely to the property benefited, and not to the municipality, for his compensation.

In many cases, however, the contract, or the statute or ordinances under which it was made, and which are in legal effect a part thereof, contain, in addition to those general provisions, terms apparently designed to emphasize the nonliability of the municipality, or even to negative its liability in any and every event. For the most part, the effect of such terms upon the question under annotation is considered in subsequent subdivisions of the note. It may be observed at this point, however, that in some instances the municipality has been held generally liable because of its inability or failure to enforce the assessment scheme contemplated by the contract, notwithstanding contractual provisions of the kind just referred to.

In other jurisdictions the courts have felt constrained by the very terms of the contract to deny municipal liability, even where the municipality had no power to carry out its contract to collect the cost of the improvement from the property benefited.

In California, for example, the courts take the position that the provisions of the contract, or of the statute under which the improvement is made, that the city shall in no event be liable, protect it against liability even though no valid assessment has been made or can be made. Connolly v. San Francisco, — Cal. —, 33 Pac. 1109.

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And under such a contract it has been held that the city is not liable even though it has passed a resolution to pay the contractor out of its general funds. McBean v. San Bernardino, 96 Cal. 183, 31 Pac. 49.

And it has even been held that it is beyond the power of the legislature to authorize the city to pay the contractor, although his inability to realize his compensation from the property was due to "errors, omissions, and irregularities" of the municipal officers. Conlin v. San Francisco, 99 Cal. 17, 21 L.R.A. 474, 37 Am. St. Rep. 17, 33 Pac. 753.

The doctrine is also recognized in Union Trust Co. v. State, 154 Cal. 716, 24 L.R.A. (N.S.) 1111, 99 Pac. 183, where the court said that it has often been held in other jurisdictions that a municipality will be directly liable where the right to collect the assessment is lost through its negligence, and that the rule has been applied even in cases of contracts or bonds providing specifically that the city shall in no event be liable, but that the rule was otherwise in California. This case, however, involved the liability of the state, and not of the municipality.

In Goodrich v. Detroit, 12 Mich. 279, it was held that the city was not liable to the contractor for money collected from assessments by the collector, who defaulted and failed to pay it over to the city, where the contract provided that the contractor should not receive or demand payment for the work until the money therefor shall have been collected and actually paid into the city treasury upon the assessment rolls.

In some jurisdictions the question of liability of the municipality in case recourse against the property is lost by defects or irregularities in the proceeding, for which it is responsible, depends upon the presence or absence of a provision of the statute or contract, in addition to the general provisions that the contractor must look to the assessment fund for his compensation, negating the liability of the municipality in any and every event.

This is well illustrated by the decisions

Messrs. C. C. Flansburg and Leonard A. Flansburg, for appellee:

A city cannot, when it expressly contracts with reference to a specific fund, be held, even in case the fund is lost through its own negligence, to pay from any other than that specific fund:

German American Sav. Bank v. Spokane, 17 Wash. 315, 38 L.R.A. 259, 47 Pac. 1103, 49 Pac. 542; *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541; *Cooley, Taxn.* p. 416; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *Rhode Island Mortg. & T. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104; *Wilson v. Aberdeen*, 19 Wash. 80, 52 Pac. 524; *Farrell v. Chicago*, 198 Ill. 558, 65 N. E. 103; *Craycraft v. Selvage*,

10 Bush, 696; *Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. Detroit*, 12 Mich. 286; *Pontiac v. Talbot Paving Co.* 48 L.R.A. 320, 36 C. C. A. 88, 94 Fed. 65; *Finney v. Oshkosh*, 18 Wis. 209; *Barber Asphalt Paving Co. v. Denver*, 67 Fed. 65; *Smith Canal or Ditch Co. v. Denver*, 20 Colo. 84, 30 Pac. 844; *Wheeler v. Poplar Bluff*, 149 Mo. 30, 49 S. W. 1088; *Reock v. Newark*, 33 N. J. L. 129; *Argenti v. San Francisco*, 16 Cal. 255; *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Alton v. Foster*, 74 Ill. App. 511; *Hunt v. Utica*, 23 Barb. 390; *Lake v. Williamsburgh*, 4 Denio, 520.

Barnes, J., delivered the opinion of the court:

This is an appeal from a judgment of

in Kentucky. In *Craycraft v. Selvage*, 10 Bush, 696, the court while recognizing that, in the absence of a provision declaring in terms or effect that the city shall not be made liable for the cost of the street improvement, it may be liable where the recourse to the property is lost by reason of defects or irregularities in the proceeding, yet denies the liability in such circumstances where the charter expressly provides that "in no event shall the city be liable for such improvements (of streets) without having the right to enforce it against the property receiving the benefit thereof." The court, while approving the *dictum* in *Murphy v. Louisville*, 9 Bush, 189, to the effect that the city will be liable if the property has been released in consequence of the failure of the city to comply with some provision of an ordinance, or its omission to perform some duty incumbent upon it, limited that *dictum* to cases where there was no stipulation in the contract like that in the case at bar. It is to be observed, however, that even the *Craycraft* Case concedes that such a stipulation in the contract will not apply so as to relieve the city where it had no power to make the improvements at all at the cost of the owner of adjacent property, and that in that class of cases the city would be liable to contractors who had done the work under a contract regularly made under a valid ordinance. (See on this point the Kentucky cases cited in the next subdivision.)

Where assessment scheme is beyond power of municipality.

The weight of authority, at least in the absence of express provisions in the contract, in addition to those which in general purport to throw the liability upon the property benefited, clearly designed to negative liability in such event, appears to hold the municipality liable where it had no power in the first instance to charge the cost of the work against the property benefited. *Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 130, 36 U. S. App. 409, 32 L.R.A. (N.S.)

72 Fed. 336; *Maher v. People*, 38 Ill. 206; *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807 (distinguishing cases holding a contractor presumed to know the city's power, upon the ground that in this case the city had power to become generally liable, but no power to levy an assessment against abutting owners); *Scotfield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *Polk County Sav. Bank v. State*, 69 Iowa, 25, 28 N. W. 416; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Leavenworth v. Laing*, 6 Kan. 274 (stating that the city had full and ample power to make the improvement); *Cole v. Shreveport*, 41 La. Ann. 839, 6 So. 688 (expressly stating that the city had power to contract for the work); *Miller v. Milwaukee*, 14 Wis. 699 (expressly stating that the city had power to contract for the work).

In *Memphis v. Brown*, 20 Wall. 289, 22 L. ed. 264, also, a municipality having general power to pave the streets, and the option to do so at the expense of the property owners, was held liable to the contractors, where the assessments had been declared void as in violation of the Constitution; but in this case the municipality had expressly guaranteed the payment of the assessments.

So, a municipality has been held liable for the proportion of the assessment that could not be lawfully charged against the abutting property.

Thus, in *Tournier v. Municipality No. 1*, 5 La. Ann. 298, a municipality was held liable for two thirds of the cost of an improvement, it being adjudged that the abutting property was liable only for one third, notwithstanding that the contractor had agreed to look to the property for two thirds, and to the municipality for one third.

And where the contract provides simply that the work is to be paid for by "assessments," and the statute provides that, if the cost exceeds 25 per cent of the value of the assessed property, the excess shall be paid by the city, the city is liable to the contractor for such excess, in the absence of an agreement by him to take as-

the district court for Lancaster county sustaining a general demurrer to the plaintiff's petition, and dismissing his action. The only question presented for our determination is: Does the plaintiff's petition state facts sufficient to constitute a cause of action?

The petition alleges, in substance, that the defendant is a city of the first class existing under and by virtue of the statutes of Nebraska; that defendant then having power and authority to let contracts for the construction of sidewalks within its corporate limits, and to levy and assess taxes against the abutting real estate to pay for the construction of such sidewalks, and collect said taxes, did on or about August 21, 1891, enter into a contract with one R.

assessments in full payment. *Cincinnati v. Diekmeier*, 31 Ohio St. 242, followed in *Keszler v. Cincinnati*, 2 Ohio C. D. 127, 3 Ohio C. C. 223, which is said to have been reversed by the supreme court without report.

But in *Welker v. Toledo*, 18 Ohio St. 452, where the statute provided that when the cost exceeded 50 per cent of the valuation of the property, the excess should be paid by the city out of its general fund, it was held that the contractor had no recourse against the city for the excess over the 50 per cent, where he had expressly agreed to take and collect the assessment at his own risk, and not to hold the city in the event any of the lots proved to be assessed beyond 50 per cent of its valuation. The court said that while the contract was against the policy of the statute, its illegality could not be asserted by the contractor.

Liability of the municipality attaches *pro tanto* where particular property, *e. g.*, property belonging to the state, which it contracts to assess for the benefit of the contractor, is not legally subject to assessment for improvement, as well as where it was beyond the power of the municipality to assess any of the property for the improvement. *Polk County Sav. Bank v. State*, 69 Iowa, 25, 28 N. W. 416; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Chicago v. People*, 56 Ill. 327.

So, the municipality has been held liable where it had been finally determined that it had no power to assess nonabutting property, as it had attempted to do. *Addyston Pipe & Steel Co. v. Corry*, 197 Pa. 41, 80 Am. St. Rep. 812, 46 Atl. 1035.

So, where the city, by purchasing a lot for its own purposes, renders it impossible to enforce the assessment against it, and the assessment is thereupon canceled, the city is directly liable to the bondholder for the amount of the assessment. *Atchison v. Friend*, 78 Kan. 30, 96 Pac. 348. (But see *infra* as to effect of purchase of property by municipality at sale of delinquent property.)

In *Newman v. Sylvester*, 42 Ind. 106, 32 L.R.A. (N.S.)

J. Gaddis for the construction of sidewalks in front of lots 7 to 12, inclusive, in block 4, *Fitzgerald's* second addition to the defendant city, and agreed to pay for said sidewalks from funds to be realized from assessments and special taxes on said lots; that Gaddis constructed the sidewalks according to his contract, and did all things required of him to be done in the performance of the same; that defendant, in accordance with its contract with Gaddis, issued to him six certificates, by which it certified that he was entitled to the several amounts mentioned therein, the same being the contract price of the sidewalk, with interest and penalties thereon, whenever said assessments should be collected, and reciting that the certificates were issued in ac-

however, the liability of the members of the city council as individuals was denied where the contractor was without remedy as to one of the lots assessed, because it was beyond the city limits.

It has been held that the municipality is not responsible for the deficiency arising from the fact that the contract price exceeds the benefit to the property, and that the assessment is void as to the excess. *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197. (As to the liability for deficiency upon a sale of the property, see *infra*.)

Nor is the municipality's liability to the contractor established by the fact that the property owner may elect to prevent the enforcement of the assessment against his property, by availing himself of an equitable defense arising from the fact that the municipality created the very nuisance for the removal of which the assessment was laid, since he may elect some other remedy. *Smith v. Milwaukee*, 18 Wis. 63.

—as affected by terms of statute, contract, or ordinance.

The liability of the municipality, in the event that it had no power to impose the cost of the improvement upon the property benefited, has been upheld in some cases, notwithstanding affirmative provisions of charter or contract, in addition to those which in general impose the liability upon the property benefited, apparently designed to emphasize the nonliability of the municipality, or even to negative its liability in any and every event. Thus, the municipality has been held liable in such circumstances, notwithstanding that the contractor had agreed to take the tax certificates in "full payment." *Scofield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *Ft. Dodge Electric Light & P. Co. v. Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 A. & E. Ann. Cas. 7.

Or had expressly agreed that there should be no recourse against the city, or that the city should in no event be liable. *Chi-*

cordance with an ordinance of the city of Lincoln, approved August 21, 1891, and in accordance with an order of the city council made December 8, 1901. The certificates were numbered, and each described the lot upon which the abutting sidewalk had been constructed. It was further alleged that the certificates were, for a valuable consideration, duly sold and assigned to the plaintiff, who is still the owner thereof; that the defendant levied and assessed taxes against the lots in question to pay for the construction of the sidewalks and for the payment of said certificates, with interest and penalties; that the taxes so levied and assessed remained unpaid, and became delinquent, and were included in and constituted a part of the amount of delin-

quent taxes declared by the district court for Lancaster county to be due on said lots, by a decree rendered on or about September 15, 1905, in a case wherein the State of Nebraska was plaintiff and Several Parcels of Land et al. were defendants in a scavenger tax suit for the year 1905, and that said decree also contained the city and county taxes for more than four years; that, in pursuance of the decree, the county treasurer of Lancaster county, on the 18th day of April, 1906, sold the lots in question to one A. C. Ricketts, the owner thereof, each lot selling for an amount which was less than the amount of the decree in said tax suit; that on May 1, 1906, and prior to the expiration of the time for premium bids on said lots, the defendant

cago v. People, 56 Ill. 327; Kirschner v. Cincinnati, 10 Ohio Dec. Reprint, 288.

So, in Kentucky, the courts, while holding that a provision of the statute that in no event shall the city be liable for the improvement, without the right to enforce it against the property receiving the benefit thereof, protects the municipality from liability in other circumstances, holds that provision inapplicable where the city had power to make the improvement, but none to charge it upon the abutting property. *Caldwell v. Rupert*, 10 Bush, 179; *Louisville v. Nevin*, 10 Bush, 549, 19 Am. Rep. 78; *Craycraft v. Selva*, 10 Bush, 696; *Louisville v. Bitzer*, 115 Ky. 359, 61 L.R.A. 434, 73 S. W. 1115. And in the last case the rule was applied although the contract expressly stipulated that the contractor would look to the lot owners or the property described in the ordinance, and that in no event should he be entitled to recover anything from the city. But see *contra*, *Bellevue v. Hohn*, 82 Ky. 1, *infra*.

So, the municipality has been held liable notwithstanding a provision that "the city shall not be otherwise liable under the contract, whether the said assessments are collectable or not." *Barber Asphalt Paving Co. v. Harrisburg*, 20 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283, distinguishing *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541.

Some courts, however, have taken the view that the contractor or warrant holder is chargeable with notice of the municipality's lack of power to charge the property, and cannot hold it liable, where he has agreed not to look to the municipality in any event. *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083, where the court said that if the remedy, by compelling the town officers to act, is nugatory on account of the lack of benefit to the abutting property, the contractor was chargeable with notice of that fact when he took the contract; *Horter v. Philadelphia*, 13 W. N. C. 40, where the assessment was laid in part upon exempt property, there being an express agreement that, in the event of the fail-

ure to collect the assessment bills, no recourse could be had against the city. To the same effect is *Dickinson v. Philadelphia*, 14 W. N. C. 367.

And in *Cincinnati v. Crowley*, 7 Ohio Dec. Reprint, 596, where the contractor agreed not to make any claim or to bring any suit against the city for any other compensation that may be due under the laws of the state and ordinances of the city, it was held that he could not recover from the city for a deficiency arising from the fact that the assessment upon one of the lots was more than 25 per cent of its value, although the statute made the city generally liable for the excess over the 25 per cent. See also similar views expressed by the court in *Goodale v. Fennell*, 27 Ohio St. 428, 22 Am. Rep. 321, where the contract provided that the city should not be liable in any event, except as to the amount chargeable upon it as an abutting owner.

Bellevue v. Hohn, *supra*, also apparently holds that a provision that the city shall in no event be liable for the improvement, without the right to enforce it against the property receiving the benefit, protects the city against liability, even where the municipality had no power to charge the cost of the improvement upon the property. But if it does so hold, it is against the doctrine established by the other Kentucky cases (cited above), though, as subsequently shown, the Kentucky cases do hold that provision sufficient to protect the municipality against liability where the power existed, but was so faultily exercised that it is impossible to hold the property.

Where recourse to property is lost because of defects or irregularities in proceedings.

There is a conflict of authority as to the liability of the municipality where it had power in the first instance to charge the cost of the improvement against the property benefited, but, owing to defects or irregularities in the proceedings toward that end, the cost of the improvement has

accepted and received, in full settlement and satisfaction for the taxes and decree against said lots, a sum of money on each of them, in addition to the sum paid to the county treasurer at the time of sale, but which several sums so paid on each of said lots were less than the amount of taxes found due thereon by the decree; that the defendant entered into a stipulation recommending to the court that the decree theretofore entered against the lots in question be vacated and set aside, and that a new decree be entered against each of said lots in amount equal to the several sums so paid thereon, and that said sums be received in full payment and satisfaction for all assessments included in said tax suit; that the court entered a decree in accordance with

said stipulation, and by reason thereof premium bids on the sales of the lots were prevented. A copy of the stipulation was attached to and made a part of the petition, and so much of it as is material to this controversy reads as follows: "It is hereby stipulated by and between the plaintiff and A. C. Ricketts, the owner of the property hereinafter described, all of the said property being in Fitzgerald's second addition to the city of Lincoln, Lancaster county, Nebraska, that the default and the decree entered in the above action, as to said several tracts hereinafter described, be, and the same hereby is, set aside and vacated." Then followed a description of the property in question, together with other lots and blocks. The stipulation then continued:

never become a legal and enforceable charge against the property. Some cases, and they are perhaps in the majority, hold that the municipality is liable in such case, if there are no provisions, in addition to those which in general impose the cost upon the property benefited, expressly negating liability of the municipality in all events. *Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; *Kearney v. Covington*, 1 Met. (Ky.) 339 (it appearing that a judgment had been rendered in a proceeding to which the city was a party, holding the assessment invalid, for what reason does not appear).

In *Murphy v. Louisville*, 9 Bush, 189, the court, while holding that the municipality was not liable, because the contract, not having been executed in accordance with the law under which the city officials are required to act, was null and void,—said *obiter* that if the contract had been fully executed by the city, and the work and labor performed by the contractor, and the city authorities had failed to comply with some provisions of an ordinance, or had omitted to perform some duty by which the property owners on the street where the improvement was made were released from liability to pay the contractor, then the city would be liable, for the reason that it had made a valid and binding contract with him to do the work, and if, by any act or omission of the corporation, it has released the property owners from liability, the city must suffer the loss. This *dictum* was subsequently limited by *Craycraft v. Salvage*, 10 Bush, 696, *infra*, so as not to apply to a case where there was an express provision in the charter or contract to the effect that the city should in no event be liable for the improvements without having the right to enforce them against the property benefited. (As shown in the last subdivision, even the *Craycraft* Case holds such provision inapplicable to relieve the municipality, where it had no power in the first instance to impose the cost of the improvement upon the property.)

The municipality has been held liable 32 L.R.A. (N.S.)

where the proceedings were defective because of the lack of a proper preliminary determination that the cost should be assessed against the individual property. *Folz v. Cincinnati*, 12 Ohio Dec. Reprint, 433.

Or because of lack of proper preliminary notices or defective notices. *Michel v. West Baton Rouge*, 3 La. Ann. 123; *Michel v. Terrebonne*, 9 La. Ann. 67; *Newcomb v. East Baton Rouge*, 4 Rob. (La.) 233. And see *Bruning v. New Orleans*, 122 La. 316, 47 So. 624 (next subdivision).

So, the assessment being invalid because of an informality in the notice of the proposed improvement prior to the contract, it was held in *Portland Lumbering & Mfg. Co. v. East Portland*, 18 Or. 21, 6 L.R.A. 290, 22 Pac. 536, that the city, having general power to pay, was liable notwithstanding that the contract was to pay for the work according to certain rates, by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose.

In *Worthington v. Sudlow*, 2 Best & S. 508, 31 L. J. Q. B. N. S. 131, 6 L. T. N. S. 283, 8 Jur. N. S. 668, 10 Week. Rep. 621, the notices given to owners by the board of health of Manchester, before making a contract for a sewer improvement, being informal and bad, the board was held liable to the contractor for the resulting deficiency, notwithstanding that, by the terms of the contract, the contractor was to be paid for the work when and as the money was collected from the owners. It is not clear from the report whether the loss would fall upon the board in its official capacity, or as individuals.

So, a municipality having power to charge the cost upon its public funds has been held liable where the proceedings were defective because of the lack or insufficiency of the petitions for the improvements. *Guffield v. Bowlinggreen*, 6 B. Mon. 224; *Louisville v. Hyatt*, 5 B. Mon. 199. This case was distinguished in *Craycraft v. Salvage*, 10 Bush, 696, *infra*, on the ground that there was no charter provision declaring, in terms or effect, the

"It is further stipulated and agreed that, upon payment to the clerk of the district court, within ten days from the entry of the decree herein, of the several sums herein stipulated as due the plaintiff on said several tracts of land, all taxes and special assessments levied against said property for the year 1904, and prior thereto, shall be discharged and canceled of record, and the city treasurer and the county treasurer shall be directed and ordered, upon the payment of said sums, to cancel and discharge said taxes on the books of their respective offices." Then followed a copy of the decree, which in form and substance followed the terms of the stipulation. It was further alleged that, at the time the original decree was entered, there were no unpaid

taxes that had been levied and assessed on the lots in question prior to the special assessment against them for sidewalk purposes, except regular city taxes for the year 1891. That the amount of said regular city taxes for the year 1891 included in the decree was as follows: \$13.17 each on lots 7, 8, 9, 10, and 11, and \$14.17 on lot 12, and that the defendant, the city of Lincoln, received as proceeds of said sales for taxes, as finally consummated between it and the owner of the lots in question, for lot 7, \$63.34, for lots 8, 9, 11, and 12, \$66.57 each, and for lot 10, \$66.02. That since such payment to the defendant and the receipt thereof, the plaintiff presented his certificate to the city treasurer of the defendant city, and demanded payment of

consequences of the failure to take the steps necessary to charge the owners. *Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214; *Abrahams v. Omaha*, 80 Neb. 271, 114 N. W. 161; *Allen v. Janesville*, 35 Wis. 403.

Nor does the receipt by the contractor of an assessment which cannot be enforced interfere with his recovery against the town. *Guffield v. Bowlinggreen*, 6 B. Mon. 229; *Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214.

So, the municipality has been held liable where the proceedings were defective because of unauthorized changes in the petition. *Sleeper v. Bullen*, 6 Kan. 300.

Or because the ordinance was void; *Leavenworth v. Stille*, 13 Kan. 539 (the contract providing that the contractor should look exclusively to the special tax for his pay, if the city levied a legal tax therefor). But see *Park Ridge v. Robinson*, *infra*.

Or because the ordinance was not published. *Morgan v. Pointe Coupee*, 11 La. 157.

In *Wren v. Indianapolis*, 96 Ind. 206, however, it was held that a city may not resist an application for mandamus to compel it to levy the assessment, upon the ground that the contract was made without advertising for proposals; what the property owners might do is a different question.

If the proceedings on the part of the city authorities are so defective as not to consummate a contract at all, the municipality is not responsible. *Saxton v. St. Joseph*, 60 Mo. 153 (the contract purporting to have been made by a mere resolution of the common council without concurrence of the mayor, whereas the charter permitted the contract to be made only by an ordinance).

—as affected by terms of statute, ordinance, or contract.

In Kentucky, as pointed out in preceding subdivisions, a distinction is made between an entire lack of power on the part of the municipality to charge the cost of the improvement against the property, and a faulty exercise of such power, it being held 32 L.R.A. (N.S.)

that an express agreement that the city shall in no event be liable will not relieve the city in the former case, but will in the latter. *Craycraft v. Selva*, 10 Bush, 696 (discussing and distinguishing earlier cases. The defect in this case was the failure of the ordinance or resolution to designate the depth back from the street to be assessed).

And other cases, without expressly making the distinction, have held that such a provision or a similar one will protect the municipality from liability because of a defective exercise of its power to charge the cost of the work against the property as contemplated by the contract:

—*Park Ridge v. Robinson*, 198 Ill. 571, 92 Am. St. Rep. 276, 65 N. E. 104 (void ordinance; stipulation to make no claim against the village in any event except from collection from special assessments, and to take all risks of the invalidity of the special taxes, or of the proceedings therein, or from failure to collect the same);

—*Johnson v. Indianapolis*, 16 Ind. 227 (petition defective for lack of signers; charter provision that the city should not be liable to the contractor except for crossings);

—*Leavenworth v. Rankin*, 2 Kan. 357 (lack of petition signed by majority of resident owners; statutory provision requiring every contract to contain a stipulation that the city shall in no event be liable for the cost of the work. The court said that, the contract being void, the contractor could not recover upon it against the city, whatever his rights might be in some other form of action);

—*Moylan v. New Orleans*, 32 La. Ann. 673 (failure to advertise for bids; stipulation that city should not be responsible for payments, should the same not be made by the property owners);

—*Keating v. Kansas*, 84 Mo. 415 (ordinance not properly passed; stipulation that city shall not in any event or in any manner whatever be liable on account of the work, and that the contractor shall assume all risk as to the validity of special tax bills, and take the same without recourse against the city in any event);

the same, but payment was refused. That on June 30, 1909, plaintiff filed his claim in due form for the amount due on said certificates in the office of the city clerk of the defendant city, and presented the same to the city council of said city for audit and allowance, but that the city council has by inaction failed and neglected to allow or disallow said claim, though said council has had said claim a sufficient time to pass upon the same. Then follows an allegation of the amount due on the certificates; that the defendant, the city of Lincoln, has failed, refused, and neglected to pay the same, and to provide any fund for such payment, and still refuses and neglects to pay or provide a fund for the payment of said certificates; and the peti-

tion thereupon concluded with a prayer for a judgment in the usual form.

Plaintiff contends that the defendant city, by failing, neglecting, and refusing to provide a fund for the payment of its claim, and by permitting the owner of the lots specially benefited by the sidewalk improvements in question to pay off and discharge all taxes levied thereon, including the special assessments made against them to pay for the construction of the sidewalks, has rendered itself liable in an ordinary civil action to recover the amount due on his certificates. The defendant claims that the cost of the construction of the sidewalks could only be paid out of funds raised by a special assessment against the abutting real estate; that its agreement with the

—*Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 (lack of ordinance; agreement by contractor to assume all risk for failure of the city to comply with the laws and ordinances, and to accept the special tax bills in full payment and discharge). This case was approved and followed in *Dalton v. Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068;

—*Swift v. Williamsburg*, 24 Barb. 427 (lack of necessary petition by landowners; agreement by a city to collect the assessment with reasonable diligence, and out of the money so collected to pay the contract or for work);

—*Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279 (lack of proper petition by property owners; charter provision that in no event should the city be responsible).

So, the fact that by an erroneous decision, from which no appeal was taken, an assessment was held void, upon the ground that the charter failed to provide for notice to the lot owners, does not render the city responsible, where the certificates provided that the holder shall have no claim against the city in any event, except from the special assessments. *Roter v. Superior*, 115 Wis. 243, 91 N. W. 651.

But the municipality has been held liable where it possessed the power to impose the cost upon the property benefited, but the power was so defectively exercised as not to charge the property, notwithstanding a provision that the assessments against the property should be accepted "in full payment" (*Fisher v. St. Louis*, 44 Mo. 482); or in "full consideration" (*Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214).

So, in *Morgan v. Pointe Coupee*, 11 La. 157, where the improvement ordinance was invalid because not published, the parish was held liable, notwithstanding a provision of the statute that it should not be in any way responsible unless the proceeds of the land should be insufficient, or the owner insolvent.

And in *Bruning v. New Orleans*, 122 La. 316, 47 So. 624, a city having general power to contract for the improvement at the cost of the city at large was held liable where the certificates issued against the

property benefited were of no avail, owing to the lack of proper notices, notwithstanding an express provision in the contract that the "city should not be held responsible for any bills, should any of them not be paid."

And in *Gable v. Altoona*, 200 Pa. 15, 49 Atl. 367, where the proceedings were bad because both branches of the city council passed the improvement the same day, the municipality was held liable, notwithstanding a provision that the city shall not be liable "whether said assessments are collectable or not" (relying on a decision of the United States circuit court of appeals in *Barber Asphalt Paving Co. v. Harrisburg*, 29 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283, upon a very similar state of facts).

Where property has been released by reason of delay of municipality.

The municipality has been held generally liable in some cases where it possessed the power to impose the cost upon the municipality, and there were no incurable defects in the proceedings, but the property was released by reason of the delay of the municipality.

It was so held in *District of Columbia v. Lyon*, 161 U. S. 200, 40 L. ed. 670, 16 Sup. Ct. Rep. 450, affirming 9 Mackey, 484, where the municipality had delayed making the assessment until it was too late to do so.

So, in *Denny v. Spokane* 25 C. C. A. 164, 48 U. S. App. 282, 79 Fed. 719, the municipality was held liable where the original assessment was invalid, and, by the time the reassessment was made, the claims against some of the property had outlawed.

And so in *Dime Deposit & Discount Bank v. Scranton*, 208 Pa. 383, 57 Atl. 770, where the assessments on certain lots were lost owing to irregularities and the failure of the city to use due diligence in collection, it was held liable to the holders of improvement bonds, notwithstanding they stipulated that the city should be liable only "for the amount collected and as fast as collected (from assessments), and as

owner and the decree rendered thereon, by which the special assessments were released and satisfied of record, was legal and valid in all respects; and the plaintiff is therefore without any remedy whatsoever.

Upon the question thus presented the authorities are divided. We think, however, that we are committed to the rule contended for by counsel for the plaintiff. The contract with Gaddis for the construction of the sidewalks was valid, and one which the defendant city was authorized to make. In *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349, it was said: "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is lia-

ble in an action brought to recover the reasonable value of the benefits received." That case was followed and approved in *Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214, and again in *Rogers v. Omaha*, 82 Neb. 118, 117 N. W. 119, where it was said: "A warrant issued by a city in consideration of a demand which is a valid obligation, payable out of its general funds, is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of the special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city." In that case, discussing the question involved in this inquiry, it was said: "It

often as there are sufficient funds in the hands of the city treasurer from said improvements, he shall call in said bonds for payment."

To the same effect is *O'Hara v. Scranton City*, 205 Pa. 142, 54 Atl. 713, where the contract provided that the "contract price is to be derived from assessments upon the city and abutting owners, according to benefits, and as to assessments upon abutting properties, the city is liable to the contractor only for the amounts actually collected."

In *Eilert v. Oshkosh*, 14 Wis. 586, where the city was held in fact not negligent, the court expressed the opinion that if the city by negligence loses the power to collect the assessments, it should be held liable.

There is some apparent conflict among the Washington cases. In *McEwan v. Spokane*, 16 Wash. 212, 47 Pac. 433, the court apparently took the position that where the city contracted to provide the fund, and had failed to do so, and had unreasonably delayed in enforcing assessments, it was liable generally. It was stated in the opinion in this case that the statute of limitations had run as to some of the property in this case.

And in *Bank of British Columbia v. Port Townsend*, 16 Wash. 450, 47 Pac. 896, the failure of the city to provide the fund out of a special assessment, until the bar of the statute of limitations had intervened, was held to render it liable to the warrant holders.

So, in *Philadelphia Mortg. & T. Co. v. New Whatcom*, 19 Wash. 225, 52 Pac. 1063, a municipality was held liable for interest where the original assessment was void, and the reassessment failed to include interest, but one reassessment being permitted.

In *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 38 L.R.A. 259, 47 Pac. 1103, 49 Pac. 542, however, it is stated that in the *McEwan* Case the right to recover was based on the ground of delay alone, and that the right to recover was there sustained as to all of the warrants, 32 L.R.A. (N.S.)

regardless of the question as to limitation. To this extent the *McEwan* Case was expressly overruled, but its authority for the position that the city will be responsible if it is no longer possible to enforce the tax against the property does not seem to have been impaired until the decision in *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524, holding that the city was not generally liable, although it was conceded by both sides that the remedy under the assessment proceedings was lost. The court apparently repudiated the attempt to distinguish the *Spokane* Case on the ground that the remedy under the special proceedings was still available in that case; and said that the obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and that, if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences.

The *Wilson* Case was followed in *Rhode Island Mortg. & T. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104, holding that the complaint stated no cause of action against the city, although it expressly averred that the city had exhausted its power and authority to make and levy any local or special assessment to create a fund from assessments as provided by the contract.

And the liability of a municipality which had neglected to enforce assessments was also denied in *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935, and *State ex rel. American Freehold-Land Mortg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321. But in neither of these cases does it expressly appear that it was no longer possible to enforce them.

There is a *dictum* to the same effect in *State ex rel. Security Sav. Soc. v. Moss*, 44 Wash. 91, 86 Pac. 1129.

It would seem, therefore, from these cases, that the *McEwan* Case has been in effect overruled, not only so far as it implied that a municipality which neglects its duty to provide a fund by assessment

is insisted by defendant that, the warrants in question having been issued against a fund which never was in fact created, the warrants themselves were void, and of no force or effect whatever. This contention has already been decided adversely to defendant in *Abrahams v. Omaha*, 80 Neb. 271, 114 N. W. 161, where we held: 'A warrant issued by a city in consideration of a demand which is a valid obligation, payable out of its general funds, is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city. A

warrant issued by the proper authorities of a city, in consideration of a valid indebtedness against it, is a written acknowledgment of such indebtedness, and promise to pay it.' That the defendant, through its mayor and council, had full power and authority to enter into the contracts for the sidewalks, cannot be seriously questioned, but the defendant contends that, inasmuch as the contract itself provides that the work done by the contractor shall be paid for in warrants drawn against a special fund to be created by an assessment upon the lots, and that the contractor agreed to receive such warrants in full satisfaction and payment for all work done and all material furnished by him under his contract, and no fund ever having been

may be liable, although it is still possible to enforce the assessment, but also so far as it held that the municipality may be liable where it has become impossible, owing to the delay to enforce the assessments against the property.

It seems that under a contract by which the property owners' share of the cost was to be collected by the contractor at his own expense, and the city failed to levy an assessment, and there was no method by which the city could be reimbursed for the property owners' share, if compelled to pay the contractor, his remedy was solely by mandamus to compel the levy. *Tipton v. Jones*, 77 Ind. 307.

In *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 545, where the contract had been entered into not by the city, but by a board of commissioners created by the legislature, such contract being for draining certain lands, only a part of which were within the city, it was held that the city was not liable for a failure to collect part of the special assessment, particularly where it appeared that the delinquent property would probably realize little, if any, more than the expenses of collection. It was said by a divided court that "when a contract for local improvement to the special assessments, and to them alone, for his compensation, and if they failments is entered into, the contractor must without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor." It is pointed out in *Barber Asphalt Paving Co. v. Harrisburg*, 29 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283, that this statement was not necessary to the decision.

Refusal to proceed with assessment scheme.

It seems to be generally held that a municipality is liable where it has definitely refused to take the steps necessary to carry out its contractual duty to realize the cost of the work from the property benefited, even though it has not lost its power 32 L.R.A. (N.S.)

to do so. Thus, in *Reilly v. Albany*, 112 N. Y. 30, 19 N. E. 508, notwithstanding the contract provision that payment for the work should not be required until the lapse of thirty days after due apportionment and assessment shall have been duly approved and confirmed by the common council, and until the same shall have been collected, the city was held liable in an action for the contract price, it appearing that board of apportionment had wrongfully rescinded the certificate of performance previously given by the street commissioner, and refused to make any further apportionment and assessment, following a judgment setting aside a previous apportionment upon the ground that the board of apportionment had not granted the hearing required by law. The court said that the resolution of the board imposed no bar to the plaintiff's cause of action, and put no duty upon him to seek a reversal of its determination by mandamus or otherwise.

So, in *Weston v. Syracuse*, 158 N. Y. 274, 43 L.R.A. 678, 70 Am. St. Rep. 472, 53 N. E. 12, involving a similar contract, it was held that a right of action for damages against the city accrued on its wrongful refusal to accept a contract as completed, and make assessments to pay the contractor. The court said that if the contractor finds, as in the case of *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006, *infra*, that the city has not proceeded with reasonable diligence to collect the assessment and turn over the proceeds to him, he may, and should, proceed by mandamus to compel such action on its part; but where a municipality disables itself from performing the contract by such action on its part as makes void, and therefore uncollectable, an assessment for the purposes of providing compensation, or refuses to perform the contract on its part, then an action against the city for damages sustained by reason of its failure to perform the contract may be maintained.

The doctrine of these cases was followed in *McCann v. Albany*, 11 App. Div. 378, 42 N. Y. Supp. 94, affirmed in 158 N. Y. 634,

created, the city is relieved from all liability. This will not do. The law is well settled that when a municipal corporation enters into a contract of this character, it thereby agrees to create the special fund by valid assessments, and that, failing so to do, it is liable generally. It will not do to say that a city may contract for the expenditure of large sums of money and material and a large amount of labor in constructing valuable improvements for the city, and agree to pay for such improvements out of a fund to be created by a special assessment, and then escape all liability by never creating the fund; or, if it attempts to create such a fund, by proceeding so irregularly that the assessments when levied cannot be enforced. No such

dishonesty would be tolerated in an individual, and we see no reason why it should be in the case of a municipal corporation. As said by the supreme court of California in *Pimental v. San Francisco*, 21 Cal. 351, 361: "The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 10 Cal. 255, 282. The legal liability springs

53 N. E. 673, where the city was held generally liable for failing to assess the full amount, erroneously claiming a right to make deductions therefrom. The court said that the distinction between the *Reilly Case* and the *Syracuse Case* was that, in the former, the action was based upon a breach of the contract, while the latter was a proceeding to prevent a breach of the contract; that in the *Syracuse Case* it was open to the contractor to say that the city had not yet been guilty of an absolute breach of contract, but of such laxity in making ready to perform it as threatened its breach, and that his remedy in such case was mandamus to secure such active diligence; but in the case at bar and in the *Reilly Case*, the contract was broken not only because of the unreasonable neglect of the city to perform, but because of its absolute refusal to perform except in part.

So, upon the authority of these cases, it was held in *Palmer v. Brooklyn*, 11 Misc. 459, 32 N. Y. Supp. 730, affirmed in 146 N. Y. 379, 41 N. E. 90, that the city was liable for services in preparing maps required in proceedings to open a street, notwithstanding the provision that the plaintiff must look to the lien of the assessment for his compensation, it appearing that the city had, by its affirmative action, rescinded and discontinued the proceedings, and in that way prevented the possibility of levying and collecting an assessment for such expenses.

And in *Quin v. Buffalo*, 26 Hun, 234, the city was held liable where the common council by resolution annulled an assessment against the property benefited, and refused thereafter to take any action in the premises except to attempt unsuccessfully to pass its rescinding resolution over the veto of the mayor. The terms of the contract in this case do not appear.

In *Atchison v. Byrnes*, 22 Kan. 66, where a city made a contract for macadamizing certain streets, and, to pay for the same, agreed to levy legal assessments upon the abutting owners by a certain date, and 32 L.R.A. (N.S.)

certify the same to the county clerk as required by law, and, on the completion of the work, to issue to the contractor assessment bonds, the court said: "When the city of Atchison failed to levy a sufficient tax to pay for the work done, and refused to issue all the special assessment bonds to which the contractor was entitled, or otherwise provide any means for paying the balance due him, he had no other alternative except bringing suit; and as the city was liable to him for the balance unpaid, his action was rightfully brought and prosecuted in the court below against that corporation."

In *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841, where the city had power to contract and pay for the planting of shade trees out of its general funds, reimbursing itself therefor later by a special assessment against the abutting property, and it contracted that it would levy a special assessment upon the abutting property to pay for trees growing two years after they were planted, and would issue warrants drawn payable only from the fund raised by such special taxation, and it refused to levy the special assessment or to take the steps preliminary thereto, it was held liable to the contractor for the work. To an objection that the contractor might have brought a proceeding to compel the city officers to act, the court said that such a proceeding was inappropriate and inadequate, as requiring numerous acts at different times by different officers; stating further that while, if the assessment had been levied and the warrants issued, no general liability would have attached, the city's refusal to act and its repudiation of the contract made it generally liable.

But in *Greencastle v. Allen*, 43 Ind. 347, it was held that on the refusal of the proper city officers to make estimates and to issue precepts against the property holders, the contractors had no action for damages against the city, but should proceed by mandate against the officers.

And the remedy in case of refusal to deliver tax bills or certificates is by man-

from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice.' In *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 373, 96 N. W. 357, it was said: 'The city, as we have seen, is provided with the means of fully protecting itself against expense in the making of special improvements. Any payments made upon its contracts for paving should be paid out of the funds realized from the special assessments; and, if the city exercise the powers given it, the general taxpayer cannot be burdened at all with the cost of the improve-

ment. If, however, the city council fails to take advantage of the means provided to realize, upon special assessments, the cost of the improvement, as between the city it represents and the contractor, the consequences of the neglect should fall upon the city.'"

O'Hara v. Scranton City, 205 Pa. 142, 54 Atl. 713, was a case where the plaintiff sued the city for the price of constructing a sewer. There was a city ordinance which provided that the contractor should not receive any sum in excess of the amount actually received by the city from the assessment for the sewer. The contract contained this clause: "It is expressly understood that the fund for the payment of the above contract price is to be derived from assess-

damus, and not by an action to hold the municipality generally liable. *Carroll v. St. Louis*, 5 Mo. App. 584; *Whalen v. La Crosse*, 16 Wis. 271.

Where municipality has merely neglected or failed to proceed with assessment scheme.

Having considered the question as to the general liability of a municipality where it had no power in the first instance to assess the cost upon the property; where, having such power, because of defects or irregularity in the proceedings, it never exercised the same so as to fix a lien upon the property; where the power to enforce the assessments against the property has been lost by delay; and also where the municipality has definitely refused or declined to perform the duty incumbent upon it under the contract to enforce the assessments against the property,—we come to the question of the liability of the municipality where its fault consist of mere delay in carrying out its contract to enforce the assessments against the property, or to take the proper steps to cure remedial errors or defects in the proceedings.

Some jurisdictions in which the municipality is held liable in either of the first four situations hold that mandamus to compel the municipality to take proper action in the premises, and not an action at law to hold it liable for damages, is the proper remedy in the fifth situation, i. e., where the municipality had power to impose the cost upon the property, and there were no incurable defects in the proceedings to that end, and no definite refusal on its part to proceed, and the delay has not been such as to prevent recourse to the property. This distinction has been touched upon in connection with the New York cases cited in the previous subdivision.

It is further emphasized by the case of *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006, where the court, in holding that mandamus was the proper remedy, said that no action was maintainable by the contractor against the city, it appearing that the common council had 32 L.R.A. (N.S.)

adopted a resolution directing the city assessors to assess the cost of the work upon the abutting property, and that a part thereof had been collected, although nothing further had been done to enforce the assessment.

So, in *Tone v. New York*, 70 N. Y. 157, affirming 6 Daly, 343, under a contract for local improvements providing that the final payment should not be made until the local assessment for the expense thereof had been confirmed, it was held that if the board failed to do its duty as to confirmation, the city was not liable, as the contractor had the same power to compel the board to do its duty as the city had.

In *Harrison v. New Brighton*, 110 App. Div. 267, 97 N. Y. Supp. 246, the court said generally that the proper remedy for the contractor if the trustees refuse to levy and collect the assessment, as required by a contract providing that payment should be made as soon as the assessment shall have been collected, and not before, is by mandamus to compel the officers of the village to proceed with such assessment and collection. It is not apparent in this case, however, that there was a definite refusal, as distinguished from a mere delay, in enforcing the assessment.

Where public works are to be paid for from special assessments and the city or village does not agree or obligate itself to pay any part of such assessment, then and in such case, the city is not liable in an action for damages because its officers have failed to do their duty, either in collecting such special assessments or paying them over to the contractor. *Broad v. Moscow*, 15 Idaho, 606, 99 Pac. 101.

So, where the contractor agrees to make no claim against the city, and to take all risks of invalidity of special assessments, the invalidity of the original levy will not render the city generally liable, at least where it does not appear that the city cannot or will not make a new levy. *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76; *Farrell v. Chicago*, 198 Ill. 558, 65 N. E. 103.

In *Vider v. Chicago*, 164 Ill. 354, 45 N. E. 720, the contractor was denied the right to

ments upon the city and abutting property owners according to benefits, and, as to assessments upon abutting properties, the city is liable to the contractor only for amounts actually collected." The city solicitor failed to file liens within the time prescribed by the ordinance, whereby many assessments were lost to the contractor. The court in construing the ordinance said: "It may be that, as between the city and her solicitor, the default should be charged to the solicitor, but, if so, the city must indemnify herself at the expense of him and his sureties, and not at the expense of O'Hara." In the case of *Lyon v. District of Columbia*, 19 Ct. Cl. 649, the claimant was owner of three tax lien certificates which were liens upon certain lots of land

in Washington, for the amount therein stated as overdue and unpaid taxes. The owners of the land in each case proved to the district commissioners that the assessments upon their land, for which said certificates were issued, were erroneous, in that they were far too large an amount. The district commissioners, finding that the lot owners had been assessed too much, reduced the assessments and discharged the liens on the land by the payment of the reduced amount. The court said: "When the commissioners destroyed the claimant's lien by settling with the lot owners for amounts less than the claims which they had sold, that was an implied obligation to pay him the difference."

We find that the cases of *Heller v. Gar-*

recover interest from the municipality during the delay consequent upon a resolution by it staying collection, under a statute providing for interest where money is unreasonably withheld, the resolution not amounting to a tort, although the city was not free from blame. (But see *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619, *infra*.)

In *Casey v. Leavenworth*, 17 Kan. 189, it was held that the city was not liable to the contractor because of a delay consequent upon a mistake by the city's engineer requiring a new apportionment.

And the neglect of the municipal officers to make the assessment does not render the city generally liable, where the charter provides that the city shall "not be liable in any manner whatever for, or on account of, any work done, and which is to be paid for in the manner provided in this section;" and the fact that neither the ordinance under which the work was done, nor the contract, specified the manner of payment, is immaterial. *Kiley v. St. Joseph*, 67 Mo. 491.

Where the first assessment was invalid owing to a mistake in law, and the city was proceeding to levy another, an action against it will not lie upon warrants payable out of the special fund, when the contract contains a clause waiving the right to demand and receive payment in any other way than from such warrants. The court was of the opinion that the city was exonerated by such waiver, even if it was negligent. *Thomas v. Olympia*, 12 Wash. 465, 41 Pac. 191.

The mere fact that one local assessment was defective, when there exists power in the city to levy a new one, will not make the city generally liable where it is proceeding with due diligence to make a new levy. *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31. The court held that as long as it was within the powers of the city officers, moved by themselves or by interested parties, to collect the special fund, that must be the source of payment, and that it was only when the negligence of the city had placed it out of its power to collect the special fund, that such negligence 32 L.R.A. (N.S.)

would open its general liability to warrant holders.

The Washington cases cited under the subdivision, "Where property has been released by reason of delay of municipality," are *a fortiori* authority against municipal liability where the delay has not worked a release of the property.

Where, the charter provides that, "in no event where work is ordered to be done at the expense of any lot or parcel of land, shall either the city or any ward be held responsible for the payment thereof," the holder of a street commissioners' certificate has no action against the city for failure to collect the assessment; he should proceed against the proper officer to make him do his duty. *Fletcher v. Oshkosh*, 18 Wis. 228.

The liability of a municipality which delays the levying or collection of an assessment has, however, been declared in a number of cases, even when it appears to have been still within its power to perform its duty in this respect.

Thus, in *Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 337, the court said: "If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has power to make the assessments, but fails to do so, or fails to make valid assessments, and thereby to provide the fund out of which the contractor may receive the price of his labor and materials, the city is primarily and absolutely liable to pay the contract price itself. . . . In cases of this character, the city becomes primarily liable, even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price, and that the city shall not be otherwise liable, whether the assessments are collectable or not."

So, where a city having general power to pay an inspector of sewers out of its general funds impliedly guarantees that it will

den City, 58 Kan. 263, 48 Pac. 841; Belton v. Sterling, — Tex. Civ. App. —, 50 S. W. 1027; O'Brien v. Concordia, 2 La. Ann. 355, Jones v. Portland, 35 Or. 512, 58 Pac. 657; Commercial Nat. Bank v. Portland, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532; Kearney v. Covington, 1 Met. (Ky.) 345; Bucroft v. Council Bluffs, 63 Iowa, 646, 19 N. W. 807; and Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336, to a greater or less extent, support the rule above stated. On the other hand, counsel for the city, in an elaborate and well-written brief, have cited many authorities, some of which seem to support their contention. But, in view of our former decisions, in which we think we are fairly committed to the more just

and equitable rule contended for by the plaintiff, we are of opinion that the petition was sufficient in form and substance to resist a general demurrer.

The judgment of the District Court is therefore reversed, and the cause is remanded for further proceedings.

Rose, J., dissenting:

My understanding of the facts pleaded by plaintiff, and of the law applicable thereto, leads me to dissent from the opinion and the conclusion of the majority. The petition does not contain a copy of the contract between the city and the contractor who constructed the sidewalks. It does allege, however, that the contractor, R. J. Geddis, agreed with the city to con-

make a levy upon certain property for the expense of a sewer, and fails to do so, it is generally liable to such an inspector, to whom it has issued sewer warrants to pay his salary, and he is not limited to his remedy by mandamus, nor is he estopped by the fact that there had been no sufficient petition of property owners, as he was not bound to pass on that. *Bill v. Denver*, 29 Fed. 344.

In *Morgan v. Dubuque*, 28 Iowa, 575, it was held that the failure of the city to collect the assessments within a reasonable time rendered it liable to pay the contract price, and that the burden of proof of diligence rested upon the city.

So, if the city neglects or refuses to discharge any of the duties required of it in connection with the levying and collection of special assessments, the remedy of persons entitled to have such assessments levied and collected is by mandamus to compel the performance of such duties. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619.

And in *Oster v. Jefferson*, 57 Mo. App. 485, where the statute provided that money to pay for macadamizing streets should be raised by assessments against abutting property, it was held that if in such case the city fails or declines so to assess and collect the money within a reasonable time, it is liable to the contractor, and that an agreement by the contractor to take special tax bills in payment is immaterial if they are worthless. (*Keating v. Kansas City*, 84 Mo. 415, was distinguished on the ground that the charter in that case exempted the city from liability.)

And the liability of the municipality where it is guilty of a want of diligence in collecting the fund is upheld in Oregon, notwithstanding an agreement that the contractor shall look to the assessments, and that it shall not, by any legal process or otherwise, be required to pay the contract price out of any other fund. *Frush v. East Portland*, 6 Or. 281; *North Pacific Lumbering & Mfg. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4; *Commercial Nat. Bank v. Portland*, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532; *Little v. Portland*, 26 Or. 235, 37 32 L.R.A. (N.S.)

Pac. 911; *Jones v. Portland*, 35 Or. 512, 58 Pac. 657.

It is also held that the burden of proof of diligence rests upon the municipality. *Morgan v. Dubuque*, 28 Iowa, 575; *Jones v. Portland*, 35 Or. 512, 58 Pac. 657.

The decision in *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 206, apparently holding that the mere delay of the city in taking steps to collect a fund by assessment upon the abutting property renders it generally liable, would seem to have been overruled by the later Washington cases cited in a preceding subdivision, at least as applied to a case where there is an express provision exempting the city from liability in any event.

It was also held in *Leavenworth v. Mills*, 6 Kan. 288, and *Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467, that the municipality was liable where it failed to provide the means of collecting from the lot owners. But these cases proceed on the theory that the municipality is primarily liable, and that the assessment is merely a means of reimbursing it.

Some of the earlier New York cases also seem to hold the municipality liable in case of unreasonable delay in providing the fund by assessment. *Cumming v. Brooklyn*, 11 Paige, 596; *Beard v. Brooklyn*, 31 Barb. 142; *Bowery Nat. Bank v. New York*, 8 Hun, 241; *Smith v. Buffalo*, 44 Hun, 156; *Baldwin v. Oswego*, 2 Keyes, 132. These cases, however, so far as they predicate liability upon mere delay, as distinguished from a definite refusal to proceed, would seem to be opposed to the distinction made by the later New York cases.

—failure to make reassessment or relevy.

There is also a conflict as to the liability of a municipality where it neglects to exercise its power to make a reassessment or relevy, after the first one has proved invalid. A municipality having power to contract for the improvement was held liable under such circumstances in *Rogers v. Omaha*, 82 Neb. 118, 117 N. W. 119, notwithstanding the contract provided that the contractor would receive in full satisfaction

struct sidewalks in front of lots 7 to 12, inclusive, in block 4, Fitzgerald's second addition, and that the city "agreed to pay for said sidewalks from funds to be realized from assessments and special taxes on said lots." If this allegation left any doubt as to the agreement that the contractor was to be paid from funds arising from special assessments against the lots, the matter is made clear by the following certificate, which is copied from the petition:

No. 121. \$17.09.

Office of City Clerk,
Lincoln, Neb., Dec. 8, 1891.

City Treasurer of Lincoln, Nebraska:

This is to certify that R. J. Gaddis or order is entitled to seventeen and $\frac{5}{100}$

dollars, assessments or special taxes for sidewalk construction on lot 7, in block 4, Fitzgerald second addition in the city of Lincoln, Nebraska, together with the interest and penalties thereon, whenever said assessment, penalty, and interest shall be collected, and you will pay the same to the order of R. J. Gaddis on the presentation of this certificate, with proper identification, after said assessment has been collected. This certificate is issued in accordance with an ordinance of the city of Lincoln, approved August 21, 1891, in accordance to an order of the city council made December 8, 1891. No. 1620.

D. C. Van Duyn, City Clerk.

The petition shows on its face, when this

warrants to be drawn against a special fund created by assessment.

So, in *Dunbar v. Williamsport*, 9 Pa. Ct. 451, where the statute providing the method of assessment was declared unconstitutional, and another statute passed authorizing reassessment, it was held that the latter statute was mandatory, and the city must proceed under it to levy assessment, or it would be liable.

But in *Pontiac v. Talbot Paving Co.* 48 L.R.A. 326, 36 C. C. A. 88, 94 Fed. 65, rehearing in 48 L.R.A. 330, 37 C. C. A. 556, 96 Fed. 679, it was held that the contractors could not recover against the city in an action for damages for failure to order a new assessment, the remedy being solely by mandamus. The contract in this case provided that payment should be made when a special tax was collected, and that the contractors should make no claims against the city in any event, except from such collections.

And in *People ex rel. Talbot Paving Co. v. Pontiac*, 185 Ill. 437, 56 N. E. 1114, it was held that the remedy was by mandamus where the contractor was limited to the assessment collection, and one assessment had been declared void. And to the same effect is *Alton v. Foster*, 207 Ill. 150, 69 N. E. 783.

And in *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, rehearing in 6 Wash. 324, 33 Pac. 1080, the liability of the city was denied where its delay in making a new assessment was due to honest doubt whether special authority was required from the legislature, and the city was guilty of no neglect, except as to the error in the first assessment.

Deficiency; purchase of property by municipality.

The municipality is not liable for deficiency upon the sale of delinquent property. *New Albany v. Sweeney* 13 Ind. 245 (charter provisions that the owners of lots should be liable to the contractor for the cost): *Creighton v. Toledo*, 18 Ohio St. 447 (contractor agreed to receive a certified

copy of the assessment with authority to collect the same "in full of all labor and materials").

Nor does the municipality become liable for the amount assessed against property by bidding it in at the sale made in proceedings to enforce the assessment in the absence of other bidders. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619, reversing 138 Ill. App. 320; *Lovell v. St. Paul*, 10 Minn. 290, Gil. 229 (charter provision that property all be struck off to the city if no other bidders).

In *Jenks v. Racine* 50 Wis. 318 6 N. W. 818, where the county treasurer had turned over the certificates of sale to the city treasurer, pursuant to a statute directing that, after the sale of any property for a delinquent tax, the county treasurer shall pay the city treasurer the amount which may have been returned delinquent, "either in cash or in certificates of sale of lots or parcels of land returned as delinquent," it was held that the city could not be held liable for the amount of the tax assessed against the property covered by the certificates of sale upon the theory that the certificates represented cash in hands of the city treasurer.

And in *Zwietusch v. Milwaukee*, 55 Wis. 369, 13 N. W. 227, where the city bid in a parcel and assigned the sale certificate to the contractor, taking up his original certificate and later giving him a tax deed, and he was subsequently ousted by the former owner owing to a defect in the assessment, it was held that the city was not liable, there being a provision in the charter that in no event should the city be responsible, and in the contract that the certificates should be accepted in full payment in satisfaction of the work, and that the contractor should have no claim for any compensation except in the certificate.

But it has been held that where the city, in default of other bidders, has become the purchaser, taking out tax certificates reciting that it has paid the amount of assessment, interest, and cost, it is estopped from contradicting such recitals, and is liable to apply the amount of the purchase to the

certificate is considered, that the contractor agreed to construct the sidewalks and to receive his pay from funds to be realized from special assessments against the lots. In thus providing for payment of the contractor, the city adopted the only means created by law for discharging the obligation. Its charter gave it no authority whatever to pay for the sidewalks described in the petition with funds raised by general taxation. In dealing with the officers of the city, the contractor was bound to know the limitations of their power. They had no authority, as representatives of the city, to guarantee the payment of his claim, or to assure him that the taxes would be sufficient to pay it, or that any deficiency would be made good by general taxation, or that the city would exercise extraordinary diligence in collecting special assessments from the lot owners, or that he would be relieved from the ordinary vigilance imposed by law upon lienors in collecting their claims. Where a city is not authorized by its charter to use its general funds for the purpose of constructing sidewalks, the law, as generally announced, does not imply an agreement to do so, and a rule of general acceptance limits a contractor to specific or special funds where, under authority of law, he contracts with reference thereto. *Lake v. Williamsburgh*, 4 Denio, 520; *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443; *Reock v. Newark*, 33 N. J. L. 129; *Finney v. Oshkosh*, 18 Wis. 209; *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541; *Altou v. Foster*, 74 Ill. App. 511; *Farrell v. Chicago*, 198 Ill. 558, 65 N. E. 103; *Craycraft*

v. Selvage, 10 Bush, 606; *Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. Detroit*, 12 Mich. 279; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524. The doctrine that a contractor is limited to the specific fund with reference to which he contracts is especially applicable to agreements for the construction of sidewalks. His judgment as to whether the property will sell for enough to pay the tax liens ought to be as good as that of the city officers, and he has the privilege of bidding it up to its full value. Like other creditors, he takes his chances on the sufficiency of his security. Ordinary business sagacity would lead him to consider in advance the location, character, and value of the lots. These are matters of which the citizens generally will know little, even if they are required, after paying for their own sidewalks, to pay also for like improvements for the benefit of others, when the city is held liable to the contractor for the full amount of his claim. If the limitations solemnly imposed by the legislature for the protection of the public must yield to "the common obligation to do justice which binds individuals," still a valid contract, honestly and fairly made pursuant to the terms of a city charter, ought to settle the question of ethics between the parties. Civic integrity does not necessarily bind a city to insure its contractors against loss. The state Constitution is a fair measure of public rectitude, and it declares: "The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor

assessment fund. *Barber Asphalt Paving Co. v. Chicago*, 139 Ill. App. 128.

And it has been held not illegal for the city to appropriate general funds to pay for such purchases, and that when such an appropriation has been made, the holder of the special assessment voucher may proceed by action directly against the city, without resorting to mandamus in the first instance. *Chicago v. Union Trust Co.* 138 Ill. App. 548.

In *Richardson v. Brooklyn*, 34 Barb. 569, a city which, in the absence of other bidders, had struck off lots to the contractor without authority, was held not liable because of refusal to resell the property, it appearing that under the law sales could be made only to those who would for the lowest term of years pay the amount charged upon the lot with interest and expenses, particularly where the city offered to deliver the certificate of sale to whomever would take the property at the bid and pay the assessment, interest, and expenses.

Where municipality grants rebates to property owners.

It is held in *WARD v. LINCOLN* that a city 32 L.R.A.(N.S.)

which undertakes to release property from the lien of a special assessment, and causes the same to be canceled and discharged of record without the payment of the amount of the assessment, becomes liable therefor.

So, in *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385, where the city, having general power to pay for street improvements out of its general funds, compromised with certain of the owners and accepted from them less than the amount assessed, it was held generally liable to the holder of a warrant issued upon the general assessment fund.

But it has been held that where the contractor agrees to make no claim except from collections of the special fund, and the city makes illegal rebates, the amount of which has never in fact been in its hands, the remedy is by mandamus to compel it to collect the amount rebated. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619.

But where the rebates are paid in money out of the special fund, the city is directly liable. *Barber Asphalt Paving Co. v. Chicago*, 139 Ill. App. 121.

G. H. P.

after the services shall have been rendered or the contract entered into." Art. 3, § 16. A city must make estimates, levies, and appropriations, and contract in relation thereto. It can only pay its obligations by taxation or other limited means of raising revenue, and persons dealing with it should observe these limitations. Plaintiff's petition, as already stated, fairly shows that the contractor agreed to build the sidewalks, and to wait for his pay until "after said assessment has been collected." Plaintiff is not the contractor, but is the holder of the latter's certificate. Is he not required, like other lienors, to be vigilant? It has been held that he must see that the officers perform their duty, even to the extent of applying for mandamus. *Green-castle v. Allen*, 43 Ind. 347. I do not observe anything in his petition to indicate that he has been diligent in his own behalf, though he does state that the city officers properly levied the necessary taxes. As I understand the petition, it fails to show that the amount realized by taxation was less than the full value of the property, or that he would have increased such amount by bidding, had he been given an opportunity to do so, or that, by stipulation or otherwise, plaintiff was injured through the acts or negligence of the officers. The stipulation, however, as pleaded in the petition demurred to, indicates that the property could not have been sold for more than the sum realized, since the following is indorsed thereon:

On recommendation of James A. Sheffield, city assessor, and believing this will secure the city as much as can be obtained for the foregoing property, I sign this stipulation.

E. C. Strode, City Attorney.

According to my understanding of this controversy, the doctrine announced in the cases cited by the majority should not be applied here. In my opinion the demurrer to the petition was properly sustained, and the judgment should be affirmed.

Sedgwick, J., dissenting:

The act of 1889 (Laws 1889, chap. 14, p. 191) provided that when sidewalks and other such improvements were authorized to be paid for by special assessments, they should "in the first instance be paid for out of the general fund." In 1891 this section was amended. Laws 1891, chap. 8, p. 144. The provision that these improvements should be paid for out of the general fund was omitted, and, in lieu thereof, it was expressly provided that "the contractor shall receive his pay for such work from

the assessments against the real estate in front of which said work was done," and that "the city treasurer of said city shall pay over to such contractor . . . all assessments or special taxes against such real estate collected, together with the interest and penalty collected thereon, which shall in each case be full compensation to such contractor for any work so done under his said contract." This amendment took effect April 9, 1891, and it is beyond question that the legislature by this amendment intended to change the rule that had obtained, and to withdraw from the city council the authority to pay for such improvements from the general fund.

For this reason, I concur in the dissenting opinion of Judge Rose.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.

J. F. PRITCHARD, Admr., etc., of William Noel, Deceased.

(— Ark. —, 133 S. W. 176.)

Tax — on judgment — validity.

A statute imposing, for the benefit of the public, a tax of a certain per cent upon every judgment entered in a court of record, is not valid, treated either as part of the costs to be paid by defendant or as a penalty, since it would deprive defendant of the equal protection of the laws.

(Frauenthal, J., dissents.)

(December 19, 1910.)

Note. — Constitutionality of specific tax upon judgments.

The particular phase of the constitutionality of a tax upon judgments, presented in *ST. LOUIS, I. M. & S. R. Co. v. PRITCHARD*, by the fact that the statute placed a tax upon a judgment defendant, but placed no reciprocal burden upon the plaintiff if he should lose, seems to have been involved in no other case. In illustration of another phase discussed in that case, namely, the want of uniformity due to the fact that the statute was made applicable only to judgments of a specified nature, reference may be made to *Hamilton v. Wilson*, 61 Kan. 511, 48 L.R.A. 236, 59 Pac. 1069, where it was held that the discrimination between different classes of judgments, providing for the taxation of personal judgments for money only, but exempting judgments on foreclosure of mortgages prior to the sale of the lands, and judgments for work and labor, or for

APPEAL by defendant from an order of the Circuit Court for Marion County taxing as costs a certain per cent of the amount of a judgment recovered, by plaintiff for personal injuries. Reversed.

The facts are stated in the opinion.

Messrs. **W. E. Hemingway, E. B. Kinsworthy, Horton & South, and James H. Stevenson**, for appellant:

The tax is not made a part of the costs, and is therefore not taxable as such.

Thorn v. Clendenin, 12 Ark. 60; **Wilson v. Fussell**, 60 Ark. 194, 29 S. W. 277; **Hempstead County v. Harkness**, 73 Ark. 600, 84 S. W. 799; **Fanning v. State**, 47 Ark. 442, 2 S. W. 70; **State v. Blackburn**, 61 Ark. 407, 33 S. W. 529; 11 Cyc. Law & Proc. p. 131, **Johnson v. State**, 85 Tenn. 325, 2 S. W. 802; **Eastman v. Nashville**, 13 Lea, 717; **Elliston v. Winstead**, 10 Lea, 472; **State v. Nance**, 1 Lea, 644; **Keith Bros. & Co. v. Stiles**, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

A statute making an arbitrary classification with respect to the subject over which it operates, based on no reason suggested by the difference of their situation or circumstances, or disclosing the propriety of such legislation, is void.

Sutherland's Notes on U. S. Const. 733; **Neal v. Delaware**, 103 U. S. 370, 26 L. ed. 567; **Barbier v. Connolly**, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; **Yick Wo v. Hopkins**, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; **Gulf, C. & S. F. R. Co. v. Ellis**, 165 U. S. 150, 41 L. ed. 606, 17 Sup. Ct. Rep. 255; **Southern R. Co. v. Greene**, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; **Sutton v. State**, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; **Murray v. Ramsey County**, 81 Minn. 350, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; **State ex rel. McCue v. Ramsey County**, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; **State v. Cadigan**, 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; **State v. Montgomery**, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; **State ex rel. Wyatt v. Ashbrook**, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765,

materials furnished in the erection of buildings, and improvements on land, rendered it void under a provision of the state Constitution requiring uniformity of taxation. Here the tax was sought to be enforced against a judgment merely, it seems, as an evidence of debt, in the hands of the judgment creditor, and, of course, in cases of this kind no opportunity is afforded to raise the question involved in the first phase of the **PRITCHARD CASE**.

Attention is also directed to **Kingman County v. Leonard**, 57 Kan. 531, 34 L.R.A. 32 L.R.A. (N.S.)

55 S. W. 627; **State v. Mitchell**, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; **Cotting v. Kansas City Stockyards Co.** (Cotting v. Goddard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

Mr. Gus Seawell for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

This is an appeal from an order of the circuit court of Marion county taxing as cost of suit 3 per cent of the amount of a judgment rendered against appellant by the court on a verdict of a jury. Authority to tax said amount as cost is asserted under an act of the general assembly approved May 31, 1909, applicable only to Marion, Boone, and Baxter counties. The statute reads as follows: "In addition to the revenue arising from ferry, dramshops, and drinking saloon license, which is appropriated for county purposes, there shall be levied and collected a county tax on the following articles in Marion, Boone, and Baxter counties: A tax of \$3 on each criminal conviction in courts of record. A tax of \$3 on each civil suit in courts of record when a verdict is rendered by the court. A tax of 3 per cent on the full amount of each and every judgment rendered by a jury in courts of record. A tax of 50 cents upon each writ of summons and writ of execution issued out of any of the courts of record in this state, and a tax of 50 cents upon the certificate of record of each instrument of writing recorded in any recorder's office of this state. Provided, mortgages shall not be taxed more than 15 cents. And a tax of 50 cents on each marriage license issued. Courts of justice of the peace are not courts of record within the meaning of this section." Laws 1909, p. 095.

It will be seen by comparison that this statute is almost an exact copy of § 6883, Kirby's Dig., which forms a part of the general revenue and taxation laws, except that it includes the provision in controversy prescribing "a tax of 3 per cent on the full amount of each and every judgment rendered by a jury in courts of record."

810, 57 Am. St. Rep. 347, 46 Pac. 960, where the court, while saying that it perceived no valid objection to the right of the legislature to tax all judgments by domestic courts, remaining unsatisfied, held that the legislature had not expressed a purpose to tax judgments in favor of citizens of another state. So, the power to tax judgments seems not to have been questioned in **Dykes v. Lockwood Mortg. Co.** 2 Kan. App. 217, 43 Pac. 268, where the question was as to the situs of a judgment for the purposes of taxation. **L. A. W.**

This statute does not specifically designate who shall pay the tax, but it is sought to be upheld on the ground that the legislature intended to impose the burden on the losing party as the cost of litigation. Conceding that the burden rests on the defendant in a judgment, can it be treated as a valid imposition of costs? Is it costs of litigation, or is it a penalty imposed on the defendant alone in a suit to recover money?

This court in *Lee County v. Abrahams*, 34 Ark. 166, held that a tax of 50 cents upon each original writ and execution issued out of any court of record "is strictly a fee to the public, and not a tax." The court quoted with approval the following statement by Judge Cooley: That taxes on legal processes "are usually imposed with a view to adjusting, on an equitable basis, as between suitors and the public, the expenses of the administration of justice. They may be imposed as stamp fees on process, fees for permission to enter suit," etc. In *Murphy v. State*, 38 Ark. 514, the court held that the tax of \$3 on each criminal conviction is a fee for the public, imposed as a part of the cost of prosecution.

It can scarcely be doubted that a "tax of \$3 on each civil suit in courts of record when a verdict is rendered by the jury" is likewise sustainable as a fee to the public, and imposed on the losing party as a part of the cost. But the provision added to this special statute has a different effect. It cannot be construed to impose the tax as a part of the cost of litigation, for it is not laid uniformly, like other impositions of cost. In the first place, it applies only to judgments for the recovery of money. It is imposed only on a losing defendant in a suit to recover money, and imposes no reciprocal burden on the plaintiff of paying if he loses.

In the next place the *per centum* rate of taxation is arbitrarily imposed on all money judgments, regardless of the amount, —the amount of the judgment being the sole measure, without regard to any other standard. For instance a money judgment for \$10,000 is taxed \$300, whilst a judgment for \$100 is taxed only \$3. A judgment for the recovery of other property, or a judgment against plaintiff, in any kind of an action, escapes taxation entirely. This is not an imposition of cost as a fee to the public, but it is a taxation on a judgment debtor. At least, that is its necessary effect. Now the question is: Can it be sustained as a penalty? We think not. If it is a penalty on the right to litigate a disputed claim, then it cannot be sustained. The legislature may, in the exercise of police power, impose penalties

for noncompliance with statutory duties. *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Kansas City Southern R. Co. v. Marx*, 72 Ark. 357, 80 S. W. 579; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797; *St. Louis, I. M. & S. R. Co. v. Wynne*, 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28. It may impose a penalty on frivolous appeals prosecuted for vexation and delay. *Wellington v. State*, 52 Ark. 447, 13 S. W. 134. It may also, as we have already stated, impose on the losing litigant a reasonable sum as a contribution to the expense of the litigation. But it cannot arbitrarily impose a penalty on the right to litigate disputed claims not based on violation of statutory duty. To do so is to deny to one party to the litigation (the defendant) the protection of the laws equally with his adversary, and to impose on one party a burden which can in no event fall on the other. If a statute imposing 3 per cent is valid, then one imposing 10, 20, or even 50 per cent of the judgment can also be imposed. It would be difficult to limit, if the power existed at all.

We leave out of consideration the question whether this is an attempt to put in force a special law where a general law can be made applicable. Generally that is a question for the determination of the legislature; but there may be limitations on the power of the legislature in that respect which we do not deem it necessary now to inquire into. Suffice it to say that, for the reasons indicated, we conclude that the portion of the statute now under consideration is void, and the judgment of the circuit court taxing costs thereunder is reversed, with directions to strike this item out of the bill of costs.

Frauenthal, J., dissents.

CONNECTICUT SUPREME COURT OF ERRORS.

EDGAR T. ANDREWS

v.

FRED R. PECK, Appt.

(— Conn. —, 78 Atl. 445.)

Sale — horse — warranty — unmanageability.

That a horse is unmanageable while being

shod does not breach a warranty that he is sound.

(Wheeler, J., dissents.)

(December 16, 1910.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Fairfield County in plaintiff's favor in an action brought to recover the balance of the purchase price of a horse. Affirmed.

Statement by Prentice, J.:

The plaintiff brought suit to recover the balance of the purchase price of a horse. The defendant purchaser filed a counterclaim for the breach of an express war-

anty of the animal. The warranty alleged was one that the horse was sound and true in every spot and place. The only breach set up was that it was then unsound, by reason of being unmanageable while it was being shod. The allegation of this breach was denied by the plaintiff. The court found that the warranty was made as alleged, save that one eye was excepted. No question is made growing out of this latter defect. It was also found that upon the last occasion before the sale when the horse was shod, it was hurt or terrified during the operation; that from this terror or hurt there originated so great a fear of the tools of a blacksmith that when it was first shod after the sale, it was unruly and fractious, and habitually thereafter ex-

Note.—What amounts to a breach of warranty of soundness of a horse.

This note is confined to warranties of soundness or the equivalent, and does not include special warranties as to particular qualities (e. g., as to breeding qualities of of a stallion), or against particular defects (e. g., lameness, blindness, defective wind, etc.), though some cases in which the decisions turn upon the combined effect of a general and particular warranty are included.

What character or extent of injury arising from disease or accident will constitute a breach of warranty of soundness of a horse is a question that has been repeatedly before the courts of this country and England. Although some difference of opinion is found to have existed upon the point, yet the general rule is believed to be now settled.

Baron Parke in *Kiddell v. Burnard*, 9 Mees. & W. 668, following the tenor of his ruling in the earlier case of *Coates v. Stephens*, 2 Moody & R. 157, defined the effect of a warranty of soundness in a horse as follows: "The rule as to unsoundness is that if at the time of sale the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound."

In *Elton v. Brogden*, 4 Campb. 281, it was proved and admitted that the horse was lame at the time of the sale; but the defendant undertook to prove that the lameness was of a temporary nature, and that he had become in all respects sound. Lord Ellenborough said: "I have always held, and now hold, that a warranty of soundness is broken if the animal at the time of the sale had any infirmity upon him which

rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough I say he is unsound, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defense to the action."

And in *Elton v. Jordan*, 1 Starkie, 127, the same judge states the rule to be that "to constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service; as, for instance, a cough which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience is an unsoundness."

Eyre, Ch. J., in *Garment v. Barrs*, 2 Esp. 673, lays down a somewhat different rule. He says: "A horse laboring under a temporary injury or hurt which is capable of being speedily cured or removed is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such an injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty." It was accordingly held that a warranty of soundness is not broken when a mare labors under a temporary injury from accident such as is occasioned by her taking up a nail at the farrier's.

The question of unsoundness is one peculiarly fit for the jury, and the court will not set aside a verdict on account of a preponderance of contrary evidence. *Lewis v. Peake*, 7 Taunt. 153, 2 Marsh. 431, 17 Revised Rep. 475.

It was held in *Watson v. Denton*, 7 Car. & P. 85, that bone spavin in the hock is unsoundness in a horse, and amounts to breach of warranty of soundness whether it produces lameness apparent at the time of the warranty, or not until years afterwards.

A warranty that a colt is sound in every particular, and that a small puff on the inside left hock joint will all disappear en-

hibited the same trait whenever it was taken into a blacksmith shop; that it was never unruly or fractious under other condition; that as a consequence of this trait it was necessary to place it in stocks or to throw it in order to shoe it; that while it could be thus shod without danger to itself or the smith, it was more troublesome and expensive to shoe it than it otherwise would have been; and that the facts thus outlined were such as to decrease the market value of the animal. Both parties at the time of sale were ignorant of these facts, and of what occurred when it was last shod during the plaintiff's ownership. No other breach of warranty was claimed than such as arose from the existence of this trait and resulting habit.

Messrs. Beecher & Canfield, for appellant:

A bad habit may be an unsoundness.

Washburn v. Cuddihy, 8 Gray, 430; Mil-

lery, is broken where the puff proved to be a blood or bog spavin. Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. 143.

In Roberts v. Jenkins, 21 N. H. 116, 53 Am. Dec. 169, it is held that a warranty of soundness is not broken by a temporary and curable injury existing at the date of the sale of a horse, which does not injure him for present service. Woods J., says: "We regard the rule as enunciated by Lord Ellenborough as being the true rule upon this subject. If a horse be afflicted with an infirmity which renders him less fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable that it should be regarded as an unsoundness, for which a party selling the horse and warranting its soundness should be held responsible. Such an infirmity may well be supposed to be the occasion of damage to the purchaser. The intention and understanding of the parties to the warranty are in such, as well as in all other, contracts, to govern their construction. It is in the use of a horse that his value principally consists. It may well be presumed then that when a horse is purchased, he is purchased for service; and that it is with reference to his ability and fitness for service that a guaranty of soundness would ordinarily be required or given. And we can see no reason for supposing that the future fitness or usefulness of the horse would be likely to be more an object of solicitude on the part of the purchaser than his present fitness, and when we consider the subject-matter of such a guaranty, we can see no reason to suppose that in such cases, the parties do not at least intend, by a general warranty of soundness, that at the time of the sale the animal is laboring under no disease or in-

jury which, at the time or afterwards, does or will diminish his natural and ordinary usefulness and fitness for service."

ler v. Smith, 112 Mass. 470; Scholefield v. Robb, 2 Moody & R. 210; Alexander v. Dutton, 58 N. H. 282; Roberts v. Jenkins, 21 N. H. 116, 53 Am. Dec. 169.

The horse was not true within the scope of the warranty.

Schouler, Pers. Prop. § 340; Hall v. Colyer, 29 N. Y. S. R. 549, 8 N. Y. Supp. 801; Walker v. Hoisington, 43 Vt. 609.

Mr. Martin J. Cunningham for appellee.

Prentice J., delivered the opinion of the court:

The defendant seeks recovery upon a counterclaim for the breach of warranty of a horse. It is found that the warranty was made. The only breach alleged is one resulting from the fact that the horse was at the time of sale unsound. The unsoundness complained of is expressly alleged to have been unmanageableness while being shod. The issue presented to the

jury which, at the time or afterwards, does or will diminish his natural and ordinary usefulness and fitness for service."

A bill of sale of "one horse sound and kind" being a warranty of soundness, it is held in Brown v. Bigelow, 10 Allen, 242, that the vendor is liable thereon if the horse proves to be permanently lame, although the purchaser knew he was lame a week before the sale, and his lameness was talked of before, and the vendor then refused to give a warranty. In this case the court said: "Lameness may or may not make a horse unsound. If it was only accidental and temporary, it would not be a breach of warranty; but if it was chronic and permanent, arising from causes which were beyond the reach of immediate remedies, it would be clearly a case of unsoundness."

In Smith v. Bryant, 10 Jur. N. S. 1107, 11 L. T. N. S. 346, 13 Week. Rep. 79, a warranty of soundness was broken where horse had splint causing lameness, although splint was pointed out at time of sale.

And so, in Robinson v. Snow (Tex. Civ. App.) 74 S. W. 328, a warranty of health and certain qualities is broken where, about a week or ten days after purchase, a disease is discovered, and the horse utterly fails to perform the services for which he was warranted.

In Snyder v. Baker (Tex. Civ. App.) 34 S. W. 981, a warranty of a stallion for breeding purposes, and represented as sound, fails if the horse is diseased and worthless as a stallion.

It is held in Johnson v. Wallower, 15 Minn. 472, Gil. 387, that any disease rendering a horse worthless is covered by a warranty that the horse is sound and free from disease.

A warranty that a horse is sound in all respects, except that he has corns in his

court was therefore whether or not the animal was unsound for reasons substantially as averred. That defendant's counsel recognized that as the issue, and tried the case upon that theory, is apparent, and the court's memorandum of decision is confined to a consideration and determination of it. Its conclusion, which was made the sole basis of decision, was that a warranty of soundness was not broken by the existence of the conditions which were found to have existed.

We have no occasion, therefore, to inquire whether or not the terms in which the warranty was couched, in their true intent and meaning, carried a more comprehensive warranty than that of soundness. It is our duty under the circumstan-

ces to accept the issue as framed by the pleadings, and review the court's determination of it.

Baron Parke, in *Kiddell v. Burnard*, 9 Mees. & W. 668, following the tenor of his ruling in the earlier case of *Coates v. Stephens*, 2 Moody & R. 157, defined the effect of a warranty of soundness in a horse as follows: "The rule as to unsoundness is that if, at the time of sale, the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of

right forward foot, is broken by proof that he was founded at the time of sale. *Vates v. Cornelius*, 59 Wis. 615, 18 N. W. 474.

A vendor is liable for breach of warranty that horse is sound, if there are defects which are not apparent on simple inspection by the vendee, and he is not informed thereof, but relies upon the warranty. *Ibid*.

So, a warranty that a horse is "sound, perfect in every respect, and true, gentle, and willing to work," is broken by proof that he was "balky" at the time of the sale. *Finley v. Quirk*, 9 Minn. 194, Gil. 179, 86 Am. Dec. 93.

Whether corns in a horse's feet constitute unsoundness is a question of fact, determinable upon the evidence and the general legal definition of unsoundness. *Alexander v. Dutton*, 58 N. H. 282.

Horses are unsound within the meaning of a warranty of soundness, if, at the time of delivery to purchaser, they had contracted a distemper, although the disease did not develop until after they came into his possession. *McCann v. Ulman*, 109 Wis. 574, 85 N. W. 493.

The term "sound" in a warranty of a horse implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes, or in its progress will diminish, his natural usefulness in the work to which he would properly and ordinarily be applied. *Kiddell v. Burnard*, 9 Mees. & W. 670, 1 Car. & M. 291, 11 L. J. Exch. N. S. 268, 6 Jur. 327.

Where the defect complained of, a bunch upon the fore leg, so far as it was obvious and visible, was known to the purchaser or his agent, but the seller represented that it did not injure or affect the horse in the slightest degree, and the purchaser or his agent did not believe, and had no reason to believe, the defect was more than a mere blemish which would never render the horse less useful or capable of service, and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of the sale, it was held one of those equivocal defects which would be guarded against by a warranty of soundness. *Hill v. North*, 34 Vt. 604.

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It was said when this case was before the county court: "The express contract of general warranty of soundness in terms covers every existing unsoundness, whether known by the parties at the time of the horse trade or not. It seems somewhat anomalous to make the liability of a party upon an express contract for a breach of it to depend upon the fact whether the party taking such contract knew at the time that the party was contracting for what he could not perform. But it seems to have been established from the earliest history of this class of actions that a general warranty does not cover defects that are perfectly visible and obvious to the senses, and known to the party taking the warranty. The illustration generally given in the old books is the sale of a horse with a general warranty of soundness, which has lost one eye or an ear or a tail. The reason given why the general warranty does not cover such defects is because it is presumed that they are not intended to be included in the warranty, being fully known to the parties at the time." But the appellate court said: "The rule excluding from a warranty such defects as are known to the purchaser only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them. All other defects, though apparent to some extent, but still equivocal and doubtful in their character whether they are permanent or temporary, or whether they are mere harmless blemishes, or but partially developed unsoundness, must be understood to be included and covered by a general warranty; and warranties are usually asked and given to protect purchasers against the risk presented by such cases." *Ibid*.

Any disease or infirmity not visible or palpable at the time of the sale of a mare, which impairs her value or usefulness, constitutes a breach of warranty of soundness, whether the owner had knowledge thereof or not. *Ellison v. Simmons*, — Del. —, 65 Atl. 591.

structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound." This statement, concurred in by his associates, has ever since remained the settled rule in England, and been accepted and followed by the courts of this country and text writers, as embodying the correct test to be applied under all ordinary conditions. We have looked in vain for authority which gives to the warranty a wider scope. It furnishes the test to be applied to the situation before us.

Applying it, the conclusion is inevitable that the horse in question, when sold, was not unsound by reason of the unfortunate trait which it had acquired. It had no dis-

ease, incipient or otherwise, and, the eye aside, it had not, either from disease or accident, undergone any alteration of structure. It had a bad trait which developed into a bad habit, which impaired its value. But such traits or habits constitute a vice, rather than unsoundness. Not everything which impairs the value of an animal constitutes unsoundness. No such test is recognized by any authority which we have been able to discover. Language of opinions can be found which is susceptible of a construction to the effect that a physical condition, to constitute unsoundness, should be one which depreciated value; but nowhere is it held, we believe, that whatever depreciates value amounts to unsoundness, or that the conditions stated by Baron

And a cough at the time of the sale of a horse is an unsoundness, and breach of a warranty of soundness, though it be afterwards cured without any permanent injury to the animal. *Coates v. Stephens*, 2 Moody & R. 157; *Shillitoe v. Claridge*, 2 Chitty, 425.

But a slight disorder, such as a cold, in a horse at the time of the sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of warranty. In this case *Coleridge, J.*, said that "a mere slight cold no more constituted unsoundness in a horse than it did in a human creature. Neither was a horse lame, within the meaning of a warranty because at the time of the sale he might have a thorn in his foot and so limped, if it were clear that the limping would be cured by simply extracting the thorn." *Bolden v. Brogden*, 2 Moody & R. 113; *Springstead v. Lawson*, 23 How. Pr. 302.

So, a cold or slight distemper in a horse will not breach a general warranty of soundness, where it is known to buyer, and it appears that death or worthlessness of horse was not produced by the disease alone, but by the manner in which he was treated after the sale. *Fletcher v. Young*, 69 Ga. 591.

Nor is unmanageableness of a horse while being shod unsoundness, within the meaning of a general warranty of soundness. **ANDREWS v. PECK.**

In *Kingsley v. Johnson*, 49 Conn. 462, it is held that partial blindness will breach a warranty that a horse when sold "was all right, except that he would sometimes shy." The court said that it was for the jury to say whether such representation was or was not in substance a representation that he was sound.

Mere defective formation not producing lameness at the time of the sale of a horse is not an unsoundness, within the meaning of the warranty. *Bailey v. Forrest*, 2 Car. & K. 131.

The mere fact that a horse is thin soled at the time of the warranty of soundness 32 L.R.A. (N.S.)

is not sufficient to constitute a breach. *Ibid.*

So, defective formation or badness of shape, namely "curby hocks," which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time, is not an unsoundness. *Brown v. Elkington*, 8 Mees. & W. 132, 10 L. J. Exch. N. S. 336.

And mere badness of shape, though rendering the horse incapable of work, is not an unsoundness. *Dickenson v. Follett*, 1 Moody & R. 299.

But permanent lameness is unsoundness in a horse. *Chadsey v. Greene*, 24 Conn. 562.

And lameness in a mule is sufficient to breach a warranty of soundness, where vendor used strategy to conceal visible defects, and vendee made purchase relying, not upon his own judgment, but upon vendor's representation that the mule was sound. *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615.

In *Margetson v. Wright*, 8 Bing. 454, 1 Maule & S. 622, 1 L. J. C. P. N. S. 128, a warranty of soundness was broken where a horse, after sale, became lame from effects of splint visible when sold. It is held that some splints cause lameness, others do not. A splint, therefore, is not one of those patent defects against which a warranty is inoperative.

A warranty of soundness is broken by a malformation existing from the birth of the horse, which at the time of the sale renders him less fit for reasonable use, as an extraordinary convexity of the cornea of the eye, producing short-sightedness, in consequence of which a horse is liable to shy. *Holliday v. Morgan*, 1 El. & El. 1, 28 L. J. Q. B. N. S. 9, 5 Jur. N. S. 69, 7 Week. Rep. 7.

In *Joy v. Bitzer*, 77 Iowa, 73, 3 L.R.A. 184, 41 N. W. 575, it is held that any disease will breach a warranty that a pony was sound and free from disease.

An express warranty against all unsoundness of a horse protects the buyer against defects arising from disease of the kidneys or spine where these defects are not ap-

Parke need not be present. *Alexander v. Dutton*, 58 N. H. 282.

There is no error.

Dissenting opinion filed by *Wheeler, J.*, December 28, 1910:

I concur in the judgment that there is no error, but not with the reasons given in the opinion in support of that conclusion. The opinion holds that the breach of the warranty alleged in the answer and counterclaim is "one resulting from the fact that the horse was at the time of sale unsound," and therefore the court has no occasion to inquire "whether or not the terms in which the warranty was couched, in their true intent and meaning, carried

a more comprehensive warranty than that of soundness. It is our duty under the circumstances to accept the issue as framed by the pleadings, and review the court's determination of it."

The warranty alleged was "that the horse so sold was sound and true in every spot and place." The warranty proven was that "said horse was sold with a warranty that it was sound and true in every spot and place, except one eye." The breach alleged was: "In fact said horse was not sound, but was unmanageable while being shod, and blind in one eye." The breach proven consisted in the horse having "a habit of becoming unmanageable while being shod."

parent to the eye, although symptoms of disease are apparent but not known to buyer as such. *Storrs v. Emerson*, 72 Iowa, 390, 34 N. W. 176.

A warranty that a stable horse is sound and perfect in every respect is broken where it appears that he was unsound in that he was unable, except once in a great while, to perform his duty as a stable horse. *Schurtz v. Kleinmeyer*, 36 Iowa, 392.

A warranty of soundness is broken where a horse had glanders a few months after the sale, and it appears that at the time of the sale he had seeds of that disease. *Woodbury v. Robbins*, 10 Cush. 520.

So, a general warranty implied by law as to soundness, healthfulness, etc., of mules, is broken by such a disease. *Snowden v. Waterman*, 100 Ga. 588, 28 S. E. 121.

A warranty that a horse is sound in every respect, and his eyes are sound as dollars, is broken where the horse turns out to be moon-eyed. *Samuels v. Guin*, 49 Mo. App. 8. It appears from this case that the general rule is that the general warranty of soundness does not cover patent defects nor defects known to the buyer, but that this is limited by the rule that the real intention of the parties must govern in the construction of contracts, and the vendor may in express terms warrant against obvious defects, as where, the condition of a horse's eyes being peculiar and a matter of doubt, the vendor binds himself by declaring "they are sound as dollars." "I guarantee him sound in every respect."

And in *Riddle v. Webb*, 110 Ala. 599, 18 So. 323, a warranty that mules traded "were as sound as a dollar" was broken where the eyes of one were affected, and the mule afterwards went blind.

A warranty that a stallion is sound, except a small bunch on one hind foot, caused by being stepped upon, which vendor claimed was not permanent, but would soon pass away, is broken where it is proved that the bunch was a ringbone from which the stallion never recovered, and which rendered him lame and unfit for service and worthless. *Erskine v. Swanson*, 45 Neb. 767, 64 N. W. 216.

And a disease rendering a stallion serv-

iceably unsound, and not an average foal getter, constitutes a breach of guaranty that he is serviceably sound. *Otto v. Braman*, 142 Mich. 185, 105 N. W. 601.

In *McAfee v. Meadows*, 32 Tex. Civ. App. 105, 75 S. W. 813, there was a breach of warranty of soundness where the horse was buck-kneed, and the evidence showed that the defect in the knees was apparent, but that whether it would prove injurious would not be disclosed by inspection.

An implied warranty that horses sold are merchantable and reasonably suited for the purpose intended does not embrace defects discoverable by ordinary care, such as deafness, blindness, and spavin. *Hoffman v. Oates*, 77 Ga. 705.

A pony being with foal is not an unsoundness, within the meaning of a general warranty. *Whitney v. Taylor*, 54 Barb. 536.

Nor does the want of castration in a male mule constitute unsoundness. *Duckworth v. Walker*, 46 N. C. (1 Jones, L.) 507.

In *Broennenburgh v. Haycock*, Holt, N. P. 630, it is held that crib-biting is not such unsoundness in a horse as to amount to a breach of general warranty of soundness. "It is," says the court, "a curable vice in its first stages, and this horse was only proved to be an incipient crib-biter. It is a mere accident arising from bad management in the training of a horse, and is no more connected with unsoundness than starting and shying."

A warranty of soundness is broken where it appears that a mare was a roarer, had a thorough pin through the hock, and had swelled hock from kicking. *Fielder v. Star-kin*, 1 H. Bl. 17, 2 Revised Rep. 700.

But Lord Ellenborough in *Bassett v. Collis*, 2 Campb. 523, says: "It has been held by very high authority (Sir James Mansfield, C. J.,) that roaring is not necessarily unsoundness, and I entirely concur in that opinion. If the horse emits a loud noise which is offensive to the ear, merely from a bad habit which he has contracted, or from any cause which does not interfere with his general health or muscular powers, he is still to be considered a sound horse. On the other hand, if the roaring proceeds from

The opinion holds the breach alleged only went to so much of the warranty as alleged unsoundness. I am of opinion that the breach alleged went to the entire warranty, but that it, as established by the finding, meant no more than a warranty of soundness.

There were two methods of pleading the breach, preferably, by pleading the facts which described the breach, *viz.*, that the horse had a habit of becoming unmanageable while being shod; or by negating the terms of the warranty. The pleader chose neither method, but pleaded that "the horse was not sound, but was unmanageable while being shod, and blind in one eye."

any disease or organic infirmity which renders him incapable of performing the usual functions of a horse, then it does constitute unsoundness. The plaintiff has not done enough in showing that this horse was a roarer. To prove a breach of the warranty, he must go on to show that the roaring was symptomatic of disease."

Where a vendor specially warrants that shearing a jack will not hurt him, and he dies of a disease brought on by such shearing, the warranty is broken, and the vendor is liable. *Norris v. Parker*, 15 Tex. Civ. App. 117, 38 S. W. 259.

In *Washburn v. Cuddihy*, 8 Gray, 430, cribbing constitutes unsoundness in a horse.

So crib-biting and wind-sucking amounts to a breach of warranty of soundness of a trotting horse. *Miller v. Smith*, 112 Mass. 470.

So, in *Dean v. Morey*, 33 Iowa, 120, and in *Walker v. Hoisington*, 43 Vt. 611, a warranty that a horse "is sound and all right" is broken where the horse is a cribber. The court does not decide whether a horse that is a cribber is physically sound, but interprets this warranty as meaning that the horse was right in conduct and behavior as to all matters materially affecting its value as well as its physical condition.

But in *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, it constitutes a vice, and not unsoundness.

And crib-biting which has not produced disease or alteration of structure is not an unsoundness, but is a vice, under a warranty that a horse is sound and free from disease. *Scholefield v. Robb*, 2 Moody & R. 210.

The following are defects in a horse which will breach a warranty of soundness: A bunch on the horse's leg where the effect of such defect is other than and beyond what is obvious (*Morrill v. Bemis*, 37 Vt. 155); divided nerve (*Best v. Osborne*, Ryan & M. 290, 2 Car. & P. 74); enlargement of withers (*Thompson v. Harvey*, 86 Ala. 519, 5 So. 825); lameness and disease in feet and legs (*Devine v. Ryan*, 115 Ill. App. 498; *Chase v. Nichols*, 32 N. Y. S. R. 88, 9 N. Y. Supp. 878; *Chadsey v. Greene*, 24 32 L.R.A. (N.S.)

The language of the breach pleaded, "but was unmanageable while being shod," is separated from the term, "sound, . . . and blind in one eye," by the punctuation; it is not limited to the single term in the warranty, "sound," but applies to the warranty in its entirety, to "true" as well as to "sound." The breach of the warranty is, "that the horse was unmanageable while being shod, and blind in one eye," not simply that he was "not sound." A construction that the breach alleged applies to "sound," but not to "true," in the warranty, is refining the pleading in technicalities, and is at variance with the practice act and rules as interpreted in many opinions.

Conn. 562); roaring or whistling (*Southard v. Haywood*, 32 Phila. Leg. Int. 4; *Onslow v. Eames*, 2 Starkie, 81, 19 Revised Rep. 680; *Brown v. Edwards*, 97 Me. 564, 55 Atl. 492; *Quintard v. Newton*, 5 Robt. 72. But it was held in *Bassett v. Collis*, supra, that roaring did not constitute unsoundness in a horse. In *Onslow v. Eames*, supra, however, a subsequent case decided by the same judge, it was held to the contrary); curb and thrush (*Faust v. Koers*, 111 Mo. App. 560, 86 S. W. 278); chest founder (*Willard v. Stevens*, 24 N. H. 271; *Atterbury v. Fairmanner*, 8 J. B. Moore, 32); water farcy, Monday morning fever, or big leg (*Shuman v. Heater*, 76 Neb. 119, 106 N. W. 1042; *Huston v. Plato*, 3 Colo. 402); ringbone (*Hobart v. Young*, 63 Vt. 363, 12 L.R.A. 693, 21 Atl. 612); chronic rheumatism (*Kavanaugh v. Wausau*, 120 Wis. 611, 98 N. W. 550); want of eye (*Butterfield v. Burroughs*, 1 Salk. 211; *Burton v. Young*, 5 Harr. 233; *House v. Fort*, 4 Blackf. 293); cold and swelled leg (*Liddard v. Kain*, 9 J. B. Moore, 356, 2 Bing. 183, 3 L. J. C. P. 246, 27 Revised Rep. 582).

And the following unreported cases to be found in *Oliphant's Law of Horses* hold a warranty of soundness of a horse broken by such defects as sidebones (*Simpson v. Potts*, p. 224); laminitis (*Hall v. Rogerson*, p. 225); navicular disease (*Matthews v. Parker*, p. 228); thickwind (*Atkinson v. Horridge*, p. 229).

In *Greenway v. Marshall*, also to be found in *Oliphant on Law of Horses*, p. 36, it is held that contraction of the hoof when produced by inflammation, or accompanied with disease in the foot or any alteration in its natural structure, though it may not cause lameness at the time of the sale, yet, if lameness be afterwards produced by it, is unsoundness.

These are some of the text-books which treat the subject: *Oliphant, Horses*; *Ingham, Animals*, pp. 89 et seq.; *Benjamin, Sales*, 5th ed. pp. 666 et seq.; *Story, Sales*, 4th ed. § 362; 2 *Schouler, Pers. Prop.* 3d ed. § 341; *Chitty, Contr.* 11th Am. ed. p. 654 et seq.; *Parsons, Contr.* 9th ed. p. 612; *Tiedeman, Sales*, § 194. J. D. C.

Under our present system of pleading, legal duties are enforced, if they arise upon facts simply stated; they are no longer affected by any mere form of statement; the only rule as to this is, "a plain and concise statement of the material facts on which the pleader relies. . . . With the growth of jurisprudence and a better appreciation of essentials, the rule of form must give way to the rule of simplicity and truth. Pleading, then, ceases to be the mistress, and becomes the handmaid, of justice." *Dunnett v. Thornton*, 73 Conn. 5, 46 Atl. 158; *Hennessy v. Metropolitan L. Ins. Co.* 74 Conn. 702, 52 Atl. 490.

A variance between proof and allegation, unless it be material and have misled, should be disregarded. *Anderson v. United States Rubber Co.* 78 Conn. 48, 60 Atl. 1057; *Robertson v. Lewie*, 77 Conn. 346, 59 Atl. 409; *Rules of Court* (Practice Book 1908, p. 245) § 149.

The same rule of construction of a counterclaim, after proof of a cause of action, ought to prevail to keep a party in court and render in his favor such judgment as the facts warrant, as prevails to support an ordinary judgment. "It has ever been the policy of courts to exercise no small measure of ingenuity in bringing favorable implications and presumptions to the aid of the allegations of declarations and complaints after verdict or judgment; but the reason of such a rule of construction does not exist where a pleading is attacked upon demurrer." *Price v. Boutviller*, 79 Conn. 257, 64 Atl. 228.

Examples of the liberality of our court in refusing to permit technical variances which did not mislead, to defeat the judgment warranted by the proof, are found in *Osborn v. Norwalk*, 77 Conn. 665, 60 Atl. 645, and *Fenton v. Mansfield*, 82 Conn. 343, 73 Atl. 770.

In *La Barre v. Waterbury*, 69 Conn. 554, 37 Atl. 1068, Hall, J., said: "It is within the discretion of the trial court to allow, or even direct, an amendment of the complaint at any time before judgment is rendered."

Within these principles, even though there were a material variance between proof and allegation, it did not mislead, and in such a situation it would be the duty of the trial court to direct an amendment, so that the judgment might follow the cause proven.

The trial judge placed his decision upon the question whether the unmanageableness of the horse while being shod was a breach of the warranty given, not of a part of the warranty, but of the entire warranty. A reference to the memorandum filed by him settles this point. The judge

says: "The horse was sold with a warranty that it was sound in every spot and place. . . . The decisive question in the case is whether or not the warranty given was broken because the horse was unmanageable while being shod. I think that a warranty of soundness is not broken because of the existence of a bad habit."

In the finding the court states: "Second. The defendant claimed that there had been a breach of the warranty, and that judgment should be rendered for the defendant; but the court overruled said claim, and rendered judgment for the plaintiff." So that the issue tried and decided was whether there had been a breach of the warranty given, whether the fact that "the horse had a habit of becoming unmanageable while being shod" was a breach of the warranty given. The suggestion that the breach alleged did not run to the entire warranty first appears in the case in the opinion of the majority.

If this court found a cause of action proven upon the facts of the finding, and also found the allegations of the cause of action defectively stated, it was its duty, if no one had been misled, to see that the cause of action proven was put in judgment, and, if necessary, that an amendment be directed and a judgment then entered in accordance with its instruction.

So, it seems to me the court was bound to pass upon the meaning of this entire warranty, and if it found the breach proved supported a cause of action, it should have directed an amendment of the defectively alleged breach, and directed a judgment in accordance with the cause of action found.

A warranty standing alone, and in the absence of explanation, that a horse is sound and true in every spot and place, would ordinarily be regarded as a broad and far-reaching warranty. "True in every spot and place" would be commonly understood as including more than "sound in every spot and place," and to have a meaning separate from and independent of "sound." "True" might be used of a horse in a biological or anatomical sense, but such would hardly be its ordinary use in everyday speech in a horse trade. "True" may mean correct, right, honest, or sure, and to be relied on; and when used of a horse in connection with a warranty of soundness, "true in every spot and place" means that the horse can be relied on to act properly in every reasonable situation. He can be driven upon the highway, meeting the ordinary vehicles and objects upon the highway, and he can be relied upon to be true under such circumstances, and his conduct and behavior will conform to right

and honest standards. He can be driven to the railroad station, and at sight of engine not bolt and run. He is not to be expected to meet a troop of elephants, and not show fear. Any conduct which was not within these definitions, and which materially affected the value of the horse, would be a breach of a warranty that he was "true in every spot and place," and give a cause of action. The breach found is not the conduct of a single occasion, but conduct which has become a habit.

In *Walker v. Hoisington*, 43 Vt. 608, the court construed a warranty that a horse was sound and right" thus: "Perhaps this horse was physically sound, although he was what is called a cribber, and perhaps not; as to that we make no decision and express no opinion; but the warranty was as to more than soundness,—it was, the horse was sound and right. A fair interpretation of this warranty would make it mean that the horse was right in conduct and behavior as to all matters affecting its value, as well as in physical condition."

The horse in question was so unmanageable when being shod he had to be put in stocks; blacksmiths refused to shoe him, and it was necessary to take him to a distance to get him shod. This added to the cost of shoeing him, caused a loss of time to the owner, and diminished the value of the horse. This was not normal conduct in a horse. The blacksmith shop was a reasonable place to take him, but one where he was not to be relied on. A horse with such a habit cannot be said to be true in every spot and place.

If this warranty stood alone, and without explanation or other fact giving to it a different meaning, the conclusion of the trial judge that the warranty proven was simply a warranty of the soundness of the horse would be erroneous. But it is to be noted that the warranty found proven by the court differs from the warranty alleged. That found by the trial judge was: "Said horse was sold with a warranty that it was sound and true in every spot and place, except one eye."

"Sound and true in every spot and place" may refer to the physical condition of the horse, and in this warranty both are limited in their meaning by the exception following them, "except in one eye." Language such as this might have its meaning fixed by the context, by facts explanatory in character; the terms of this warranty fix the meaning and show clearly what the parties intended. "Except in one eye" refers to the physical condition, and controls the meaning of "sound and true." The defendant understood this 32 L.R.A. (N.S.)

warranty as the trial judge did, for in his answer and counterclaim he pleaded, "By reason of being so unmanageable, said horse was not sound," thus limiting the meaning of "sound" to the physical condition, and making "sound" and "true" equivalent terms.

The trial judge held that the warranty given was one of soundness, and was not broken because of the existence of a habit in the horse of becoming unmanageable while being shod. That conclusion, as applied to this case, was correct; as a statement of a proposition of law of universal application, it required the qualification, unless such habit sprang from or was the result of disease. In this case we do not know whether the habit sprang from disease or not.

The ground upon which the trial judge placed his decision I concur in; the ground upon which the opinion of the court places its decision I dissent from.

DISTRICT OF COLUMBIA COURT OF APPEALS.

WISDOM D. BROWN, Appt.,

v.
PHILADELPHIA, BALTIMORE, & WASHINGTON RAILWAY COMPANY.

(— App. D. C. —)

Carrier — refusal to deliver goods — conversion.

A carrier is guilty of conversion which refuses to deliver goods to the consignee, who tenders the freight due according to the weight of the property transported, which is the correct manner of ascertaining it, although a larger amount is called for by the waybill, and it holds the property to secure correction by a connecting carrier.

(January 3, 1911.)

Note. — Liability of connecting carrier for detaining freight on account of mistake as to the amount due.

The earlier cases on this subject will be found in notes to *Beasley v. Baltimore & P. R. Co.* 6 L.R.A. (N.S.) 1048, and *Goodin v. Southern R. Co.* 6 L.R.A. (N.S.) 1054.

This note is confined to cases where there was an actual detention of the goods, and does not include cases like *Louisiana R. & Nav. Co. v. Holly*, — Ia. —, 53 So. 822, where the terminal carrier delivered the goods, and then sued the shipper for the additional freight due.

As to payment or tender of freight charges as a condition precedent to an action of trover against carrier, see note to

APPPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action of trover for the conversion of certain goods shipped to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. G. L. Baker, C. C. Miller, and H. H. Obear, for appellant:

There being no defense showing a qualified refusal, there was nothing to rebut the prima facie case made by the plaintiff, and he was entitled to have the jury instructed that there had been a conversion as a matter of law.

Dent v. Chiles, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350; Fletcher v. Fletcher, 7 N. H. 452, 28 Am. Dec. 359; Carroll v. Mix, 51 Barb. 212; Zachary v. Pace, 9 Ark. 212, 47 Am. Dec. 744; Bolling v. Kirby, 24 Am. St. Rep. 807, note; Watt v. Potter, 2 Mason, 77, Fed. Cas. No. 17,291; Long v. Mobile & M. R. Co. 51 Ala. 512; Adams v. Clark, 9 Cush. 215, 57 Am. Dec. 41; Richardson v. Rich, 104 Mass. 156, 6 Am. Rep. 210; Northern Transp. Co. v. Sellick, 52 Ill. 249; Evansville & C. R. Co. v. Marsh, 57 Ind. 505; Beasley v. Balti-

Baltimore & O. R. Co. v. O'Donnell, 21 L.R.A. 117.

Where the initial carrier, under authority of the terminal carrier, contracts with the shipper for a through rate, which is paid in advance, the terminal carrier, who refuses to deliver to the shipper until an additional sum alleged to be due as freight is paid, is liable to the latter for all damages caused by such delay in delivery. Southern Kansas R. Co. v. J. W. Burgess Co. — Tex. Civ. App. —, 90 S. W. 189.

And if the terminal carrier refuses to deliver at the through rate agreed upon, on the ground that it is less than the rate fixed by the Interstate Commerce Commission, the burden is on it to prove such fact. Ibid.

When two connecting carriers have no traffic arrangements, but a shipper makes a through contract with the initial carrier to ship goods from a point on its line to a point on the line of the other, and pre-pays the freight for the whole distance, the terminal carrier, however, being informed by the initial carrier only that the freight of such initial carrier has been paid, the terminal carrier is not guilty of conversion merely because it refuses to deliver the goods until its own freight charges have been paid, or until it has time to ascertain whether they were prepaid to the contracting carrier. Shewalter v. Missouri P. R. Co. 84 Mo. App. 589; Berry Coal & Coke Co. v. Chicago, P. & St. L. R. Co. 116 Mo. App. 219, 92 S. W. 717 (*dictum*).

When two connecting carriers have no traffic arrangements, the terminal carrier is not liable in trover for withholding delivery of the goods to the consignee until the latter should execute a general aver-

more & P. R. Co. 27 App. D. C. 595, 6 L.R.A. (N.S.) 1048.

Messrs. Frederic D. McKenney, John S. Flannery, and G. Bowdoin Craighill for appellee.

Mr. Justice Robb delivered the opinion of the court:

This judgment brings into review a judgment of the supreme court of the District upon a verdict for the defendant in an action of trover for the conversion of 303 crates of mail boxes shipped to the plaintiff from Wapakoneta, Ohio.

The material facts are these: On January 16, 1907, the defendant notified the plaintiff that it held a consignment of mail boxes for delivery to him. The following morning plaintiff called at defendant's freight office, where a dispute arose as to the amount of the freight charges, the plaintiff contending that the amount demanded by defendant's agent was based upon a weight of 2,500 pounds in excess of the actual weight of the shipment. The weight and dimensions of these boxes being standardized by the government, any

age bond, conditioned to satisfy a lien for general average alleged to be due to the initial carrier should the lien be found to be valid, when such terminal carrier has no knowledge that the lien was unfounded; and it is not bound at its peril to ascertain its validity. Berry Coal & Coke Co. v. Chicago, P. & St. L. R. Co. supra.

A terminal carrier having no traffic or partnership relation with the initial carrier is entitled, before making delivery, to demand and receive from the consignee the tariff rates fixed by the Interstate Commerce Commission or state railroad commission, although that causes the freight to be greater than the shipper had contracted for with the initial carrier, and is not liable for damage to or loss of goods in consequence of delay or refusal to deliver caused thereby. San Antonio & A. P. R. Co. v. Clements, 20 Tex. Civ. App. 498, 49 S. W. 913; Texas Mexican R. Co. v. Reed, — Tex. Civ. App. —, 121 S. W. 519 (where the contract rate was prepaid).

Where the initial carrier, having no traffic arrangements with connecting carriers, by mistake, makes a contract with the shipper for a through rate which is less than the legal rate established by the railroad commission, but it is understood that the legal rate is to govern if the contract rate is not correct, such initial carrier is not liable in damages for injury to the shipment caused by delay in consequence of the terminal carrier demanding the legal rate before delivering, which rate the shipper is able to pay; since the wrongful quotation of rates is not the proximate cause of the injury. Texas Mexican R. Co. v. Reed, supra.

R. A. E.

variation in the weight of the shipment would be attributable to a variation in the weight of the crates. In the waybill accompanying the shipment it was stated that the shipment contained 303 crates of the aggregate weight of 24,500 pounds; that the through rate was 38 cents per hundred, making the total charges, according to the waybill, \$93.11. This waybill showed that the consignment was weighed in the car on track scales; that is to say, the loaded car was first weighed and then the supposed weight of the car was subtracted, the difference being the supposed net weight of the shipment. This waybill was exhibited to the plaintiff by the chief clerk of the defendant, who informed the plaintiff that he must pay the amount called for by this bill, and await the subsequent adjustment of the matter. The plaintiff demurred, and at his suggestion it was finally agreed that the defendant would reweigh the shipment. On the next morning the plaintiff again went to the freight office of the defendant, and was informed that the goods had been reweighed and that the correct weight was 22,740 pounds. The plaintiff thereupon asked the defendant if he could get his goods, and was informed that he could not until the matter had been taken up at headquarters and with the connecting and initial line, or words to that effect. The following day the defendant again weighed these goods, on one scale only,—the first weighing having been made on several new scales—and the result of the second weighing was an aggregate weight of 22,200 pounds. On that day an agent of the plaintiff, an employee of the Union Storage Company, called at the freight office and tendered a sum sufficient to pay the charges on the revised or correct weight of the goods, but the company declined to deliver them until the matter could be adjusted with said connecting line. On the 28th of January plaintiff again asked the defendant if it was ready to deliver the goods, and was informed that the matter had not been adjusted and that the goods could not be delivered until it was. Thereupon plaintiff notified the defendant that he would decline to receive the goods, contending that the delivery had been unduly delayed. No contention was ever made that any of these crates had been in any manner broken or disturbed, and it was admitted at the trial that the proper freight charges had been tendered by the plaintiff. This tender, it will be remembered, occurred about ten days before plaintiff declined to accept the goods. On January 30th the defendant's freight agent received authority to deliver the goods upon pay-

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ment of the scale weight of 22,200 pounds, and delivery was thereupon tendered and refused. The goods were subsequently turned over to the Washington Storage Company, that company advancing the freight charges, and were finally sold by said company to satisfy storage and freight charges. A small balance is still in the hands of the storage company. The plaintiff was, of course, given legal notice that the sale was to be made. The defendant at the trial offered evidence tending to show that it exercised diligence in taking up the matter of the adjustment of the freight charges with the proper officials of its own line, and through these officials with said connecting line.

At the close of all the evidence the plaintiff moved the court for a directed verdict. This motion was refused and exception taken, which was renewed at the close of the court's charge. The position of the court perhaps sufficiently appears from the defendant's two prayers which were granted. They read as follows:

"1. If the jury shall find from the evidence that the freight agent of the defendant, the Philadelphia, Baltimore, and Washington Railroad Company, had reasonable cause to hold the shipment of mail boxes consigned to the plaintiff, because of the difference in weights, in order to obtain instructions from the intermediate and initial carriers for the delivery of the boxes at the correct weight, and that agent exercised reasonable diligence in endeavoring to obtain said instructions and in offering or tendering said boxes to the plaintiff upon receiving said instructions, their verdict must be for the defendant.

"2. The jury are instructed that the defendant, the Philadelphia, Baltimore, and Washington Railroad Company, is only liable in this action for the acts and omissions of its own agents and servants, and cannot be held responsible for any mistakes which may have been made or any delays in ascertaining the correct weight of and charges upon the shipment in question, which may have occurred by reason of the acts and omissions of agents of the initial carrier, the Toledo & Ohio Central Railway Company, or the freight agent at Columbus, Ohio, or the auditor at Pittsburgh, Pennsylvania, of the Union Line, the intermediate carrier, which received the shipment from said initial carrier and delivered it to the defendant at Baltimore, Maryland."

Under the interstate commerce act it is unlawful for any carrier to charge, demand, collect, or receive a greater or less or different compensation for the trans-

portation of passengers or property than the regular published tariff rates. When the goods in question arrived, the only dispute that arose, and under the evidence the only dispute that could have arisen, was whether the weighing by the initial carrier on its track scales and in the manner heretofore described should be accepted as correct, or whether the weight as ascertained by the defendant should govern. The first weighing by the defendant was on different scales and evidently did not quite satisfy the defendant, for it again weighed the goods on a single scale, and that weight is conceded to have been correct. The delay from that time on was occasioned solely by the efforts of the defendant to adjust the matter with its connecting line.

It appearing that the defendant ascertained the correct weight of this shipment, the weight which, under the law, was absolutely controlling, and that the plaintiff, after this weight had been thus ascertained, tendered correct freight charges based upon such weight, and that the defendant declined to deliver the goods for the reasons stated, and that the defendant thereafter held such goods until January 30th before offering to deliver them, we think it was error for the court to refuse the plaintiff's prayer for a directed verdict. Under the admitted facts we think it clear that the withholding of the shipment was without justification, and formed a proper basis for the action of trover. *Beasley v. Baltimore & P. R. Co.* 27 App. D. C. 595, 6 L.R.A. (N.S.) 1048, and cases cited. See there also *Bolling v. Kirby*, 24 Am. St. Rep. 807, and note thereto. In the *Beasley* Case, which involved a shipment of horses, there was a dispute as to the proper rate, the bill of lading calling for one rate and the waybill for another. This court assumed, without deciding, that the carrier in such a situation would be justified in holding the shipment a reasonable time until it ascertained the correct charge. The same concession may be made in this case, since the carrier has a lien upon the goods for the amount of the legal freight charges. Those charges, however, are not governed by the bill of lading or the waybill. They are governed by the regular published tariff rate, and in a case like the present are to be computed upon the actual weight of the shipment. In other words, irrespective of any contract between the parties, the delivering carrier, under the law, is authorized to accept no more and no less than the correct charge. *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Texas & P. R. Co. v.* 32 L.R.A. (N.S.)

Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. When this shipment arrived, therefore, and the weight as stated in the waybill was found to be incorrect, and the true weight was ascertained, it was the defendant's duty, upon being tendered the legal charge, to deliver the goods, and its refusal to do so rendered it liable to this action. The tender of the correct charge under the circumstances stated operated as a discharge of defendant's lien, and thereafter its possession of the goods was wrongful. The shipper, in such a situation, ought not to be compelled to await the tedious settlement of controversies between connecting carriers. The law having fixed the rate, it is the delivering carrier's duty, upon tender of the legal amount, to make prompt delivery, and subsequently adjust any differences that may arise between it and connecting lines. The delivering carrier is fully protected by the statute, and there is no reason for withholding the shipment to the inconvenience and loss of the shipper or consignee.

The judgment will be reversed, with costs, and a new trial awarded.

Reversed.

GEORGIA SUPREME COURT.

HARDWOOD LUMBER COMPANY, Plff.
in Err.,

ADAM et al.

(134 Ga. 821, 68 S. E. 725.)

Damages—sale—failure to deliver.

1. The general rule is that in a suit for breach of contract for failure to deliver goods of a certain quality sold at a specified price, the measure of damages is the difference between the contract price and the

Headnotes by LUMPKIN, J.

Note.—*Delay by purchaser in securing substitute as affecting his damages for vendor's failure to deliver.*

There are many cases concerning the breach of a contract by the vendor of personality, which use general language to the effect that it is the duty of the vendee in case of a breach by the seller to exercise reasonable diligence in endeavoring to obtain the goods elsewhere, to do all that can reasonably be expected to mitigate the loss, and act throughout as a reasonable man of business. Among such cases are *Armeny v. Madison & B. Co.* 111 Ill. App. 621; *Creve Coeur Lake Ice Co. v. Tamm*, 90 Mo. App. 189; *Indian Mountain Jellico Coal Co. v.*

market price at the time and place of delivery.

Same—actual.

2. This is not an inflexible rule in all cases, so as to exclude a recovery of actual damages sustained in cases to which such rule in its very nature is inapplicable; as, where there is no market at the time and place of delivery by which damages can be measured, and resort must be had to the nearest available market, with the cost of shipment to the place of delivery added.

Same—goods bought for resale.

3. If goods are bought for the purpose of resale, and so known to both parties, and upon failure of the seller to deliver there is no market in which the buyer can readily obtain them, he may go into the market and purchase the best substitute obtainable, using reasonable care and diligence, and charging the seller with the difference between the contract price of the goods and the price of the goods substituted.

Same—duty of purchaser.

4. In order to entitle the purchaser to recover full damages in such a case, he must

Asheville Ice & Coal Co. 134 N. C. 574, 47 S. E. 116.

When, by reason of the nondelivery of goods according to contract, the buyer is obliged to go into the open market and purchase goods to replace those not so delivered, such purchaser is entitled to a reasonable length of time to do so. Where the contract expresses the time, the question is one of construction, and therefore one of law for the court, and not for the jury; but the question of what is a reasonable time is often a question of fact for the jury, under all the circumstances of the case. *Love v. Barnesville Mfg. Co.* 3 Penn. (Del.) 152, 50 Atl. 536.

In *Rosenthal v. Empire Brick & Supply Co.* 123 App. Div. 503, 108 N. Y. Supp. 347, where a seller of bricks refused to make further deliveries under the contract, the measure of damages recoverable by the buyer was the difference between the contract price and the market price at the time and place of delivery, and he could not, some time thereafter, when the market price had risen, buy a substitute, and hold the seller liable for the difference between the contract price and the price paid:

A case of interest in this connection is *Aronson v. H. B. Claffin Co.* 115 N. Y. Supp. 97, where it was held that a purchaser of merchandise who had been informed that the seller did not have the goods, and who had an opportunity to buy elsewhere at practically the same price, cannot wait several weeks and demand delivery, for the purpose of securing damages based upon an advancing market.

In *Ralli v. Rockmore*, 111 Fed. 874, where a purchaser of cotton continually urged delivery, and the vendor did not absolutely refuse to make delivery until long after the 32 L.R.A. (N.S.)

have acted within a reasonable time, and have used due diligence to mitigate the loss.

Appeal—instruction—finding—evidence—sufficiency—review.

5. The evidence was sufficient to authorize the charge of the judge, and to sustain the finding of the jury, approved by the presiding judge.

Sale—failure to deliver—extension of contract—damages.

6. If the seller of goods fails to deliver them according to the contract, and thereafter the purchaser urges delivery, and the seller promises to make it, but fails to do so, this alone does not work such an extension of the contract as will prevent the purchaser from recovering damages on the basis of the original breach.

Damages—sale—failure to deliver—conduct of vendee.

7. In such a case, if there is no market in which the articles sold can be readily bought, and, within the knowledge of both parties, they were bought for resale, and the purchaser buys the best substitute obtainable in order to fulfil his subcontract of sale, in determining the reasonableness of

date set in the contract, it was held that the measure of damages recoverable by the purchaser was the excess over the contract price which he was compelled to pay for cotton purchased in the market immediately after the absolute refusal to deliver. A similar case, and holding to the same effect, is *Crescent Hosiery Co. v. Mobile Cotton Mills*, 140 N. C. 452, 53 S. E. 140, 6 A. & E. Ann. Cas. 164.

In *Pope Metal Co. v. Sandoval Zinc Co.* 148 Ill. App. 444, the buying of merchandise in the market by a vendee the next day after definite refusal on the part of the vendor to deliver was held sufficient to fix the market price thereof at that date as a basis of calculating the vendee's damages, although it appeared that the merchandise, according to the contract, was to be delivered several weeks prior to the date of the absolute refusal.

In *Summers Bros. v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899, where a vendee of sheet iron, upon a breach of contract, was compelled to go into the market and buy a substitute, the court took occasion to say: "There is no doubt of the correctness of the rule stated by appellants, that, where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should be made. In the case at bar, appellees made threats to buy in at seller's expense, but excuses rendered and promises made by appellants of frequent and large shipments deterred them from doing so. If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement; and where

his conduct and of the time when he makes the purchase, the conduct of the defendant in asking delay after the failure to deliver, and promising to make delivery, may be considered.

Appeal — instruction — review.

8. When taken in connection with the entire charge, none of the excerpts of which complaint was made are such as to require a new trial.

(July. 15, 1910.)

ERROR to the Superior Court for Richmond County to review a judgment in plaintiffs' favor in an action brought to recover damages for breach of a contract to sell and deliver certain lumber. Affirmed.

Statement by Lumpkin, J.:

In May, 1906, the Hardwood Lumber Company, of this state, contracted to sell to Adam & Steinbrugge, of New Orleans, Louisiana, 75,000 feet of red gum lumber for July and August shipment. The correspondence between the parties showed that the lumber was bought for the purpose of resale, references being made in the letters of the purchasers to their customers. The first letter written by them, which was introduced in evidence, said: "If you would care to make us a price C. I. F. Rotterdam, and guarantee that our customers will get exactly what the B/L calls for, we believe that we could do some business with you." The lumber was not shipped at the time agreed upon. In October thereafter the plaintiffs began writing a series of letters to the defendants, urging the latter to deliver the lumber. The sellers replied by making various excuses, such as that the logs had to be gotten out of the swamp, that it had been raining so as to make it impossible to do so, and that the railroad did not furnish enough cars; and promising delivery at an early time. This correspondence of urgency on one side and excuses on the other continued for a num-

ber of months. On October 11, 1906, the purchasers wrote: "We sold this stock according to your contract with us; and if you don't deliver it, the customer that we sold it to will certainly hold us up for indemnity so much per M. feet, in which event we will put the matter up to you. Please let us know if you know of some place where you could buy this stock?" In its reply the seller said: "We know of no place where we can place this order. If we could find someone to take it, we do not think they could get it out any quicker than we will. We will make delivery just as soon as possible." On December 10, the purchasers wrote: "If you cannot give us any definite information in regard to delivery of this stock, we must go out and buy it somewhere else; and if there is any difference in price, we would expect you to help us out." On January 30, 1907, they again wrote: "We really do not know how we can make our customers wait any longer; they simply must have this stock, and they will not accept the excuse you give us, and threaten to buy the stock on the open market, charging us up with the difference." On February 21, 1907, the purchasers wrote: "We wish to advise you that, inasmuch as you have made no efforts, apparently, to get this stock for us, this letter will serve to advise you that, if you will not have delivered this stock by the 1st of May, we will buy what is due on the open market, or allow you the privilege of doing it." The sellers replied: "We have yours of the 21st, with reference to extending the time of delivery of the red gum sold you to the 1st of May. We will use our best endeavors to get the lumber ready for shipment by that time. We are anxious to fill your order, and regret that conditions have been such that we have been unable to do it. We intend to do it, and if you just have patience you will get the lumber all right." The purchasers continued to write letters urging

the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance."

In *Northwestern Iron & Metal Co. v. Hirsch*, 94 Ill. App. 579, it was also recognized that the postponement from time to time of the performance by a vendor of goods, and repeated promises to deliver, will also postpone the duty of the vendee to go upon the market and by a purchase fix the amount of his loss and consequent damage.

In *United States v. Withers*, 65 C. C. A. 16, 130 Fed. 696, it was held that one who contracts to furnish a department of the government with stationery cannot, upon 32 L.R.A.(N.S.)

breaching the contract, be held liable for the difference between the contract price and the price paid by the government to the public printer several months after the breach, where it appears that with reasonable diligence the government could have procured the stationery at less than the contract price. In this case the record also failed to show at what price the stationery could have been bought in the open market at the time when it was bought from the public printer; and therefore, said the court, there was nothing upon which the jury could have assessed any substantial damages, since the measure of damages was the difference between the contract price and the market price. G. V.

the delivery of the lumber until November, 1907. On October 24th they informed the seller that, if the latter did not deliver the lumber immediately, the purchasers would at once bring suit for the breach of contract. They added: "We have secured at different times gum lumber at considerably higher prices than we paid you, to deliver our contracts that we made based on getting the stock from you." The seller finally wrote on November 9, 1907, saying: "It is useless for us to promise to make delivery of this stock within the next thirty days. . . . We have always intended to deliver this stock, as we told you before; but if you think that you can get your money quicker by bringing suit against us, it is a matter for you to decide. We have told you before we regretted this delay, but it is impossible to prevent it."

The purchasers brought suit, alleging that they had been compelled to buy red gum lumber to fill their contracts at a higher price than that at which they purchased, and had incurred the expense of transportation, which the seller agreed to pay, making an aggregate difference of \$441.78. They recovered a verdict for the full amount. A motion for a new trial was overruled and the defendant excepted.

Mr. William H. Fleming, for plaintiff in error:

In a suit for breach of contract for failure to deliver goods of a stated quality sold at a specified price, the measure of damages is the difference between the contract price and the market price at the time and place of delivery.

Ford v. Lawson, 133 Ga. 237, 65 S. E. 444; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *Crescent Hosiery Co. v. Mobile Cotton Mills*, 6 A. & E. Ann. Cas. 166, note; *Wrenn v. Deveney*, 74 Ga. 421.

Where a vendee, upon the trial of an action against his vendor for such damages, fails to submit any evidence as to the market price at the time for delivery, no actual damages can be recovered.

Bloom Sons v. Americus Grocery Co. 110 Ga. 784, 43 S. E. 54.

Messrs. S. H. Myers and George T. Jackson, for defendants in error:

Where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them, the buyer may procure the best substitute for the goods and fulfil his subcontract, charging the seller with the difference in price.

2 Benjamin, Sales, ¶¶ 1117, 1322, 1325, 1327; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 Jur. N. S. 267, 11 L. T. N. S. 771, 13 Week. Rep. 32 L.R.A. (N.S.)

386; *Hinde v. Liddell*, L. R. 10 Q. B. 265, 44 L. J. Q. B. N. S. 105, 32 L. T. N. S. 449, 23 Week. Rep. 650.

The voluntary offer on the part of the plaintiffs after the breach, to waive the same and accept delivery, was not an extension of the time for delivery, and they had the right at any time to purchase the goods elsewhere and sue on the original contract, the offer to waive and the repeated promises to deliver being merely independent facts for the consideration of the jury in determining whether or not the purchases were made "within a reasonable time" after the breach.

1 Benjamin, Sales, ¶¶ 215, 216, 230, 231; 2 Benjamin, Sales, ¶¶ 1310, 1125; *Loder v. Kekulé*, 3 C. B. N. S. 128; 27 L. J. C. P. N. S. 27, 4 Jur. N. S. 93, 5 Week. Rep. 884; *Ogle v. Vane*, L. R. 3 Q. B. 272, 9 Best & S. 182, 37 L. J. Q. B. N. S. 77, 16 Week. Rep. 463; *Hickman v. Haynes*, L. R. 10 C. P. 598, 44 L. J. C. P. N. S. 358, 32 L. T. N. S. 873, 23 Week. Rep. 872.

Lumpkin, J., delivered the opinion of the court:

The defendant did not deny that it broke the contract and never delivered the red gum lumber sold. The only question was as to the measure of damages. The plaintiffs contended that they were entitled to recover the difference between the cost of lumber which they had purchased in this country and had shipped to Europe, in order to meet the contracts which they had made on the faith of the contract with the defendant, and the price at which the lumber was sold to them, with cost of delivery at Rotterdam, in accordance with the contract with the defendant. The latter claimed that there was no sufficient evidence to show that there was not a market at Rotterdam in which the lumber could have been procured; that the date of the breach was either in July and August, 1906, or in November, 1907, and that the purchases made by the plaintiffs were between those dates; that the proper measure of damages was the difference between the contract price and the market price at the time and place fixed for delivery; and that, in the absence of sufficient evidence to show this difference, only nominal damages could be recovered. Various exceptions were made to charges and refusals to charge, but they all referred to the measure of damages, and need not be stated in detail.

Damages are given as compensation for the injury done. "Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as

the parties contemplated when the contract was made as the probable result of its breach." Civil Code 1895, § 3790. "Any necessary expenses which one of two contracting parties incurs in complying with the contract may be recovered as damages." Section 3806. One injured by a breach of contract is bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Section 3802. In a suit for breach of contract for failure to deliver goods of a stated quality sold at a specified price, the general rule is that the measure of damages is the difference between the contract price and the market price at the time and place fixed for delivery. If there is no market at the place of delivery at the time fixed therefor, resort may be had to the nearest available market, with cost of transportation to the place of delivery usually added. *Ford v. Lawson*, 133 Ga. 237 (6a) 65 S. E. 444. It is evident that the general rule cannot be taken as a procrustean one, subject to no exception or modification. If so, it would exclude the possibility of recovering profits where in contemplation of the parties at the time of the contract. If there should be no market at the time and place fixed for delivery, the seller breaking his contract could not escape liability for actual damages, on that account. The article sold may be such as requires to be manufactured, and such as is not ordinarily carried in the market for sale. *Robert B. Sizer & Co. v. Melton*, 129 Ga. 143 (7), (8), 58 S. E. 1055.

In 2 Benjamin on Sales, 6th Am. ed. § 1327, after reviewing a number of cases, the author states as follows: "It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of resale, and there is no market in which the buyer can readily obtain them: I. If, at the time of the sale, the existence of a subcontract is made known to the seller, the buyer, on the seller's default in delivering the goods, has two courses open to him: (1) He may elect to fulfil his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted. (2) He may elect to abandon his subcontract, and in that case he may recover as damages against the seller (a) his loss of profits on the subsale, and (b) any penalties he may be liable to pay for breach of his subcontract; but if the amount of the penalties has not been made known to the seller, the buyer is not entitled to recover their amount as a matter of right, but the jury may, if the

penalties are reasonable, assess the damages at that amount. It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it. II. If, at the time of the sale, the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with the general intention to resell, or notice of the subcontract given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract; the buyer may either procure the best substitute for the goods as before, and fulfill his subcontract, charging the seller with the difference in price, or abandon the subcontract and bring his action for damages, when the ordinary rule, it would seem, will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price, in the sense that there is no place where the buyer can readily procure the goods contracted for. III. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."

According to the seller's letters in this case, the timber from which it was to be sawed had to be gotten out of the swamps where it grew. After the failure to deliver in accordance with the contract, the purchasers made this request of the seller: "Please let us know if you know of some place where you could buy this stock?" To this the seller replied: "We know of no place where we can place this order." The agent of the purchasers testified that "their default had forced us to enter the open market for the purchase of lumber wherever we could get it, and to meet obligations we had assumed when we supposed that the Hardwood Lumber Company was going to fulfil their contract." It is true that the agent testified that the lumber bought to fill the contracts of the purchasers, as indicated in an exhibit to their petition, was bought after November 9, 1907. He, however, testified to the items of the account. The bills of lading introduced in evidence indicated that the purchases were in fact made after the time provided in the contract for delivery, but before the date mentioned by him. After the breach occurred, the plaintiffs again and again urged

the defendant to ship the lumber, and informed the latter that it had been sold to customers who insisted on having their contracts filled; and the plaintiffs threatened to hold the defendant liable if its contract of sale was not complied with promptly. The seller made excuses and various indefinite promises to make the shipment at an early date, until November, 1907, when the patience of the plaintiffs was exhausted, and they brought suit.

After a contract of sale of goods is broken by failure to deliver, the mere fact that the purchaser is willing, by way of voluntary forbearance, to waive the delay and receive the property sold, and urges delivery, does not operate as a waiver of the legal damages incurred by him, if there is no extension for a consideration, and no compliance or tender of compliance on the part of the person in default. He cannot repudiate his contract, and be relieved from damages for its breach, because he was urged to comply with it. This case presents no question of request for delay in performance, and grant thereof, before breach or pending delivery in instalments.

After a complete breach of contract on the part of the seller to deliver the goods sold, if they are of a kind not readily obtainable in the market, and if the purchaser undertakes to procure the best substitute he can to fill his contract of resale, for which purpose both parties knew that the goods were bought, the purchaser must act within a reasonable time and with reasonable diligence. In determining whether he does so or not, the conduct of the seller tending to cause some delay in action may be considered. The presiding judge charged, on this subject, as follows: "I charge you that the plaintiff is only bound to exercise good business judgment and reasonable diligence in the matter of repurchasing the lumber, and would not be bound to purchase all in one lot, if he exercised good faith and reasonable business ability as a reasonably good business man would exercise under the circumstances." While generally the measure of damages is to be fixed at the time of the breach of the contract, it cannot be said as matter of law, under the conduct of the seller and its repeated assurance of early shipments and requests for delay, that the purchasers were bound to purchase the entire lumber immediately. Indeed, it might be inferred from the evidence that they

could not do so, but that they did the best they could to remedy the default of the seller, and save themselves from damages as far as possible on account of their resales. There are some decisions which go further than this charge, and hold that if the purchaser waits until a certain time, at the request of the seller, and then purchases goods to meet his subcontract of sale, the seller cannot complain. On the subject of delay induced by the party in default, see *Mendel v. Miller*, 126 Ga. 834, 7 L.R.A.(N.S.) 1184, 56 S. E. 88.

Upon a careful consideration of the entire record, we do not think this a case of nominal damages. While there is some conflict in the testimony introduced by the plaintiffs as to the dates of the purchases made by them after the defendant's default, and as to whether the specific purchases made were rendered necessary by such default, there was sufficient evidence to authorize the finding of the jury in favor of the plaintiffs. Nor do any of the grounds of the motion for a new trial, when considered in the light of the entire evidence and the charge of the court, require a reversal. As showing the general rule, and certain modifications of it, both in England and America, see *Ogle v. Vane*, L. R. 3 Q. B. 272, 9 Best & S. 182, 37 L. J. Q. B. N. S. 77, 16 Week. Rep. 463 (dealing both with the question of the statute of frauds and delay, not as a new contract, but as a voluntary forbearance); *Barrow v. Arnaud*, 8 Q. B. 595, 601, 10 Jur. 319; *Loder v. Kekulé*, 3 C. B. N. S. 128, 27 L. J. C. P. N. S. 27, 4 Jur. N. S. 93, 5 Week. Rep. 884; *Hinde v. Liddell*, L. R. 10 Q. B. 265, 44 L. J. Q. B. N. S. 105, 32 L. T. N. S. 449, 23 Week. Rep. 650; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. N. S. 169, 11 L. T. N. S. 771, 13 Week. Rep. 386; *Hickman v. Haynes*, L. R. 10 C. P. 598, 44 L. J. C. P. N. S. 358, 32 L. T. N. S. 873, 23 Week. Rep. 872; 2 *Joyce, Damages*, §§ 1625, 1626; 3 *Sutherland, Damages*, 652; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495; *Haskell v. Hunter*, 23 Mich. 305; *Watson v. Kirby*, 112 Ala. 436, 20 So. 624 (6); *Paine v. Sherwood*, 21 Minn. 225; *Thomas Iron Co. v. Jackson Iron Co.* 131 Mich. 130, 91 N. W. 137; *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763.

Judgment affirmed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY J. HILLMAN

v.

BOSTON ELEVATED RAILWAY COMPANY.

JOHN J. HILLMAN

v.

SAME.

(207 Mass. 478, 93 N. E. 653.)

Carrier — provision for crossing tracks — invitee.

The mere fact that a railroad company

Note. — Duty of carrier to prevent passengers at stations from going into dangerous places.

Very few cases have been found expressly to involve the question of the duty of a carrier to take active measures to prevent a passenger from going into a dangerous place, as distinguished from the question of the negligence of the carrier in allowing the place to become dangerous. The situation presented in *HILLMAN v. BOSTON ELEV. R. Co.* is anomalous from the view point indicated by the foregoing title, for the reason that it was perfectly proper to make use of the platforms of elevated trains for the purposes of getting on and off such trains, but that it seemed improper to use them for the purpose of passing from one platform to another, and that in this situation it was well-nigh impossible for the carrier's servants to determine who were seeking to make the first use of such platform, and who were seeking to make the second use thereof. This largely accounts for the conclusion in the *HILLMAN CASE*, that the failure of the carrier to prevent a violation of its rules did not amount to an implied invitation to violate them.

It was held in *Perego v. Lake Shore & M. S. R. Co.* 158 Mich. 225, 122 N. W. 535, that a carrier which had provided a safe approach from its trains to its station, and which had posted notices forbidding passengers to cross over its tracks for the purpose of reaching the station, had discharged its duties, and that it owed no duty to travelers to station a man at this point "to prevent them from trespassing," notwithstanding it appeared that people were in the habit of taking the forbidden course to such an extent that there was a deep path at that point.

In the case of *Missouri, K. & T. R. Co. v. Criswell*, 101 Tex. 399, 108 S. W. 800, in which the peculiar situation existing in the *HILLMAN CASE* was not involved, the court said: "The use of the platform by passengers when it was not intended for their use could create no liability on the part of the railroad company; but its liability arises from its neglect to use ordinary care to warn passengers that it was not the proper way for them to take in going to

which provides a subway for passengers to pass from one side of its tracks to the other, with signs directing them to it, does not enforce its order not to let them cross over standing trains, because it is impossible to distinguish between those wishing to embark on such trains and those wishing to cross the tracks, does not amount to an invitation to them to cross the train, within the rule governing the care which is due to invitees.

(January 6, 1911.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Middlesex County made during the trial of consoli-

and from its trains. It would be a harsh rule to hold that a passenger knowing that a certain way had not been provided for his use would have the right to depart from the way provided, and take one which was not intended nor prepared for such use, and thereby make the railroad company liable for injury. But we think it a just rule, and consistent with the law which governs the relation between passengers and carrier, that, when the carrier has permitted such use of a passway as to give it the character of an authorized way, it should be held responsible to those passengers that it might receive or discharge thereafter at that depot, who did not know that the use was unauthorized, and who, seeing other passengers going that way, might be and most probably were, led to follow, believing they were using the walk intended for them. A stranger arriving at the depot could not stop to take into consideration the appearances of the different platforms, and determine which one was the proper one for him to use; but it would be an easy matter for the railroad company to take such precaution as a man of ordinary prudence would take under such circumstances, to inform its passengers which of the two ways was intended for their use, or to obstruct the one not so intended in such manner as to give notice of the fact."

It has been held by the United States Supreme Court that a carrier does not discharge its entire obligation by giving notice of a certain rule as to where passengers may go, and, if the custom of passengers to disregard the rule is so common as to charge the servants of the road with notice of it, then it is the carrier's duty either to take active measures to enforce the rule, or to make disregard thereof safe. *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281.

On the duty of the carrier to guard passengers against walking through station doorways leading to a place of danger, see the note to *Speck v. Northern P. R. Co.* 24 L.R.A. (N.S.) 250.

On the duty of carrier to guide or conduct person to or from train, see the note to *Père Marquette R. Co. v. Strange*, 20 L.R.A. (N.S.) 1041. L. A. W.

dated actions brought to recover damages for personal injuries to plaintiff Mary J. Hillman, for which defendant was alleged to be responsible. Overruled.

The facts are stated in the opinion.

Messrs. Storer & Sweetser for plaintiffs.

Mr. Walter Shuebruk, for defendant:

An invitation cannot be implied from evidence merely that a defendant allowed or permitted or did not prevent or object to the use made of the way or premises by the plaintiff.

Boden v. Boston Elev. R. Co. 205 Mass. 504, 91 N. E. 879; Bowler v. Pacific Mills, 200 Mass. 364, 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767; Legge v. New York, N. H. & H. R. Co. 197 Mass. 88, 23 L.R.A. (N.S.) 633, 83 N. E. 367; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Shea v. Gurney, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Galligan v. Metacommet Mfg. Co. 143 Mass. 527, 10 N. E. 171; Wheelwright v. Boston & A. R. Co. 135 Mass. 225.

In the absence of any invitation, express or implied, to use the car platform as a bridge, the court was bound to rule that the plaintiff was either not in the exercise of due care, as in—

Boden v. Boston Elev. R. Co. 205 Mass. 504, 91 N. E. 879; Wheelwright v. Boston & A. R. Co. 135 Mass. 225; Bancroft v. Boston & W. R. Corp. 97 Mass. 275;—

or that she was a trespasser, or at most a licensee, as in—

Wright v. Boston & M. R. Co. 129 Mass. 440; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Norris v. Hugh Nawn Contracting Co. 206 Mass. 58, 31 L.R.A. (N.S.) 623, 91 N. E. 886; Boden v. Boston Elev. R. Co. 205 Mass. 504, 91 N. E. 879; Legge v. New York, N. H. & H. R. Co. 197 Mass. 88, 23 L.R.A. (N.S.) 633, 83 N. E. 367; Shea v. Turney, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133.

In whichever class the plaintiff had placed herself, the defendant owed her no other duty than to refrain from wilfully and wantonly injuring her.

McManus v. Thing, 202 Mass. 11, 88 N. E. 442; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; Metcalfe v. Cunard S. S. Co. 147 Mass. 68, 10 N. E. 701; Hanks v. Boston & A. R. Co. 147 Mass. 403, 18 N. E. 218; Wright v. Boston & A. R. Co. 142 Mass. 296, 7 N. E. 860. 32 L.R.A. (N.S.)

Loring, J., delivered the opinion of the court:

The only question in this case is whether the evidence warranted the jury in finding that the plaintiff in the first action was invited by the defendant to go from one to the other platform in its Sullivan Square station by crossing over an elevated train which was standing between the two platforms to discharge and receive passengers.

Sullivan Square station is primarily a transfer station. Through the center of it runs the single track of the defendant's elevated railway. This track runs north and south, and is in a pit about 4 feet below the station platforms. The station platforms are on a level with the platforms of the cars of the elevated trains. Surface cars from and to Somerville and beyond run up an incline onto five tracks with dead ends, which are reached from the platform on the west of the pit through which the elevated trains run. Similarly surface cars from and to Everett and Malden run up an incline onto five tracks on the east side of the pit. Passengers who have taken a surface car at Somerville for a point reached by a surface car running to Everett or Malden have to pass from the west to the east platform, which (as we have said) are separated by this pit 4 feet deep, extending the whole length of the platforms. A subway had been constructed by the defendant for this purpose at the south end of the station, which led down under the pit and up to the platform on the other side. There was a turnstile and ticket office at each entrance to the subway, and a ticket was given to each passenger on his entering it. There was a sign on the west platform (the platform on which the plaintiffs disembarked) near the entrance to the subway, on which was printed in large letters, "Subway to East Platform," with an "index hand" pointing to it; and on the ticket office at the entrance another sign, in smaller letters, on which was printed "Transfer to surface cars and East Platform."

On the morning in question the plaintiff in the first action and her husband (the plaintiff in the second action) left their home in West Somerville to visit their son, who lived in Malden. The plaintiff was a woman sixty-eight years of age, and her husband (as she testified) was aged, feeble, and just recovering from a paralytic shock. When the plaintiff and her husband disembarked in the Sullivan Square station, there was an elevated train standing between the two platforms, with the gates on its car platforms open. The plaintiff assisted and guided her husband onto the plat-

form of one of the cars of this train, and was about to follow him when another woman crowded in between them. The husband reached the east platform in safety, but as the plaintiff was stepping from the car platform to the east platform of the station, the starting gong sounded and the brakeman closed the gate. The plaintiff at once felt that her dress was caught, turned round and tried to free it by pushing on the gate. A guard on the station platform called, "Open the gate," but before the brakeman, who was then looking into the car, did so, the plaintiff was thrown down and dragged some distance along the platform of the station. The plaintiff testified that she knew the subway was there for the purpose of enabling passengers to go from one platform to the other, but that she did not want to take her husband up and down the two flights of steps; "that she feared the exertion would be bad for him," and took the way across the elevated train "for her own convenience."

The plaintiff contends that there was evidence in the case which warranted the jury in finding that the defendant had invited her to use the elevated train as she did use it. The evidence on which this contention is based consists of the plaintiff's testimony that "she had frequently seen other people use trains as a bridge in crossing from one platform to the other," and "she had never seen any signs or notices displayed in the terminal forbidding such crossing by means of the trains, and she had never seen any attempts made by the guards or train men to prevent it." There was testimony from two other witnesses that "it was a general practice for passengers going from one platform to the other to walk across the platform of the elevated cars standing in the station, or through the cars," meaning through the doors in the middle of the sides of the cars; that "there were no notices posted by the defendant forbidding people to cross from one platform to the other by means of the trains standing there, and he had never seen any employee of the defendant forbidding any person to use the trains for this purpose, or attempting to prevent anyone from so using them." The defendant's station master testified that "he had seen people use the elevated trains to cross the tracks; that they had done so everyday." Several of the defendant's employees testified "that they had been instructed not to allow people to cross by the trains, and when people asked them how to cross to the further platform, they always directed them to use the subway; that passengers used the trains as a means to cross; and that witnesses did not and could not attempt to stop them, because when a

person stepped onto the platform of an elevated car it was impossible to tell whether they intended to cross to the other platform, or to go inside the car to ride."

It was said by Chief Justice Bigelow in *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 374, 87 Am. Dec. 644, that "a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability." In *Wheelwright v. Boston & A. R. Co.* 135 Mass. 225, 229, it was said by Colburn, J.: "The most that can be contended, on the evidence, is that the defendant had tolerated a practice which the plaintiff and others had adopted, of crossing where she was attempting to cross, without taking any active measures to prevent it. This is far different from an inducement or invitation from the defendant to cross there." And in *Galligan v. Metacomet Mfg. Co.* 143 Mass. 527, 528, 10 N. E. 171, this rule of law was stated by C. Allen, J., in these words: "Merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the condition of the lot." A number of cases have been since decided on the rule of law thus clearly stated. See *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Shea v. Gurney*, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Legge v. New York, N. H. & H. R. Co.* 197 Mass. 88, 23 L.R.A. (N.S.) 633, 83 N. E. 367; *Bowler v. Pacific Mills*, 200 Mass. 364, 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767; *Boden v. Boston Elev. R. Co.* 205 Mass. 504, 91 N. E. 879. The portion of the opinion of Chief Justice Bigelow in *Sweeny v. Old Colony & N. R. Co.* *ubi supra*, quoted above, was adopted by Kennedy, L. J., as a correct statement of the law, in the recent case of *Lowery v. Walker* [1910] 1 K. B. 173, 198, 79 L. J. K. B. N. S. 297, 101 L. T. N. S. 873, 26 Times L. R. 108, 55 Sol. Jo. 99, 17 A. & E. Ann. Cas. 553.

The case at bar comes within this well-established principle. In addition, there is in this case a point which was relied upon in the decision of the recent case of *Bowler v. Pacific Mills*, *ubi supra*, at page 365 of 200 Mass., 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767, namely, that it would have been impracticable, if not impossible, to prevent persons from using the defendant's premises as they were used by the plaintiff, without interfering with the defendant's business in the use of its premises in question. The cases of *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, and *Murphy v. Boston & A. R. Co.* 133 Mass. 121, relied on

by the plaintiff, were cases depending upon special circumstances which have been fully explained in previous cases. See *Bowler v. Pacific Mills*, 200 Mass. 364, 366, 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767, where the distinction is pointed out and these previous cases are collected.

Exceptions overruled.

KENTUCKY COURT OF APPEALS.

J. T. SLADE et al., Appts.,
v.

CITY OF LEXINGTON.

(— Ky. —, 132 S. W. 404.)

Contract — to renew agreement — power to enforce.

1. An agreement between a water company and a municipal corporation which it undertakes to supply with water, that the contract shall be renewed at the expiration

of a certain time upon such terms as are mutually agreed upon at that time, is not so indefinite as to be invalid, since it will be interpreted as providing for a renewal on reasonable terms.

Constitutional law — retroactive effect.

2. Constitutional provisions prescribing the manner in which a municipal corporation may enter into a contract, and its duration, and prohibiting it from incurring indebtedness, do not, under the provisions of the Federal Constitution, forbidding states to impair the obligation of contracts, control a renewal in accordance with its own provisions of a contract existing at the time they were adopted.

(December 9, 1910.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Fayette County in favor of defendant in an action brought to enjoin the execution of a renewal water contract between the defendant city and a water company. Affirmed.

The facts are stated in the opinion.

Messrs. Bruce & Bullitt, with Messrs.

Note. — Validity and effect of stipulation in contract to renew on terms to be agreed upon.

The purpose of this note is merely to supplement, by a number of cases, the discussion in *SLADE v. LEXINGTON* of the question of validity and effect of a stipulation in a contract to renew on terms to be agreed upon at the time of renewal; for it should be noted that, owing to the practically unlimited number of ways in which this question may arise, and its consequent diversity in classification in the digests, no assurance can be given that the cases found are exhaustive of the subject.

In *Howe v. Larkin*, 119 Fed. 1005, a covenant in a lease of a hotel providing that, at the expiration of the term, the lessor agreed to make a new lease for a certain rental per year, "and under and subject to certain covenants, provisos, and agreements to be decided upon at that time, between the said parties, not embodying, in said agreement for a further lease, any of the conditions or agreements contained in this present lease," was held void for uncertainty. The court said that while it expressly negatived a present agreement that the new lease should contain the conditions and agreements of the old, it contained nothing upon which even a conjecture could be based as to what covenants, provisos, and agreements were intended by the parties to be included in the new lease, and that it was a mere agreement to make an agreement upon undefined subject-matter.

In *Duffield v. Whitlock*, 28 Wend. 55, a covenant in a lease granting the lessor, at the expiration of the term, the privilege of paying the appraised value of the buildings erected on the premises, or grant a new

lease for the term of twenty years upon such terms as he might think proper and as might be approved by the lessee, and providing that, in case the lessee should not approve of the terms offered, he should have the privilege of removing the buildings within three months after the expiration of the lease, was held not to authorize the lessee, after the lessor has declined to pay the appraised value, to compel the submission to him of a lease on terms other than those considered proper by the lessor. The court said: "The good sense of the covenant, I think, is this,—after the buildings are appraised, the lessors may elect to pay or not, and, if they refuse, the lessee has three months to remove them. The new lease spoken of was but a suggestion, dependent upon the amicable arrangement of the parties; it bound nobody. It is conceded the lessee is not bound to accept whatever may have been the terms of the lease tendered; and I think the lessors under no greater obligation; for a stipulation to tender such an one as they may think proper, legally speaking, carries with it no binding force. The power thus reserved, is no more nor less than what belongs to every landholder before he enters into the contract. But if the lessors were bound to tender a lease, I find nothing in the covenant that will authorize the court to dictate the amount of rent, or any other terms, or conditions to be embraced in it, except its duration, unless we assume to make a lease for a party who has not only not entered into any agreement to this effect, but has expressly reserved to himself the privilege of settling the amount and fixing the conditions according to his own notions of what may be for his interest."

And a covenant, for renewal of a lease,

Samuel Wilson and Helm Bruce, for appellants:

A city cannot grant a franchise nor make a contract with reference thereto for a longer term than twenty years, nor otherwise than to the highest and best bidder.

Const. § 104.

An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is a nullity.

Ridgeway v. Wharton, 6 H. L. Cas. 268, 2 Eq. Rep. 839, 27 L. J. Ch. N. S. 46, 4 Jur. N. S. 173, 5 Week. Rep. 804; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; Duffield v. Whitlock, 20 Wend. 55; Mayer v. McCreery, 119 N. Y. 434, 23 N. E. 1045; Howe v. Larkin, 119 Fed. 1005; Pause v. Atlanta, 98 Ga. 92, 58 Am. St. Rep. 200, 26 S. E. 480; Streit v. Fay, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 61 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Domestic Tele.

& Teleph. Co. v. Metropolitan Teleph. & Teleg. Co. 39 N. J. Eq. 160; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77; Clark, Contr. p. 6; Western Transp. Co. v. Lansing, 49 N. Y. 499; Morrison v. Rossignol, 5 Cal. 64.

Statutory grants in corporate charters are to be strictly construed in favor of the public.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

Messrs. George C. Webb, J. Embury Allen, Wallace Muir, Allen & Duncan, Stoll & Bush, and Humphrey & Humphrey, for appellee:

Some meaning must be given to all the terms of the contract.

to let a lot for a yearly rent to be fixed by persons to be mutually chosen was held void for uncertainty in *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377, upon the ground that it was impossible to collect from it for what term the parties contemplated the new lease should be given.

But see *Kaufmann v. Liggett*, 209 Pa. 87, 67 L.R.A. 353, 103 Am. St. Rep. 938, 58 Atl. 129, sufficiently set out in *SLADE v. LEXINGTON*.

In *Alabama G. S. R. Co. v. South & North Ala. R. Co.* 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286, a contract made between two railroad companies, providing that one should have the perpetual and free use of the right of way of the other, "in a manner to be hereafter determined by deed," was held not void for uncertainty, where it appeared that the privileged railroad was placed in possession of the right of way and continued in its daily use for over nine years. The court said that the conduct of the parties, and uniform usage, thus acquiesced in, had supplemented the alleged uncertainty.

In *Domestic Teleph. & Teleg. Co. v. Metropolitan Teleph. & Teleg. Co.* 41 N. J. Eq. 241, 3 Atl. 709, the court said in regard to a stipulation in a contract between two telephone companies: "It seems to me that when, in a contract of this nature, there is a clause which provides that one of the parties shall have the first right to a new contract (not a renewal of the existing one), upon such terms as shall be fixed upon by the other party, and, during the continuance of such contract, new terms are added upon the assurance that such clause gives the right to renew or will fully protect the right to renew, a court of equity ought to enforce such contract, and secure its renewal to the party to whom such promise is made, if the terms contemplated in the clause giving such first right have been 32 L.R.A. (N.S.)

fixed, or any principle acknowledged by the party to be bound by which they can be ascertained."

A provision in a lease granting the lessee the "privilege of five years longer, he paying additional rent on revaluation, now fixed at \$500," no provision having been made as to when or how the revaluation should be determined, is too vague and indefinite to constitute a valid covenant for renewal. *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648.

A similar lease and holding to the same effect is *Pray v. Clark*, 113 Mass. 283, where a lease contained a stipulation for renewal at its expiration, the rent to be "proportioned to the valuation of said premises at said time."

In *McIntosh v. Miner*, 37 App. Div. 483, 55 N. Y. Supp. 1074, it was held that a contract whereby certain persons agreed to assume the management of an actor in a theatrical company for three seasons, which were to commence at certain times "and to continue as long as the same may be mutually agreed upon," is too indefinite to be enforceable. But see *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, and *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359, sufficiently set out in *SLADE v. LEXINGTON*.

It will be noted that a number of the above cases are not strictly within the scope of this note, but, because of their value in this connection, they have nevertheless been included here.

This note does not purport to deal with the question whether a contract containing a stipulation for renewal on terms to be agreed upon at that time is within the statute of frauds, or whether, in case the terms are to be agreed upon by third parties, it amounts to a submission of the question to arbitration.

G. V.

United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144.

Equity will specifically enforce a contract otherwise not enforceable, where the parties cannot be placed in *status quo*.

Rutgers v. Hunter, 6 Johns. Ch. 215; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 330; Kaufmann v. Liggett, 209 Pa. 87, 67 L.R.A. 353, 103 Am. St. Rep. 988, 58 Atl. 129; Schneider v. Hildenbrand, 14 Tex. Civ. App. 34, 36 S. W. 784; Strohmaier v. Zeppenfeld, 3 Mo. App. 429; Gunton v. Carroll, 101 U. S. 427, 25 L. ed. 985; Bristol v. Bristol & W. Waterworks, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359; Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161; Milnes v. Gery, 14 Ves. Jr. 400, 9 Revised Rep. 307; Wood, Land. & T. pp. 673, 674.

A contract must be construed and enforced in the light of the parties to it.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 29 Fed. 546; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Worthington v. Beeman, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232; Daggett v. Johnson, 49 Vt. 345; Hawkins v. Graham, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312; Gaslight & Coke Co. v. New Albany, 139 Ind. 660, 39 N. E. 462; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 570, 41 L. ed. 287, 16 Sup. Ct. Rep. 1173; Schmidt v. Louisville & N. R. Co. 101 Ky. 471, 38 L.R.A. 809, 41 S. W. 1015.

Hobson, J., delivered the opinion of the court:

The city of Lexington is not on a river, and there is no natural water supply near it. With the view to supplying the city with water, the Lexington Hydraulic & Manufacturing Company was incorporated by an act of the legislature of Kentucky, approved February 27, 1882 (Priv. Acts 1881-82, chap. 333). The scheme provided for was in substance this: The requisite quantity of land was to be bought, dams were to be built, and artificial lakes made, sufficient to supply the city with water. To do all this and put in the necessary mains, involved a large outlay. To justify the investment of capital in the enterprise, it was necessary that the company's rights should be fixed and certain. So, among other things, the charter contained the provision: "This act shall be and remain in force for the term of sixty years from and after its passage, but the legislature may at any time alter, amend, or repeal this act by a vote of majority of each branch thereof, but such alteration, amendment, or

repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act."

An ordinance of the city of Lexington, passed in December, 1883, authorized a contract between the city and the company for a supply of water on certain terms, for twenty-five years after the completion of the plant; and it was provided that the city was to have the option of purchasing the plant at a price to be fixed by three commissioners, one to be chosen by the city, one by the company, and the third to be chosen by these two. The ordinance also contained this clause: "At the expiration of twenty-five years from the date of completion and testing of said waterworks, if the city of Lexington does not, or has not, purchased said waterworks upon above terms, it shall renew the contract with said company for twenty-five years longer, upon terms as mutually agreed upon at that time."

The plant was completed about January 1, 1885. The term of twenty five years mentioned in the contract ended January 1, 1910, and as the city had grown during this twenty five years, the company's plant had been enlarged to meet the increased demands upon it; and thus a large sum of money had been spent. In the year 1909, after much conference between the city authorities and the water company, the contract between them was renewed for twenty five years longer, upon terms agreed upon between them. A contract to this effect having been entered into between the city and the water company, J. T. Slade and others, taxpayers of the city, brought this suit to enjoin the execution of the contract, on the ground, that the city authorities were without power to make it, under § 164 of the Constitution, which provides: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids."

The contract in question is for a term exceeding twenty years; there was no advertisement; no bids were received for the franchise of using the streets of Lexington; the franchise was not sold to the highest

bidder; there was no effort to comply with this provision of the Constitution.

Section 157 of the Constitution also provides: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

By the contract in question the city incurred an indebtedness exceeding the income and revenue provided for the year, without the assent of two thirds of the voters. The plaintiffs ask that the contract be adjudged void on both these grounds. The circuit court dismissed the petition, and they appeal.

To meet the ruling that the charter of a corporation constitutes a contract between it and the state, which the state cannot impair by subsequent legislation, the legislature, by the act of 1856, provided as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendments or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." Ky. Stat. § 1987 (Russell's Stat. § 4181).

It will be observed that this act did not affect charters where a contrary intent was therein plainly expressed and so when the charter of the Lexington Water Company was granted in 1882, it was provided that the act should remain in force for the term of sixty years, and that it should not be amended within thirty years, unless the company had violated the act, and then only by a majority of each branch of the legislature; the intent being to give the company an irrevocable charter for thirty years, and a charter for thirty years thereafter which could only be amended or repealed by a majority of each branch of the legislature. With the charter in this condition, it was provided in the contract between the water company and the city that the contract should continue for twenty five years; that the city should have an option to purchase the plant, but that if it did not purchase the

plant at the expiration of twenty five years, it should renew the contract with the company for twenty five years longer, upon terms as mutually agreed upon at that time. If this was a valid contract between the city and the water company, the city was under obligation, by the contract, either to purchase the plant at the end of twenty five years, or to renew the contract upon terms mutually agreed on. If there was a valid contract made in 1885, by which the city was bound to renew the contract, if it did not exercise its option to purchase the plant, the state of Kentucky could not thereafter impair this contract, for, by the Constitution of the United States, no state may impair the obligation of a contract. The state can no more impair the obligation of a contract by subsequently adopting a new Constitution than it can by legislative action. The provisions of the Constitution above quoted cannot therefore impair the obligation of a contract made before its adoption, and were not intended to have any such effect. The case before us, therefore, comes to this: Was there a valid and enforceable contract between the city and the water company, obligating the city to renew the contract for another term of twenty five years, when it did not exercise its option to purchase the plant?

It is insisted for the plaintiff that an agreement to renew a contract upon terms to be agreed on by the parties is a nullity, and that it is paradoxical to call such an agreement a contract. The general rule is that an agreement to make at a certain time such an agreement as the parties may then agree on is invalid, but to the general rule there is a well-defined exception. This was well illustrated in the case of *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243. In that case a railroad company took a right of way under a contract which contained this stipulation as to the use of the tracks by other railroads: "(9) Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

The grantee refused thereafter to agree with another road upon terms for the use of the tracks, and, a suit having been brought, the matter came before Justice Brewer of the Supreme Court sitting on the circuit; it being insisted there as here that the contract was void for uncertainty. Justice Brewer held the contract valid, and

referred the case to a special master to report reasonable regulations, terms, and compensation. The master having filed his report, it was confirmed, and a judgment entered pursuant to it. In disposing of the case, among other things, Justice Brewer said: "Does the omission of the details destroy the power of the court, and practically nullify the force of the stipulation, or was it the intent of the parties simply to contract for a right and leave with the court, in the absence of the agreement of parties, the full determination of all the details? I am aware of the rule that courts are not bound to relieve parties from mistakes or omissions, or to complete contracts which parties have left incomplete. But it is also true that oftentimes, at the making of a contract for a right, it may be impossible to determine details, or the changing situation of affairs may indicate that details also must be subject to modification, and therefore should not be definitely prescribed, and should be left to settlement by an agreement or decree at the time the right is insisted upon. In such cases if the right is absolutely contracted for, and the details are of a nature which courts may properly fix and settle, then, I take it, the courts should not hold the contract incomplete, but determine the right and also prescribe and settle the details." *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 29 Fed. 546. An appeal was taken from his judgment to the Supreme Court of the United States, and there the judgment was affirmed.

Disposing of the objection which is made here, the Supreme Court, among other things, said: "Paragraph 9 is imperative. It provides that the county company 'shall permit' other railroads to use its right of way. This is to be done 'under such reasonable regulations and terms as may be agreed upon,' and 'upon such terms and for such fair and equitable compensation to be paid' to the county company 'therefor as may be agreed upon by such companies.' Not only are the regulations and terms to be reasonable, but the compensation is to be fair and equitable. Although the statement is that the compensation is to be such 'as may be agreed upon by such companies,' yet the statement that it is to be 'fair and equitable' plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a 'fair and equitable' compensation therefore is to determine it by a court of equity. Such is, in substance, the agreement of the parties. The provision

cannot be construed as meaning that, if the parties do not agree, there is to be no compensation, and that, because there can in that event be no compensation there is to be no enjoyment of the right of way. In this view it cannot be said that the court is making an agreement for the parties which they did not make themselves. . . . In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespective of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances. . . . The want of mutuality is urged when the appellants are called upon to comply with the covenant, which is valuable to the city of St. Louis and the public whom that city represents. Such want of mutuality is alleged to consist in the inability of the appellants to prevent other railroads which may use the right of way from discontinuing such use, and in the fact that the contract did not specify the period during which the other railroads should be required to use the right of way. But we think that there is no such want of mutuality as should interfere with the enforcement of the contract." *Joy v. St. Louis*, *supra*.

A like conclusion was reached by the supreme court of Pennsylvania in *Kaufmann v. Liggett*, 209 Pa. 87, 67 L.R.A. 353, 103 Am. St. Rep. 988, 58 Atl. 129, where there was a provision in a lease that there should be a renewal on terms to be fixed by persons chosen by the parties. The lessee erected valuable improvements, and, at the end of the term, the landlord refused to choose an arbitrator, and attempted to take possession of the premises, with the improvements which the tenant had erected. The court enforced the agreement. It is said: "The real subject-matter of the contract being a right to the renewal of the leases, and fixing of the rent being only secondary, the terms as to rental being in substance and effect that the rent shall be a fair one, fixed by an impartial tribunal,—for that is all that the clause as to fixing the rent means,—has equity jurisdiction? We think it has. . . . The right of renewal constituted the substantial element in this portion of the agreement. It was that feature which, in great measure,

justified the lessees in erecting upon the premises a large and costly building adapted to the needs of their business."

In *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359, the question we have here came before the supreme court of Rhode Island, from the standpoint of the water company. There the agreement was that the town might purchase the waterworks for a fair and reasonable price to be agreed upon by the parties or fixed by arbitrators appointed for that purpose. The town elected to purchase, but the water company refused to fix a price or to name arbitrators, insisting that the contract was void. The court held the contract enforceable. It said: "In such a case the courts hold that the manner of determining the price is a matter of form rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other."

A like conclusion was reached in *Schneider v. Hildenbrand*, 14 Tex. Civ. App. 34, 36 S. W. 784; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Rutgers v. Hunter*, 6 Johns. Ch. 215. See also *Pom. Eq. Jur.* §§ 148-152.

It will be observed that the contract before us is no less mandatory than the contract in the Joy Case. The language here is that at the expiration of twenty five years, if the city of Lexington has not purchased the waterworks "it shall renew the contract with said company for twenty five years longer." The parties evidently meant that the contract between the city and the water company should be carried out upon the terms agreed on for twenty five years, but it was contemplated that the city would grow, and what were reasonable terms then might not be reasonable terms in twenty five years, under changed conditions; and so, they provided that the contract should be renewed, but the terms of the renewal were to be agreed on at the end of the twenty five years. The water company has invested a large sum of money upon the faith of its contract rights here, and the case is not substantially different from that of a tenant who has built an extensive improvement upon a piece of land under a contract that his lease is to be renewed. A court of equity will not allow injustice to be done or one to reap where another has sowed, upon the faith of a contract like this. At the end of twenty five years the water company was as much bound to renew the contract as the city was bound. The plain meaning

of the writing is that the contract is to be renewed at the end of twenty five years. It could not be renewed by one alone; so it is evident that both parties were bound to renew. The only distinction between this case and the Joy Case is that in the Joy Case the agreement used the words "reasonable and equitable terms to be agreed on," and here the words "reasonable and equitable" are not used. But the sense is manifestly the same. If the words "reasonable and equitable" had been used, they would have added nothing to the sense, and the rule is that the omission of what is necessarily implied is immaterial. The water company by its charter was bound to serve the city on reasonable terms. The council, acting for the city, could only demand of the water company the services contemplated in its charter on reasonable terms. So, when the parties made the stipulation that they would renew the contract for twenty five years longer, upon terms as mutually agreed upon at the time, it necessarily meant that the agreement was to be made on reasonable terms. Neither of the parties could force what changes twenty five years would bring about. Neither could tell then what would be reasonable terms at the end of twenty five years, and so the agreement was expressed as it was. The parties have at the end of twenty five years agreed upon reasonable terms, and, the city being bound by its contract to renew, the property right of the water company to a renewal for twenty five years was not taken away or affected by the provisions of the present Constitution of the state, subsequently adopted.

Judgment affirmed.

LOUISIANA SUPREME COURT.

MRS. EMMA MAY, Appt.,

v.

SHREVEPORT TRACTION COMPANY.

(127 La. 420, 53 So. 671.)

Carrier — separation of white and colored passengers — mistake — liability.

1. The discretion vested in street railway companies and their officers and agents by

Headnotes by MONROE, J.

Note. — *Carriers: insulting passenger by suggesting he belongs in the colored compartment as an actionable wrong.*

While it has been held that to call a person of the white race a negro is slanderous (see cases cited in brief for appellant

act No. 64 of 1902, with regard to the assignment of the white and colored races, respectively, to separate compartments in street cars, is to be exercised by them at their own peril, and they, and not the sufferers, are liable for the consequences of their mistakes or their abuse of such discretion.

Same — duty to protect.

2. A carrier of passengers is as much bound to protect them from humiliation and insult as from physical injury.

Same — calling white person "negro."

3. To apply the term "negro" to a white person is humiliating and insulting, and a suggestive question, such as, "Don't you belong over there?" addressed to a white person by the conductor of a street car, who points to the seats reserved for negroes, is but little less so. In either case, and whether the language used be heard by others or not, an action in damages will lie against the carrier.

(November 28, 1910.)

in MAY v. SHREVEPORT TRACTION Co.), apparently the only other case definitely holding a carrier liable for insulting a passenger by declaring or intimating that he belongs in the colored compartment is *Wolfe v. Georgia R. & Electric Co.* 2 Ga. App. 499, 58 S. E. 899, cited in MAY v. SHREVEPORT TRACTION Co. In that case the court discusses at length the question as to whether or not such action on the part of the carrier's servant is insulting and actionable, and says: "The question has never heretofore been directly raised in this state as to whether it is an insult to seriously call a white man a negro, or to intimate that a person apparently white is of African descent. We have no hesitation, however, after the most mature consideration of every phase of the question, in declaring our deliberate judgment to be that the wilful assertion or intimation embodied in the declaration now before us constitutes an actionable wrong. We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen, either by legislation or by judicial decisions, is repugnant to every principle underlying our Republican form of government. Nothing is further from our purpose. Under our benign institution, 'every man is the architect of his own fortune;' every citizen, white or black, may gain, in every field of endeavor, the recognition his associates may award. That is his right and his own concern. But the courts can take notice of the architecture without intermeddling with the building of 32 L.R.A. (N.S.)

A PPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Caddo in defendant's favor in an action brought to recover damages for wrongfully assigning plaintiff to the negro compartment of a street car. Reversed.

Statement by Monroe, J.:

Plaintiff sues for damages on the ground, as stated in her petition, that she boarded one of defendant's cars in which there were a number of passengers, and, having taken her seat in the compartment assigned to white passengers, and paid her fare, she was asked by the conductor, "Don't you belong over there?" pointing to the seats reserved for negro passengers, and designated by a large sign marked "Colored;" that petitioner, with great surprise, asked him what he meant, and the conductor repeated in a loud and rough tone of voice, "You are in the wrong seat; you belong over there," again pointing to the seats set aside for

the structure. It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality."

A further reason for holding that to intimate that a white person has negro blood in his veins is insulting, and one which would apply equally well in case a colored person was charged with having white blood in his veins, is given by the court as follows: "Keeping in view the further fact that a pure black man cannot be mistaken for a white man, and the fact that intermarriage between the races has been continuously forbidden in this state, to charge a white man, even though of dark skin, with being a colored man, or a colored man, even though of fair skin, with being a white man, is to impute the odium of illegitimacy. Under the decisions of this state it cannot be questioned that to make such a charge (either directly, or by intimation easily understood by the bystanders) would be an aggravated insult." Ibid.

In addition to these reasons, another which would apply to either white or colored persons is found in the fact that by statute it is a misdemeanor for a person to remain in any car or apartment other than that to which he is assigned, and falsely to charge a person with occupying a seat not assigned to his race is to charge him with the commission or attempt to commit a misdemeanor.

Wolfe v. Georgia R. & Electric Co. differs from MAY v. SHREVEPORT TRACTION Co. in that in the former it is held that if the conductor, in the exercise of his duties in enforcing the separation law, uses extraordinary diligence or extreme care and caution to prevent mistaking a white person for a negro, or *vice versa*, and such a mis-

negro passengers. She alleges that the attention of the passengers was attracted, that they stared at her with suspicion and contempt; and that she felt much humiliated and embarrassed. She further alleges that she caused the conductor to be arrested; that he was fined; that defendant's manager and train master and the same conductor thereafter further abused her by declaring publicly that she frequently rode in the colored compartment of the car, and have libeled her by causing to be published in a newspaper the statement: "Mrs. May boarded McCoy's car on Thursday afternoon (Dec. 24, 1908), and took her seat behind the 'colored' sign." And by publishing in another paper the statement: "Mrs. May, once before, rode in the negro department."

She alleges that she is of the Caucasian race, and that the matter complained of has injured her in various ways, which she sets out in detail. None of the passengers to whom plaintiff refers in her petition appeared as witnesses in the case, save a lady who testified that she was seated near the front of the car, whilst plaintiff was near the rear end, and that, though she heard plaintiff "jawing" a good deal at the conductor, she did not hear what he said. Plaintiff's version of the matter as given in her testimony differs from that given in her petition, in that she says that the conductor, having received her fare, said: "'You belong over there.' And I was greatly surprised, and I asked him what he said. I am hard of hearing. And he goes on up the car and receives two more fares, and, as he came back, I says: 'Young man, what did you say? What do

you mean?' And there was a gentleman sitting over on the seat opposite me, and I looked over at that man, and I says: 'That man is drunk or crazy,—must be crazy.' This frustrated me, so I got off the car and went and had him arrested,—went to Judge Fullilove's office." At another time she tells the story as follows: "When he came around to me and got my fare, he received the fare, and says: 'You belong over there.' I could not hear very good, and I says: 'What did you say?' He did not answer me, but went on and received two more fares, and, when he came back, I approached him again, and I says: 'What do you mean?' He says: 'You are in the wrong seat. You belong over there. You are a negro woman.' Pointing to the negro seats, seats reserved for negroes, he says: 'You are a negro woman.'"

Our conclusion, after considering the statements above given, the allegations of the petition, which were predicated upon information obtained from plaintiff, the testimony of Messrs. Wise & Freyer (of the law firm by which defendant was represented before Judge Fullilove), the testimony of the judge, himself, as to the "trend" of the conductor's testimony on the occasion of his trial in the city court, and the testimony of the conductor as given in this case, is that what took place was about as follows: Plaintiff, having taken her seat in that part of the car assigned to white passengers, and having paid her fare, was asked by the conductor, "Don't you belong over there?" he at the same time pointing to the seats behind the sign "Colored," intended for the use of negroes. Plaintiff being a little deaf, and surprised at the

take occurs notwithstanding such care, the carrier will not be liable, while the latter holds that the carrier and its servants must determine the question at their peril.

In *San Antonio Traction Co. v. Lambkin*, — Tex. Civ. App. —, 99 S. W. 574, and *San Antonio Traction Co. v. Davis*, — Tex. Civ. App. —, 101 S. W. 554, cases growing out of the same transaction, where recoveries of damages were permitted for insulting language and conduct by a street railway conductor toward passengers, while it does not clearly appear from the cases as reported what constituted the insulting language or conduct, it is fairly inferable from the opinions, that it involved, in part at least, an intimation that the plaintiffs belonged in seats assigned to colored persons.

In *Little Rock R. & Electric Co. v. Putsche*, 84 Ark. 623, 104 S. W. 554, damages were claimed because defendant's conductor called plaintiff a negress and demanded that she sit among the negroes; she did not accede to the demand and was not further molested. Recovery was denied on 32 L.R.A. (N.S.)

the broad ground that damages could not be recovered for mental suffering unaccompanied by physical or other injuries, so that the actionable nature of such conduct was not discussed.

In *Southern R. Co. v. Thurman*, 121 Ky. 716, 2 L.R.A. (N.S.) 1108, 90 S. W. 240, it was held that a carrier is not liable for mistakes in separating white and colored passengers unless, in doing so, the servant of the carrier did not act in good faith or in the exercise of ordinary care. It is clear that the court did not regard it to be insulting to mistake a white person for a colored person, for they say that the jury should have been instructed that if they found for plaintiff the measure of damages would be such sum as fairly to compensate her for the trouble in leaving the car and returning to it, unless the brakeman was insulting; and they further expressly say: "When a mistake is made, the carrier is not liable in damages simply because a white person was taken for a negro, or *vice versa*. It is not a legal injury for a white person to be taken for a negro." R. L. S.

question, as she understood it, said to him, "What did you say? What do you mean?" The conductor, however, moved on towards the front of the car, and collected some other fares, and, on his return, plaintiff repeated her question, and he repeated his, probably in a somewhat louder voice, again pointing to the seats reserved for negroes. Plaintiff had by that time become considerably excited, and the conductor was disposed to drop the subject, and did so, so far as he was allowed, but plaintiff continued talking at or to him, until, within a few minutes, she got off the car, and, as she states, went to the city court and preferred a charge upon which the conductor was arrested, and at a hearing, some days later, was fined \$5. When notified of the charge against him, the conductor went to the police station and surrendered. Whereupon defendant's manager signed a bond for his appearance, and, on that occasion, we think, he told the manager, in the presence of others, that he had seen, or thought he had seen, plaintiff on a previous occasion riding in the negro end of the car, but, being asked whether he could prove it, said that he could not. It seems probable that the statement to the effect that she had so ridden, as published in the papers, originated in that way. No attempt was made on the trial of this case to substantiate the statement, save that the conductor testified that he had seen either the plaintiff, or someone who looked like her, riding in the negro end of the car. We find no reason to doubt that there were passengers in the car who heard the conductor ask the question here complained of, and who understood the significance of his gestures in pointing to the seats behind the sign; the fact that the lady who testified on behalf of the company did not hear or see him being natural enough, as she was seated at the other end of the car (which was in motion and making considerable noise), with her face in the other direction. Why no other witnesses were produced we are, of course, unable to say, except that it appears that plaintiff is a very poor woman, and did not have the facilities for looking up witnesses and inducing them to come in to court that are possessed by others differently situated. We do not find that plaintiff has been injured in the estimation of her friends and acquaintances, by the incident here in question; but there is no doubt that she was very much mortified at the time, and has been very much distressed and disturbed since. The question, then, is: Do the questions and acts of the conductor, all the circumstances considered, furnish her a sufficient cause of action for damages against defendant? That

question was first submitted to a jury, who disagreed over it. It was then submitted to the judge of another division of the district court, who arrived at the facts, as we have done, by reading the typewritten testimony, and answered the question in the negative.

Messrs. John B. Files and Hugh C. Fisher, for appellant:

It is slander *per se* to call a person of the white race a negro.

Toye v. McMahon, 21 La. Ann. 308; Spotorno v. Fourichon, 40 La. Ann. 423; Upton v. Times-Democrat Pub. Co. 104 La. 141, 28 So. 970; Vinas v. Merchants' Mut. Ins. Co. 27 La. Ann. 367; Pattison v. Gulf Bag Co. 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

A common carrier is an insurer of the respectful treatment of its passenger.

Hutchinson, Carr. 595, 596; Thomp. Neg. 3186; Booth, Street Railways, 372.

A corporation is responsible in damages for slanderous and libelous statements of its agents and officers in regard to matters pertaining to company business.

Pattison v. Gulf Bag Co. 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224; Vinas v. Merchants' Mut. Ins. Co. 27 La. Ann. 367.

Messrs. Wise, Randolph, & Rendall, for appellee.

Monroe, J., delivered the opinion of the court:

The learned judge *a quo* has summed up the facts in an able written opinion, and there is but little difference between us on that subject. His view, however, was that the conductor was required by law to assign white people to one part of the car and colored people to another; that it was necessary for him, in some way, to obtain the information required for the discharge of that function; and that the method adopted was the least objectionable,—the conclusion being that the incidental hurt sustained by plaintiff should be regarded as *damnum absque injuria*. We are unable to concur in that conclusion. It is true that, where the law imposes a duty upon an individual or an officer, the courts are usually disposed to be lenient with regard to mistakes committed in the honest effort to discharge such duty; but the rule, which obtains wherever justice is recognized and administered, nevertheless, is that he who makes the mistake, and not the victim, shall, so far as practicable, be made to suffer the consequences. It is thus written in our law: "Every act whatever of man that causes damage to another

obliges him by whose fault it happened to repair it." Civil Code, art. 2315.

The particular statute relied on by defendant as imposing a duty upon it, and as thereby exempting it from liability for injury to others whilst attempting in good faith to discharge that duty, is act No. 64 of 1902, which requires that all street railway companies shall provide separate accommodations on their cars for the white and colored races, and that "no person or persons shall be permitted to occupy seats in cars or compartments other than the ones assigned to them on account of the race they belong to." The act imposes a penalty upon the passenger who insists on going into a compartment to which, by race, he does not belong, and a penalty upon the officer of the railway company who insists upon assigning the passenger to such compartment, and it empowers and requires the officers of "such street cars to assign each passenger to the car or compartment used for the race to which such passenger belongs." The officer, therefore, who insists upon assigning the passenger to the wrong compartment, violates the law, and thereby subjects himself to its penalty of a fine or imprisonment, as, also, to an action in damages by the passenger. Upon the other hand, if he does not insist in a proper case, he subjects himself to the penalty imposed by the act; and it is argued that, in order to protect himself from such penalty, he may, by his inquiries upon the subject, suggest that any white passenger in the car is a negro, or looks like a negro, or consorts with negroes, and intimate that he belongs in the negro compartment. In other words, no matter what may be the humiliation or injury inflicted upon the passenger, the carrier to which he has intrusted himself, and from which, under his contract and under the law, he is entitled to protection from injury to his person and feelings, is to be saved harmless from the penalties imposed by the act of 1902, and all responsibility as to the manner in which the discretion vested by that act in the carrier is exercised, so long as the carrier acts in good faith, without express malice, is to be shifted from its (the carrier's) shoulders to those of the passenger.

The position is wholly untenable on general principles, and has been, in effect, specifically repudiated by this court. Thus, under act No. 111 of 1890, providing for separate accommodations for the white and colored races on interstate traffic railroads, one Plessy, a passenger, was prosecuted and convicted for a violation of the act in insisting "on going into a coach to which, by race, he did not belong," and he brought

his case up, by habeas corpus, on the question of the constitutionality of the statute. In an exhaustive opinion, in which the statute was maintained, Mr. Justice Fenner, as the organ of this court, among other things, said: "It [the statute] undoubtedly imposes a severe burden upon railways; but the Supreme Court of the United States has held that they are bound to bear it. It impairs no right of passengers of either race, who are secured that equality of accommodation which satisfies every reasonable claim. . . . The discretion vested in the officer to decide primarily the coach to which each passenger by race belongs is only that necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise. It is a discretion to be exercised at his peril and at the peril of his employer." (Italics by the present writer.) Ex parte Plessy, 45 La. Ann. 87, 88, 18 L.R.A. 639, 11 So. 948, 951. A similar view has since been expressed by Mr. Justice Russell of the court of appeals of Georgia, in the main opinion in Wolfe v. Georgia R. & Electric Co. 2 Ga. App. 499, 58 S. E. 899 (decided in 1907), though upon that particular point, the two concurring justices disagreed with the organ of the court. Mr. Justice Russell said: "In no case where a passenger is mistreated can the fact that the servant of the company was carrying out the provisions of Penal Code be used as a defense, unless it appears that such servant was acting outside the scope of his authority. The conductor acts at the peril of his employer. The police power, the duty of executing the law requiring the separating of the races, is not placed upon the conductor as an individual, but upon a particular agent of the company, to enable the carrier to better perform its duty of protecting its passengers,—of protecting them not only from assault and physical injuries, but also from abuse and insult." The case thus cited was one in which it appeared that the plaintiff, a white person, was directed by the conductor of a street car in Atlanta, to occupy a seat among those which were assigned to the colored race, and in which it was held that the fact stated furnished a cause of action for damages against the company operating the car.

We have, then, the law, already quoted, which obliges him through whose fault damage is sustained to repair the damage; the established doctrine that he upon whom is imposed the duty of executing a law discharges that duty at his own peril, and the universally recognized rule (in support of which we need cite no authority) that a carrier of passengers is as much bound

to protect them from humiliation and insult as from physical injuries; and, applying law, doctrine, and rule to this case, we find that plaintiff, a white woman, was a passenger on a car operated by defendant, and that defendant, through its agent, the conductor, in the discharge of the duty imposed on it by the act of 1902, to assign passengers of the white and colored races, respectively, to different compartments, intimated to the plaintiff that in his opinion she was a negro, and that her proper place in the car was in the compartment assigned to the negro race. We now apply to the case another doctrine, which is also well established, to wit, that, to charge a white person, in this part of the world, with being a negro, is an insult which must, of necessity, humiliate, and may materially injure, the person to whom the charge is applied. This court has said: "Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. . . . This was treated as an actionable slander by the court organized under the Constitution of 1808. *Toye v. McMahon*, 21 La. Ann. 308." *Spotorno v. Fourichon*, 40 La. Ann. 424, 4 So. 71.

In a later case, a daily newspaper published a despatch in which the plaintiff was referred to as a negro, the mistake having been made by the telegraph operator, who converted the word "cultured" into "colored." An apology was published immediately (and it may here be stated that defendant's conductor and attorney called upon the plaintiff, in the instant case, the day following the incident out of which this suit has arisen, and that the conductor tendered an apology), and it was found by this court that there was no actual malice. Mr. Justice (now Chief Justice) Breaux, as the organ of the court, however, said: "The word complained of was provoking to an extreme degree. Inserted as it was in one of the daily papers, it was enough to arouse the most profound indignation of the most patient man. . . . But retraction and apology, even when timely, are not all that is needful to relieve a publishing company from liability; for injury resulting from oversight or negligence . . . may give rise to liability in damages. A newspaper would yet be liable, if an injurious untruth should find its way into its columns, though by the merest accident. The law seeks to protect the innocent who has been injured by libelous reports. The fact that a management may be all that can be expected to guard against unfortunate accidents is not, in itself, a protection from damages and a sufficient

defense." *Upton v. Times-Democrat Pub. Co.* 104 La. 143, 28 So. 971.

In the case of *Flood v. News & Courier Co.* 71 S. C. 112, 50 S. E. 637, 4 A. & E. Ann. Cas. 685, the supreme court of South Carolina, after a careful consideration of the subject (referring to the 13th, 14th, and 15th Amendments), said: "We therefore hold that these three Amendments to the Federal Constitution have not destroyed the law of this state, which makes the publication of a white man as a negro anything but libel."

It is true that, in the instant case, we do not find it sufficiently proved that the conductor, in direct terms, applied the word "negro" to the plaintiff; but we consider that immaterial. The question, "Don't you belong over there?" when the person asking it points to seats in a car set apart for negroes and designated by a sign, is sufficient to wound the feelings of the white person to whom it is addressed, and, for that wound, the defendant is bound to render an account. We are of opinion that there were passengers who heard the question, and, undoubtedly, the cause of the trouble was known to them all, or to the most of them, before plaintiff left the car. Defendant's counsel seems to think that no one would have known of the matter if plaintiff had not been somewhat deaf, and if she had remained silent, and that defendant is not responsible for either her deafness or her loquacity. The injury to plaintiff's feelings would have been inflicted, however, if no one but her had heard the suggestive question, and the fact that the conductor was compelled to raise his voice in order to make her hear a question which it was an insult to her for him to ask, and that she was unable to restrain her indignation, can hardly excuse the defendant.

Being of the opinion that plaintiff was not injured in the estimation of her friends and acquaintances or of the public at large, and that the only malice which can be attributed to the defendant is such as the law imputes from a wrongful act done without just cause or excuse, the only remaining question is as to the quantum of damages, and that we fix at \$250.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiff, Mrs. Emma May, wife of L. G. May, and against the defendant, the Shreveport Traction Company, in the sum of \$250, with legal interest thereon from the date at which this judgment shall become final until paid, and all costs.

MICHIGAN SUPREME COURT.

J. I. CASE THRESHING MACHINE COMPANY, Appt.,
v.

EZRA S. HUBER.

(160 Mich. 92, 125 N. W. 66.)

Sale — warranty — right to substitute parts.

1. A provision in a contract for sale of an engine, that in case it does not work as warranted the seller may substitute what shall fill the warranty, does not require the purchaser to postpone indefinitely the right to return the machine in case it is not made to work.

Same — return — placing on railroad property.

2. A provision in a sale of machinery giving the purchaser a right to rescind in case

the machine does not work as warranted, if he returns it "to the place where received," does not require him to place it upon the property of the railroad company through which it was delivered to him.

Appeal — wrong theory of recovery — error.

3. That one sued upon a note given for the purchase price of an engine was permitted to recover from plaintiff the value of certain other property delivered to plaintiff in exchange for the engine, upon the theory that there had been no acceptance of the engine, and therefore no consideration for the property, instead of upon breach of warranty of the engine, does not require a reversal, where the engine delivered was wholly worthless for the purposes for which it was purchased, although some parts of it might have had some value for old iron.

(March 5, 1910.)

Note. — Sale: construction of provision for return in the event of rescission for breach of warranty.**In general.**

The question under consideration should not be confused with the question as to the effect of such a clause in a contract upon the usual and ordinary remedies of a purchaser for breach of warranty or the question as to what will constitute a waiver by the purchaser of his right to avail himself of the privilege of returning the property, as neither of these questions is covered in this note.

The general doctrine has frequently been stated that a purchaser of property under a warranty which provides in substance that the property shall be returned to the place where received for breach of warranty, in order under this provision to rescind for breach of such a warranty, must strictly comply with this requirement, it being a condition precedent to his right to rescind. *Charter Gas & Engine Co. v. Barton*, — Ala. —, 39 So. 985; *Stone v. Victor Electric Co.* 36 Colo. 370, 85 Pac. 327; *Dickey v. Winston Cigarette Mach. Co.* 117 Ga. 131, 43 S. E. 493; *McCormick Harvesting Mach. Co. v. Allison*, 116 Ga. 445, 42 S. E. 778; *J. I. Case Threshing Mach. Co. v. Cook*, 7 Ga. App. 631, 67 S. E. 890; *Aultman & Co. v. Johnson*, 45 Ill. App. 313; *Burke v. Keystone Mfg. Co.* 19 Ind. App. 556, 48 N. E. 382; *Davis v. Goeßer*, 41 Kan. 414, 21 Pac. 240; *Frick Co. v. Fry*, 75 Kan. 396, 89 Pac. 675; *Osborne v. Traylor*, 8 Ky. L. Rep. 359; *Gaar, S. & Co. v. Hodges*, 28 Ky. L. Rep. 889, 90 S. W. 580; *Acme Harvester Co. v. Carroll*, 80 Neb. 594, 114 N. W. 780; *Sturtevant Mill Co. v. Kingsland Brick Co.* 74 N. J. L. 492, 70 Atl. 732; *Birch v. Kavanaugh Knitting Co.* 145 N. Y. 617, 59 N. E. 1119, affirming 34 App. Div. 614, 54 N. Y. Supp. 449; *Slauson v. Albany R. Co.* 3 Thomp. & C. 768, 1 Hun. 438, (affirmed in 60 N. Y. 32 L.R.A.(N.S.)

606); *Knoxville Traction Co. v. Manchester Mfg. Co.* — Tenn. —, 59 S. W. 173; *Haynes v. Plano Mfg. Co.* 36 Tex. Civ. App. 567, 82 S. W. 532; *Shearer v. Gaar, S. & Co.* 41 Tex. Civ. App. 39, 90 S. W. 684; *Hamilton v. Northey Mfg. Co.* 31 Ont. Rep. 468.

While the foregoing cases assert as the general rule the necessity of complying with the requirement of the warranty clause as to a return of the property in order to rescind for breach of warranty, in none of them was the question raised or apparently passed upon as to whether such a provision could be relied upon where the place or manner of return was ambiguous, or the requirement under the circumstances unreasonable or impossible to perform without committing a trespass or breach of the peace. While recognizing this general rule, *J. I. CASE THRESHING MACH. CO. v. HUBER* makes an exception thereto, where the provisions for the return are general, and literal compliance with them would require the purchaser to commit a trespass. This exception would seem to be founded in reason and in harmony with the rules relative to the construction of provisions relating to a penalty or forfeiture, where a forfeiture is claimed for a failure to comply with a provision uncertain or unreasonable as to the manner or place of performance.

The doctrine finds support in *Osborn v. Rawson*, 47 Mich. 206, 10 N. W. 201, which holds that where a contract for the sale of a machine required its return for breach of warranty, but was silent as to the manner and place of delivery, it could not be said that the purchaser was under any obligation to deliver the machine to the seller or his agent at the place of residence of either; and that upon notice of the machine's failure to work as warranted, it was the duty of the seller to remedy the difficulty, or, failing so to do, to deliver a perfect machine in its place.

APPEAL by plaintiff from a judgment of the Circuit Court for Eaton County and from an order denying a new trial in an action on a promissory note given for the purchase price of an engine. Affirmed

Statement by Ostrander, J.:

The action is assumpsit, the declaration containing the common counts, and setting out, under proper notice, a copy of a promissory note purporting to have been executed by defendant. The plea is the general issue, with notice that the note sued upon and another note and a certain portable engine were delivered by defendant to plaintiff for a certain other portable steam engine, which plaintiff agreed to thereafter deliver to defendant. "That instead of delivering the said engine which it agreed to deliver, the said plaintiff wholly failed in that regard, and because of such failure the defendant says that no consideration whatever passed to him

for said promissory notes so sued upon, or for said other promissory note so executed and delivered to said plaintiff simultaneous with said note so sued upon, which this defendant avers the said plaintiff has disposed of to some stranger to said contract, or for said Huber engine so delivered to said plaintiff as part payment for said engine which said plaintiff so agreed to, but failed to, deliver to this defendant. And this defendant says that he is entitled to a judgment against said plaintiff for damages because of the disposal and delivery of said note to some stranger to said contract, and also because of the conversion to its own use of said Huber engine by said plaintiff, and claims damages, by reason of the premises aforesaid, at the sum of \$2,000." The contract of the parties is in writing. By its terms the defendant agreed to receive "on cars on arrival, subject to the warranty below printed," and to pay for, an engine to be

Where a contract of warranty contains an agreement on the part of the seller to take the property back, and give a similar chattel in return, if the same does not fulfil the warranty, and does not contain any term or stipulation binding the purchaser to take advantage of the right to return the property afforded by this agreement, and there is nothing in the contract evidencing any agreement on the part of the purchaser to return the property for breach of warranty, the obligation as to the return is unilateral and rests upon the vendor, the purchaser being under no obligation to do so. *Moore v. Emerson*, 63 Mo. App. 137.

Another exception to the general rule is made in *International Harvester Co. v. Dillon*, 126 Ga. 672, 55 S. E. 1034, holding that where, by the terms of such a warranty, the purchaser of a machine is required to give the seller notice of its failure to comply with the warranty, and the seller is to send a man to make the machine work, and, if it fails to do so, the purchaser is to return the machine to the agent of the seller from whom it was received, the requirement that the purchaser should return the machine can be insisted upon by the seller only where he has received notice of the failure of the machine to work, and has sent a man who has failed to make it work; and hence, where, after receiving notice, he fails to attempt to make the machine work, there is no obligation resting upon the purchaser to return the machine in order to rescind.

So, where, as a condition precedent to the return of machinery for breach of warranty, the buyer is required to give the seller notice of the failure of the machinery to comply with the warranty, whereupon the seller agrees to test the machine and endeavor to make it comply therewith, and, if he fails to do so, to

permit the buyer to return it, and, in compliance with such contract, the buyer gives notice to the seller of the failure of the machine to comply with the warranty, and the seller does not attempt to give the machine another trial, the buyer then has the right, independent of the contract, to rescind, by reason of such breach and neglect; and for a rescission upon these grounds, the purchaser is not required strictly to follow the provisions relative to the return of the machine. *Warder v. Robertson*, 75 Iowa, 585, 35 N. W. 905.

Compare with *Hoover v. Doetsch*, 54 Ill. App. 65, where, under a substantially similar warranty, it was held that, if a seller failed to attempt to make the machine work after receiving notice from the buyer of its failure, it was then the duty of the buyer to return the machine, the failure of the seller to attempt to make the machine work not affecting the duty of the buyer under the warranty clause.

Where a warranty is positive and unequivocal that the machine sold is well made, of good material, and durable with proper care, and it is thereafter provided in a wholly distinct and separate paragraph that if, upon one day's trial, the machine does not work well, the vendee shall give immediate notice to the vendor, and there is also a provision for the return of the machine for the failure of the vendor thereafter to make it comply with the warranty, this requirement and provision have reference simply to the work of the machine, and not the manner in which it is made or the material therein used, or to its durability. And hence a return of the machine is not a condition precedent to the right of the purchaser to rely upon the first-mentioned warranty. *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161, 95 N. W. 886, dis-

furnished by the plaintiff. The engine was described in the order as: "One 20-10x10 horse power simple engine, traction, coal and wood burning, and the fixtures usually furnished with your engines. Also for the above machinery jacketed boiler." Defendant did receive and pay for the engine. It was of the kind and description called for by the contract. The contract stipulated that the "purchaser expressly waives all claims for damages on account of the nonfulfilment of said warranty." The agreed method of redress is the return of the engine, or of the defective part or parts, by the purchaser, free of charge, to the place where it was received, and notification to the plaintiff, which at its option may substitute what "shall fill the

warranty, or notes and money for such part immediately returned and the contract rescinded to that extent, and no further claim made on the company."

There was testimony tending to prove a trial of the engine; notification to plaintiff that it did not perform as it was warranted to do; repeated and continued and unsuccessful efforts of plaintiff's agents to make it perform. The engine was delivered to defendant, by rail, at Charlotte, Michigan. It was not returned to plaintiff there, but was left standing, unprotected, on premises of defendant. Plaintiff was notified of the fact, and that defendant "will not under any circumstances accept and pay for the engine." Defendant made no unconditional offer to return

tinguishing *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227.

Waiver by seller.

The seller of an article, under a warranty providing generally for its return or its return to a designated place, may, either expressly or by his conduct, waive his right to insist upon a strict construction and compliance by the purchaser with the provision for the return of the article as a condition precedent to his right to rescind the sale. *Kingman v. Meeks*, 56 Ill. App. 272; *McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85; *Padden v. Marsh*, 34 Iowa, 522; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537, same case on subsequent appeal, 94 Iowa, 144, 62 N. W. 700; *Massillon Engine & Thresher Co. v. Shirmer*, 122 Iowa, 699, 98 N. W. 504; *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417; *Frick Co. v. Fry*, 75 Kan. 396, 89 Pac. 675; *McCormick Harvesting Mach. Co. v. McNicholas*, 66 Minn. 384, 69 N. W. 36; *Keystone Implement Co. v. Leonard*, 40 Mo. App. 477; *Cornell v. Fox*, 95 App. Div. 71, 88 N. Y. Supp. 482.

As where the seller or his agent authorized in that regard, repudiates his agreement that the property shall be returned for breach of warranty, or notifies the purchaser that he will not receive the property if it is returned, or refuses to receive the property when offered to him, he thereby waives his right to insist upon the return of the property as a condition precedent to rescission by the purchaser for breach of warranty. *Kingman v. Meeks*, 56 Ill. App. 272; *McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85; *Padden v. Marsh*, 34 Iowa, 522; *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417; *Cornell v. Fox*, 95 App. Div. 71, 88 N. Y. Supp. 482.

Where the seller refuses to receive a machine which the purchaser tendered in rescission of the contract of purchase, in accordance with the provision of the warranty requiring the return of the machine

to the place where he received it, the purchaser is not thereafter obliged to return it to any particular place. *Kingman v. Meeks*, 56 Ill. App. 272.

The performance of the requirement of the warranty that for a failure of the machine to fulfil the warranty, it shall be returned by the purchaser to the agent of the seller from whom it was received, is excused where the purchaser offers to return it, and the agent informs him he need not do so as he will not receive it. *McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85.

And such a requirement is waived by the seller notifying the buyer that he will not receive the machine back. *Padden v. Marsh*, 34 Iowa, 522; *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417.

So, where the seller repudiates his agreement to permit the return of the property if it proves unsatisfactory, he thereby waives any actual return of the property by the buyer. *Cornell v. Fox*, 95 App. Div. 71, 88 N. Y. Supp. 482.

The right to insist upon a compliance with an agreement by a purchaser of a machine, to return it if it fails to work as warranted, is waived by the seller where, as a consideration for the settlement of the purchase price by the note of the purchaser, the seller agrees that he will thereafter make the machine do good work. *McCormick Harvesting Mach. Co. v. McNicholas*, 66 Minn. 384, 69 N. W. 36.

The right to insist upon the requirement that a machine be returned for breach of warranty is waived by the execution of a supplemental agreement whereby the relation of the parties is changed, and the buyer becomes the bailee of the property for the seller for a certain time, when the seller is to put it in condition to comply with the warranty. *Frick Co. v. Fry*, 75 Kan. 396, 89 Pac. 675.

So, where the failure to return a machine for breach of warranty is due to a request of the seller's agent, who desired further time to make it comply with the warranty, a strict requirement as to the return of the machine is waived. *Key-*

it. He received the engine in October. Efforts to make it perform were continued, at intervals, until December 4th. In May following plaintiff, in writing, offered to substitute another engine upon return of the one first sold to the place where it was received, the new engine to be delivered at the same place, and to accept new notes in place of those first taken. In reply defendant stated that he had purchased an engine, and could not accept the offer. He proposed a settlement which, according to his statement, involved a loss to himself of some \$200. In this letter, as in some written earlier, defendant takes the position that he never accepted the engine. A clause in the contract of the parties reads as follows: "It is further understood and

expressly agreed that general agents, so called, have no general agency powers, and any breach of this warranty or any omission on the part of the company does not confer any right of damage for delay or loss of work or earnings, or to other damages, and shall not affect the rights of the parties with respect to any other machinery sold the purchasers or any warranty of such other machinery, and no cause of action arising out of this contract or transaction shall be offset or counter-claimed against any liability of the purchaser arising out of any other contract or transaction. In no event shall the company be liable otherwise than for the return of cash and notes actually received by it."

stone Implement Co. v. Leonard, 40 Mo. App. 477.

And such a provision is waived by the seller, through its agents, requesting and insisting upon the purchaser keeping the machine and giving it further trial, they promising that if he did so, the seller would make it comply with the warranty. *Masillon Engine & Thresher Co. v. Shrimmer*, 122 Iowa, 699, 98 N. W. 504.

An agreement by the agent of the seller to receive back the machine at the farm of the buyer is a waiver of the clause requiring the machine to be returned for breach of warranty, where the purchaser had the right at the time to rescind. *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537, same case on subsequent appeal, 94 Iowa, 144, 62 N. W. 700.

A return is not waived when the buyer's failure to comply with this requirement is in reliance upon the promises or agreements of an agent of the seller, whom the buyer concedes was not authorized in that regard. *Bomberger v. Griener*, 18 Iowa, 477.

Where a contract of warranty provides for the return of the article sold for breach of warranty, the return to be to the local agent at whose place of business the purchaser received the property, he has a right to assume that the agent is authorized to arrange for the reception of the article, and a waiver by the agent of the return of the article is binding upon the seller. *D. M. Osborne & Co. v. Mullikin*, 88 Mo. App. 350.

Sufficiency of compliance with requirement.

It is a sufficient compliance with the requirement to return the machine to the place where received if the purchaser returns it to the same town where he received it, and notifies the agent where it is, who makes no objection to the place where it was left, it being impossible literally to comply with the requirement as to return, since the machine was unloaded from a car at the time it was delivered to the purchaser. *Briggs v. M. Rumely Co.* 32 L.R.A. (N.S.)

96 Iowa, 202, 64 N. W. 784. See in this connection *J. I. CASE THRESHING MACH. CO. v. HUBER*.

It is a sufficient compliance with the requirement that the buyer of a machine shall return it if it fails to comply with the warranty, if he does return it, but is induced to take it back by the agent of the seller promising to make it comply with the warranty, although, after the failure of the agent to make the machine work as it should, the buyer does not again return it, but merely informs the agent that he might come and take it away. *Hall v. Aetna Mfg. Co.* 30 Iowa, 215.

Under a contract for sale of a machine providing that if the machine did not work according to the warranty, the purchaser is to return it, and the seller is either to return the purchase price or furnish another machine which should comply with the warranty, the purchaser cannot rescind for a breach of the warranty by tendering the machine and demanding the surrender of his note given for the purchase price, but to rescind, he must tender the machine and demand either the return of his note or another machine which should comply with the warranty. *Pitt's Sons Mfg. Co. v. Spitznegle*, 54 Iowa, 36, 6 N. W. 71.

But *Skeen v. Springfield Engine & Thresher Co.* 34 Mo. App. 485, construing a similar provision, holds that it is sufficient for the purchaser to return the article and demand the purchase money paid by him, that the seller's right of election to return the purchase money paid or furnish another machine is a privilege accorded him by the contract, the exercise of which is not within the compulsory power of the purchaser, and hence a return of the machine and a demand of the purchase money does not deprive the seller of either option, but, on the contrary, affords him an opportunity under his contract to exercise the same.

An offer to return a machine sufficiently complies with a contract to the effect that, if the machine is not as represented, it is to be returned to the seller. *McCormick Harvesting Mach. Co. v. Knoll*, 57 Neb. 790, 78 N. W. 394.

The record shows the following:

We run the engine down home, and Mr. Thompson and the experts went down, and were standing around there. I says: "Now, Mr. Thompson, this is up to you." I says: "We can't do nothing with that engine. What do you want done with it?" He said: "Let the water out of it;" to let it stand here until there is something done about it. And then he made some remark there: "There is something rotten about it; I can't fire it, and," he says, "there is nobody can." So I let the water out of the engine, and it sets right there yet.

Mr. Huggett: We move to strike the answer out.

The Court: I understand Thompson is the state agent.

Mr. Huggett: He was state agent at that time.

Mr. Dean: He was acting directly with the factory at the time.

Mr. Huggett: The contract expressly provides that he has no right to make any statement whatever to bind the company or any other person in testing that machine.

The Court: It doesn't follow it binds the company; but certainly Mr. Huber has a right to say just what he did, and all that was done with the people who came

there representing the company. I will deny the motion to strike.

Mr. Huggett: My brothers are putting it in here with an attempt to bind the company.

Mr. Dean: No; we simply say we never accepted this. If we had not given it a fair test, then they would have said we never tested it. But after we tested it we refused to accept it.

The Court: I will say no statement of that kind can bind the company; but it is permitted by the court to show just what Mr. Huber has done with this engine and all that was done.

Mr. Huggett: Exception.

Witness continues: That is about all there was to it. After that we drew the water out, and then the next morning Mr. Thompson, I understood him to say, they telephoned to Racine and this expert that was from Racine they ordered him to go back the next morning and line this engine up, to see whether it was perfectly in line, every part of it properly where it should be; that is the way I understood it; whether it was properly constructed. This gentleman,—I really objected to that in the first place, because I didn't know nothing about,—particular about lining up an engine. I told him, I says: "If you will

Where the contract for the sale of a machine required the buyer to return it to the place from which it was received, if it does not work in accordance with the warranty, an offer to return it to the local agent from whom it was received is sufficient, where he told the buyers to store it in one of their sheds, which they did. *Gaar, S. & Co. v. Stark*, — Tenn. —, 36 S. W. 149.

Notice of a defect in a machine sold under a warranty that if it did not fulfil the warranty, the purchaser should return it, together with an offer to return the machine for such defect, is all that can be required of a purchaser, and he is not liable for the purchase price, although he retained the machine after the refusal of the seller to accept his tender of it. *Osborne v. Everett*, 2 Monaghan (Pa.) 347, 15 Atl. 723.

Compare with *Hoover v. Doetsch*, 54 Ill. App. 65, which holds that a mere offer to return a machine for breach of warranty is not a sufficient compliance with the contract on the part of the purchaser to return it, even though the agent at the time it was to be returned said that he would not receive it.

The purchaser of a machine under a warranty, coupled with a provision that if it did not work as warranted, it was to be returned to the seller, if he wishes to rescind for breach of this warranty, must comply with the terms of the contract, and return

the machine as therein stipulated; and it is not sufficient merely to write the seller to the effect that the machine has proved to be a failure, and that he tenders it subject to the seller's order, where the seller does not in any way acknowledge the letter. *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. 1004.

Merely writing the seller that the machine sold under such a warranty is not doing satisfactory work, and that it is held subject to the order of the seller, is not such a return of the machine as complies with the contract. *Dickey v. Winston Cigarette Co.* 117 Ga. 131, 43 S. E. 493.

Where the purchaser of a machine is to return it for breach of warranty, it is not sufficient for him merely to write to the seller and inform him that he will not keep the machine and ask for a return of his note, but not asking for any directions for the return of the machine; and the seller is under no obligation to answer the letter. *Zimmerman v. Robinson*, 118 Iowa, 117, 91 N. W. 918.

In *Jasper County Bank v. Barts*, 130 Mo. App. 635, 109 S. W. 1057, a provision that a machine warranted must be returned to the place from which it was purchased, if it does not fulfil the warranty, was held not satisfied by its return to another place, and the notifying of the seller of that fact and asking for instructions.

A. G. S.

be honest with me, I will submit to your lining this engine up; and, if you find it all right, say it is in regard to being in line, why all right," and they went at it and lined it up,—what they call it. After they got through he says: "There is nothing I could find out of place about the engine." So far as everything being in its place where it should be. And they went away then, and the next morning they came back with another man from Racine, with what they call an indicator. They wanted me to go to work and try this right out with them again, and fire it all up and fill it up with water and fire it up, and put it onto the separator and run it again. And Mr. Thompson told me the day before that he was done with, and that is all there was to it; he had his last man here that he had, and I was surprised at their coming back the next morning with another man. He said this man that was there—the expert that was there—was the foreman of the testing room in the factory; the man that was there the day he was trying to fire it. They did not do anything with the indicator. I says: "I ain't got no time to fool away trying this out again." I told them they could have the team and the water tank, and do what they were a mind to with the engine, but I wouldn't have anything more to do with it, after they said they got through with it.

Q. From the time that Mr. Thompson instructed you to draw off the water and leave the engine standing there, has that engine been at the order of the plaintiff?

Mr. Cook: I object to it as leading and calling for the witness's conclusion.

The Court: Answer.

Mr. Cook: Exception.

Mr. Dean: I will change that.

Q. Since Mr. Thompson left the engine and gave you instructions what to do with it, has the engine been at the order of the plaintiff?

Mr. Cook: Objected to for the same reason.

The Court: Overrule it.

Mr. Cook: Exception.

A. Certainly.

Q. Have you ever used it or exercised any acts of ownership over it?

A. No, sir; never done a thing to it."

The jury was instructed that there was no dispute about the order for the engine; that defendant paid in full for it; that he received it, and proceeded to use it in his business of threshing. They were told that the defense to the note was a want of consideration for the same, because the plaintiff failed to deliver the engine pur-

chased by defendant; that defendant also sought to recover the amount of the other outstanding note and interest and the value of the secondhand engine turned over to plaintiff in part payment for the engine furnished by plaintiff. In various parts of the charge this theory of defendant was presented to the jury, with the instruction that, if the company failed to make the engine such a one as was ordered, defendant was under no obligations to accept or pay for it. The court was requested by plaintiff to say to the jury: "(8) There is some claim on the part of the defendant, Huber, that he never received the engine described in the contract, and never accepted the engine that he did receive. In regard to that, you are instructed that the engine received by the defendant, Huber, at the depot at Charlotte, on or about September 20, 1907, was an engine of the kind or description called for by the contract or order, and the receipt of said engine by said defendant at the time and place aforesaid was an acceptance thereof by the defendant, subject to the warranty contained in the contract, and the title thereby passed to the defendant, Huber." This was refused, although the jury were instructed that the engine was of the kind or description called for by the order, and the receipt of the same by defendant was an acceptance, subject to the conditions of the warranty.

After being out for a time the jury returned into court for further instructions, when the following occurred:

The Foreman: We wish to ask for the ruling of the court as to the further responsibility of the defendant, Mr. Huber, if we find that he followed the instruction of Mr. Thompson as to drawing water from the engine and leaving it where requested or directed by Thompson. We want to know if Huber would be released from the contract and further responsibility if we should find he did as he was directed by the company's agent.

The Court: I don't know but I can give you that better right from the formal charge. Under the topic of the acceptance by Mr. Huber of the engine, I gave you this instruction, which I think possibly covers what you want: (X) "I further charge you that, if you find from the evidence that W. I. Thompson was at the time of the delivery of this engine, and at the time of the testing of the same, the agent for said plaintiff, and ordered and directed the defendant to draw the water from said engine, and to leave the engine where it then stood until an adjustment of

the matter between the plaintiff and the defendant, and if you find that the defendant followed such direction, then I charge you that such act would not be an acceptance of such engine, and the defendant would not be held liable for the purchase price thereof." Does that cover what you want?

The Foreman: I think that is what we wanted.

They returned a verdict for defendant for \$1,133.50. Motion for judgment for the note sued upon *non obstante* was made and overruled. A new trial was refused.

Messrs. Huggett & McPeck and Cary, Upham, & Black, for appellant:

Return of the article must be made where the contract provides, in order to defend an action for the purchase price for breach of warranty.

Hull v. Belknap, 37 Mich. 179; McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636, 31 N. W. 561; Horner v. Fellows, 1 Dougl. (Mich.) 51; Otto v. Braman, 142 Mich. 185, 105 N. W. 601; McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445, 42 S. E. 778; Dickey v. Winston Cigarette Mach. Co. 117 Ga. 131, 43 S. E. 493; Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62.

One cannot avail himself of those parts of a contract or deed which are beneficial, and, at the same time, reject the parts that are not beneficial.

16 Cyc. Law & Proc. p. 791; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42.

Defendant must prove that he complied with all of the conditions of the warranty to be performed on his part.

Westbrook v. Reeves, 133 Iowa, 655, 111 N. W. 11; Nichols & S. Co. v. Chase, 103 Wis. 570, 79 N. W. 772; J. I. Case Threshing Mach. Co. v. Vennum, 4 Dak. 92, 25 N. W. 563.

It devolved upon him to return the engine, according to his agreement, to the place where he received it, and to give the company the option to replace it with a perfect machine or return him his notes. This was his sole remedy.

International McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445, 42 S. E. 778; Harvester Co. v. Dillon, 126 Ga. 672, 53 S. E. 1034; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62; Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123; Nichols & S. Co. v. Miller, 76 Neb. 809, 107 N. W. 1010; Dickey v. Winston Cigarette Mach. Co. 117 Ga. 131, 43 S. E. 493; Gaar, S. & Co. v. Hodges, 32 L.R.A. (N.S.)

28 Ky. L. Rep. 889, 90 S. W. 580; Otto v. Braman, 142 Mich. 185, 105 N. W. 601.

Application for rehearing.

Mr. John B. Simmons, of counsel, also for appellant:

The contract is not unreasonable.

Davis's Sons v. Butrick, 68 Iowa, 94, 26 N. W. 27; Davis's Sons v. Robinson, 67 Iowa, 355, 25 N. W. 280, 71 Iowa, 618, 33 N. W. 132; Paulson v. D. M. Osborne & Co. 35 Minn. 90, 27 N. W. 204; Berlin Mach. Works v. Marbury Lumber Co. 146 Ala. 542, 40 So. 951.

Where the contract provided that the purchased chattel, if not satisfactory or not in compliance with the warranty, should be returned by the purchaser "to the place where received," failure to return the articles as agreed is fatal to the purchaser's rights under the contract.

Davis v. Gosser, 41 Kan. 414, 21 Pac. 240; J. I. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. Rep. 1862, 72 S. W. 356; Gaar, S. & Co. v. Hodges, 28 Ky. L. Rep. 889, 90 S. W. 580; Wisdom v. Nichols & S. Co. 29 Ky. L. Rep. 1128, 97 S. W. 18; Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227; Avery Planter Co. v. Peck, 80 Minn. 519, 83 N. W. 455, 1083; 86 Minn. 40, 89 N. W. 1123; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62; Nichols & S. Co. v. Miller, 76 Neb. 809, 107 N. W. 1010; Heagney v. J. I. Case Threshing Mach. Co. 4 Neb. (Unof.) 745, 96 N. W. 175; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; J. I. Case Threshing Mach. Co. v. Patterson, — Ky. —, 125 S. W. 287; J. I. Case Threshing Mach. Co. v. Combs, — Ky. —, 125 S. W. 289; Reeves v. Lewis, — S. D. —, 29 L.R.A. (N.S.) 82, 125 N. W. 289.

A contract is not invalid, nor is the promisor discharged, merely because it turns out to be difficult, unreasonable, dangerous, or burdensome.

9 Cyc. Law & Proc. p. 625; Lawson v. Cobban, 38 Mont. 138, 99 Pac. 128; Ptacek v. Pisa, 231 Ill. 522, 14 L.R.A. (N.S.) 537, 83 N. E. 221; McCormick v. Jordon, 65 W. Va. 86, 63 S. E. 778; Michigan Pipe Co. v. Michigan F. & M. Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; Perkins v. Washington Ins. Co. 4 Cow. 645.

Messrs. Garry C. Fox and Frank A. Dean for appellee.

Ostrander, J., delivered the opinion of the court:

The contract of the parties is one of sale of a chattel. The engine was bought and paid for. Title to it passed to the vendee, and at any time he might have sold it to another. The engine was sold

with express, but conditional, warranty. A trial of the engine was required; notice of improper performance or of defects was required, and it was one of the conditions that the seller, at its option, might return the purchase price or replace the engine, or any part of it. The vendee was obligated to render friendly assistance to efforts of the vendor to make the engine perform as it was warranted to do. Another condition was that the vendee should return the machine to the place where he received it. There was the necessary trial and the notification. It will be assumed, for the purposes of this discussion, that the engine was not as warranted. Reasonable friendly assistance was furnished by the vendee. It would be wholly unreasonable to require the vendee to indefinitely postpone his right to return the machinery, meantime assisting the vendor, whenever called upon, in efforts to make the engine perform. What the vendee did not do was to return the engine to Charlotte.

The vendee has been permitted to recover from the vendor the entire purchase money and interest, not upon the theory of a recoupment of damages for breach of the warranty, but upon the theory that there had been no acceptance of the engine, and that consideration for the purchase price had wholly failed. The question is whether, nevertheless, the judgment may be and ought to be sustained. I think it ought to be affirmed, for the following reasons: The condition that the vendee shall return the machinery "to the place where received" is one which may be reasonable and enforceable in many cases. If the vendee receives the chattel from an agent of the vendor, at a warehouse maintained by the vendor, the condition may be specific enough, and in such cases it must be complied with. But when machinery is received from a railroad company, upon the premises of the company, how shall the vendee comply with the condition? No other place of return is suggested in the brief for the plaintiff. He ought not to be required to commit a trespass in order to comply with a condition which is imposed for the benefit of the vendor. He ought not to be required to negotiate with the railroad freight agent for permission to leave a traction engine on the premises of the company. He ought not to be required to assume the position of a consignee of the machinery, or to pay charges. In principle the point is ruled by *Osborn v. Rawson*, 47 Mich. 206, 10 N. W. 201, and *Westinghouse Co v. Gainor*, 130 Mich. 393, 90 N. W. 52. This ruling renders unimportant the contention that the directions

of plaintiff's agent, testified to by the defendant, as to the disposition of the engine changed or varied the contract. There was testimony tending to prove that the engine was without value for the use for which it was purchased. It is unimportant that for old iron it may have some value, or that it may be dismantled, and parts of it be sold or used elsewhere. We are therefore able to say that the real issue was in fact tried without any error which would have affected the result if it had been tried upon a proper legal theory. No other or different testimony would have been, or could properly have been, produced by either party. Defendant is in no position to accept the result and deny to the plaintiff the right to take the engine. Upon the facts found by the jury, costs must, in any event, have been paid by the plaintiff. Under the circumstances we do not feel obliged to reverse the judgment, and to order a new trial.

The judgment is affirmed.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

JAMES H. GARRISON

v.

UNION TRUST COMPANY, Admr., etc., of
Kittie Levering, Deceased, Plff. in Err.

(— Mich. —, 129 N. W. 691.)

Gift — return to donor — effect.

1. A gift of a ring, completed by delivery and acceptance, is not affected by the fact that it is lent by the recipient to the donor, and retained in his possession until his death.

Evidence — declarations — gift.

2. Evidence of declarations of an alleged donor is admissible as corroborative of evidence of the gift.

(February 2, 1911.)

Note. — Retention or resumption of possession by donor as affecting gift.

It is not the purpose of this note to consider what constitutes delivery of a gift, but assuming that delivery is necessary to complete a gift, and that there has been such delivery as, without more, would make a gift complete, the question is, What is the effect of the retention or resumption of possession thereafter by the donor? Those cases have been excluded in which a delivery by the donor to himself, as trustee for the donee, is held to be a sufficient delivery to complete the gift, as in such cases there is no actual change of possession, and continued possession of the donor cannot affect the gift.

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action of replevin to recover possession of a ring. Affirmed.

The facts are stated in the opinion.

Messrs. Devine & Snyder, for plaintiff in error:

Where the claim of a gift is not asserted until after the death of the alleged donor, it must be sustained by clear and satisfactory evidence of every element which is required to constitute a gift.

Denigan v. Hibernia Sav. & L. Soc. 127 Cal. 137, 59 Pac. 389; Robinson v. Mutual Sav. Bank, 7 Cal. App. 642, 95 Pac. 533; Schneider v. Schneider, 122 App. Div. 774, 107 N. Y. Supp. 792.

Mrs. Levering not only retained entire

It seems clear that while delivery is necessary to effect a valid gift, it is not necessary that the donee should afterward retain actual possession of the subject of the gift. Ivey v. Owens, 28 Ala. 641; Shepard v. Shepard, — Mich. —, 129 N. W. 201; Gannon v. McGuire, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7.

So, an absolute and completed gift of several securities is not affected by the fact that the donee gives coupons and securities into the donor's possession, and that the latter collects interest and executes extensions in his own name, returning the securities to the donee. Martin v. Martin, 170 Ill. 18, 48 N. E. 694.

"When it appears that the donor has relinquished all dominion and control over the property as owner, and parted absolutely with title, the mere fact that the donee allows possession to remain with the donor will not necessarily defeat the gift." Hall v. Simmons, 125 Ga. 801, 54 S. E. 751.

As said in GARRISON v. UNION TRUST Co., after a gift has been completed by sufficient delivery and acceptance, the donee may loan the subject thereof to the donor, or give him, as well as any other person, the mere custody of it for any purpose, without affecting the gift.

So, where one has made an absolute and complete gift of money to another, "the fact that the money was afterward loaned to deceased [the donor] does not show that it was not a gift." Stewart v. Whittemore, 3 Cal. App. 213, 84 Pac. 841.

"If the gift is complete, the whole title of the donor has passed from him to the donee, and the subsequent redelivery of the subject-matter of the gift to the donor to keep for the donee will not disturb the title of the latter in the thing given." Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054.

The mere fact that the donor has the subject of the gift in his possession does not necessarily show that no gift was intended, as "subsequent possession of the property by the donor is not necessarily incompatible with the investiture of the donee with the dominion over it. . . . Nor is

control and disposition over this ring, but actually recalled the gift and disposed of it again; and there having been no consideration given for it by the plaintiff, no action would lie to enforce it, and under these circumstances the gift is absolutely void.

Holmes v. McDonald, 119 Mich. 565, 75 Am. St. Rep. 430, 78 N. W. 647; Snyder v. Snyder, 131 Mich. 658, 92 N. W. 353; Chaddock v. Chaddock, 134 Mich. 48, 95 N. W. 972; Godard v. Conrad, 125 Mo. App. 165, 101 S. W. 1108; Sims v. Sims, 2 Ala. 117; Hunley v. Hunley, 15 Ala. 91; Bryant v. Ingraham, 16 Ala. 116; Busby v. Byrd, 4 Rich. Eq. 9; Chamberlain v. Eddy, 154 Mich. 593, 118 N. W. 499; Hobart v. Vail, 80 Vt. 152, 66 Atl. 820; Howe v. Ripka,

the subsequent possession of the donor conclusive evidence that there has been no delivery, or that the dominion over the property has not passed to the donee." Ivey v. Owens, 28 Ala. 641; Bone v. Holmes, 195 Mass. 495, 81 N. E. 290.

So, where one indorsed upon a mortgage a written assignment of the mortgage and the notes secured by it to his son, and delivered all the papers to the son as a gift, and told the mortgagor that he had given the notes and the mortgage to his son, but with the understanding that the donor was to have the interest on the notes so long as he lived, the fact that the notes were afterward given to him that he might receive the interest, and were found among his papers after his death, is not necessarily inconsistent with the hypothesis that the delivery of the papers was intended to take effect *in presenti* as a gift; nor does the fact that he afterward obtained possession of the notes for such purpose as matter of law establish a revocation or surrender of the gift. McNally v. McAndrew, 98 Wis. 62, 73 N. W. 315.

And "an executed gift [of wearing apparel and jewelry] is not necessarily revoked because the thing given subsequently comes back into the possession of the donor, whether with or without the consent of the donee." Whiting v. Ralph, 75 Conn. 41, 52 Atl. 406.

"Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes into the physical possession and control of the property without any retransfer of the ownership by the donee." Beaumont v. Beaumont, 81 C. C. A. 251, 152 Fed. 55.

Thus, a gift of bonds, completed by delivery and acceptance, is not affected by the condition that the donor is to have the coupons maturing during his life, for which purpose he rents a safe-deposit box in the name of himself and the donees, in which the donees put the bonds given to them, and the donor puts some coupons cut therefrom, and given to him by the donees,

199 Mass. 359, 85 N. E. 88; *Beebe v. Coffin*, 153 Cal. 174, 94 Pac. 766.

A gift cannot be made to take effect in the future. It would be but a promise to make a gift, and cannot be enforced.

Re Soulard, 141 Mo. 642, 43 S. W. 617; *Harris Bkg. Co. v. Miller*, 190 Mo. 640, 1 L.R.A. (N.S.) 790, 89 S. W. 629; *Hogue v. Bierne*, 4 W. Va. 658; *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353; *Shafer v. Manning*, 132 Ill. App. 570; *Stark v. Kelley*, 132 Ky. 376, 113 S. W. 498.

Evidence of declarations by the donor are not sufficient to establish the gift.

Campbell v. Sech, 155 Mich. 634, 119 N. W. 922; 20 Cyc. Law & Proc. p. 1225.

Messrs. Davis & Bromley, for defendant in error:

each retaining a key to the box. *Ibid.* The court said: "It is sufficient for the facts of this case to say, if the donor, with the clearly expressed intention of making a gift, make an actual delivery into the hands of the donee, the fact that the donor has lawful access to the depository of the thing given does not invalidate the gift, if the donee has also the same access to said depository, and has such control over the thing given that he may remove it at any time he chooses to do so."

And where a father has given certain securities to his sons, completing the gift by either actual or constructive delivery, with the intent to vest title in the donees, the gift is not affected by the fact that the subject thereof is thereafter kept in a safe in the house of the donor, to which safe the donor and donees all have free access at all times. *Shepard v. Shepard*, — Mich. —, 129 N. W. 201.

"It is well settled that if there has been an actual or constructive delivery of the subject-matter of the gifts, with the intent to vest title, the fact that the donor retains possession of the same for any purpose is not sufficient to defeat the gift." *Ibid.*

So, a complete gift of a slave by a father to his married daughter is not affected by the fact that the daughter, on account of her husband's objection to having the slave at their place, sent the slave back to the donor merely to keep for her benefit. *Mims v. Sturtevant*, 18 Ala. 359.

And a gift of slaves by a father to his infant son, completed by delivery to the latter or to someone for him, was not invalidated by the continued possession of the donor thereafter, where the donee was of very tender years when the gift was made, continued to reside with his father, the donor, had no guardian, and was controlled, both himself and the slave, by the donor, the possession of the father being regarded as the possession of the son. *Sewall v. Glidden*, 1 Ala. 52.

And a valid and complete gift of a note is not annulled by a redelivery thereof to the donor by the donee, to keep until the 32 L.R.A. (N.S.)

The court did not err in refusing to direct a verdict for the defendant.

The donor may constitute himself a trustee for the donee in an express trust, and in that case no further delivery of the gift is necessary to its validity.

20 Cyc. Law & Proc. pp. 1199, 1200; *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843; *O'Neil v. Greenwood*, 106 Mich. 572, 64 N. W. 511; *Crittenden v. Phoenix Mut. L. Ins. Co.* 41 Mich. 442, 2 N. W. 657; *Frank v. Morley*, 106 Mich. 635, 64 N. W. 577; *Bostwick v. Mahaffy*, 48 Mich. 342, 12 N. W. 192; *Harris v. Hopkins*, 43 Mich. 272, 38 Am. Rep. 180, 5 N. W. 318; *Davis v. Zimmerman*, 40 Mich. 24; *Ivey v. Owens*, 28 Ala. 641; *Whitford v. Horn*, 18 Kan. 455; *Conner v.*

latter calls for it, or to collect it for him. *Grover v. Grover*, 24 Pick, 261, 35 Am. Dec. 319.

Where one gives a promissory note to a trusted servant who has lived many years in his family, and tells her that he gives it to her, and as evidence of the fact, indorses it to her, and she accepts it, a completed gift is shown, although she allows him to retain its custody as her agent and protector, as the head of the family, and it is found among his papers after his death. *Royston v. McCulley*, — Tenn. —, 52 L.R.A. 899, 59 S. W. 725.

And a gift of a pocketbook containing notes, completed by delivery to the donee, the notes indorsed and the pocketbook wrapped in a paper marked for the donee, is not affected by the fact that the donee returns the package to the donor for keeping until some other time. *Brandon v. Dawson*, 51 Mo. App. 237.

Likewise, a gift of promissory notes, completed by delivery by the payee to the makers, his children, is not revoked by a subsequent redelivery of the notes to the donor and payee, on the same day, without any intent on the part of either donor or donees to revoke the gift, but under an agreement that the donor should take them back as the property of the donees, to hold upon the condition that if he should become poor, he should have the right to draw upon each of the donees *pro rata* for such amount as he should actually need for his support. *Marston v. Marston*, 64 N. H. 146, 5 Atl. 713.

And an executed gift of a note payable from a third person to the donor is not affected by the fact that the donee, upon demand, surrendered it to the executor of the donor after the death of the donor, without admitting his right to the note or proceeds. *Clinton v. McKeown*, 39 S. C. 21, 17 S. E. 504.

Where a gift of certain notes secured by trust deeds is completed by delivery, the donee's title is not destroyed or impaired by the fact that he subsequently gives possession of the notes to the donor for some purpose, without any intention of trans-

Hull, 36 Miss. 424; *Clinton v. McKeown*, 39 S. C. 21, 17 S. E. 504; *State Bank v. Johnson*, 151 Mich. 538, 115 N. W. 464.

Evidence of declarations and admissions of the donor is admissible as corroborative of other testimony.

Campbell v. Sech, 155 Mich. 638, 119 N. W. 922; 20 Cyc. Law & Proc. p. 1225.

Bird, J., delivered the opinion of the court:

The plaintiff, James H. Garrison, commenced an action of replevin against the defendant, as special administrator of the estate of Kittie Levering, deceased, to recover possession of a diamond ring, to which he claimed title by gift. His title was contested by the defendant, and the is-

sue was determined by a jury in favor of the plaintiff. Defendant asks this court to reverse the judgment of the trial court for several reasons, chief of which is that the court erred in refusing to direct a verdict for the defendant. It was the claim of plaintiff that Kittie Levering gave him the ring while he and his wife were on a visit to her home in Detroit, on February 8, 1905. It was Mrs. Garrison's birthday, and Mrs. Levering invited other relatives to dinner that evening. It is claimed that while at dinner Mrs. Levering gave him the ring. All the invited guests, save plaintiff, testified as to what was said and done with reference to the ring.

In determining whether the trial court was in error in refusing to direct a verdict

ferring title to him. *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed in 188 Ill. 363, 58 N. E. 950.

So, where one, during his last sickness, gave his wife certain money, completing the gift by delivering to her two pocketbooks containing the money, which she, at his request, had brought to him from a desk where he kept it, the gift is not defeated by the conduct of the donee in putting the money back in her husband's desk immediately after its delivery to her, manifestly because that was the place where her husband kept his money, and because she thought that it would be more secure there than in any other place in the house, and not with any intention to decline or revoke the gift, nor for the purpose of destroying or giving up her right to the money. *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157.

Nor is a completed gift of money affected by the fact that the donee subsequently transferred it back to the donor for the purpose of investing it for her, and that he took the money into his possession, and promised thus to invest it, and account to the donee for it. *Frank v. Morley*, 106 Mich. 635, 64 N. W. 577.

Where a father gives his son a deposit in the savings bank, delivering the bank book to him, the gift is not affected by the fact that the donee afterwards returns the book to the donor, and gives him permission to draw out money when he wants it. *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255, 44 N. E. 251.

And where one has given to another a definite portion of a fund in a savings bank, giving possession of the bank book to enable the latter to obtain possession of the money, "the return of the book to the donor for the sole purpose of enabling her to obtain the balance from the bank, without relinquishing the prior gift of the portion of the fund, would not invalidate or affect the previous executed gift." *Jacobs v. Jolley*, 29 Ind. App. 25, 62 N. E. 1028.

So, a completed gift of securities, made by a father to a son and daughter, is not affected by their merely giving such securities back to the donor, and asking him

to keep them, saying that they did not want the securities then, and would call for them and get them afterward when wanted. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

And a gift of a bond and mortgage, completed by delivery from the mortgagee to the mortgagor, is not cut down nor changed in any respect by the fact that the donee immediately handed the papers to the donor for safe-keeping. *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7.

Nor can a valid and completed gift of securities be defeated by the fact that the donor subsequently exercises certain control over such securities as a deputy in custody by written authority. *Reese v. Philadelphia Trust, S. D. & Ins. Co.* 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

So, a completed gift of a watch to a little girl is not affected by the donor's resumption of mere possession thereof, some months later, at the suggestion of the donee's father, to take care of it for the donee until she becomes older, which possession continues until the death of the donor. *Whitford v. Horn*, 18 Kan. 455.

It is not necessary in order to complete a gift of a horse by a husband to his wife that she shall continue in the sole possession thereof, but an actual delivery to her by him is sufficient, and "the mere possession and use of the horse afterwards by her husband did not divest or even impair her title." *Swindell v. Swindell*, 153 N. C. 22, 68 S. E. 892.

So, where one gave a horse and buggy to his minor daughter, who had always resided at home, and she thereafter took charge of the horse, and other members of the family were told by the donor to ask the donee's permission to use it, the fact that it remained in the donor's stable and was fed upon products of his farm does not defeat the gift. *Re Wachter*, 16 Misc. 137, 38 N. Y. Supp. 941.

And a gift of a calf, perfected by delivery and open, visible, and continuous possession by the donee for a year, cannot be defeated by an attaching creditor of the donor merely because the animal is there-

for the defendant, it will be necessary to review briefly the testimony of those present on that occasion.

Mamie Garrison, the wife of the plaintiff, testified that "while we were playing cards, we had our hands on the table, and she spoke up and she says: 'Well, Jim, we have all got rings on but you. Where is yours?' And he says, 'Well, I have not got any just now, Aunt Kittie,' and she says, 'How would you like to wear one like this?' He says, 'I think it is pretty fine,' and she says, handing—she took it off and handed it to him, and she says, 'Try it on,' and she says, 'I will give you this ring, Jim.' She says, 'It was a diamond that was in the stud that my husband, Harry, wore in the front of his shirt.' And Jim

then says: 'Oh, thank you, Aunt Kittie; that is awfully nice.' And he slipped it on, and he says, 'It don't quite fit,' and she says, 'You can easily have that fixed, made larger.' And he says: 'Oh, yes; I can. I have got a cousin in the jewelry business, that is an expert I think at doing such things as that.' And he says, 'I will appreciate it highly, Aunt Kittie, and shall always enjoy wearing it, and I am very thankful to you.' And she says, 'Jim, let me take it and wear it till I am through with it, but the ring is yours.' So he handed it back to her, and she put it on her finger, and ever afterwards she spoke of it as Jim's ring—"this is the ring I gave Jim." This testimony was corroborated by Seely Wolfe, a nephew of Mrs. Levering.

after returned to the possession of the donor. *Allen v. Knowlton*, 47 Vt. 512.

Where a father buys and presents to his minor daughter a piano, which she then has conveyed to his house, where she resides as a member of his family, and where the piano is under her sole and exclusive control, the simple fact that it is so kept in the donor's house, with his own furniture, will not affect the gift, or render the piano subject to the father's subsequently contracted debts. *Pierson v. Heisey*, 19 Iowa, 114.

And while subsequent possession of the subject of a gift by the donor is evidence of fraud against creditors, a parent's subsequent possession of a slave which he has given to a minor child who resides with him is not a badge of fraud, as possession under such circumstances is consistent with the donee's title. *Howard v. Williams*, 1 Bail. L. 575, 21 Am. Dec. 483.

And a gift of a slave by a father to his son will not be defeated in favor of subsequent creditors with notice by the fact that the donor retains possession after the gift. *Madden v. Day*, 1 Bail. L. 587.

In *Tucker v. Tucker*, 138 Iowa, 344, 116 N. W. 119, the court said: "It is needless to add that, where there has been a completed gift, the mere fact that naked possession has been acquired by the donor for the temporary purpose of enjoying the use only, as for the collection of interest on deposits in a bank, or the dividends on stock therein, as in this case, without intent to reinvest him with title, will not disturb it. . . . And, of course, any act of the donor after a completed gift, not consented to or acquiesced in by the donee, will not affect the title in the latter."

So, a gift of a chest of wearing apparel and jewelry by a father to his daughter, completed by a delivery thereof to a third person for the use of the daughter, is not invalidated by the fact that the donor afterward took some of the contents of the chest into his possession again. *Lucas v. Lucas*, 1 Atk. 270.

And where one gave a slave to his infant children, completing the gift by de- 32 L.R.A. (N.S.)

livering the slave for their benefit to their grandfather, who took and retained possession for them, the fact that the donor subsequently resumed possession cannot affect the rights of the donees, who, in consequence of their tender years, were incapable of authorizing or assenting to it. *Easley v. Dye*, 14 Ala. 158.

A gift of a slave, completed by a delivery to a third person as trustee for the donee, is not affected by the fact that the trustee immediately parts with all dominion and control over the slave to the donor, in whose possession he remains until the latter's death. *Conner v. Hull*, 36 Miss. 424.

And in *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242, it is held that a completed gift of a slave by a father to his minor son is not affected by subsequent possession and use by the donor, which cannot defeat a title once acquired.

Where there has been a bona fide gift of a horse, completed by the delivery from a son to his mother, living in the same home, the donee's title is not affected by subsequent possession by the donor, or by the latter's subsequent offer to give a mortgage on the horse as security for the payment of a buggy which he proposed to purchase. *Moore v. Cline*, 115 Ga. 405, 41 S. E. 614.

And a completed gift of an endowment life insurance policy upon the life of the donor, and payable to the donee, as beneficiary, in case of the death of the donor before the expiration of the endowment period, is not affected by the fact that the donor, without the consent of the donee, subsequently obtains possession of the policy from a third person with whom it has been deposited for safe-keeping, and has the name of the beneficiary changed by the company. *McGlynn v. Curry*, 82 App. Div. 431, 81 N. Y. Supp. 855.

As a circumstance tending to negative an executed gift "the mere custody of the property [by the donor] after a complete gift in *presenti* has been made, is subject to explanation, and its chief importance is its bearing upon the question whether there

The following is the testimony of Della Wolfe, a niece of Mrs. Levering, who testified to subsequent statements of Mrs. Levering that she had given the ring to plaintiff: "This was Christmas Day, 1908, that we were at my aunt's for a Christmas dinner, and I was Santa Claus, distributing the presents, and she said we were all looking at our presents, after we got them—and she says, 'I didn't give anybody any Christmas presents this year because I was not able to get it,' and she turned to my brother-in-law, and she says, 'You have not forgotten I gave you this ring?' and he

says: 'No, auntie; I have not.' And she says, 'Well, it won't be long before you have it.'"

Mary E. Wolfe, a sister of Mrs. Levering, was present on this occasion. She gave testimony to the same effect as the foregoing.

Charles Fuller, a neighbor of plaintiff, ate his Christmas dinner at plaintiff's house in 1907. Mrs. Levering was also present, and made statements to him with reference to her having given the ring to plaintiff, as follows: "I think she spoke directly to me. I had on a ring, and I

was an executed gift." *Gannon v. McGuire*. 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7.

So, a donor's collecting the interest and dividends on securities given by him to his children is evidence of control over them, which, unexplained, would tend to prove the exercise of assumed ownership, but it is not inconsistent with the idea that he held the securities for the donees. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

And in *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290, the court said that the fact that the subject of the alleged gift (the bond) was found in the donor's box after his death was, of course, to be considered, but it was not necessarily decisive.

In *Adler v. Davis*, 31 Misc. 120, 63 N. Y. Supp. 875, holding that there was not sufficient evidence of a gift, the court said: "Although delivery is essential to perfect a gift, it is not necessary that the donee should retain the property in his possession. The subsequent possession by the donor, while it may in some cases tend 'to throw suspicion upon the transaction,' is not necessarily incompatible with the donee's dominion over the property, and if 'satisfactorily explained,' will not divest the donee of title to the property when once it has been acquired by him. . . . The plaintiff's theory of the facts may seem feasible enough, but has the continued possession by the donor, which throws 'suspicion on the transaction' as a gift, been 'satisfactorily explained away?'"

And in *Bowron v. de Selding*, 105 App. Div. 500, 94 N. Y. Supp. 292, holding that there was no evidence to show any intention on the part of the alleged donor to make a valid gift, the court said: "It is true after the gift has been perfected by delivery it is not necessary that the donee shall retain possession of the property, but it may be redelivered to the donor as the agent of the donee for safe-keeping; but it is equally true that where the donor is dead, and the thing given was in his possession at the time of his death, the clearest evidence of the gift is required. . . . No explanation of this fact is offered, and the intention of the parties as indicated thereby necessarily follows: viz., that both of them regarded it as her [the donor's] property."

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But "subsequent possession by the donor, while it may in some cases tend to throw suspicion upon the transaction as being in fraud of creditors, is not necessarily incompatible with the donee's dominion over the property; and, if satisfactorily explained, will not divest the donee of the title to the property when once it has been acquired by him." *Shepard v. Shepard*, — Mich. —, 129 N. W. 201; *Re Wachter*, 16 Misc. 137, 38 N. Y. Supp. 941.

"That circumstance [subsequent possession] is susceptible of explanation; and the facts that the donee is the donor's daughter, lives with him, and composes a part of his family, and that the subject of the gift is a slave, too young to be a source of profit or active service, or to be permanently separated from a family of slaves belonging to the donor, would be, prima facie, sufficient explanation of the subsequent control and possession of the donor, notwithstanding the donee might be over the age of twenty-one years." *Ivey v. Owens*, 28 Ala. 641.

And where one, by deed of gift, transfers to his stepdaughter all his interest in that portion of the estate of his wife's father to which his wife is entitled as a distributee, his subsequent possession of the property so conveyed is sufficiently explained by showing that such donee is a minor and lives with the donor. *Ector v. Welsh*, 29 Ga. 443.

Subsequent possession by the donor of the subject of an alleged gift is, of course, evidence to be considered in connection with all other facts and circumstances bearing upon the question whether there were in fact all the elements of an executed gift present. Thus, possession of a note by the payee at the time of his death is evidence tending to show that he has not made a gift of the note to the maker. *Oelke v. Theis*, 70 Neb. 465, 97 N. W. 588.

And in *Sims v. Sims*, 2 Ala. 117, in which the only question was whether the facts showed that certain slaves alleged to have been given by a father to his daughter were ever delivered by the alleged donor, the court said: "In concluding that the gift sought to be established wants an essential constituent, viz., delivery, we have been influenced by the consideration that the possession of the slave remained with the father."

A. C. W.

went out in the dining room and kitchen to smoke before dinner, and Mrs. Levering was there. She and Mr. Garrison were talking out there, and she says, 'Here is the ring I gave Jim,' and pointed to the ring on her finger, in comparison with mine."

To constitute a valid gift *inter vivos*, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and an acceptance thereof by the donee. 14 Am. & Eng. Enc. Law, 2d ed. p. 1015. In the foregoing testimony, every necessary element to constitute a valid gift *inter vivos* can be found. There is testimony that the deceased intended to and did give plaintiff the ring; that she delivered it to him and that he accepted it; and that afterwards she borrowed, or, as one witness said, she loaned it to wear until she was done with it. This testimony, if believed by the jury, would justify them in finding that the title to the ring was in plaintiff.

Counsel insists that, because the donor had the ring in her possession until her death, that fact shows conclusively that she intended no gift. After the gift was once completed and the title had passed to the plaintiff, he could loan it to her or to anyone else without affecting the validity of the gift. *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7; *Ivey v. Owens*, 28 Ala. 641; *Conner v. Hull*, 36 Miss. 424; *Clinton v. McKeown*, 39 S. C. 21, 17 S. E. 504; *Whitford v. Horn*, 18 Kan. 455; *Crittenden v. Phoenix Mut. L. Ins. Co.* 41 Mich. 442, 2 N. W. 657; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 131, 35 N. W. 853. In *Whitford v. Horn*, 18 Kan. 455, the facts were very similar to the one under consideration. One Nicklison gave a watch to a girl about twelve years of age and delivered it to her. She afterward returned it to him to keep until she was older. Nicklison had the possession of the watch when he died, and in a contest between his administrator and the girl, it was decided that it was a valid gift. In *Ivey v. Owens*, 28 Ala. 641, where the donor repossessed himself of the gift until the donee was older, the court said: "Although an actual delivery is indispensable to perfect a parol gift, . . . yet it is not necessary that the actual possession should be afterwards retained by the donee. Subsequent possession by the donor is not necessarily incompatible with the donee's dominion over the property; nor is it conclusive evidence that there was no delivery, or that the

dominion did not pass to the donee." It would undoubtedly call for an explanation where the custody of the thing given had been retained by the donor, and such fact might be taken into consideration in determining whether a valid gift had been consummated, but it would not necessarily raise a conclusive presumption. *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7.

It is assigned as error that the trial court admitted the testimony of the witnesses Della and Mary Wolfe and Charles Fuller, who testified to admissions of Mrs. Levering that she had given the ring to plaintiff. Counsel say that this testimony was incompetent because declarations and admissions of the donor are not sufficient to establish a valid gift, and cite *Campbell v. Sech*, 155 Mich. 638, 119 N. W. 922. That case so holds, but it also holds that such declarations and admissions are admissible as corroborative evidence. It was for this purpose that the testimony of these witnesses was used, and we see no error in its admission. *Harris v. Hopkins*, 43 Mich. 272, 38 Am. Rep. 180, 5 N. W. 318.

Defendant's counsel complain because the court refused to give their five requests to charge. We think the general charge of the court fairly covered requests 1, 2, 3, and 4. The fifth request was refused, and properly so. It was as follows: "If you find from the evidence that Mr. Garrison was not to have the ring until after Mrs. Levering's death, and that she was to have the use of it in the meantime, then there was not such unconditional passing of title as the law requires, and the gift is not valid, and your verdict must be for the defendant." This request assumed that, if the donor had the custody of the ring until her death, there could be no valid gift. This is not the law. As we have before said, if the gift was complete and title passed to the plaintiff, he could permit her to have the custody until her death, without affecting his title in any way.

The testimony clearly presented a question of fact for the jury. The trial court submitted the questions to them with a very lucid charge of the law applicable thereto, and explained to them fully what they must find before they could determine that the title was in plaintiff. We think there was no error in the charge.

We have examined the other assignments of error, but find no reversible error in them.

The judgment of the trial court will be affirmed, with costs of both courts.

UNITED STATES SUPREME COURT.

MOBILE, JACKSON, & KANSAS CITY
RAILROAD COMPANY, Plff. in Err.,
v.

J. A. TURNIPSEED, Admr., etc., of Ray
Hicks, Deceased.

(219 U. S. 35, 55 L. ed. —, 31 Sup. Ct.
Rep. 136.)

**Constitutional law — equal protection
of the laws — classification of railway
employees — police power.**

1. The abrogation of the fellow-servant rule as to railway employees, made by Miss. Code 1802, § 3559 does not offend against the equal protection of the laws clause of the Federal Constitution, because construed as applying to the foreman of a section crew charged with keeping the track in repair.

Same — due process of law — statute creating presumption of negligence.

2. Neither the equal protection of the laws nor due process of law is denied by Miss. Code 1906, § 1985, under which, in actions against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence.

(December 19, 1910.)

ERROR to the Mississippi Supreme Court to review a judgment affirming a judgment of the Circuit Court for Newton County in plaintiff's favor in an action

Note. — Power of legislature to make injury prima facie evidence of negligence.

This note is confined to cases where the statute makes the happening of an injury prima facie evidence of negligence only, and does not include cases where the happening of the injury is made conclusive evidence of negligence, as that is equivalent to imposing an absolute liability regardless of negligence.

Personal injuries.

Statutory provisions making the occurrence of personal injuries from the operation of railroads prima facie evidence of the negligence of the railroad company are valid. *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674; *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 31 L.R.A. 651, 56 Am. St. Rep. 695, 42 N. E. 768; *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45.

Thus, a statutory provision that the happening of an accident through a defect in the locomotive, cars, machinery, or attachments of railroads shall be prima facie evidence of negligence in actions for injuries by their employees is constitutional. *Pennsylvania Co. v. McCann*, 54 Ohio St. 32 L.R.A. (N.S.)

brought to recover damages for wrongful death. Affirmed.

The facts are stated in the opinion.

Mr. James N. Flowers, for plaintiff in error:

Railroad companies having been put in a class by themselves for the purpose of special legislation, because the business in which they are engaged is peculiarly hazardous, the reason for the classification must be constantly kept in mind; employees cannot claim the benefit of this special legislation simply because they are employed by railroad companies; where the reason fails, the classification must fail; the employees sought to be helped are such only as are in need of help; no employee can claim the benefit of the special enactment whose safety is not imperiled by the hazards peculiar to railroading.

Bradford Constr. Co. v. Heflin, 88 Miss. 314, 12 L.R.A. (N.S.) 1040, 42 So. 174, 8 A. & E. Ann. Cas. 1077.

Messrs. May, Flowers, & Whitfield also for plaintiff in error.

Mr. Chalmers Alexander, with Mr. C. H. Alexander, for defendant in error:

The proper construction of state legislation being a question of local, and not of Federal, law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to that court.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Lombard v. West Chicago Park*, 181

10, 31 L.R.A. 651, 56 Am. St. Rep. 695, 42 N. E. 768.

So, a statute making a railroad company responsible for the damages occasioned by or resulting from an accident or collision, unless it shows that the precautions prescribed by the statute were performed, is within the constitutional power of the legislature to enact. *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45.

In *Pennsylvania Co. v. McCann*, supra, the court said: "There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its legislative department necessarily has authority, limited only by the constitutional guarantees respecting due process of law, vested rights, and the inviolability of contracts."

The presumption declared by statute, that, where it has been shown that a passenger on a railroad was hurt or damaged by the running of its trains or machinery, the company is negligent, is a common-law presumption not originating in the statute, and is not in violation of the 14th Amendment of the Constitution of the United States, on the ground that it abridges the privileges and immunities of the company,

U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; *Smiley v. Kansas*, 190 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167.

When a state court decides a case upon two grounds, one Federal, and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Murdock v. Memphis*, 20 Wall. 590, 636, 22 L. ed. 420, 444; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Giles v. Teasley*, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; *Allen v. Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

Section 1985 of the Mississippi Code of 1906 is not in conflict with the Federal Constitution.

Georgia R. Co. v. Ivey, 73 Ga. 499; *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674; 33 Cyc. Law & Proc. p. 1274.

Mr. Justice Lurton delivered the opinion of the court:

This was an action in tort for the wrongful killing of Ray Hicks, a section foreman in the service of a railroad company. There was a judgment for the plaintiff in a circuit court of the state of Mississippi, which was affirmed by the supreme court of the state.

and puts upon it a presumption not enforced against private citizens. *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674.

Killing stock.

A statute providing that "the killing of stock on any railroad track shall be prima facie evidence that it was done by the trains, and the onus to prove the reverse will be upon the railroad company," is valid. *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

Fire from locomotives.

The legislature may constitutionally pass a statute providing that the occurrence of a fire caused by the operation of a railroad is prima facie evidence of negligence on the part of the railroad company. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Missouri P. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833.

Thus, in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the Supreme Court of the United States held that the Kansas statute which provides that in an action against a railroad company for damages by fire 32 L.R.A. (N.S.)

The Federal questions asserted, which are supposed to give this court jurisdiction to review the judgment of the supreme court of the state, arise out of the alleged repugnancy of §§ 3559 and 1985 of the Mississippi Code to that clause of the 14th Amendment of the Constitution which guarantees to every person the equal protection of the laws.

Section 3559 of the Mississippi Code of 1892, being a rescript of § 193 of the Mississippi Constitution of 1890, abrogates, substantially, the common-law fellow-servant rule as to "every employee of a railroad corporation." It is urged that this legislation, applicable only to employees of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employees imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi supreme court had, in prior cases, so defined and construed this legislation. *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 532, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Bradford Constr. Co. v. Heflin*, 88 Miss. 314, 12 L.R.A. (N.S.) 1040, 42 So. 174, 8 A. & E. Ann. Cas. 1077.

It is now contended that the provision has been construed in the present case as applicable to an employee not subject to any danger or peril peculiar to the operation of railway trains, and that therefore

caused by operating the railroad, the plaintiff need establish only the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof shall be prima facie evidence of negligence on the part of the railroad,—is not in conflict with the 14th Amendment to the Federal Constitution as denying the equal protection of the laws to such company, and is valid, even though it also contain the provision that the plaintiff, if he recover, shall be allowed a reasonable attorneys' fee.

This holding was placed on the ground that the statute was a police regulation, and that it was a reasonable classification to make the statute applicable only to railroads, on account of the special danger of fire. The court said: "That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do, at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken (and sometimes in spite of such care), scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas."

As to power of legislature to enact prima facie rules of evidence for criminal cases, see note in 2 L.R.A. (N.S.) 1007.

R. A. E.

the reason for such special classification fails, and the provision, so construed and applied, is invalid as a denial of the equal protection of the law.

This contention, shortly stated, comes to this: that although a classification of railway employees may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial of the equal protection of the law the moment it is found to embrace employees not exposed to hazards peculiar to railway operation.

But this court has never so construed the limitation imposed by the 14th Amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy, because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees generally is repugnant to the clause of the Constitution guaranteeing the equal protection of the law, merely because it is not limited to those engaged in the actual operation of trains, is without merit.

The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employees, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the side of the track to let a train pass by; a derailment occurred, and a car fell upon him and crushed out his life.

In the late case of *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tipple alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to.

The next error arises upon the constitutionality of § 1985 of the Mississippi Code of 1906. That section reads as follows:

"Injury to persons or property by railroads prima facie evidence of want of skill, 32 L.R.A. (N.S.)

etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies."

The objection made to this statute is that the railroad companies are thereby put into a class to themselves, and deprived of the benefit of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.

It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employees of such companies; second, to injuries arising from the actual operation of railway trains or engines; and third, the effect of evidence showing an injury due to the operation of trains or engines is only "prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common-law aspects of the subject, see *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* 1 L.R.A. (N.S.) 533, 71 C. C. A. 316, 139 Fed. 528 et seq.

Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. A few of the leading ones are *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Horne v. Memphis & O. R. Co.* 1 Coldw. 72; *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; *Com. v. Williams*, 6 Gray, 1; *State v. Thomas*, 144 Ala. 77, 2 L.R.A. (N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744.

We are not impressed with the argument that the supreme court of Mississippi, in

construing the act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Tested by these principles, the statute as construed and applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars" is not an arbitrary classification, but one resting upon considerations of public policy, arising out of the character of the business.

Judgment affirmed.

32 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA EX REL.
N. H. McCLAUGHERTY

v.

BLUEFIELD WATERWORKS & IMPROVEMENT COMPANY.

(67 W. Va. 285, 68 S. E. 28.)

Mandamus — public duty — private relator.

1. A resident of a city may, in his own name, maintain mandamus against an incorporated water company, to compel it to furnish him water as required by its franchise from the city to construct and operate its works in the city.

Water company — rule — repairs — validity.

2. A rule of a water corporation requiring a consumer of water to repair service pipes leading from its main pipe in a street to the property of the consumer, assented to by him, and made a part of the contract between him and the corporation, is valid; the franchise giving power to make such rule.

(March 22, 1910.)

Headnotes by BRANNON, J.

Note. — Right of water company to require customer to keep service pipe in repair.

STATE EX REL. McCLAUGHERTY v. BLUEFIELD WATERWORKS & IMPROV. Co. finds support in *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030, where it was held that a city which owns its waterworks, and which requires the cost of service pipes to be paid for by the consumer, might compel him to pay the cost of keeping the same in repair; and that the city is justified in severing the connection where the owner refuses to pay the expenses of repairing a break in the pipe in the street a short distance from the main pipe, although it appears that he has paid his water rates for a period running beyond the time when the connection is severed.

But in *Colne Valley Water Co. v. Hall*, 96 L. T. N. S. 395, 71 J. P. 173, 5 L. G. R. 260, it was held that, as to the portion of the service pipe lying under the public highway, the water company is bound to repair, and must bear the cost of such repair, where the water company alone has the right to break up the highway for the purpose of either repair or inspection, although its charter authorizes it to make necessary repairs and recover the cost thereof from the consumer, upon his failure to repair after notice. (Appeal dismissed in 98 L. T. N. S. 398, 52 Sol. Jo. 57, 72 J. P. 25, 6 L. G. R. 115, without opinion on the question of liability to repair, where it was said that the facts had not been suf-

PETITION for a writ of mandamus to compel the restoration of water to petitioner's premises. Writ refused.

The facts are stated in the opinion.

Messrs. McClaugherty & Peters and Ritz & Ritz, for relator:

Mandamus is an appropriate remedy, and the relator is a proper party to maintain this proceeding.

High, Extr. Legal Rem. § 433; Farnham, Waters, § 159d; Independent School Dist. v. Le Mars City Water & Light Co. 131 Iowa, 14, 10 L.R.A. (N.S.) 859, 107 N. W. 944; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363.

If the rule requires relator to maintain the service pipe, then it is unreasonable.

Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

On petition for rehearing.

The application did not raise between the parties any contractual relations of any kind.

Bishop, Contr. § 24; Page, Contr. p. 302;

International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

Messrs. A. W. Reynolds and Sanders & Crockett, for respondent:

A private public service corporation can require of the water taker that he maintain the connections between the main service and his property.

Dill. Mun. Corp. 4th ed. § 656, p. 778; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Lewis, Em. Dom. 2d ed. § 91e, p. 174.

The contract required that the service pipe should be put in and maintained by the water consumer.

Rockland Water Co. v. Adams, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; Stephens v. Southern P. Co. 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 17, 41 Pac. 783; Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249; Palmer v. Danville, 154 Ill. 156, 38 N. E. 1067.

sufficiently established to demand a decision on the question.)

And in Jackson v. Anderson, — Miss. —, 51 So. 896, it was held that a city furnishing its inhabitants with water, which controls the cock at the junction of the service pipes and the main pipe, by which water is let on and off, must remove an obstruction therein within a reasonable time.

Under a regulation requiring consumers to pay for connections between the street mains and their premises, which included the service pipe and a stop box to be erected within the sidewalk space, from which the water could be turned off without entering the consumer's premises, it was held in Fisher v. St. Joseph Water Co. — Mo. App. —, 132 S. W. 288, that the consumer received the water at the street main, and not at his property line, and hence, the service pipe and the stop box being his property, it was his duty, and not that of the water company, to maintain the same in reasonably safe repair. The question was raised in an action against the water company to recover damages for personal injuries sustained by a pedestrian who had tripped over the stop box, which had been caused to work out of position by the action of the frost, so as to become an obstruction in the sidewalk. The plaintiff sought to charge the water company with liability on the ground that the nuisance was maintained by the water company because the appliance was sold by it, installed by one of its licensed plumbers, and was there for the use and benefit of defendant in the prosecution of its business, and invoked the rule that one who is in control of a place or instrumentality, and 32 L.R.A. (N.S.)

through whose negligence another sustains injury, is liable although he is not the owner. On the other hand, the water company contended that the control it retained, by its rules and regulations, over the method of making private connections, and the appliances and material to be used, was necessary to the end that uniform service might be given through the medium of uniform construction, and that it assumed the performance of no duty either to the consumer or to travelers on the streets. The court held that, as the findings showed that the stop box was properly constructed, the duty of the water company was fully performed, and the burden of using reasonable care to prevent the instrument from becoming a nuisance was on the property owner, and that it was immaterial that it was an instrument defendant might use to enforce payment of water bills.

As to the right to compel consumer to pay for the connection with water mains, see note to Bothwell v. Consumers' Co. 24 L.R.A. (N.S.) 485.

A municipal corporation may require consumers of water to use meters and keep them in repair at their own expense, under charter authority to legislate as to the means for ascertaining amounts to be paid as water rates by consumers, and to make regulations for the protection of the works and the use thereof. State ex rel. Hallauer v. Gosnell, 116 Wis. 606, 61 L.R.A. 33, 93 N. W. 542.

As to the right of a municipal corporation to require use of water meters, and to impose expense of same on consumers, see note to Cooper v. Goodland, 23 L.R.A. (N.S.) 410. A. L. R.

Brannon, J., delivered the opinion of the court:

The Bluefield Waterworks & Improvement Company is a corporation supplying the city of Bluefield with water. N. H. McClaugherty is a resident of that city, owning a lot fronting on one of its streets. He had a contract with the water company to furnish his residence with water. He filed a petition in this court alleging that the water company had cut off the water from his premises, and asking a mandamus to compel the water company to restore water to his premises. The company laid a main pipe for carriage of water along that street.

A law question of importance is raised by the water company. It is that McClaugherty as an individual cannot maintain mandamus to compel the performance of its duties by the water company. By no means can we accede to this proposition. Seeing that McClaugherty is peculiarly and individually interested in the performance of its public duty under the franchise granting the water company admission to the city for supplying the public with water, he must be accorded some adequate remedy for the failure of the company to do its duty to him as a resident of the city. What other effective remedy can he have? A suit for damages? That is a slow process, and does not restore the water to his premises. He needs some prompt and effective remedy that will enforce the supply of water. We find in 26 Cyc. Law & Proc. p. 401, the statement that in some jurisdictions such proceeding must be instituted by the city or a public officer, but that, where a private individual has a special and peculiar interest in the enforcement of the right or the performance of the duty, apart from his interest as one of the general public, he may resort to mandamus. This principle is obvious. It is like that principle as to public nuisances, that an individual merely because of his right as one of the general public, cannot maintain injunction against a public nuisance; but if he lives on a road which is a means of access to his home or land, impeded by an obstruction, or is in any way peculiarly and individually interested, he can have injunction. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275. *High*, Extr. Legal Rem. § 433, and *Farnham on Waters*, § 159d, pointedly say that such an individual may enforce this right against a water company by mandamus. We are told that this defense of the water company can be sustained by §§ 28cI and 28cII., chap. 47, Code of 1906. There we find that mandamus may be awarded at the instance of the city in its corporate name, to compel a water

company to perform its duty, and it is said that, as the writ is there given to the municipality, that excludes the right of an individual. This cannot be conceded. The law as just stated is clear that the common law gives an individual the right to maintain mandamus to vindicate his right. Can it be said that this statute was designed to take away from the individual this important privilege of self-protection, and the enforcement of his just rights? Not with reason. What rule of construction would sustain this proposition? The citizen cannot lose such an important power without plain words from the legislature. I think that that statute is perhaps only declaratory of what would be the law without it, which would accord the city right to this writ to enforce the public right under the public franchise for public good, and that the statute is only a precautionary declaration of the right of the city, which would exist without the statute. At any rate, we cannot hold that a remedial statute, made to make the remedy more expressive and clear in behalf of the municipality, can be construed to destroy the individual's action. Moreover, I see that said statute says that it "shall not be construed to deprive such county, city, town, or village, or any inhabitant thereof, of any other remedy to compel such individual, association, or corporation to comply with the terms, conditions, and agreements of such right, privilege, license, or franchise, or of the right to recover damages for their failure so to do." This preserves all legal rights existing in an individual. Its intent is to save any existing right of action. We cannot say that the words "any other remedy" saves all other remedies than mandamus, and thus takes it away. Why should the legislature be thought to have singled out that action and taken it away, and left all others? It did not mean to save only the action for damages, for that is expressly saved. The statute is remedial, and must be construed as giving the city mandamus, and saving to individuals a like writ existing under the common law.

A leak appeared in the street in front of McClaugherty's residence. The water company sent its hands to investigate the leak; it being supposed that it might be in the main. The hands excavated, and in doing so cut off the water from McClaugherty's service pipe for the purposes of investigation.

They discovered that the leak was not from the main pipe, but somewhere in the service pipe connecting McClaugherty's residence with the main pipe. McClaugherty, being informed of this, asked the company to give him a little time and he would

make the repair. Later he informed the company that he had thought that a few inches of pipe would cure the leak, but, finding out otherwise, he would have nothing more to do with it. He did not demand then that the company turn on the water. Thus declining to make the repair, the company allowed the water to remain cut off. Whose duty was it to cure this leak?

This water company adopted a set of rules for the conduct of its business. Among them was a rule requiring the consumer of water to put in service pipes from the main in the street to his residence, and to keep them in repair. When McClaugherty filed an application to the company to supply him with water, which application calls itself "Application and Contract of Consumer," he signed that application or contract. There were two of them, each for one year. When these contracts were signed, the rule requiring the consumer of water to keep the service pipe in repair was in force. That contract makes McClaugherty ask the company to supply him with water, and for the permission to make the connection and to attach the same to the pipe of the company. Not only that, but by that contract McClaugherty "covenants and agrees to strictly abide by the rules of the company," referring to the rules to be had at the office. This is a part of the body of the contract. These rules are posted for the open inspection of all. These two contracts signed by McClaugherty make this rule a part of his contract. If it is to govern, clearly the case is with the water company. Counsel for McClaugherty states unquestionable law when he says that "there is no question but that the respondent in a case like this has the right to adopt all such rules as it may deem proper or necessary for the conduct of its business, and it is likewise true that such rules must be reasonable ones." It is well settled that a corporation has power to make all necessary rules and regulations for its government and operation, though such power may not be expressly conferred in its charter, in the statute of its creation, or any other statute. It is regarded as a power that is included in the grant of the capacity of being a corporation. It is generally said to be an incident to a corporation. Corporate by-laws must not contravene those principles of common right embodied in the common law or its franchise or law. By-laws must operate equally upon all persons of the class which they are intended to govern. The rule must not be unreasonable, oppressive, or extortionary.

Now, what is there in this rule that contravenes law or public policy? Why is it not within the power of this corporation

to contract with the consumer that he shall keep the service pipe in repair? Counsel says this rule is contrary to public policy. This thing of overthrowing a contract as against public policy is a tender thing. It has been called "an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached, before, if respondent's position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' Richmond v. Dubuque & S. C. R. Co. 26 Iowa, 191. 'Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' Kellogg v. Larkin, 3 Pinney (Wis.) 125, 56 Am. Dec. 164. 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.' Swann v. Swann (C. C.) 21 Fed. 299." Stephens v. Southern P. Co. 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 19, 41 Pac. 783. The Supreme Court of the United States, in Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

I again ask why could not this company agree with McClaugherty that he should repair this service pipe, beneficial to his own use? What is there unreasonable in it? I

may safely say it is the general rule in cities and towns. Counsel for McClaugherty, admitting the power to make these rules, if reasonable, tells us that this particular rule operates to put upon the consumer a duty which otherwise rests on the water company. The ordinance granting the franchise puts no such duty on the company. It may be that, in the absence of a contract, the company would be called upon to lay and repair service pipes to the line of the consumer. For this position we are cited to Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518. It so holds incidentally. A late Virginia case (Vinton-Roanoke Water Co. v. Roanoke, 110 Va. 661, 66 S. E. 835) looks the other way. There the water company agreed, as a part of its contract of franchise, to furnish the city buildings and fire hydrants with water. It was held that the city must make the service pipes to its buildings and hydrants, and that the water company had fulfilled its duties when it had laid its mains along the streets. But we do not have to pass on this question of what would be the duty of the company in the absence of this contractual rule. We say the rule governs this case. This proposition is supported by Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249, and Prindiville v. Jackson, 79 Ill. 337. Counsel for McClaugherty cites us International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816, for the proposition that it is the duty of the water company to construct its pipes to the line of the consumer's property. But that case does not help McClaugherty. It is against him. In that case there was an ordinance requiring the company to furnish water to consumers, without provision as to payment for service or connecting pipes, and no rule upon the subject. The court distinctly said: "The contract nowhere provides that the consumer shall pay for such work. . . . We think the failure to provide that the consumer should pay said rates and also the cost of making the connection with his property rather indicates that he was not to bear the cost of the latter. . . . Primarily the duty to furnish water to property owners on streets containing mains carried with it the duty to do and perform what was necessary to be done to place the company in position to furnish the property with water. It could not do this without connection to the property lines. . . . We think, in order for respondent to be able to claim immunity for this consequence, there would have to be some provision in the grant or contract which unmistakably, or at least by fair implication, taking into consideration all the provisions 32 L.R.A. (N.S.)

of the contract bearing on the subject, would relieve it." This admits that if there had been a contract, as in this case, the consumer must furnish and repair the service pipe. To show that McClaugherty is not bound by this contract, we are cited to Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363. There a party signed a contract for the supply of water in a village adjacent to Chicago, contracting to pay certain rates. The village was incorporated with Chicago, and the council of Chicago passed an ordinance lowering water rates. The company claimed that the party must pay the higher rate fixed by the contract; but the Illinois court held that, the rate having been lowered by law, the party should only pay what others paid. However, I notice that the application for water in that case said that it was "subject to the rules and regulations of the company now in force or hereafter to be enacted or adopted, which rules and regulations are hereby made and declared to be part of the contract" between the parties. Of course, that gave the party the right to the lower rates. The very letter of the contract demanded no more.

It is argued that the duty of making and repairing the connecting pipes rests on the company from the consideration that the individual would not have the right to dig up the street to lay his pipe without the city's permission. We cannot accede to this position. The very grant of the franchise necessarily means that the company could dig up the streets for connecting pipes, or that the consumer contracting with it for water might do so under the privilege accorded the company. When the company contracts with the consumer to furnish water, that alone implies that the company makes the consumer its agent to lay the service pipe, and gives him authority to do so, else the franchise would be practically worthless. 2 Dillon on Municipal Corporations, § 656, says that the abutting owner has a right of passage and also rights not shared in by the public at large, "special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it, and that these rights . . . were rights of property. . . . In cities the abutting owner's property is essentially dependent upon sewer, gas, and water, connections." The abutting owner has a right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the street to lay his pipe for conveyance of water a right of access, constituting a property right in the street, which he may use and

of which he cannot be divested or denied? We recognize this full right of use of the street for the purposes of ingress and egress for all necessary purposes connected with the use of the lot, in *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

For these reasons we refuse the peremptory mandamus, and dismiss the alternative mandamus.

A petition for rehearing having been filed, Brannon, J., on May 18, 1910, handed down the following response:

A petition for rehearing makes as its strong point that the application and contract signed by McClaugherty, binding him to the company's rule that each consumer of water must furnish and repair service pipes, is invalid because without consideration. I would think that when, at the request of McClaugherty, the parties made a contract by which the water company bound itself to supply McClaugherty with water, and he bound himself to buy water and pay for it, there was benefit and detriment to each contracting party, a mutuality of obligation and benefit, a mutual consideration, a part and element of which contract was the rule alluded to. The company was to make the outlay of furnishing water, a detriment to it, and get pay for it, a benefit; whilst McClaugherty was to pay, a detriment to him, and get the water, a benefit. That seems plain to me. "Anything which confers benefit on the party to whom the promise is made, or loss or inconvenience on the party promising, is a valuable and sufficient consideration," is a sound definition of consideration given by Judge Green in *Hornbrooks v. Lucas*, 24 W. Va. 497, 49 Am. Rep. 277. "Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute good consideration for a promise." 3 Va. & W. Va. Enc. Dig. 338. "A benefit to the party promising, . . . or an injury, loss, charge, or inconvenience, or the risk thereof, to the party promised," we said, in *Rutherford v. Rutherford*, 55 W. Va. 60, 47 S. E. 242, citing 3 Minor's Inst. 133. "Benefit to be derived by each party to a contract furnishes a sufficient consideration for it." *Rowan v. Hull*, 55 W. Va. 335, 104 Am. St. Rep. 998, 47 S. E. 92, 2 A. & E. Ann. Cas. 884.

But the petition for rehearing, as an additional argument to show no consideration, puts the proposition that, when this water company got its franchise, it was bound by law to furnish service pipes in order to perform its public duty as a part thereof, and that the consumer was not bound to do so, and that this contract makes Mc-

Clagherty do what he was not bound to do, and relieves the company of its obligation, and is without law to support it, and is without consideration; that is to say, that this rule requiring the consumer to furnish water connections is against public policy as relieving an incorporated company of public service from its duty. I should think the party could bind himself by such a contract. But a decisive answer to that proposition is found in the franchise granted to the company, which gives the company power to maintain its works and supply the city and citizens with water, "upon any terms and conditions that from time to time may be agreed upon by and between the said Bluefield Waterworks & Improvement Company, its successors and assigns, and the said city of Bluefield and other patrons and customers of the said Bluefield Waterworks & Improvement Company." Under that clause of its franchise the company could make such rule as that involved in this case. It was thus given full authority to do so. The rule is thus binding.

WISCONSIN SUPREME COURT.

MERT H. VOUGHT, Impleaded, etc., Plff.
in Err.,
v.

STATE OF WISCONSIN.

(135 Wis. 6, 114 N. W. 518.)

Criminal law — joint offense — partial acquittal — conviction — validity.

1. The acquittal of part of several town officers jointly indicted for larceny in making false town orders, and securing and ap-

Note. — Larceny by making or procuring fraudulent orders on public funds.

Without any extended discussion, the court in *People v. Lammerts*, 104 N. Y. 137, 58 N. E. 22, held that there was no fatal variance between an indictment against a county treasurer for larceny, which alleged that he took, stole, and carried away a certain amount in dollars and cents of the goods and chattels of the county, and proof that he, as county treasurer, drew a check upon a county depository, took it to the bank, and exchanged it for a draft payable to a third person, to whom he delivered it in satisfaction of a personal judgment against himself. The court said that the instant the money was paid over upon the check, it became the county's money, and that when it was used in the purchase of the draft to the order of the third person, it was converted and appropriated to the use of the defendant.

In *People v. Neff*, 191 N. Y. 210, 83 N.

appropriating to their own use the cash upon them, will not render void a conviction of one who is shown to have cashed and received the money upon orders fraudulently issued as charged.

Larceny — void records.

2. A prosecution for stealing town orders cannot be defeated on the theory that they were fraudulently issued, and therefore of no value, where they were regular on their face, and there was nothing on the records to cast suspicion upon their validity.

Same — officer — property in custody — absence of trespass.

3. An officer of a town who converts to his own use property of the town in his possession cannot avoid liability for larceny on the theory that, having possession of the property, the element of trespass or nonconsent was lacking, since his possession was for a lawful, and not an unlawful, purpose,—at least, where the statute makes embezzlement larceny.

Officer — jury commissioner — freeholders — validity.

4. Requiring the commissioners who are to select the grand jury to be freeholders of the county is not unconstitutional.

(Winslow, Ch. J., and Marshall, J., dissent.)

(January 8, 1908.)

ERROR to the Circuit Court for Ashland County to review a judgment convicting defendant of larceny. Affirmed.

E. 970, which affirms 122 App. Div. 135, 106 N. Y. Supp. 747, the court upheld the conviction of a county auditor under an indictment in the common-law form, for larceny by corruptly countersigning a county warrant in pursuance of ostensible authority which the county supervisors had unlawfully essayed to delegate to him, and in favor of a contractor who was not entitled thereto. The defendant objected that he could not be convicted under the indictment for the reason that his offense, if any, was not common-law larceny, but statutory larceny by false pretenses. The court, however, said: "The appellant has been a party to procuring the payment of this money, felonious in other respects, by a purported warrant which rested on no lawful authority or foundation, and which was inherently illegal and invalid. And the county treasurer, being a mere custodian authorized to pay claims when properly passed on and audited, and having no discretion to do otherwise, very likely acting without bad faith, but nevertheless without any authority, has parted with the money of the county upon a purported warrant which in fact was utterly invalid. We think it is very plain that under such circumstances legal title to the money was not secured by false representations, but that on a void warrant

Statement by Kerwin, J.:

The plaintiff in error, hereinafter called defendant Vought, was tried and convicted of larceny of several alleged town orders. The indictment was against defendant Mert H. Vought and four others, namely, Michael J. Collins, Alexander McDonald, H. B. Templin, and Peter Fishbach. Templin was not arrested, and a *nolle* was filed as to Fishbach. Collins and McDonald filed a plea in abatement, which was demurred to by the state, and the demurrer sustained and exception taken. A trial was had and resulted in a verdict finding the defendant Vought and Templin guilty, and Collins and McDonald not guilty. A motion by defendant Vought to set aside the verdict, and for a new trial, was denied, and Vought was sentenced to state's prison at Waupun for one year, beginning at 12 o'clock noon on the 22d day of April, 1907. Defendant Vought brings error.

Messrs. A. W. Sanborn W. F. Bailey, Frank B. Lamoreux, Allan T. Pray, and Horace B. Walmsley, for plaintiff in error:

Requiring jury commissioners alone, of all the public officials, to have a property qualification, is an unconstitutional discrimination.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Damp v. Dane, 29 Wis. 428; 23 Am. & Eng. Enc. Law, 2d ed. p. 332, note 2; Black v. Trower, 79 Va. 123.

mere possession was obtained, which was not any more valid or effective than it would have been had the appellant obtained it by the purely physical process of reaching his hand into the money drawer or safe, and that the form of indictment properly fitted the facts which were developed."

It was held in State v. White, 66 Wis. 343, 28 N. W. 202, that, notwithstanding the municipality's possible nonliability upon unissued bonds wrongfully taken and disposed of to others by the city comptroller, who had them in his possession, he could be convicted of embezzlement, under a statute making it an offense for a public officer to take, while having them in his own possession, certain articles including "any other property which is the subject of larceny," where a statute defining larceny enumerated, among other things, a bond or any instrument in writing whereby any demand, right, or obligation is created.

Perhaps it should be stated that this note does not purport to include cases like State v. Morgan, 109 Tenn. 157, 69 S. W. 970, upholding an indictment for false pretenses against a constable who, by wilfully false representations, obtained a county warrant in his favor for a sum much larger than that to which he was entitled for services.

L. A. W.

The legislature of Wisconsin cannot create a public office and confine the incumbents to freeholders.

Barker v. People, 3 Cow. 703, 15 Am. Dec. 322; *Cooley*, Const. Lim. 7th ed. 894; note, *Re Dorsey*, 7 Port. (Ala.) 293; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 284; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

It deprives defendant of the equal protection of the laws.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338.

And due process of law.

United States v. Cruikshank, supra.

Mr. V. T. Pierrelee, with Messrs. *F. L. Gilbert*, Attorney General, and *J. E. Messerschmidt* for the State.

Kerwin, J., delivered the opinion of the court:

There is evidence tending to show that the defendant Vought and McDonald were members of the board of supervisors of the town of Morse, Ashland county, and Collins, chairman of the board, Peter Fishbach, highway commissioner, and Templin, town clerk; that, on the 1st day of November, 1902, the town board was in session doing its regular business and passing upon claims presented against the town; that during the proceedings and before the completion of their work, it was suggested by one of the members that it was about time they were having another rake off, and, for the purpose of carrying out this scheme and fraudulently obtaining money for each of the five parties concerned, namely, the three members of the board, the clerk, and highway commissioner, it was proposed to present claims in names of fictitious persons and have them allowed, orders issued therefor, and the money collected and distributed between the parties; that defendant Vought took an active part in the scheme, whereupon seven fictitious names were presented by members of the town board, the clerk, and the commissioner of highways, and claims for alleged road work entered in their favor, varying in amounts from \$35 to \$40.25. These claims were entered up among the legitimate claims and placed upon the pay roll, voted upon by the board and allowed, all members of the board voting in favor of such allowance. The minutes of the town meeting show that these claims were regularly presented and O. K'd by the chairman, and regularly

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voted upon, passed, and allowed in favor of the parties named as claimants in the claims presented. After the claims were allowed, in pursuance of the scheme, orders were drawn up by the clerk (Templin), in the regular form of town orders, and regularly numbered from 1854 to 1860, inclusive, and signed by Collins, chairman of the board of supervisors, and Templin, clerk. The clerk then tore out the orders and passed them around, one to the chairman, one to each of the supervisors, one to the highway commissioner, and had three left. Whereupon it was suggested by one of the party that all the orders be given to Collins (chairman) to have cashed and the money divided, and they were delivered to Collins accordingly. The understanding was that the parties should have about \$50 apiece out of the rake off, which was represented by these seven orders. The orders, when taken out of the order book, were receipted for by Fishbach signing on the stub the names of the payees and his own initials below. Shortly after the orders were delivered to Collins, Fishbach called at Collins's saloon, and received something over \$50 as his portion of the plunder. The seven orders aggregated \$265.25. Three of these orders, aggregating over \$100, were presented at a bank by defendant Vought and cashed. Several propositions based upon the errors assigned are discussed by appellant.

1. It is insisted that because the indictment charges Collins, McDonald, defendant Vought, Templin, and Fishbach jointly, it cannot be sustained against any one of the persons jointly indicted, unless the alleged offense was committed in the manner detailed by Fishbach, one of the principal witnesses for the state; that it was impossible for defendant Vought alone, or in conjunction with Templin or Fishbach, to do the thing charged, and that the offense could not have been committed unless McDonald and Collins were equally guilty with defendant Vought; that in clearing Collins and McDonald the jury found Fishbach was a perjurer and his story a fabrication, therefore all persons accused with Collins and McDonald were necessarily exonerated. We do not think the acquittal of Collins and McDonald had any such effect; nor do we think the jury necessarily found by the acquittal of Collins and McDonald that Fishbach was a perjurer, or that his testimony respecting the making of the orders and pay roll was necessarily false. Fishbach's story was corroborated in many particulars by other evidence tending to fix guilt upon defendant Vought. The evidence respecting the guilt of Vought and the other defendants was different. Each defendant

testified in his own behalf. The jury may well have found the evidence of Fishbach on the making of the orders true, and yet have found that Collins and McDonald were not guilty of larceny of the orders, or any of them. The jury may have found, as testified to by Fishbach, that McDonald took all the orders and carried them away, and also have found that defendant Vought afterwards, in pursuance of the fraudulent scheme, got possession of three of the orders and cashed them, and that Collins and McDonald never cashed any of the orders, or received any money upon them, although they participated in the scheme up to the point of delivering the orders. There is no doubt that the evidence is sufficient to establish the corrupt scheme, and the issuance and delivery of the orders in pursuance thereof, and that defendant Vought got a portion of the plunder by obtaining the money upon three of the orders. The jury doubtless found this in convicting defendant Vought. They doubtless also found, upon all the evidence, some ground for acquitting Collins and McDonald not inconsistent with the conviction of Vought, and whether the grounds for the discharge of Collins and McDonald were sufficient it is unnecessary to consider, since the evidence was sufficient to convict defendant Vought. Upon the evidence produced we are very clear that the discharge of Collins and McDonald did not necessarily work a discharge of defendant Vought. Counsel is in error in his contention that the discharge of Collins and McDonald necessarily discharged defendant Vought. It is true that there are cases where the acquittal of one jointly indicted works a discharge of all. But such authorities are clearly distinguishable from the case before us, as will be seen by an examination of the cases cited by counsel for defendant, and many others. *State v. Wilson*, 3 M'Cord, L. 187, is where two persons were indicted together for stealing the same goods, and it was held that one could not be convicted of grand, and the other of petit, larceny. The court said that two persons equally concerned in stealing the same article could not be guilty of different offenses; that the jury could not value the property at one price in the hands of one man, and at another in the hands of another, who were equally concerned in the same transaction, for the purpose of subjecting one to a greater punishment than the other. *State v. Jackson*, 7 S. C. 283, 24 Am. Rep. 476, 3 Am. Crim. Rep. 50, was where A and B were indicted for conspiracy. Both appeared and pleaded to the indictment. B was put upon trial, and A used as a witness for the state. After the

jury retired, a *nolle* was entered as to A, and a verdict of guilty rendered as to B. It was held that judgment could not be pronounced on the verdict, since it would amount to convicting one of conspiracy, and a conspiracy implies a combination between two or more. *State v. Tom*, 13 N. C. (2 Dev. L.) 569, and *King v. Plummer* [1902], 2 K. B. 330, are conspiracy cases. *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064, turned on the construction of a statute relating to costs. *Delany v. People*, 10 Mich. 241, was a case of lewd and lascivious cohabitation under a statute making the offense the joint act of two, and hence an indictment charging one stated no offense under the statute. 2 Hawk. P. C. chap. 29, § 40, relates to principal and accessory. It will be seen that the foregoing cases cited by counsel for defendant Vought are not in point, and do not help his contention. In case of adultery it has been held that one participant may be convicted and the other acquitted. *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207, citing 2 Whart. Crim. Law, §§ 1724, 1730, and *State v. Caldwell*, 8 Baxt. 576. But we regard it unnecessary to prolong discussion upon this point. We think it entirely clear that the verdict of not guilty as to Collins and McDonald in no way interfered with the conviction of Vought.

2. It is further insisted that if Fishbach's story falls, the whole case falls. In the first place it is for the jury to say whether Fishbach's story falls. His story was in many respects corroborated. A record was made of the transactions and the signatures produced. A record of the orders made and signed was produced. There was also a stub book showing receipts for the seven orders, and a record showing that the bank received three orders from Vought. Other evidence might be recited strongly corroborating Fishbach's evidence as to the board meeting. We cannot bring ourselves to the conclusion contended for by counsel that Fishbach's board-meeting story falls, but on the contrary think it is well supported by the evidence.

3. It is further insisted that the value of the property was not shown, and that it had no value. The argument of counsel is that the seven orders being issued without authority were void and of no value. As we have before observed the orders in question were regular upon their face. Not only were they regular upon their face, and signed by the chairman and countersigned by the clerk, but all the proceedings back of the orders, as appears from the town of records, were regular. The claims in favor of the persons named in the orders as payees for labor were presented, filed, and

allowed by the board, and placed upon the pay roll, and the orders in question drawn for the respective amounts. There was nothing upon the face of the orders or in the town records to cast any suspicion upon the validity of the orders at the time the three orders were cashed at the bank by Vought, or at the time the seven orders in question were signed and delivered to Collins. Now, in order to successfully defend against these orders, it would be necessary to establish the facts contrary to the town records, to the effect that the names of the payees were fictitious names, and that no such claims in fact existed against the town. Until this was established, the orders constituted valid obligations against the town, subject to be defeated upon proof of facts showing their invalidity, and a determination of the fact of invalidity. It is said the orders were of no value. The three orders cashed by Vought proved to be of value to him, since he received more than \$100 for them at the bank. They accomplished the purpose for which they were issued, namely, to pass as valid obligations against the town, and it is safe to say that no diligence on the part of the bank would have discovered any infirmity in them. Section 4415, Stat. 1898, provides: "Any person who shall commit the crime of larceny by stealing the property of another, any money, goods, or chattels, or any bank note, bond, promissory note, bill of exchange, order, certificate, book of account, conveyance of real estate, bill of sale, mortgage, valuable contract, receipt, release, defeasance, railroad passenger ticket, ticket of admission to any place, any writ, process, public record, or any instrument in writing whereby any demand, right, or obligation is created, increased, diminished, or extinguished, or any personal property whatever, if the value thereof shall exceed \$100, shall, unless it be otherwise provided in these statutes as to some particular offense, be punished by imprisonment in the state prison not more than five years nor less than one year. . . ." There can be no doubt under this statute that a town order is the subject of larceny. *Clawson v. State*, 129 Wis. 650, 116 Am. St. Rep. 972, 109 N. W. 578, 9 A. & E. Ann. Cas. 966; *State v. White*, 66 Wis. 343, 28 N. W. 202. The only question is whether the alleged invalidity renders the orders of no value, and therefore not the subject of larceny. We think the case at bar is ruled by the doctrine laid down by this court in *State v. White*, supra, and *Norton v. State*, 129 Wis. 659, 116 Am. St. Rep. 979, 109 N. W. 531. In *State v. White*, supra, it was held that unissued negotiable bonds of a city in the custody

of the city comptroller were property for the taking and conversion of which he may be convicted of embezzlement, even though the city may not be liable on the bonds. The reasoning of the court is very much in point as bearing upon the instant case. At page 349 of 66 Wis., the court said: "The argument that the city of Milwaukee may not be liable to the holders of the bonds fraudulently converted by the defendant,—an argument which may or may not be a sound one, and the determination of which, one way or the other, may depend very much upon the court in which the action to enforce the payment thereof may be brought—does not seem to us a sufficient reason for holding the defendant not guilty of a crime in converting them. To him the bonds were just as good as though they had been regularly issued. He received the same compensation that he would have received, had they been regularly issued; and it would seem to be just that he should not now be heard to say they were merely waste paper. If the person who purchased them of him shall fail to recover on them against the city, certainly a great injustice has been done to that person; and, though the city may succeed in making a defense, it will be at considerable cost and expenditure, and so far it will be injured by the fraud of the defendant." In *Norton v. State*, supra, it was held that a check falsely made with intent to defraud, and apparently sufficient on its face, is a forgery, even though other steps, such as indorsement by the payee, would be necessary, if it were genuine, to perfect it in the hands of the accused. In *State v. Morgan*, 109 Tenn. 157, 69 S. W. 970, it was held that a county warrant obtained by fraud and void was the subject of larceny.

It is further insisted by counsel for defendant that the orders were not orders at all, but simply waste paper, and created no obligation against the town. They were valid on their face and upon the face of the town records, and valid until set aside or defeated by a judgment establishing their invalidity, which might or might not be accomplished, depending on the evidence produced and the result of a trial. We think under the rules laid down by this court in *State v. White* and *Norton v. State*, supra, the orders were the subject of larceny, and their value sufficiently established.

4. It is further insisted that the element of trespass or nonconsent is wanting, and hence no larceny is proved. It is said the things claimed to have been stolen were lawfully in possession of the town board as officers of the town, and if they carried them away there could be no trespass and

no nonconsent. But the property of the town was in possession of its officers for lawful, not for unlawful, purposes, and every unlawful diversion of funds of the town by its officers involves the element of nonconsent on the part of the town. Nor it is necessary that a trespass in the technical sense be committed in order to constitute larceny, where the property is taken by artifice, fraud, or false pretense. *People v. Hughes*, 91 Hun, 354, 36 N. Y. Supp. 493; *People v. Laurence*, 137 N. Y. 517, 33 N. E. 547; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372, 24 N. W.—*Frazier v. State*, 85 Ala. 17, 7 Am. St. Rep. 21, 4 So. 691. Moreover, by § 4415, Stat. 1898, embezzlement is made larceny, and counsel for defendant says if the state has proved an offense, it is embezzlement.

5. It is further urged by counsel for defendant that Vought was not indicted by a lawful grand jury, on the ground that chapter 90, p. 136, Laws 1903, is unconstitutional as being in contravention of the state and Federal Constitutions. We regard this question settled against the appellant's contention by former decisions of this court, notably *State ex rel. Gubbins v. Anson*, 132 Wis. 461, 112 N. W. 475. After a careful examination of the exhaustive argument of counsel upon this point, we are unable to discover any reason for receding from our former decisions, and must regard the question at rest.

Complaint is made by counsel of the "excessive zeal of state's attorney," but we find nothing under this head which could have worked any prejudice to the defendant. Error is also assigned because of alleged erroneous admission of evidence. The most objectionable evidence came in inadvertently, and was afterwards stricken out, and the jury instructed to disregard it. We find no prejudicial error under this head.

After a careful examination of the record, we think no prejudicial error was committed, and therefore the judgment must be affirmed.

Winslow. Ch. J., dissenting (filed January 28, 1908):

I cannot agree with this decision, because it seems to me that some well-settled principles of the law of larceny have been disregarded. Grand larceny can only be committed by the stealing of personal property exceeding \$20 in value, and the value must be affirmatively proven. The property claimed to have been stolen here was a fictitious town order, fraudulently issued to pay no debt and payable to a nonexistent person. It was not authorized by law, but was absolutely void in whose-

soever hands it might be found. *Hubbard v. Lyndon*, 28 Wis. 674. It was not negotiable. *Sanborn's Stat. Supp.* 1906, § 1675-1 (Laws of 1899, chap. 356). It was utterly worthless. The fact that the defendant may have induced someone to believe that it was genuine, and thus by fraud obtained recognition for it, does not prove that it was of value. As well might it be claimed that the value of a bogus gold brick was \$1,000 because a sharper had obtained that sum for it from his confiding victim. This instrument looked like a town order, but was not so in fact, any more than a forged note which has deceived an innocent purchaser is a genuine note. In order to be the subject of larceny, it must be shown that the instrument charged to have been stolen is valid and genuine. 2 *Bishop, New Crim. Law*, § 786; 18 *Am. & Eng. Enc. Law*, 2d ed. p. 517; 1 *Wharton, Crim. Law*, §§ 878, 882b. It has, indeed, been held that where genuine negotiable instruments have been stolen from the maker before delivery, and can be or have been placed in the hands of innocent purchasers for value, and thus become binding obligations, they become the subjects of larceny. *Com. v. Band*, 7 Met. 475, 41 *Am. Dec.* 455; *Bork v. People*, 91 N. Y. 5; *State v. White*, 66 Wis. 343, 28 N. W. 202. The principle, however, does not reach the present case, because the instrument here in question was non-negotiable, even if it had been genuine. It is true that in the *White Case* it was said that it would make no difference in such a case whether the instrument could be recovered on in the hands of an innocent purchaser or not; but it must be remembered that the court was speaking of a regularly executed negotiable bond, which, in some courts at least, would be valid in the hands of an innocent purchaser even if stolen, and the question whether the taking of a spurious non-negotiable instrument would be subject to the same rule was not before it. I think that the conclusion of the court in the present case on this question is not only contrary to sound principle, but contrary to the practically unanimous weight of authority.

I am authorized to state that Mr. Justice Marshall concurs in this dissent.

Petition for rehearing denied, March 10, 1908.

Writ of error dismissed by United States Supreme Court, April 18, 1910. 217 U. S. 590, 54 L. ed. 895, 30 Sup. Ct. Rep. 694.

WISCONSIN SUPREME COURT.

LOUIS E. CLUTE et al., Respts.,
v.CLINTONVILLE MUTUAL FIRE INSUR-
ANCE COMPANY et al., Appts.

(144 Wis. 638, 129 N. W. 661.)

Insurance — gasoline — violation of condition.

1. A clause in an insurance policy making it void if gasoline is kept or allowed on the premises is not violated by the delivery in the building of a five-gallon can, ordered for use elsewhere by one of the insured, who was absent when it arrived, where it was set outside upon his return, a few moments afterwards, and taken away by him within an hour.

Appeal — exception to part of charge — bringing up entire charge.

2. Where only a portion of the charge is excepted to and included in the bill of exceptions, in order to permit a review by the appellate court, the bill must show that it includes the whole charge on the subject-matter covered by the exception.

Pleading — amendment — after trial.

3. It is not error to permit an amendment of a complaint for the amount due on a fire insurance policy, which claimed the amount fixed by adjusters, which deducted salvage, so as to make claim for a total loss, as shown by the evidence, where there is nothing to show that the insurers were thereby put to a disadvantage.

Evidence — ownership of insured property — statement by seller.

4. Upon the question of the ownership of insured property claimed by retail merchants to have been bought by them from wholesalers on credit, a statement of the latter to their banker, showing the gross amount of accounts receivable owned by them, is not admissible in evidence, where it contains nothing to contradict the positive testimony of insured that they owned the property, while the amount named in the statement might well have included what insured owed on the property.

(January 31, 1911.)

Note. — Effect of temporary condition which ceased before loss, under general provision against increase of risk, or specific provision against certain condition.

This question is discussed in the notes to *Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.* 10 L.R.A. (N.S.) 730, and *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 28 L.R.A. (N.S.) 593. Since the preparation of the later note, the case to which that is appended (56 Wash. 681, 106 Pac. 194) was relied upon by the court in *Silver v. London Assur. Corp.* — Wash. —, 112 Pac. 666, in holding that a provision in a policy of insurance to the effect that the 32 L.R.A. (N.S.)

APPEAL by defendants from a judgment of the Circuit Court for Winnebago County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

Statement by Barnes, J.:

This action was brought to recover for fire loss under policies of insurance issued by the defendant companies to the plaintiffs. In the answers interposed liability was denied on various grounds. So far as it is necessary to consider these defenses on this appeal, they were: (1) Plaintiffs were guilty of fraud and false swearing in making their proofs of loss, in that they represented the value of the property insured to be \$6,400, when, in fact it did not exceed \$600; (2) that they represented themselves to be the owners of the property, and that it was not encumbered, when in fact they did not own it; (3) that plaintiffs violated a provision contained in each of the policies by keeping and storing gasoline on the premises, and thereby forfeited their right to recover; (4) that fraudulent representations were made in the applications for insurance, both as to the ownership and the value of the insured property. There was a verdict and judgment for the plaintiffs, and from this judgment defendants appeal.

Mr. N. P. Christensen, with Messrs. Phillips & Hicks, for appellants:

The law of this state makes this standard policy as to gasoline the contract between the parties, and prohibits its being kept or allowed on the premises.

Ostrander, Fire Ins. 2d ed. § 327; Faust v. American F. Ins. Co. 91 Wis. 158, 30 L.R.A. 783, 51 Am. St. Rep. 876, 64 N. W. 883; *Cerf v. Home Ins. Co.* 44 Cal. 320, 13 Am. Rep. 165.

A policy may declare that a violation of a specific clause shall avoid it; otherwise,

policy should be void upon the doing of a prohibited act, or upon the failure to do an act agreed to be performed by the insured, only suspends the operation of the policy while the condition is broken, and has no application to a loss occurring at a time when there was no breach of the contract. Accordingly, recovery was allowed upon a policy which provided for its avoidance if the insured building should become vacant and unoccupied, and so remain for ten days, where the building was occupied at the time it was destroyed by fire though it had been vacant after the issuance of the policy for the period prescribed thereby.

J. A. C.

the breach of an immaterial provision does not avoid the policy.

Mead v. Northwestern Ins. Co. 7 N. Y. 530; *Westfall v. Hudson River F. Ins. Co.* 12 N. Y. 289; *Wheeler v. Traders' Ins. Co.* 62 N. H. 450, 13 Am. St. Rep. 582; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Fire Asso. of Philadelphia v. Williamson*, 26 Pa. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543; *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124; *Bastian v. British American Assur. Co.* 143 Cal. 287, 66 L.R.A. 255, 77 Pac. 63; *Sperry v. Springfield F. & M. Ins. Co.* 26 Fed. 234; *McFarland v. St. Paul F. & M. Ins. Co.* 46 Minn. 519, 49 N. W. 253; *Betcher v. Capital F. Ins. Co.* 78 Minn. 240, 80 N. W. 971; *Heron v. Phoenix Mut. F. Ins. Co.* 180 Pa. 257, 36 L.R.A. 517, 57 Am. St. Rep. 638, 36 Atl. 740.

Messrs. Bouck & Hilton, with Messrs. Churchill, Bennett, & Churchill, for respondents.

Barnes, J., delivered the opinion of the court:

The evidence was ample to sustain the finding of the jury that the plaintiffs were the owners of the goods destroyed and damaged by the fire, and also the finding that the value of the insured property at the time of the fire was \$6,729.47. No discussion of the evidence bearing on these points will be indulged in.

By its answer to question 6 of the special verdict, the jury found that the plaintiffs did not permit gasoline to be "kept or allowed" on the premises. Each policy provided that it should be void if gasoline were kept, allowed, or used on the premises without the consent of the insurer being indorsed thereon, and no such consent was given. The testimony in reference to gasoline was to the effect that a week or two before the fire, the plaintiff Clute ordered five gallons of gasoline, not intended for use in the factory, or to be kept therein, without directing where it should be sent, and that it was delivered at the factory while Mr. Clute was out; that he returned very shortly thereafter, and found the gasoline, and instructed one of the employees, to set it outside, and that it remained outside until Clute was going home to supper, when he took it with him. The evidence tended to show that the gasoline was kept in the factory but a very few minutes, and that it did not remain outside to exceed an hour before it was taken away. There was testimony also offered on the trial to show that the fire resulted from an explosion; the defendants claiming that the explosion

was caused by gasoline, and the plaintiffs claiming that it was caused by the accumulation and ignition of coal gas in a coal stove. The appellants contend that the court erred in submitting question 6 to the jury, and also in charging the jury in reference thereto. Appellants' counsel requested the submission of this question, and are in no position to assert error because their request was complied with. The court instructed the jury that the words "kept or allowed," as used in the policies of insurance, did not "refer to the temporary presence on the premises of gasoline;" furthermore, that the prohibition meant something more than a mere casual taking of gasoline on the premises and removing it soon after; also, that the burden of proof was upon the defendants to show by a fair preponderance of the evidence "that the plaintiff exposed the property insured to the additional hazard of habitually keeping gasoline upon the premises for a considerable time" before the jury would be warranted in returning an affirmative answer to question 6. If there is any vice in the charge of the court, it is found in the foregoing excerpts, although they embody but a small portion of the charge to which exception is taken. That the instructions given were correct in the abstract is very generally held. *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 37 Am. Rep. 647; *Smith v. German Ins. Co.* 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236; *Hynds v. Schenectady County Mut. Ins. Co.* 11 N. Y. 554; *Williams v. Firemen's Fund Ins. Co.* 54 N. Y. 569, 13 Am. Rep. 620; *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 478, 479, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572; *Williams v. New England Mut. F. Ins. Co.* 31 Me. 219; *Maryland F. Ins. Co. v. Whiteford*, 31 Md. 219, 1 Am. Rep. 45; *Springfield F. & M. Ins. Co. v. Wade*, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; *Szymkus v. Eureka F. & M. Ins. Co.* 114 Ill. App. 401; *Thompson v. Equity F. Ins. Co.* 17 Ont. L. Rep. 214. Many additional cases will be found cited in the notes to the last case, as reported in 13 A. & E. Ann. Cas. 532. The instructions as applied to the facts in the case before us were not erroneous. They were evidently framed to meet the testimony offered as to the circumstances under which gasoline was brought to the premises in the first instance, and as to the length of time it remained, and we think were so understood by the jury. The court might well have instructed the jury that, if this

testimony were found to be true, the provision of the policy was not violated.

There was some evidence offered in behalf of the defendants from which the jury might have inferred that the fire was caused by an explosion of gasoline vapor, and it is argued that the jury might have interpreted the instructions given as meaning that there was no violation of the policies, even though the gasoline was permitted to remain on the premises from the time it was delivered until the fire occurred. We are not called upon to decide whether the instructions would be erroneous if they were as broad as counsel claim they were. As before stated, we think the instructions would be understood by the jury as applying to Clute's testimony and to that of the witnesses who corroborated him. There was no other evidence to the effect that gasoline had been taken to or removed from the premises. If it be assumed that the explosion was caused by gasoline, there is no evidence to show when the gasoline was brought on the premises or how long it remained there. We are entirely unable to agree with appellants' contention that it is a verity in the case that the fire was caused by an explosion of gasoline. As we read the evidence, it preponderates the other way.

Only those portions of the charge that are excepted to are preserved in the bill of exceptions, and it is argued by respondents that under *James v. State*, 124 Wis. 130, 133, 102 N. W. 320, and *Grabowski v. State*, 126 Wis. 447, 456, 105 N. W. 805, this court cannot review any part of the charge because the whole is not incorporated in the bill of exceptions. The cases do not go to the extent claimed. It may often happen that, while a charge is lengthy, exception is taken to only one or two legal propositions therein contained, and it may be unnecessary to incorporate the entire charge in the bill. But this court is entitled to know whether anything is said elsewhere in a charge which may cure an erroneous statement, and is entitled to have all of the charge before it that is germane to the part excepted to, and which might tend to qualify or explain it, and where the whole charge is not made a part of the record, the bill of exceptions should affirmatively show that it does include the whole charge on the subject-matter covered by the exception.

Three other insurance companies also carried insurance on the property damaged. 32 L.R.A. (N.S.)

aged and destroyed to the amount of \$2,500 in the aggregate. A Mr. Casper represented these companies in the adjustment of the loss. A Mr. Haessly represented the defendant mutual insurance companies. The value of the insured property seems to have been agreed upon between the parties, or at least some of them, but there was some disagreement as to whether there was any salvage on the property, and, if so, how much. The amount of salvage was finally agreed upon as being \$976.25. Mr. Haessly testified that the plaintiffs figured that they ought to have a total loss; that they finally agreed that they would accept these figures, provided the insurance companies would pay in cash, but they wanted a total loss. Proofs of loss were made on the basis of the adjustment, and sent to all the companies. What disposition of the loss was made by the three stock companies does not appear, and it is immaterial, as they are not defendants in this action. In the complaint in the action, damages were claimed on the basis of the proofs of loss which were furnished to the defendants. On the trial, evidence was introduced, apparently without objection, to show that the loss was total, and such evidence was practically uncontradicted. The jury found that the loss was total, and assessed the plaintiffs' damages accordingly. After verdict was returned, the plaintiffs moved to amend their complaint so as to conform to the proofs, and such amendment was allowed. The ruling of the court in this regard is assigned as error. There was no showing made by the defendants in opposition to the motion, to the effect that they relied on the statements contained in the proofs of loss or on the allegations contained in the complaint in reference to the damage which the plaintiffs sustained, and that, because of such reliance, they were unprepared to offer, and did not offer, any testimony in reference to the amount of the salvage. In fact, they claimed that the entire stock insured was worth only a few hundred dollars. In the absence of any showing that the defendants were misled or placed at any disadvantage by reason of the averments of the complaint in reference to the amount of damage sustained, it was within the sound discretion of the trial court to permit the amendment. *Williams v. Arnold*, 139 Wis. 177, 180, 120 N. W. 824; *Bieri v. Fonger*, 139 Wis. 150, 154, 120 N. W. 862, and cases cited.

It is further urged that the insured

stock of goods belonged to the Wiens Brush Company, and that the plaintiffs were not the sole and unconditional owners of the property, and in fact had no insurable interest therein, and that therefore no recovery could be had upon the policies of insurance. We are unable to find any evidence which supports this contention. There may be some facts established which tend to create a suspicion as to the ownership, but this is the extent to which the evidence goes. The stock of goods in question was almost entirely purchased from the Wiens Brush Company by the plaintiffs, and the defendants offered a statement made by the Wiens Brush Company to the bank with which it was doing business, under date of January 2, 1908, which statement showed the aggregate amount of accounts receivable at that time. They also offered another statement made to the same bank, showing the aggregate amount of accounts receivable which such company claimed to own on December 31, 1908. Both of these exhibits were rejected, and error is assigned because they were not received in evidence. The statement of January 2, 1908, showed the amount of accounts receivable to be \$4,670.82. The statement of December 31, 1908, showed the amount of such accounts to be \$5,187.21. The sale to the plaintiffs was made during the year 1908, and was made largely on credit. The amount due to the Wiens Brush Company on December 31, 1908, on account of this sale, was approximately \$3,613.88. No error was committed in excluding the exhibits, if for no other reason than because they did not tend to prove anything. The accounts receivable were not itemized. The statement of December 31st might well have included the account against the plaintiffs. Certainly, in the absence of any testimony showing that it was not included, no inference could be drawn to the effect that it was omitted. The statement might have been competent evidence in connection with other testimony in reference to ownership, but no other testimony was offered. There being nothing in the statements that tended to contradict or put in issue the direct and positive testimony of the plaintiffs that they were the owners of the stock of goods, the statements were wholly immaterial.

Some other errors are assigned. They have been examined and found to be without merit, and we deem it unnecessary to discuss them in detail.

Judgment affirmed.

32 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

FIRST NATIONAL BANK OF OPP, Appt.,
v.
HACODA MERCANTILE COMPANY.

(— Ala. —, 53 So. 802.)

Record — mistake in initials — effect.

A mistake in the middle initial of a name signed to a chattel mortgage by one whose business signature consists of his surname and initials destroys the efficacy of its record as against subsequent bona fide purchasers.

(November 15, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Geneva County in defendant's favor in an action brought to recover possession of a horse. Affirmed.

The facts are stated in the opinion.

Mr. C. D. Carnichael, for appellant:

The common law recognizes but one Christian name; hence the middle name or names, or the middle initial letter or letters, of a person's name, are not material, either in civil or criminal proceedings. 16 Am. & Eng. Enc. Law, pp. 114, 116; 29 Cyc. Law & Proc. pp. 264-266; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169; Diggs v. State, 49 Ala. 311; Pace v. State, 69 Ala. 231, 44 Am. Rep. 513; Sewell v. State, 82 Ala. 58, 2 So. 622; Rampey v. State, 83 Ala. 31, 3 So. 593; Rooks v. State, 83 Ala. 79, 3 So. 720; Wilson v. Holt, 83 Ala. 528, 3 Am. St. Rep. 768, 3 So. 321; 5 Words & Phrases, 4660; Grimmer v. Nolen, 146 Ala. 466, 40 So. 97.

Mr. W. O. Mulkey, for appellee:

Notice of a prior recorded mortgage emanates not from a description of the property, but from the name of the conveyancer.

Johnson v. Wilson, 137 Ala. 472, 97 Am. St. Rep. 52, 34 So. 392; Fincher v. Hanegan, 50 Ark. 151, 24 L.R.A. 543, 26 S. W. 821; Ridgway's Appeal, 15 Pa. 177, 53 Am. Dec. 586; Jones's Estate, 27 Pa. 337; Coyne v. Souther, 61 Pa. 457; Bu-

Note. — For certainty and accuracy as to Christian names or initials in record or index relied on as imparting constructive notice, see notes to Burns v. Ross, 7 L.R.A. (N.S.) 415, and Prouty v. Marshall, 25 L.R.A. (N.S.) 1211.

As to effect of summons or notice to person by wrong initial, see note to Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A. (N.S.) 129.

As to use of initials instead of Christian name in publication of process, see note to Butler v. Smith, 28 L.R.A. (N.S.) 436.

chan v. Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305.

Evans, J., delivered the opinion of the court:

On the 12th day of August, 1907, one W. N. McDonald executed a mortgage to the First National Bank of Opp, Alabama, and conveyed, among other things, one sorrel horse about seven years old. The name "W. H. McDonald" was signed to the mortgage, and the mortgage was duly recorded in the office of the probate judge of Geneva county on the 13th day of August, 1907. The said W. N. McDonald lived in Geneva county at the time the mortgage was executed and recorded. The said horse was in the possession of the said McDonald, and was owned by him at the time the said mortgage was executed and recorded. In the fall of 1907, without paying any amount on said mortgage debt, the said mortgagor sold the said horse to defendant, the Hacoda Mercantile Company. The only notice, if any, that defendant had that said W. N. McDonald had executed the said mortgage was that given by the filing of said instrument for record and the recording of the same. The said McDonald's name was William N. McDonald, but his regular way of signing his name was "W. N. McDonald." The only real question raised in the case is whether or not the filing and recording of this mortgage was notice to the subsequent purchaser of the horse that W. N. McDonald had executed said mortgage.

Appellant insists that, by analogy to the requirements of the law as to names in a criminal prosecution, the insertion or omission of or mistake in a middle name or initial is immaterial,—citing *Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169; *Diggs v. State*, 49 Ala. 311; *Pace v. State*, 69 Ala. 231, 44 Am. Rep. 513; *Sewell v. State*, 82 Ala. 58, 2 So. 622; *Rampey v. State*, 83 Ala. 31, 3 So. 593. In this latter case the court say: "As the law recognizes but one Christian name, the insertion or omission of a middle name or initial is entirely immaterial." This was where the name G. H. Croft was drawn on the grand jury, and G. N. Croft appeared and answered thereto, and was made foreman of the grand jury. The court held that the difference in the middle initial was immaterial, and said that the insertion of a middle name made no difference. Such was the rule at common law, if initials were there recognized. But we are of opinion, and so hold, that our recording act together with modern business custom or usage, requires a modification of the common-law rule as to what constitutes a name, if the common-law rule recognized initials at all. It is the rule

in modern business dealings to sign the initials, only, of one's Christian name. Such being the case, it is very necessary for the speedy transaction of business that the initials should be correctly given where one so signs his name, before one should be held to know who the person signing was, merely from the record of his conveyance. It is true that some courts have held otherwise, contending that the property described, together with the identity of the surname, was sufficient to put the subsequent purchaser on notice of facts which, if followed up, would lead to knowledge of the real fact. But is it not a better rule to require the person taking a conveyance to see that it is correctly signed, than to permit him to take a conveyance incorrectly signed, and charge some subsequent purchaser who has been misled by the name signed to pay for property twice, or pay for it once and then lose it?

There are but twenty-six letters in our alphabet, and one of these must constitute the initial of every name in the land. The same letter is the initial of a vast number of different names; hence it can be easily seen that, where a person signs his Christian name by initials only, each initial should be correctly written. The common-law rule of but one Christian name and one surname, and that a wrong middle initial or name is immaterial (if the rule applies to initials), will certainly not answer the modern requirements of business, with reference to recorded conveyances being notice to the world of the conveyancer and the property conveyed. Suppose there were in the same county a W. N. McDonald and a W. H. McDonald, who were well known to a party about to make a purchase; would the fact that he saw on the record a mortgage signed "W. H. McDonald" be notice to him that the mortgage was in fact made by W. N. McDonald, any more than if any other name than that of W. N. McDonald had been signed to it? We think this is substantially the rule laid down in the case of *Johnson v. Wilson*, 137 Ala. 472, 97 Am. St. Rep. 52, 34 So. 392, where the court say: "It may be, and doubtless is, true that the mortgage executed by J. W. Dixon to the defendant, under the assumed name of A. W. Dixon, is a valid conveyance *inter partes*; but it does not follow from this that the plaintiffs, who subsequently purchased it from Dixon under his true name, are chargeable with constructive notice of the mortgage, which was recorded correctly. In other words, the record of a mortgage executed in the name of A. W. Dixon is not notice that J. W. Dixon executed it. The names are as entirely different as are the names of J. W. Dixon

and J. W. Smith." When we come to the real truth of the matter, and cease to attempt to follow antiquated dogma, there is just as much difference between the names "J. W. Dixon" and "J. A. Dixon" as there is between the names of "J. W. Dixon" and "A. W. Dixon," and this fact is recognized in the case of *Martin v. State*, 144 Ala. 8, 40 So. 275.

We doubt if the common-law doctrine of one Christian name and one surname ever really applied (though it has been held to have done so) where the Christian name was signed by initials only. The better rule undoubtedly is that, where the Christian name is signed by the initials only, the initials taken all together in their regular order should be considered as the Christian name for the purposes of signature. We are of opinion that the cases of *Johnson v. Wilson* and *Martin v. State*, supra, substantially hold to this view. We therefore hold that the recording of the mortgage signed "W. H. McDonald" was not constructive notice of the fact that the mortgage was executed by W. N. McDonald.

The other point raised by appellant is without merit. An inspection of the mortgage, which is sent up by the trial court with the record in accordance with the rule provided in such cases, shows clearly that the mortgage was signed W. H. McDonald, and there was nothing for the jury to decide on that point, and the bill of exceptions shows that it was properly recorded. The court is presumed to know the letters of the alphabet when they are plainly written. There might arise cases of doubt, but this is not one of them. The court correctly charged that the mortgage and the record of the mortgage was signed "W. H. McDonald."

Affirmed.

Dowdell, Ch. J., and Anderson and Sayre, JJ., concur.

ILLINOIS SUPREME COURT.

CITY OF CHICAGO, Appt.,

v.

DUNHAM TOWING & WRECKING COMPANY.

(246 Ill. 29, 92 N. E. 566.)

Limitation of actions — injury to bridge.

The statute of limitations will run against the right of a municipal corporation to recover for injury to a bridge which it is bound to maintain and keep in 32 L.R.A. (N.S.)

repair as part of its highway system, although it is held in trust for the public.

(June 29, 1910.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in defendant's favor in an action brought to recover damages for injury to a bridge. Affirmed.

The facts are stated in the opinion.

Mr. Charles M. Haft, with Mr. Edward J. Brundage, for appellant.

Mr. Michael F. Sullivan for appellee.

Cooke, J., delivered the opinion of the court:

On November 18, 1907, the city of Chi-

Note. — May the statute of limitations be interposed against an action by a municipality to recover damages for injury to property.

This note, of course, does not cover the question whether one may gain title to municipal property by adverse possession.

It will be noted that in those jurisdictions where the rule prevails that the statute of limitations may be interposed as a defense to all actions by municipal corporations to enforce mere private rights, while it is no defense to those involving public rights, the real question in each case becomes whether the municipality is seeking to enforce a public right or a private right.

In *Houston & T. C. R. Co. v. Travis County*, 62 Tex. 16, the holding of the court that an action by a county for damages caused by the manner in which a railroad company constructed its railway over a public highway was barred by limitations was placed upon the broad ground that the maxim, *Nullum tempus occurrit regi*, had no application to a suit by a county.

And to the same effect is *Chamberlain v. Lawrence County*, 71 Miss. 949, 15 So. 40, where it was held, in a suit by a board of supervisors for damages for the cutting of trees on public lands, that they, the supervisors, were subject to the bar of the statute of limitations.

The general question of applicability of statute of limitations to actions by agencies of state is discussed in a note to *Eastern State Hospital v. Winston*, 3 L.R.A. (N.S.) 746.

The question of effect of statute of limitations upon claims against the state is included in a note to *Houston v. State*, 42 L.R.A. 67.

A number of cases dealing with the question of limitation of time to present claims against the United States may be found in a note to *Waddell v. United States*, 7 L.R.A. 861.

The question of vested right of municipal corporation in defense of statute of limitations is discussed in a note to *State v. Seattle*, 27 L.R.A. (N.S.) 1188. G. V.

cago brought suit in the municipal court of Chicago against the Dunham Towing & Wrecking Company to recover damages amounting to \$108, resulting from an injury to certain piles supporting a part of the bridge structure of a bridge across the Chicago river at Fullerton avenue, caused on August 17, 1901, by a schooner coming in contact with them while being towed by one of appellee's tugs. The municipal court held that the action was barred by the statute of limitations, and rendered judgment for the defendant. The appellate court for the first district affirmed that judgment, and granted a certificate of importance, whereupon the city prosecuted an appeal to this court. The case was decided by the municipal court upon an agreed statement of facts, from which it appears that the city of Chicago extended one of its streets, known as Fullerton avenue, across the Chicago river by the construction of a bridge, which was paid for and is maintained out of funds derived solely from general taxation of property lying within the city of Chicago, and that the city of Chicago, in its corporate or private capacity, derives no income or benefit of any nature, kind or description from the said bridge or the use thereof, but that the people residing in the city of Chicago are benefited and inconvenienced by the use of said bridge as a part of the street. It was a portion of this bridge that was injured by the schooner colliding with it.

The only question presented to this court for determination is whether the statute of limitations can be interposed as a defense to the action by the city to recover damages for injuries to the bridge. The rule in this state is that the statute may be interposed to all actions by municipal corporations to enforce mere private rights, but that it is no defense to those involving public rights. *Logan County v. Lincoln*, 81 Ill. 156; *Ramsay v. Clinton County*, 92 Ill. 225; *Piatt County v. Goodell*, 97 Ill. 84; *School Directors v. School Directors*, 105 Ill. 653; *People ex rel. Atlanta v. Oran*, 121 Ill. 650, 13 N. E. 726; *Greenwood v. LaSalle*, 137 Ill. 225, 26 N. E. 1089; *Brown v. Trustees of Schools*, 224 Ill. 184, 115 Am. St. Rep. 146, 79 N. E. 579, 8 A. & E. Ann. Cas. 96. Whether or not the statute of limitations can be interposed in defense of this action, therefore, depends upon whether the appellant is seeking to enforce a public or a private right. The contention of the appellant is that the right sought to be enforced is a public right; that while the title to the street in question, of which this bridge is a part, is in the city, it holds that title in trust for the entire public, and is the agent 32 L.R.A. (N.S.)

of the state, discharging a governmental duty, when suing with reference to the damage done to the street, and, like the state itself, is not under such circumstances to be subject to the statute of limitations. It is true, as the appellant contends, that its title in this street is held in trust for the entire public, and is subject to the paramount authority of the state. It is the duty of the appellant, however, at its own expense, to keep this street in proper repair and in a fit condition to be used by the public in traveling over and upon it. The public, as such, is in no wise concerned in the repair and maintenance of any part of this street, but is only concerned in its right to use the same. The rights of the public will be undisturbed and unaffected whether the city is successful or unsuccessful in this litigation. The authorities relied upon by appellant are all cases where the title to the street was involved, and where streets, or portions of them, were sought to be held by individuals under a claim of adverse possession. In those cases this court properly held that the statute of limitations did not run, and they are all of them clearly cases where public rights alone were sought to be enforced. The title to the bridge in question is in no way involved in this litigation. No attempt is being made to invade or interfere with the rights of the public in any part of Fullerton avenue. The city is not seeking to oust anyone from the possession of any part of the street, but is simply seeking compensation for damage done to that part of the street which it is the duty of the city to maintain and keep in repair. No public right is involved. The city is seeking to enforce a mere private right, and the statute of limitations may properly be pleaded as a defense. The judgment of the Appellate Court is affirmed.

Petition for rehearing denied October 11, 1910.

KANSAS SUPREME COURT.

CHARLIE HUNT et al., by Next Friend,

JOHN D. REMSBURG, Admr., etc., of John Hunt, Deceased, et al., Appts.

(— Kan. —, 112 Pac. 590.)

Benefit insurance — legal representative — administrator — children.

A fraternal insurance association issued a certificate of membership to a man who named his wife as beneficiary. It was pro-

Headnote by GRAVES, J.

vided that in case the wife died before he did, he might name another beneficiary, but if he failed to do so, or if for any reason there was none when the insurance should be payable, the money should be paid to his legal representative. The wife died; he died some years after; an administrator of his estate was appointed, to whom the association paid the money. The insured left three minor children, who commenced an action against the administrator and his sureties to recover the money. Held that they ought not to recover. The administrator was the "legal representative" of the deceased, within the meaning of that term, and was entitled to the money as a part of the estate of the insured.

(Johnston, Ch. J., and Smith and Porter, JJ., dissent.)

(January 9, 1911.)

APPEAL by defendants from a judgment of the District Court for Allen County in plaintiffs' favor in an action upon an administrator's bond to recover insurance

Note. — Who are "legal representatives" in life insurance policies.

This question is discussed in a note to *Rose v. Wortham*, 30 L.R.A. 609, where the earlier cases will be found collected. From the decisions there reviewed and from the cases decided since then, it may be safely said that the weight of authority supports the proposition that as a general rule the term "legal representatives" will be given its ordinary meaning even in policies of insurance, thereby making the proceeds thereof payable to the estate of the insured, unless a different intention upon the part of the insured may be gathered from the context of the contract and the surrounding circumstances.

In *Pittel v. Fidelity Mut. Life Asso.* 30 C. C. A. 21, 52 U. S. App. 638, 86 Fed. 255, it was held that the term "legal representatives" ordinarily meant "executors or administrators" when not in any way qualified by the context, though it might be shown to mean "next of kin or successors or assigns." Hence the ordinary meaning would be given to the term, even in a contract of life insurance, where there was nothing in the record to require the court to depart from the usual construction of the language used, especially where the insured himself, in his life, stamped upon the contract his understanding of its import by assigning it to a third person.

And in *Waters v. Kopp*, 34 App. D. C. 575, it was declared that the natural and usual construction given these words in insurance policies was "that of 'executor, administrator, and assigns,' or 'executor and administrator,' thus making the policy payable to the estate of the insured in the absence or death of a named beneficiary."

In *Geoffroy v. Gilbert*, 5 App. Div. 98, 32 L.R.A. (N.S.)

money received upon the life of John Hunt, deceased, and used as part of his estate, which was alleged by plaintiffs to belong exclusively to them as the children of deceased. Reversed.

The facts are stated in the opinion.

Messrs. Charles H. Apt and Frederick G. Apt, for appellants:

The term "legal representative" as commonly used means "administrator or executor" of the deceased.

O'Neill v. Douthitt, 40 Kan. 689, 20 Pac. 493; *Bacon*, Ben. Soc. § 262; *Warnecke v. Lembea*, 71 Ill. 91, 22 Am. Rep. 85; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Cox v. Curwen*, 118 Mass. 198; *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95; *Johnson v. Van Epps*, 110 Ill. 551; *Weaver v. Roth*, 105 Pa. 408; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, 42 S. E. 269; *People use of Brooks v. Petrie*, 191 Ill. 497, 85

38 N. Y. Supp. 643, reversing 15 Misc. 60, 30 N. Y. Supp. 884 (cited in the note in 30 L.R.A. above referred to), it was held that the phrase "legal representatives" ordinarily meant "executors or administrators," and "in the absence of any proof requiring a different meaning to be given to that phrase, it must be thus construed," in a life insurance policy.

To the same effect are the following cases, in which the term "legal representatives" used in policies of life insurance was held to have its ordinary meaning, where there was nothing in the surroundings or circumstances attending the transaction to warrant the conclusion that the expression was used in any other sense: *Johnson v. Van Epps*, 110 Ill. 551, affirming 14 Ill. App. 201; *New York L. Ins. Co. v. Kansas City Bank*, 121 Mo. App. 479, 97 S. W. 195; *Walker v. Peters*, 139 Mo. App. 681, 124 S. W. 35; *Fisher v. Fisher*, 28 Ont. Rep. 459.

On the other hand, in *Hall v. Ayer*, 32 Ky. L. Rep. 288, 105 S. W. 911, the proceeds of a policy which was payable to the wife and two daughters of the insured, if living at the time of the death of the insured, otherwise to his legal representatives, were held to belong to the surviving daughter of the assured, and to a child of the other daughter, who, with the wife, had predeceased him, especially in view of a statute which provided that the proceeds of insurance could not be subject to the payment of the assured's debts, though it was conceded that the words "legal representatives" frequently meant "executors and administrators." The court said that the expression "legal representatives" used in the policy did not indicate an intention to direct its proceeds to any other persons than those named in the policy, or in case

Am. St. Rep. 268, 61 N. E. 499; *Staples v. Lewis*, 71 Conn. 288, 41 Atl. 815.

The fund collected is a part of the estate and subject to distribution under the orders of the probate court.

Union Mut. L. Ins. Co. v. Stevens, 19 Fed. 671; *People use of Brooks v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499; *Sulz v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242; *Fox v. Senter*, 83 Me. 295, 22 Atl. 173; 11 Am. & Eng. Enc. Law, 2d ed. p. 846.

Messrs. Frank R. Forrest and Chris Ritter, for appellees:

The phrase "legal representative" in this policy means the children of the insured member, his heirs.

O'Neill v. Douthitt, 40 Kan. 694, 20 Pac. 493; 18 Cyc. Law & Proc. p. 55; *Oates v. Union P. R. Co.* 104 Mo. 514, 24 Am. St. Rep. 348, 16 S. W. 487; *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211; *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 96, 14 Pac. 449; *Re Conrad*, 89 Iowa, 396, 48 Am. St. Rep. 396, 56 N. W. 535; *Schultz v. Citizens' Mut. L. Ins. Co.* 59 Minn. 308, 61 N. W. 331; *Hodge's Appeal*, 8 W. N. C. 209; *Rose v. Wortham*, 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458; *Harton's Estate*, 213 Pa. 499, 4 L.R.A.(N.S.) 939, 62 Atl. 1058; *Sternberg v. Levy*, 159 Mo. 617, 53 L.R.A. 438, 60 S. W. 1114; *Re Schaefer*, 194 Pa. 420, 45 Atl. 311; *Mutual Protective League v. McKee*, 223 Ill. 364, 79 N. E. 25; *Johnson v. Mutual L. Ins. Co.* 63 L.R.A. 832, note, 180 Mass. 407, 62 N. E. 733; *Wist v. Grand Lodge*, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Edwards v. Kearzey*, 96 U. S. 607, 27 L. ed. 798; *Tate v. Commercial Bldg. Asso.* 97 Va. 74, 45 L.R.A. 243, 75 Am. St. Rep. 770, 33 S. E. 382; *Hall v. Ayer*, 32 Ky. L. Rep. 268, 105 S. W. 911; *Carson v. Vicksburg Bank*, 75 Miss. 167, 37 L.R.A. 559, 65 Am. St. Rep. 596, 22 So. 1.

On petition for rehearing.

Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464, held that the administrator of *Griswold's* estate could not recover the

funds with which to pay *Griswold's* creditors, as against the claims of the wife and children of deceased.

To the same effect are *Sulz v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242 (from which the language misquoted in the opinion as from the *Griswold Case* was taken); *Hubbard v. Turner*, 93 Ga. 752, 30 L.R.A. 593, 20 S. E. 640; *Lyons v. Yerex*, 100 Mich. 214, 43 Am. St. Rep. 452, 58 N. W. 1112; *Hall v. Ayer*, 32 Ky. L. Rep. 288, 105 S. W. 911; *Rose v. Wortham*, 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458; *Morris v. Dodd*, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; *Tucker v. Knights of Pythias*, — Ga. —, 68 S. E. 796; *Re Conrad*, 89 Iowa, 396, 48 Am. St. Rep. 396, 56 N. W. 535; *Schultz v. Citizens' Mut. L. Ins. Co.* 59 Minn. 308, 61 N. W. 331; *Harton's Estate*, 213 Pa. 499, 4 L.R.A.(N.S.) 939, 62 Atl. 1058; *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778.

The proceeds of the policy were exempt from debts, under the law of the member's domicile.

Iowa 21st Gen. Assem. chap. 65, §§ 1784-1789, 1805; Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Silvers v. Michigan Mut. Ben. Asso.* 94 Mich. 39, 53 N. W. 935; *Roberts v. Winton*, 100 Tenn. 484, 41 L.R.A. 275, 45 S. W. 673; *Mullen v. Reed*, 64 Conn. 240, 24 L.R.A. 664, 42 Am. St. Rep. 174, 29 Pac. 478; *Nielsen v. Provident Sav. Life Assur. Soc.* 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168; *Larrabee v. Palmer*, 101 Iowa, 132, 70 N. W. 100; *Murdy v. Skyles*, 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; *Mitchell v. Allis*, 157 Ala. 304, 47 So. 715.

Graves, J. delivered the opinion of the court:

This is an action upon an administrator's bond to recover insurance money received upon the life of *John Hunt*, deceased, and used as a part of his estate. The widow is dead; the plaintiffs are all the children

of their death "to such persons as would take as their heirs at law."

And in *Nashville Trust Co. v. First Nat. Bank*, — Tenn. —, 134 S. W. 311, it was declared to be well settled, in view of a statute exempting the proceeds of life insurance from the debts of the insured, that if a policy by its terms was payable to the legal representatives of the assured, and he died without having made any disposition of it, the claims of his widow and next of kin, whether the latter were children or other kin, would prevail over the claims of his general creditors, whether the estate of the insured was solvent or insolvent. 32 L.R.A.(N.S.)

And in *Harton's Estate*, 213 Pa. 499, 4 L.R.A.(N.S.) 939, 62 Atl. 1058, the term "legal representatives" used in a certificate issued by a mutual benefit society was construed to mean the assured's heirs, where a statute of the society's domicile expressly indicated its purposes and objects to be (and to this extent placed a limitation upon its powers and privileges) "for the mutual protection and relief of the members, and for the payment of stipulated sums of money to the family or heirs of the deceased members of such association."

J. A. C.

of said John Hunt, deceased. It is claimed that this money belongs exclusively to the children of John Hunt, deceased, and is no part of the estate of the insured, and that neither the administrator nor the probate court have any right to assume control of or to exercise any dominion over it.

John Hunt, on the 2d day of December, 1897, at Burlington, Iowa, joined the association known as the Merchant's Life Association, located at that place. He thereby became a member of that association, with his life insured in the sum of \$2,000. It was an insurance association organized upon the mutual plan. John Hunt died intestate April 30, 1907, at Gas, Allen county, Kansas, leaving three minor children as his sole heirs at law; his wife having died prior thereto. John D. Remsburg was duly appointed as administrator of said estate, and was duly qualified, and entered upon his duties as such. In May following he collected the \$2,000 insurance money from the association and reported it to the probate court.

When John Hunt received his certificate of membership, he named his wife, Martha Elizabeth Hunt, as beneficiary, who, on February 26, 1900, died at their residence in Packwood, Iowa, where they resided when the insurance was obtained. A few years afterward they removed to Allen county, Kansas, where they resided until the death of John Hunt. There is a provision in the certificate of membership which reads: "In the event of the death of the beneficiary prior to that of the member, or in case none is named, the benefit then to be payable to the legal representative of the deceased member." No other beneficiary was named by John Hunt after the death of his wife, although he had a right to make such an appointment at any time after her death. The administrator, under the directions and orders of the probate court, paid the proceeds of said insurance certificate to the creditors of said estate, to the amount of \$1,500. The defendants J. S. Christian and T. J. Anderson are sureties on the administrator's bond. It is contended by the plaintiffs that the proceeds of the certificate belong exclusively to the legal representatives of John Hunt, and that his children are such legal representatives, while it is contended by the defendants that the legal representative is the administrator, John D. Remsburg; and this constitutes the sole question in controversy.

The question as to who constitutes the legal representative of the holder of an insurance policy is not very well settled. The proper interpretation seems to depend upon the context of the instrument where used, and surrounding circumstances.

32 L.R.A. (N.S.)

In the case of *Griswold v. Sawyer*, 125 N. Y. 411, 26 N. E. 464 [*Sulz v. Mutual Reserve Fund Life Assn.* 145 N. Y. 574, 28 L.R.A. 383, 40 N. E. 242], it is said: "The words 'legal representatives' mean, ordinarily, executors or administrators, and that meaning will be attributed to them in any instance, unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea. The facts in this case are not sufficient to change the ordinary meaning of this language, and we therefore must attribute to the insured an intention in conformity to the ordinary meaning given to those words." See also *Cox v. Curwen*, 118 Mass. 198, where the syllabus reads: "A, by indenture, conveyed all the property inherited from his father to B in trust, to retain and hold it during the life of A to convert the real estate into personalty, to render accounts to him annually, and to pay to him from time to time the income, and, if necessary, part of the principal, at the discretion of the trustee, for the benefit of A and his daughter, and after his death to transfer all the estate then remaining to his 'legal representatives.' Held, that there was nothing in the indenture to show that the words 'legal representatives' were intended to have other than their ordinary meaning, 'executors and administrators,' and, A having devised the residue of the estate, that the trust estate should be conveyed by B to A's executor, to be distributed according to the terms of the will."

The second syllabus in the case of *Johnson v. Van Epps*, 110 Ill. 552, reads: "The words 'legal representatives' in a policy of insurance, as designating the beneficiaries, when there is nothing in the context or surrounding circumstances to indicate a contrary intention, mean 'executors or administrators.' A policy of insurance payable to the legal representatives of the assured is the same as if made payable to himself."

In the case of *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95, it is said: "There can be no doubt that the ordinary meaning of the term 'legal representatives' is 'executors and administrators.' *Cox v. Curwen*, 118 Mass. 198; *Price v. Strange*, 6 Madd. Ch. 159, 22 Revised Rep. 266. In wills, the term may mean whatever the testator intended; but if the meaning is not controlled by the context, it means executors or administrators."

In *Geoffroy v. Gilbert*, 15 Misc. 60, 36 N. Y. Supp. 884, as follows: "Primarily these words [legal representatives] signify the executors or administrators of a deceased person. They, however, have been construed to refer to blood relations . . . as heirs or next of kin, and are held to mean

that class of persons where the circumstances indicates such intention;" and "where a father took out a policy on his life payable to his daughter, four years old, or her 'legal representatives,' and she married and died before her father, her husband is not entitled to the proceeds of the policy."

The ordinary meaning of the words "legal representatives" is "executors and administrators," and they will be given this meaning where there is nothing in the instrument in which they are used to indicate an intention to use them in any other sense. *Cox v. Curwen*, 118 Mass. 198; *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95; *Johnson v. Van Epps*, 110 Ill. 551.

The insured in this case, J. H. Hunt, named his wife as beneficiary. After she died there remained three small children, and he might at any time, for several years thereafter, have named some other person, but did not do so. It must be assumed that he knew of this condition in his certificate and failed to appoint another beneficiary for some reason satisfactory to himself, but which is not clearly expressed. He evidently thought that a beneficiary and a legal representative were not persons belonging to the same class, or they would not have been mentioned as they were in the certificate, which says, if there be no beneficiary, then the money shall go to the legal representatives of the deceased member. It would have been very easy to change the words "legal representatives" to "children," if that had been the desire, and then the intent would have been unmistakable. It seems unreasonable to assume that John Hunt was familiar with the narrow margin of difference between these phrases, and how by interpretation they could be made to mean the same thing or otherwise. It seems more reasonable to assume that if he so understood, he would have been sufficiently solicitous for his children to have made his meaning clear. We do not know why he neglected to appoint another beneficiary. We only know that he allowed the language to stand unchanged, which, in its ordinary meaning, justified the interpretation placed upon it by the insurance company when it paid the money, and by the administrator and probate judge who officially exercised jurisdiction over it. The ordinary meaning of the language used would lead to this conclusion, and we are unable to find anything, either in the instrument where this language is used or elsewhere in the case, which, to our minds, shows any other intent.

The judgment is reversed, with direction to enter costs in favor of defendants.

Burch and Mason, JJ., concur.
32 L.R.A.(N.S.)

Benson, J., concurring specially:

Concurring with the opinion of the majority of the court I desire to add: (1) The articles of incorporation of the insurance company which issued the policy in question declare that beneficiaries may be "husband, wife, relative, legal representative, or legatee." It must be presumed that these terms were used in their ordinary sense, and that each represents a distinct class. The Iowa statute set out in the pleadings authorizes insurance for such beneficiaries, using the same terms and including creditors also. The term "legal representative," as used in the articles referred to and in the statute, clearly applies here, as it does ordinarily, to an administrator or executor.

(2) The policy was written in accordance with the power given by the articles of incorporation and the statute, naming the wife as the beneficiary, with the proviso that in case she died, and no new beneficiary was designated by a member, the amount of the policy should be paid to his legal representative. The wife did die before the insured; no new beneficiary was named; hence it was payable to the administrator, unless the apparent meaning of the language of the statute, the articles, and the policy, is controlled by some statute or judicial interpretation to the contrary.

(3) The provisions of the Iowa statute relied upon by the appellees do not appear to affect the question. These provisions are: "But no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to the creditors," and "a policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors." Code Iowa, §§ 1789, 1805. The first provision referring to benefit certificates, if it applies in any case to an ordinary insurance policy like the one under consideration, has no application here, for there was no change attempted. The policy was made payable directly to the legal representative, subject only to the death of the wife before the death of the insured. It was not issued to creditors, but for the benefit of the estate. Whether creditors might ultimately share in it was a contingency which, if contemplated at all, was not prohibited by the statute or by public policy, which is not inimical to the payment of debts. The other statutory provision only declares that, in the absence of an agreement or assignment to the contrary, the policy shall inure to wife or children. Here the agreement to the contrary is expressly made in

the contract. The statute thus recognizes the right to make insurance available to creditors, if the insured so desires. Both of these statutory provisions, however, relate to insurance payable to creditors directly, and not to any contingent or possible benefits they may receive through the administration of an estate.

(4) The Iowa decision relied upon by the appellees (Re Conrad, 89 Iowa, 396, 398, 48 Am. St. Rep. 396, 56 N. W. 535, 530), does not sustain their contention. The policy there was made payable to the wife of the insured or to her legal representatives, or if not living at the time of the death of the insured, the sum then to be payable to his children. It will be observed that the beneficiary named was the wife or her legal representatives and that there was an express provision added that her children should receive the money. The court said: "It is expressly provided in the policy that, if the assured be not living at the time the policy becomes payable, the amount thereof shall be payable to her children. There was no authority to make payment to the administrator of her estate in any event. The clause authorizing payment to 'her legal representatives' does not mean payment to her administrator. It contemplates payment to some legal representative appointed by the wife to receive the money for her. There can be no other meaning attached to the expression 'legal representatives,' because it is expressly provided that, if the assured be not then living, payment shall be made to the children or their guardian."

As the policy in the foregoing case require the payment to be made to the children, the term "legal representative," as there used, necessarily meant a person authorized to receive payment for them. No other meaning could be given consistently with the terms of the policy. An earlier case in that state, *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211, held that it was the duty of an administrator to collect a policy payable to personal representatives, but also held that it could not be applied to the payment of debts, because of a statute expressly exempting the proceeds of certain life insurance therefrom. That statute, however, was not pleaded in this case (which was decided upon a motion for judgment on the pleading), but if it had been pleaded, it would not have been controlling here, for exemption laws are not a part of the contract; they are subject to the laws of the forum. *Chicago, R. I. & P. R. Co. v. Strum*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Freeman, Executions*, § 209.

In *Schultz v. Citizens' Mut. L. Ins. Co.* 59 Minn. 308, 61 N. W. 331, it appeared that the policy was made payable to and

for the sole use of the legal representatives of the insured. On the application, made part of the policy, the insured stated that the money should be paid to his "legal heirs"—"wife, if living." Construing the language of the two instruments together, the court held that the policy was payable to the wife and children of the deceased. This decision supports the principal opinion that it is permissible to construe the term "legal representative" with reference to the context.

(5) The answer, admitted by the motion for judgment to be true, alleged that the money was received in May, 1907, and that it had been disbursed in accordance with and under the judgments and order of the probate court, before the commencement of this action (March, 1909); that the administrator had duly performed all the orders and judgments of the court respecting said estate, and had not violated any condition of his bond. There is no averment in the petition that the appellees ever presented their claim in the probate court, although the sum due on this policy appeared on the inventory. A grave question is presented whether, even if the appellees were entitled to the fund, they should not have presented their claim in the probate court. The right of the administrator to collect the money is expressly held in *Kelley v. Mann*, *supra*. The fund was thus brought within the jurisdiction of the probate court, and the question remains whether there is any breach of the bond, until there is a violation of some order of the court respecting its distribution.

Johnston, Ch. J., dissenting:

While the technical meaning of the term "legal representative" is an executor or administrator, it is frequently used in insurance policies like the one in this action to mean next of kin or heirs. Looking at the statute and the charter of the association in pursuance of which the contract was made, as well as the surrounding circumstances, it appears quite manifest to me that the term was used here in the broader sense, and meant a natural representative, like husband, wife, relative, or heir, in connection with whom the term was used. It was so interpreted in *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449. The certificate in question was issued by an Iowa association organized under an Iowa statute, and we may look to that statute and the decisions under it in interpreting the contract. The statute provides that the purpose of insuring the lives of the members is to "furnish benefits to the wives, heirs, orphans, or legatees of deceased members." Code Iowa, § 1784.

Another provision of the statute indicating that it was not contemplated that creditors could obtain benefits or proceeds of insurance through an executor or administrator is that the beneficiary may be changed at the pleasure of the assured, and it is then provided that "no certificate issued for the benefit of a wife or children shall be thus changed, so as to become payable to the creditors." Iowa Code, § 1789. In this case, the wife was named as beneficiary. Under the statute, it would have been impossible for the assured to have changed the beneficiary, so as to have made the benefits payable to creditors.

In the face of this provision, the benefits ought not to be given to creditors through the technical definition of the term "legal representative." The term being susceptible of interpretation as an heir or child, it should be given that meaning, rather than one that would be in conflict with the statute. "The words 'legal representatives' have a secondary sense well recognized, which harmonizes entirely with the purposes and objects of the association. The instances are not few in which they have been held to mean heirs at law. The terms 'legal representative,' 'personal relatives,' etc., are often used in statutes and instruments of writing in a broader sense, so as to include all persons who stand in place or represent the interests of another, either by his act or operation of law." *Harton's Estate*, 213 Pa. 499, 4 L.R.A.(N.S.) 939, 62 Atl. 1058. Another section of the statute provides that, in the absence of an agreement to the contrary, a policy "shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors" (Code Iowa, § 1805), and in the same section there is a provision that the proceeds of a policy shall be exempt from liability for any debts, and still other provisions to the effect that benefits, indemnity, or the avails of policies shall be exempt from liability for debts. It may be mentioned, too, that the charter of the association struck out the term "creditors" from the list of those who, under the statute, might have been named as beneficiaries. It was competent for the association to narrow the classes to whom benefits might go, and the charter of the association named all of those mentioned by the statute, except creditors. It is provided, too, that a certificate when issued to those designated by statute cannot be assigned to anyone else. Code Iowa, § 1789. The supreme court of Iowa held that an administrator who obtained money on a policy payable to legal representatives was liable for the avails of the policy, which should have been paid to the wife and chil-

dren. *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211. See also *Re Conrad*, 89 Iowa, 396, 48 Am. St. Rep. 396, 56 N. W. 535. In *Schultz v. Citizens' Mut. L. Ins. Co.* 59 Minn. 308, 61 N. W. 331, where the term "legal representative" was used in the contract, and the application stated that the insurance was taken for the benefit of legal representatives, it was held that the term should be interpreted as meaning heirs or next of kin, and not executors or administrators. In deciding it, the court said: "It is always permissible to construe these words in that way, especially in wills and policies of life insurance wherever it is apparent from the context or subject-matter that they were used in that sense. They will be construed in that way more readily in policies of life insurance than in almost any other kind of instrument, for the reason that such insurance is very commonly intended as a provision for the family of the insured." If a term in a statute is of doubtful import, it should be construed in connection with the entire statute and the obvious purpose of the lawmakers, and when the whole statute and charter of the association are considered, it seems reasonably clear to me that provision was not being made for the benefit of creditors. The declared purpose of the statute was to provide protection for widows, heirs, orphans, and legatees of deceased members. In cases of doubt, the intention of the insured is an important element in determining the meaning of words used in a certificate.

Now the assured had a widow and children, and he became a member of an association that was organized to provide insurance for wives and children. He designated his wife as a beneficiary, and when his wife died the children still needed protection. He did not, it is true, name another beneficiary after the death of his wife; but it is not to be supposed that he was planning and intending to make provision for the protection of creditors at the expense of his children. It is rather to be inferred that he regarded the term "legal representatives" as broad enough in its meaning to include his children, and, so far as intention can go, it would not take much evidence to raise the presumption that he intended the insurance for his children, and not for his creditors.

Smith, J.: I join in the dissenting opinion.

Porter, J.: I concur in the foregoing dissent:

Petition for rehearing denied February 17, 1911.

KANSAS SUPREME COURT.

CHARLES E. ELLIS, Revived by Commonwealth Title Insurance & Trust Company et al., Exrs., Appts.,
v.

ELIZABETH SNYDER et al.
(Two Cases.)

(— Kan. —, 112 Pac. 594.)

Limitation of action — mortgage debt — payment by tenant in common.

1. A husband and wife executed a note secured by mortgage on their land, and the husband thereafter died, having previously conveyed the title to his wife. The widow rented the farm to her son-in-law, and during such tenancy the widow died. The son-in-law, with his wife, continued in possession of the farm, and before the expiration of five years from the maturity of the note made a small payment on the debt. They continued in possession for a number of years until this action to foreclose the mortgage was brought, with the acquiescence of the brothers and sisters of the wife, and he, with her consent, made several payments upon the indebtedness and paid the taxes on the land, all of which payments were made from the proceeds of crops raised upon the land. No interval of five years elapsed between such payments. He neither paid nor contracted to pay any rent to any of the heirs. Held, that such payments prevented the running of the statute of limitation in favor of any of the heirs against the mortgage debt.

Cotenancy — duty to pay mortgage interest.

2. A tenant in common in possession of mortgaged real estate, with the acquiescence of the other cotenants, and in the absence of any contract to pay rent, owes a duty to the other cotenants to pay the interest maturing on the mortgage and taxes accruing on the land.

(January 9, 1911.)

A PPEAL by plaintiffs from a judgment of the District Court for Sumner County in defendants' favor in an action brought to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. James T. Herrick and Harold W. Herrick, for appellants:

The persons representing the land had a right to apply the proceeds of the rent to the payment of the encumbrance; and if they had a right to make or cause to be made payments on the mortgage and

taxes, the making of such payments would toll the statute.

21 Cyc. Law & Proc. p. 100; 15 Am. & Eng. Enc. Law, 2d ed. p. 55; Ducker's Succession, 10 La. Ann. 758; Ronald v. Barkley, 1 Brock. 356, Fed. Cas. No. 12,031; Wright v. Comley, 14 Ill. App. 551; Cheney v. Roodhouse, 135 Ill. 257, 25 N. E. 1019; 2 Perry, Tr. § 607; MacPherson, Infants, 285; 9 Am. & Eng. Enc. Law, p. 114.

Payment made by one of the heirs tolls the statute, not only as to the interest in the land of the heir making the payment, but as to the interest of all the other heirs.

Andrews v. Morse, 51 Kan. 30, 32 Pac. 640; McLane v. Allison, 60 Kan. 441, 56 Pac. 747.

Mr. Ed. T. Hackney, for appellees:

The payments made by Bert Snyder did not toll the statute.

Harlock v. Asberry, L. R. 19 Ch. Div. 539, 51 L. J. Ch. N. S. 394, 46 L. T. N. S. 356, 3 Week. Rep. 327; Chinnery v. Evans, 11 H. L. Cas. 115, 10 Jur. N. S. 855, 11 L. T. N. S. 68, 13 Week. Rep. 20; Phillips v. Mahan, 52 Mo. 197; Good v. Ehrlich, 67 Kan. 96, 72 Pac. 545; United States v. Wilder, 13 Wall. 254, 20 L. ed. 681; Shanks v. Louthan, 70 Kan. 303, 131 Am. St. Rep. 294, 99 Pac. 613.

One tenant in common cannot toll the statute against cotenants.

1 Washb. Real Prop. p. 572; Mayfield v. McKnight, — Tenn. —, 56 S. W. 42; Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Greenl. Ev. 176; Watson v. Gregg, 10 Watts, 289, 36 Am. Dec. 176; Bernard v. Walker, 2 U. C. Err. & App. 146; Dexter Lime Rock Co. v. Dexter, 6 R. I. 353, 4 Mor. Min. Rep. 291; Wilson v. Goldstein, 12 Pa. Co. Ct. 337; Mahoney v. Van Winkle, 21 Cal. 582; Pearis v. Covillaud, 6 Cal. 617, 65 Am. Dec. 543; Re Kennedy, 167 N. Y. 163, 60 N. E. 442; Murdock v. Waterman, 145 N. Y. 55, 27 L.R.A. 418, 30 N. E. 829; Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75; Gallagher v. Whalen, 10 Ky. L. Rep. 458, 9 S. W. 390, 701; Tracey v. Shumate, 22 W. Va. 475; Grant v. Maier, 32 La. Ann. 51; Haines v. Haines, 69 N. J. L. 39, 54 Atl. 401.

Smith, J., delivered the opinion of the court:

February 1, 1889, John W. Gray and Elizabeth A. Gray, his wife, executed a mortgage on the land in question to secure the payment of a note for \$2,000, payable five years after that date, with interest. The Southern Kansas Mortgage Company was the mortgagee, but before the commencement of this action assigned the note

Headnotes by SMITH, J.

Note. — As to effect of part payment on mortgage by one cotenant to toll statute of limitations as to others, see Clute v. Clute, 27 L.R.A.(N.S.) 146, and note appended thereto.
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and mortgage to Charles E. Ellis, who brought the action to foreclose the same. Both Gray and his wife died before the maturity of the note and mortgage. Before his death the husband conveyed the land to his wife. She died April 10, 1892, leaving as her only heirs at law Elizabeth D. Snyder, who had been theretofore married to one Bert Snyder, Tina Gray, who, together with the said Elizabeth D. Snyder, had attained her majority, besides the three sons and two other daughters, who were all minors. At a time prior to the death of Mrs. Gray, Bert Snyder had rented a portion of the land in question, and soon after her death he and his wife, Elizabeth, moved upon the land and continued to occupy it until this action was brought. Bert Snyder made an oral contract with the guardian of the minor children for the purchase of their interest in the land, conditioned upon the approval thereof and order of the probate court. No action, however, was taken by the court in relation thereto. Bert Snyder borrowed money of the mortgagee to pay insurance, buy seed wheat, taxes, etc., from September 18, 1895, to February, 1900. He made payments from time to time to the mortgagee from October, 1895, to November, 1901, which were almost entirely from the proceeds of wheat and corn raised on the farm. On November 14, 1896, he paid the mortgagee, by proceeds of wheat, \$44.20, and on December 20, 1896, the proceeds of corn, \$19.25, at neither of which dates was he indebted to the mortgagee on any account other than the mortgage. These two payments, aggregating \$63.45, must be regarded as payments on the interest, and at the time the payments were made neither the principal of the mortgage debt nor any interest thereon had been due five years. Thereafter Bert Snyder borrowed further sums of money from the holder of the mortgage from time to time, and repaid certain amounts from the proceeds of the farm until November 16, 1901, when the sum of the payments exceeded the amounts borrowed by over \$700, but at no time paid an amount equal to the interest due on the mortgage. Elizabeth Snyder objected to her husband's plan to buy out the interest of the minors in the land, as he had agreed with the guardian, for \$100 and to pay off the mortgage; but she signed with him chattel mortgages on the growing crops to enable him to carry out the plan, and she knew generally of the payments he made, and, from the general findings of the court against her, it must be assumed that it found that she acquiesced therein. The evidence, while conflicting, is sufficient to support such finding. There is no evidence of

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any agreement that she should convey her interest to her husband. The payments were made in her behalf, as well as in his, and were in fact her payments, as well as his. The other adult heir, Tina Gray, lived with the Snyders on the farm some time after the death of the mother and before she married Marks. The undisputed evidence is that she was present when the tentative agreement was made between Bert Snyder and the guardian of the minors, and agreed to deed her interest in the land to Bert Snyder, but said they could not pay the mortgage, and had better let it take the land. Mr. Bishop, the guardian, testified that he thought there was nothing in the land for his wards, never made any effort to get possession for them, and agreed, if the probate court would approve it, to sell their interest to Bert Snyder for \$100.

It thus appears that Bert Snyder and his wife continued in possession by the consent or acquiescence of all the other cotenants, and made the payments on the interest for the benefit, in part, of each; also it appears that the holder of the mortgage was about to foreclose it at the time this arrangement was made, and, relying thereon, forebore such action. Under such circumstances, it would seem very inequitable, if not illegal, to permit the cotenants, who paid nothing, and years after, when changed conditions have greatly augmented the value of the property, to set up the statute of limitations and take their respective interests in the land, free of encumbrance, and thus not only debar the mortgagee from recovering a large portion of his just claim, but also to subject the interest of the cotenant who strove and paid in part, to be entirely taken for the remainder.

It is said in *Clute v. Clute*, 197 N. Y. 439, 27 L.R.A. (N.S.) 146, 134 Am. St. Rep. 801, 90 N. E. 988: "Interest payments upon the mortgage debt by the son of the mortgagor, who, having been let into possession of the property during the lifetime of the mortgagor, under an agreement to work it on shares, continues his possession after the mortgagor's death, with the acquiescence of his brothers and sisters, prevent the running of the statute of limitations in favor of the latter against the mortgage debt. A tenant in common in possession of mortgaged real estate owes the duty to his cotenant to pay the interest maturing on the mortgage." (Syllabus.) See also 2 Jones, *Mortg.* 3d ed. § 1188; Freeman, *Cotenancy*, 2d ed. § 371; *Hollister v. York*, 59 Vt. 1, 9 Atl. 2; *Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611, 16 N. E. 587.

We have not been cited to nor do we

recall any Kansas case that involves this question. The principle enunciated in *Clute v. Clute*, supra, and in *Lawton v. Adams*, 13 Ohio C. C. 233, 7 Ohio C. D. 129, to wit: "Where one of the owners of the land comes to him and offers to pay upon the note (in this case one of the heirs), it would seem to be that upon principles of justice and equity, as between the mortgagee and these various persons holding an interest in the land, that payment by one should be held to be the joint act of all,—a payment made for the purpose, primarily, of relieving the property from the debt; that is to say, that it is made to reduce the indebtedness upon the land, and is made for the benefit of all, and should be binding upon all,"—seems entirely just and equitable, applied to this case. We hold, accordingly, that the action to foreclose the mortgage was not barred as to any one of the defendants in the court below.

The case is therefore remanded, with instructions to render judgment in favor of the holder of the mortgage against all of the defendants.

All the Justices concur.

LOUISIANA SUPREME COURT.

BANK OF MONROE

v.

E. C. DREW, Impleaded, etc., Appt.

(126 La. 1028, 53 So. 129.)

Ordinary partnership — single commercial act — effect.

1. As the object of the partnership was the purchase and sale of lands, the partner-

Headnote 1 by BREAUX, Ch. J., and rehearing headnotes by MONROE, J.

Note. — Power of member of dissolved firm to bind other members by a note given in payment of a firm debt.

A distinction exists between the right of a partner to indorse after dissolution negotiable paper belonging to the partnership for the purpose of transferring the title thereto, where no liability of the partnership is thereby created, and his right to indorse negotiable paper in such a manner as to create a liability of the partnership on the indorsement. Cases sustaining the right of a partner after dissolution to transfer negotiable paper by indorsement without recourse, or in some other manner which does not create a liability of the partnership, are not within the scope of this note, and are not included herein. Cases are included, however, where 32 L.R.A. (N.S.)

ship was an ordinary one, and the incidental preparation and sale in the market of an article obtained from its lands does not change it into a commercial partnership, especially as this incidental act occurred during the existence of several years.

On Rehearing.

Partnership — dissolution — subsequent note by partner for firm debt — liability of other partners.

2. After a partnership, whether commercial or ordinary, has been dissolved, a former member cannot bind the other former members by making a note in the firm name, whether for the creation of a new debt or the acknowledgment of an old one. Same — action on note of — recovery upon open account.

3. Where suit is brought on a note purporting to have been made by an ordinary partnership (but after its dissolution) through one of the former members, and it is held that the other former members, not having authorized it, are not bound thereby, the plaintiff cannot, in the same action, recover upon the open account or overdraft in settlement of which the note is said to have been given, and which account was admitted in evidence over the objection of the defendants.

Same — note for firm debt — liability of partners.

4. Where an ordinary partnership created for the buying and selling of land and standing timber is dissolved by consent, and two of the members are authorized to liquidate its affairs by selling the property of the firm and applying the proceeds of the sales to the payment of the firm debts, and one is allowed to draw checks for small amounts in payment of taxes and expenses, the other liquidator cannot, as such, bind his former partners by giving a note in the firm name in settlement of an old account or over draft.

(Breaux, Ch. J., dissents in part.)

(February 28, 1910.)

a member of a dissolved partnership indorsed negotiable paper in the firm name in such a manner as to create a new liability of the partnership, if authority existed to make the indorsement.

General rule.

As to all persons having knowledge or chargeable with notice, the dissolution of a partnership operates as a rescission of the authority of any member to bind the partnership on a new contract. A promissory note or the indorsement of a note is a new contract, and creates a different liability within this rule, even though it is in settlement or payment of a pre-existing firm indebtedness or in renewal of an outstanding firm note. *Fraser v. Wolcott*, 4 McLean, 365, Fed. Cas. No. 5,065; *Dick v. Laird*,

APPEAL by defendant E. C. Drew from a judgment of the Judicial District Court for the Parish of Ouachita in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Hudson, Potts, & Bernstein and Dorman & Reynolds, for appellant:

The power of one partner must be express and special to draw or indorse bills of exchange or promissory notes.

Folger v. Peterkin, 39 La. Ann. 815, 2 So. 579.

After the dissolution of a partnership, no act of one member of the firm can bind the other members of the dissolved partnership.

Vancleave v. Nelson, 49 La. Ann. 621, 21 So. 734; Dodd v. Bishop, 30 La. Ann. 1178; Meyer v. Atkins, 29 La. Ann. 586; Johnson v. Marsh, 2 La. Ann. 772; Rudy v. Harding, 6 Rob. (La.) 70; Davis v. Houren, 6 Rob. (La.) 256; Carr v. Wooda, 11 Rob. (La.) 95; Fisk v. Mead, 18 La. 332; Walker v. M'Micken, 9 Mart. (La.) 192; Herrick v. Conant, 4 La. Ann. 276; Peet v. Riley, 26 La. Ann. 712; Lowe v. Penny, 7 La. Ann. 356; Lachomette v. Thomas, 5 Rob. (La.) 174; Commercial Bank v. Perry, 10 Rob. (La.) 61; Nott v. Douming, 6 La. 680, 26 Am. Dec. 491; Poignand v. Livermore, 5 Mart. N. S. 324; Conery v. Rotchford, 30 La. Ann. 692; Dodd v. Bishop, 30 La. Ann. 1180; Prudhomme v. Henry, 5 La. Ann. 700; Speake

5 Cranch, C. C. 328, Fed. Cas. No. 3,892; Draper v. Bissel, 3 McLean, 275, Fed. Cas. No. 4,068; Lockwood v. Comstock, 4 McLean, 383, Fed. Cas. No. 8,449; Fontaine v. Lee, 6 Ala. 889; Cunningham v. Bragg, 37 Ala. 436; Myatt v. Bell, 41 Ala. 222; Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Burr v. Williams, 20 Ark. 171; Curry v. White, 51 Cal. 530; New Haven County Bank v. Mitchell, 15 Conn. 220; Mims v. Brook, 3 Ga. App. 247, 59 S. E. 711; Humphries v. Chastain, 5 Ga. 166, 48 Am. Dec. 247; Bower v. Douglass, 25 Ga. 714; Silas v. Adams, 92 Ga. 350, 17 S. E. 280; Whitesides v. Lee, 2 Ill. 548; Hicks v. Russell, 72 Ill. 230; Bank of Montreal v. Page, 98 Ill. 109; Jansen v. Grimshaw, 26 Ill. App. 287; Hamilton v. Seaman, 1 Ind. 185; Conklin v. Ogborn, 7 Ind. 553; Whitworth v. Ballard, 56 Ind. 279; King v. Barbour, 70 Ind. 35; Stair v. Richardson, 108 Ind. 429, 9 N. E. 300; Huntington-White Lime Co. v. Mock, 14 Ind. App. 221, 42 N. E. 761; Van Valkenburg v. Bradley, 14 Iowa, 108, overruling Kemp v. Coffin, 3 G. Greene, 190; Mullins v. Simpkinson, 10 Ky. L. Rep. 280; Nott v. Douming, 6 La. 680, 26 Am. Dec. 491; Rudy v. Harding, 6 Rob. (La.) 70; Carr v. Woods, 11 Rob. (La.) 95; Johnson v. Marsh, 2 La. Ann. 772; Lowe v. Penny, 7 La. Ann. 356; Durkee v. Price, 11 La. Ann. 333; Peet v. Riley, 26 La. Ann. 712; Meyer v. Atkins, 29 La. Ann. 586; Perrin v. Keene, 10 Me. 355, 36 Am. Dec. 759; Lumberman's Bank v. Pratt, 51 Me. 563; Hurst v. Hill, 8 Md. 309, 63 Am. Dec. 705; Robb v. Mudge, 14 Gray, 534; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Carleton v. Jenness, 42 Mich. 110, 3 N. W. 284; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Bryant v. Lord, 19 Minn. 396, Gil. 342; Leithauser v. Baumeister, 47 Minn. 151, 28 Am. St. Rep. 336, 49 N. W. 660; Brown v. Broach, 52 Miss. 536; Maxey v. Strong, 53 Miss. 280; McDaniel v. Wood, 7 Mo. 543; Long v. Story, 10 Mo. 636; Richardson v. Moiea, 31 Mo. 430; Moore v. Lackman, 52 Mo. 323; Seufert v. Gille, 230 Mo. 453, 31 L.R.A.(N.S.) 471, 131 S. W. 102; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; 32 L.R.A.(N.S.)

Fellows v. Wyman, 33 N. H. 351; Morrison v. Perry, 11 Hun, 33; Sanford v. Mickles, 4 Johns. 224; Bristol v. Sprague, 8 Wend. 423; Lusk v. Smith, 8 Barb. 570; Nation Bank v. Norton, 1 Hill, 572; Gale v. Miller, 54 N. Y. 536, affirming 1 Lans. 451; Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Haven v. Goodel, 1 Disney (Ohio) 26, 12 Ohio Dec. Reprint, 465; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241; White v. Union Ins. Co. 1 Nott & M'C. 556, 9 Am. Dec. 726; Loomis v. Pearson, Harp. L. 470; Galliot v. Planters' & M. Bank, 1 McMull. L. 209, 36 Am. Dec. 256; Foltz v. Pourie, 2 Desauss. Eq. 40; Dickerson v. Wheeler, 1 Humph. 51; Martin v. Kirk, 2 Humph. 529; Bank of Mobile v. Andrews, 2 Sneed, 535; Fowler v. Richardson, 3 Sneed, 508; McElroy v. Melear, 7 Coldw. 140; Tarver v. Evansville Furniture Co. 20 Tex. Civ. App. 66, 48 S. W. 199; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Had-dock v. Crocheron, 32 Tex. 276, 5 Am. Rep. 244; Brown v. Chancellor, 61 Tex. 437; Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611; Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388; Woodson v. Wood, 84 Va. 478, 5 S. E. 277; Roots v. Mason City Salt & Min. Co. 27 W. Va. 483; Lange v. Kennedy, 20 Wis. 279; Spenceley v. Greenwood, 1 Post. & F. 297.

In McPherson v. Rathbone, 11 Wend. 96, on the theory that, although one partner cannot bind his copartner by a note after the dissolution of partnership, yet he can merely liquidate a previous account, since by so doing he does not create a debt, the authority of a partner to bind the firm by a note executed in the firm name after dissolution, but in payment of a pre-existing indebtedness of a partnership, is sustained. The action in this case, however, was for goods sold and delivered, and the declaration also contained the money counts. Evidence was offered of the sale of goods to the partnership prior to dissolution, and the execution of the note in liquidation of the account after dissolution. It would seem, therefore, that the suit was based on the

v. Barrett, 13 La. Ann. 479; Offutt v. Bredlove, 4 La. 32.

Power of one partner to bind the other after dissolution cannot be derived from their former relations as partners, but must be by a contract or mandate.

Peters v. Gardere, 8 La. 565; Offutt v. Bredlove, 4 La. 31; Johnson v. Marsh, 2 La. Ann. 772.

An agent's authority to sign a promissory note for his principal must be express and special, and, on the trial of the case under the general issue, the burden of showing the agent's authority to sign the note falls on the holder.

Barriere v. Fortier, 23 La. Ann. 274.

Members who belong to two corporations cannot represent both corporations, so as to make a valid contract.

original account, and the note was dependent upon as evidence of liquidation in the action of an account stated.

In Morrison v. Perry, 11 Hun, 33, the doctrine was again asserted that the execution by one partner of a note in the firm name, in payment of a pre-existing debt of the firm, was not contracting a new debt; but even on this theory the court said that the question as to the validity of the note was purely one of power in the partnership executing it, and that where the partnership had been dissolved prior to its execution, and no special authority had been given such partner to execute notes in the firm name, it must be held, both in fact and in law, that his authority so to use the name had wholly ceased; and this is the doctrine of the New York court. See the New York cases, *supra*.

But a note signed by one partner in the firm name after dissolution, in renewal of a note given by the partnership prior to dissolution, is valid where the renewal was in performance of an agreement with the partnership made prior to the dissolution. Richardson v. Moies, 31 Mo. 430.

So, one partner may indorse a bill of exchange after the dissolution of the partnership, where it was drawn and accepted by the partnership prior to the dissolution. Lewis v. Reilly, 1 Q. B. 349, 5 Jur. 98, 10 L. J. Q. B. N. S. 135, 4 Perry & D. 629.

Since a note takes effect from its delivery rather than from its execution by the parties thereto, one member of a partnership cannot bind his copartners by the delivery of a note after the dissolution of the partnership, although it was executed by the firm in the firm name prior thereto. Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

Necessity of notice of dissolution.

But in order to relieve the members of a partnership from liability on commercial paper in the firm name, issued or indorsed in the usual course of business by a single member after dissolution, notice of dissolution is required.

Civil Code, 429; Gordon v. Goodrich Co. 11 La. Ann. 411; Durkee v. Price, 11 La. Ann. 333; Meeker v. York, 13 La. Ann. 18; Knabe v. Ternot, 16 La. Ann. 16.

Mr. Allan Sholars also for appellant. Messrs. Stubbs, Russell, & Theus, for appellee:

Defendant, having been engaged in buying and selling timber and logs, is a commercial partnership, and the partners are therefore bound *in solido*.

Hamblin's Succession, 3 Rob. (La.) 130; Nachtrieb v. Prague, 6 La. Ann. 759.

Breaux, Ch. J., delivered the opinion of the court:

The defendant E. C. Drew appeals from a final judgment rendered against him on the 22d of June, 1908, condemning him to

tion must be given, or knowledge thereof brought home, to the holder of the paper, if he is not chargeable with notice. Burr v. Williams, 20 Ark. 171; Bluff City Lumber Co. v. Bank of Clarksville, — Ark. — 128 S. W. 58; Ewing v. Trippe, 73 Ga. 776; Burson v. Stone, — Ga. —, 68 S. E. 1038; Mims v. Brook, 3 Ga. App. 247, 59 S. E. 711; Hicks v. Russell, 72 Ill. 230; Jansen v. Grimshaw, 26 Ill. App. 287; Iddings v. Pierson, 100 Ind. 418; Buchanan v. Buckler, 8 Ky. L. Rep. 617; Nott v. Douming, 6 La. 680, 26 Am. Dec. 491; Lowe v. Penny, 7 La. Ann. 356; Taylor v. Hill, 36 Md. 494; Whitman v. Leonard, 3 Pick. 177; Pitcher v. Barrows, 17 Pick. 361, 28 Am. Dec. 306; Pecker v. Hall, 14 Allen, 532; Hall v. Heck, 92 Mich. 458, 52 N. W. 749; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535; Seufert v. Gile, 230 Mo. 453, 31 L.R.A.(N.S.) 471, 131 S. W. 102; Holt v. Simmons, 16 Mo. App. 97; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; Graves v. Merry, 6 Cow. 701, 16 Am. Dec. 471; Bristol v. Sprague, 8 Wend. 423; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Lamb v. Singleton, 2 Brev. 490; Clement v. Clement, 69 Wis. 599, 2 Am. St. Rep. 760, 35 N. W. 17; Johanning v. Wilson, 86 N. Y. Supp. 7; Anderson v. Weston, 6 Bing. N. C. 296, 4 Jur. 105, 9 L. J. C. P. N. S. 194, 8 Scott, 583.

To entitle one to notice of the dissolution, the note must have been executed in accordance with the usual dealings of the parties, and where a renewal note was executed by one of the partners in the firm name, but out of the ordinary course of trade, it is not binding upon the other members of the firm, although no notice of the dissolution was given. Whitman v. Leonard, 3 Pick. 177.

So, notice of dissolution of a partnership is required to guard against imposition only in the regular course of business of the firm, and is not necessary as to dealings between a member of a dissolved firm and a third person outside the usual course of business of the firm. Hicks v. Russell, 72 Ill. 230.

It is not intended to consider in this

pay an amount claimed by plaintiff in *solido* with J. E. Reynolds.

The plaintiff, Bank of Monroe, held a promissory note, averred that it was due, and prayed for judgment thereon, which was rendered, as just above stated.

In the first suit, the defendant proceeded by mandamus and asked to have the judgment canceled. In that case, which came up to us on appeal, an exception of no cause of action was filed in the district court on the ground in part that a mandamus cannot be substituted to a direct action. The exception was maintained, and the mandamus proceeding dismissed. This was in case No. 17,328 (*State ex rel. Drew v. Myatt*, 122 La. 974, 48 So. 428).

Some time after that case had been de-

cided by this court on appeal, the Drew Investment Company brought a suit to annul the judgment. In the suit, which was a direct action to set aside the judgment against which the writ of mandamus before mentioned had been directed, there was a trial in the district court, and judgment rendered rejecting plaintiff's demand to have the judgment in question annulled. That case is disposed of to-day. *Bank of Monroe v. E. C. Drew Invest. Co.* 126 La. 1047, 53 So. 136, handed down with other cases.

In the case just referred to—that is, case No. 17,328—the Drew Investment Company, plaintiff, introduced the record of proceedings in the mandamus case. That record contains all the evidence admitted on the

note the question what is sufficient knowledge of the dissolution of a partnership, or the question as to what constitutes notice thereof, or as to what notice is sufficient either as to strangers or persons in the habit of dealing with the partnership. In this connection, however, it may be remarked that the same distinction has been made as to the sufficiency of the notice of the dissolution of the partnership in order to affect the holder of negotiable paper of the partnership, as is generally made with reference to other dealings with the partnership by persons having a general course of dealing with the firm and other third persons having only isolated transactions with the partnership; and applying this distinction it has been held that a published notice of the dissolution of the partnership is good as to strangers who have not previously dealt with the firm, but not as to its former customers, who are entitled to particular notice, if it is not shown that notice was otherwise brought home to them. *Nott v. Douming*, 6 La. 680, 26 Am. Dec. 491; *Graves v. Merry*, 6 Cow. 701, 16 Am. Dec. 471.

And it has been held that a person loaning money to a partnership firm is entitled to actual notice of its dissolution, and that notice published in a paper, not brought home to such person is not sufficient to relieve the partners from liability on a renewal of such note by one of the partners in the firm name after dissolution. *Jansen v. Grimshaw*, 26 Ill. App. 287.

Where authorized.

The members of a partnership, in the articles of dissolution or otherwise, may authorize a member of the firm to bind it by the issuance or indorsement of commercial paper in the firm name after dissolution, and paper issued or indorsed under such authority is as binding upon the other partners as though it had been issued or indorsed prior to dissolution. *Lockwood v. Comstock*, 4 McLean, 383, Fed. Cas. No. 8,449; *Myatt v. Bell*, 41 Ala. 222; *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114; 32 L.R.A. (N.S.)

Burr v. Williams, 20 Ark. 171; *New Haven County Bank v. Mitchell*, 15 Conn. 220; *Bank of Montreal v. Page*, 98 Ill. 109; *Hamilton v. Seaman*, 1 Ind. 185; *Conklin v. Ogborn*, 7 Ind. 553; *Van Valkenburg v. Bradley*, 14 Iowa, 108; *Carr v. Woods*, 11 Rob. (La.) 95; *Johnson v. Marsh*, 2 La. Ann. 772; *Lowe v. Penny*, 7 La. Ann. 356; *Durkee v. Price*, 11 La. Ann. 333; *Meyer v. Atkins*, 29 La. Ann. 586; *Perrin v. Keene*, 19 Me. 353, 36 Am. Dec. 759; *Long v. Story*, 10 Mo. 636; *Richardson v. Moies*, 31 Mo. 430; *Graves v. Merry*, 6 Cow. 701, 16 Am. Dec. 471; *National Bank v. Norton*, 1 Hill, 572; *Lusk v. Smith*, 8 Barb. 570; *Palmer v. Dodge*, 4 Ohio St. 21, 62 Am. Dec. 271; *Haven v. Goodel*, 1 Disney (Ohio) 26, 12 Ohio Dec. Reprint, 465; *White v. Union Ins. Co.* 1 Nott & M'C. 556, 9 Am. Dec. 726; *Myers v. Huggins*, 1 Strobb. L. 473; *Martin v. Kirk*, 2 Humph. 529; *Fowler v. Richardson*, 3 Sneed, 508; *McElroy v. Melear*, 7 Coldw. 140; *White v. Tudor*, 24 Tex. 639, 76 Am. Dec. 126; *Brown v. Chancellor*, 61 Tex. 437.

Ordinarily, the authority of a partner to bind the partnership after dissolution by a note in the firm name, although for pre-existing indebtedness, must be express and special. *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114; *Burr v. Williams*, 20 Ark. 171; *New Haven County Bank v. Mitchell*, 15 Conn. 220; *Rudy v. Harding*, 6 Rob. (La.) 70; *Carr v. Woods*, 11 Rob. (La.) 95; *Johnson v. Marsh*, 2 La. Ann. 772; *Lowe v. Penny*, 7 La. Ann. 356; *Durkee v. Price*, 11 La. Ann. 333; *Meyer v. Atkins*, 29 La. Ann. 586.

It is not, however, necessary to prove express consent by the members of a partnership, to the execution by a copartner of a note in the firm name after dissolution, in order to bind the firm; but such consent may be inferred from circumstances. *Graves v. Merry*, 6 Cow. 701, 16 Am. Dec. 471.

—effect of authority to settle partnership affairs.

General authority to one partner upon

trial of the mandamus case. It contains a full statement of all the facts. The case was heard on the merits in the district court. E. C. Drew and J. E. Reynolds, defendants, each have appealed. The issues in each appeal are the same.

The Note Sued on and the Amount—Consideration of This Note.

The E. C. Drew Investment Company was formed about the year 1902. For brevity's sake, we will hereafter refer to this company as the Drew Company. Drew, Reynolds, Parker, and Blanks were the partners. Blanks was the president, and Parker, the vice president, of the Merchants' & Farmers' Bank. Subsequently this bank changed its name to that of the

Bank of Monroe, and its management also changed. The Drew Company was a borrower of a large amount from the bank. We infer that, two of the members of the company being officers of the bank, they met with no great difficulty in obtaining large loans. As usual with banks, checks and vouchers of the company were filed away by it until its accounts were made out. Accounts were rendered from time to time, and the checks and vouchers were returned to Drew, who, as principal member of the partnership was authorized to receive them. There is positive evidence that these checks and vouchers were returned to Drew personally (as he usually signed the checks of the company on the bank), and to him also accounts were rendered. As just

dissolution, to settle the business of the firm, does not authorize him to give a note in the firm name for pre-existing firm debts, or to renew a partnership note then existing. *Lockwood v. Comstock*, 4 McLean, 393, Fed. Cas. No. 8,449; *Hamilton v. Seaman*, 1 Ind. 185; *Van Valkenburg v. Bradley*, 14 Iowa, 108, overruling *Kemp v. Coffin*, 3 G. Greene, 190; *Palmer v. Dodge*, 4 Ohio St. 21, 62 Am. Dec. 271; *White v. Union Ins. Co.* 1 Nott. & M'C. 556, 9 Am. Dec. 726; *Hutton v. Stewart*, 2 Lea, 233; *White v. Tudor*, 24 Tex. 639, 76 Am. Dec. 126; *Brown v. Chancellor*, 61 Tex. 437.

Neither does authority to settle and adjust the partnership business. *Perrin v. Keene*, 19 Me. 355, 36 Am. Dec. 759.

So, power to adjust the debts of the firm, or power to settle the partnership concerns, is not sufficient. *Lusk v. Smith*, 8 Barb. 570.

For a renewal note in the firm name, executed after dissolution by one of the members of a partnership, to be binding upon the other members thereof, power to execute such note must have been expressly delegated; it is not sufficient that the member of the firm signing the note by the articles of dissolution, was given power to settle the business of the firm, and use the firm name for that purpose. *National Bank v. Norton*, 1 Hill, 572.

And special authority is necessary to authorize one partner to bind the other members of a dissolved partnership by giving, in the partnership name, notes to liquidate the firm's indebtedness, general authority to settle the business of the partnership not being sufficient. *Long v. Story*, 10 Mo. 636.

A partner authorized to settle the affairs of a partnership has power, in the firm name, to guarantee notes which, under a contract of the partnership made prior to its dissolution, were to be indorsed by the partnership, the guaranty being in result the same as a waiver of notice upon an indorsement if made prior to the dissolution. *Star Wagon Co. v. Swezey*, 52 Iowa, 391, 3 N. W. 421, a. c. on 32 L.R.A. (N.S.)

subsequent appeal, 59 Iowa, 609, 13 N. W. 749.

General power to wind up the business of the partnership is not in excess of the power which each partner naturally possesses after dissolution, and does not authorize one partner to issue, indorse, or accept commercial paper after dissolution. *Myatt v. Bell*, 41 Ala. 222; *Bank of Montreal v. Page*, 98 Ill. 109; *McElroy v. Melear*, 7 Coldw. 140.

Power to use the firm name in liquidation simply does not authorize the signing of a bill or note in the firm name, even for an antecedent debt of the partnership. *Fowler v. Richardson*, 3 Sneed, 508; *Martin v. Kirk*, 2 Humph. 529.

A contrary rule prevails in Pennsylvania. In that state the liquidating partner is held to have authority to bind the firm by the use of the firm name in issuing or indorsing commercial paper for purposes necessary to closing up the affairs of the partnership. Thus, he may give a note to raise money to liquidate the partnership indebtedness, or renew a partnership note then existing. *Meyrau v. Abel*, 189 Pa. 215, 69 Am. St. Rep. 806, 42 Atl. 122; *Siegfried v. Ludwig*, 102 Pa. 547; *Lloyd v. Thomas*, 79 Pa. 68; *Ward v. Tyler*, 52 Pa. 393; *Robinson v. Taylor*, 4 Pa. 242; *Petrikiri v. Collier*, 1 Pa. St. 247; *Houser v. Irvine*, 3 Watts & S. 345, 38 Am. Dec. 708; *Davis's Estate*, 5 Whart. 530, 34 Am. Dec. 574.

In order to act as liquidating partner, no express authority is necessary. *Meyran v. Abel*, 189 Pa. 215, 69 Am. St. Rep. 806, 42 Atl. 122.

Thus, all the members of a firm are liable on a note in the firm name, given by one of the partners for a debt due by the partnership, although such partner has no express authority to settle the partnership business, he, however, remaining in possession of the partnership place of business and attending to the collection of debts due the firm. *Robinson v. Taylor*, 4 Pa. 242.

The liquidating partner, however, can-

stated the management of the bank had changed. Evidently the new management was particular about overdue paper. It follows the matured paper of the company gave some concern to the cashier of the bank. He insisted upon new notes; spoke to all the partners and wrote to them.

Taking up in the first place the accounts: The former president, Blanks, swore to their correctness. The former cashier of the bank also; and he adds that he never heard of any complaint. C. W. Esterling, another employee of the bank, swore that he handed a statement to E. C. Drew with vouchers some time in 1906, to which Drew raised no objection. The last cashier, Kilpatrick, testified that he made repeated demands of payment of the defendants of the amount of their indebtedness; they did not urge the least objection, except Mr. Reynolds, who objected to the interest charged as excessive. That if they suspected the

least mistake in the accounts it was quite easy to correct it; the books of the bank were accessible to them. He also added that Mr. Drew said to him that if his partners were willing to sign the note he also would sign. The note was not signed by any of the partners. After a time had passed, this cashier did not wish to leave the matter open longer. In order to place the claim in some shape, he obtained the signature of Blanks, who signed for the firm and treasurer. The theory on which an argument was presented by defendant, that the books were so kept as to throw dust in the eyes of the bank examiner in his rounds in examining the banks, is not sustained. We have no reason to infer that mere paper promises to pay were used to blind the examiner, and less reason to believe that in time the bank officers took possession of the paper they found under the new management, which they are now

not give a judgment note in settlement of an existing indebtedness or in renewal of an existing note not of this character. *McKenna v. McSherry*, 1 Lack. Leg. News, 230.

Ratification.

Of course, the members of a partnership, having the power in the first instance to authorize one of the members of the firm to bind them by issuing or indorsing in the firm name commercial paper after dissolution, may ratify or adopt the unauthorized act of a member of the firm in issuing or indorsing such paper, and thereby render themselves liable thereon to the same extent as if the authority had been given in the first instance. *Sanborn v. Stark*, 31 Fed. 18; *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114; *Silas v. Adams*, 92 Ga. 350, 17 S. E. 280; *Roberts v. Barrow*, 53 Ga. 314; *Chamberlain v. Stone*, 24 Ga. 310; *Conklin v. Ogborn*, 7 Ind. 553; *Carter v. Pomeroy*, 30 Ind. 438; *Whitworth v. Ballard*, 56 Ind. 279; *Van Valkenburg v. Bradley*, 14 Iowa, 108, overruling *Kemp v. Coffin*, 3 G. Greene, 190; *Eaton v. Taylor*, 10 Mass. 54; *Fowle v. Harrington*, 1 Cush. 146; *Wilson v. Forder*, 20 Ohio St. 89, 5 Am. Rep. 627; *Murray v. Ayer*, 16 R. I. 665, 19 Atl. 241; *Hatton v. Stewart*, 2 Lea, 233; *McElroy v. Melear*, 7 Coldw. 140.

Ratification must be express. It may, however, be proved it divers ways, but it cannot be inferred from the mere acknowledgment by a copartner of the debt thus created. *Conklin v. Ogborn*, 7 Ind. 553.

Thus, a renewal note in the firm name, given by a member of the partnership after dissolution, is binding upon the copartner if he consents to, and recognizes, it. *Sanborn v. Stark*, 31 Fed. 18. To the same effect is *Randolph v. Peck*, 1 Hun, 138.

So, if one partner after dissolution, in 32 L.R.A. (N.S.)

the presence of the other and with his acquiescence, express or implied, signs a note in the firm name for a firm debt, such note is binding upon both partners. *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114.

And a partner ratifies such a note by consenting to it after its execution. (*Silas v. Adams*, 92 Ga. 350, 17 S. E. 280); or by an express promise to pay it. (*Chamberlain v. Stone*, 24 Ga. 310; *Wilson v. Forder*, 20 Ohio St. 89, 5 Am. Rep. 627; *Waite v. Foster*, 33 Me. 424); or by expressly adopting the act of such partner in signing the note after dissolution as their own. (*Carter v. Pomeroy*, 30 Ind. 438; *Whitworth v. Ballard*, 56 Ind. 279); or by making a payment thereon. (*Eaton v. Taylor*, 10 Mass. 54).

To constitute ratification of such an assumption of authority by a copartner, there must be some act on the part of the other partner fairly implying a willingness to affirm what had been done. *Hatton v. Stewart*, 2 Lea. 233.

Bringing suit on a note indorsed after dissolution by one of the partners in the firm name is a sufficient ratification by the other partner. *Murray v. Ayer*, 16 R. I. 665, 19 Atl. 241.

A partner who executes a note to take up one executed by his copartner after the dissolution of the partnership, being at the time ignorant of the fact that the note was executed after dissolution, ratifies the act of the copartner, if he does not, within a reasonable time after receiving notice of the invalidity of the note, return it, and repudiate the act of the copartner. *Roberts v. Barrow*, 53 Ga. 314. A bill of exchange drawn on a partnership prior to the dissolution thereof, but not accepted until after dissolution, binds only the partner accepting it. *Tombeckbee Bank v. Dumell*, 5 Mason, 56, Fed. Cas. No. 14,081.

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attempting to collect. That is the merest hypothesis, to which we can give no credence with the facts before us.

Defendant and appellant also contend that they are not liable for the note sued on, by reason of the fact that it was signed after the dissolution of the company. There was an understanding arrived at among the members of the Drew Company in the year 1905. From that date the partnership was to go out of business. The evidence is that it did not continue the business. Because two of the members of the defendant company, who were officers of the bank, knew of the fact, took part in putting an end to the partnership, the contention of the defendant is that, although there was no public notice given of the dissolution, the bank must be held to have known of its dissolution.

We are of the opinion: As a member of the firm, under the agreement of dissolution of the partnership, Blanks could acknowledge the indebtedness of an amount which the evidence shows was due. But he could go no further. He could not bind his partners to the payment of 3 per cent interest in addition, as he attempted to do, nor could he bind the firm to pay 10 per cent fee of attorney. Blanks and Drew were authorized to liquidate the debts of the partnership. (See the testimony of Blanks later.) The following are the facts and circumstances referred to before in matter of making the note sued on: True, by general agreement, the partners, Drew, Blanks, Parker, and Reynolds, were not to continue the business after May 25, 1905. Mr. Blanks testified, and in this testimony he was not contradicted: "We were not to buy any more real estate; and it was left to Mr. Drew and myself to wind up the affairs of the company, and to liquidate the debts." T. 94. "At that meeting, it was agreed that we would liquidate the indebtedness of the company by turning our assets into money."

Blanks at that date was an officer of the bank only in a secondary position. He was not in charge; Dr. Foresythe and Kilpatrick were president and cashier. His knowledge was not knowledge of the bank. See *Seixas v. Citizens' Bank*, 38 La. Ann. 424.

We should have before mentioned that no public or any other notice was ever given of the dissolution of the partnership. The defendants rely exclusively upon the fact that Blanks, a vice president of the bank at the time (who did not have charge of its business), one of the four partners, who took part in a private agreement entered into by him, Drew, Parker, and Reynolds, to dissolve the partnership and to

liquidate its affairs through the agency of Blanks and Drew as liquidators, was vice president, as just stated. The plaintiff bank had furnished statements to defendants, and no objection was raised thereto.

To return for a moment to the dissolution of the partnership: At the time that the partners determined to bring its business to a close, it was agreed that the partnership would exist for the purpose of its liquidation,—we have already noted. The note given by one who had signed notes and checks for the partnership was to put an end to the overdrafts in bank, and to liquidate the indebtedness by furnishing a note. Drew, one of the defendants, for the purpose of liquidation, continued to sign checks. Why should not Blanks sign the note to the same end? There had never been any partnership agreement signed. The power was never established by consent between the bank and its customers, the partnership. It has never been held that those who have invested their funds in a corporation can be made to lose their investment only because one or two of the investors in the corporation have knowledge of their own in a partnership of which they are members. It is no concern of the incorporators that which the partners may have agreed among themselves. The knowledge of one of the incorporators is not knowledge of all the incorporators. If, as in this instance, two of the incorporators become the debtors of the corporation, they and those who act with them in the indebted partnership are not in a position to plead that they are released from payment of a note made by one of the partners who was selected as one of the liquidators at the time of the private dissolution of the partnership, only because the liquidating partners (not at all in charge of the bank) have agreed among themselves upon a mode of dissolution.

The following is directly in point: "Knowledge of a vice president is not knowledge to a company." *Fisher v. Muddock* (1878) 13 Hun, 485. Although the president and cashier are the discount committee, and discount a note which is indorsed by the president, the bank is not charged with notice that the note was given for an illegal purpose. *Graham v. Orange County Nat. Bank* (1896) 59 N. J. L. 225, 35 Atl. 1053. It must be borne in mind that it does not appear of record that Vice President Blanks at the time had charge of the affairs of the bank.

The following is pertinent: "It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators or stockholders or clerk. But the corpora-

tion has notice of facts which come to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control." 2 Cook, Corp. § 727. Blanks at the time had no control whatever over the bank. Notice to an agent (Blanks was in no sense an agent), but conceding that he was, there is precedent for holding that notice to an agent not in the course of his business is not notice to the corporation. *Willard v. Denise* (1892). 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29. No one will seriously contend that Blanks was representing in any way the bank at the time that the private agreement of dissolution of the partnership was entered into. Partners have always been held to the necessity of giving notice of the dissolution of the partnership. There was no public notice given. The fact that one of the borrowers from the bank—Blanks—knew of the dissolution cannot be held as equivalent to a notice to his creditor, the bank. The principle here involved was laid down in general terms in *Louisiana State Bank v. Senecal*, 13 La. 525. When one who has been an officer of a bank seeks his own advantage, and does not represent the bank (Blanks did not represent the bank when he signed the note), his knowledge is not knowledge of the bank. *Richardson v. Watson*, 51 La. Ann. 1390, 26 So. 422; *Seixas v. Citizens' Bank*, 38 La. Ann. 428.

In passing from this point, we will state, in regard to the signature of Blanks, treasurer, that defendants did not allege in their petition that Blanks, treasurer, had no authority to sign as treasurer. The ground alleged here is that he had no authority after the dissolution of the firm (a private dissolution) on condition before stated,—he had no authority to use the partnership's name. We can only say that if he had the authority before the dissolution of the firm, he had the authority after the dissolution, to sign, as no notice had been given of the dissolution, and furthermore it was agreed that he and Drew were to liquidate the firm. As relates to the onus of proof, we will state again in passing, before leaving the said subject, under the rules of evidence, that it was for defendants to prove the affirmative of the proposition that the corporation had notice of the dissolution of the firm, and not for the corporation to prove that it did not have notice.

Before proceeding further, it is necessary to note that defendants in the original answer pleaded that the note had not been

duly signed by Blanks, as he, as defendants contended, had no authority. They, none the less, thereafter pleaded that the said note had no consideration. Plaintiff filed a motion to compel the defendants to elect whether they limited their defense to the alleged want of authorization in Blanks to sign the note, or whether they defended on the ground that the note was without consideration. The district court overruled the motion in question. Very soon thereafter, the defendants filed a motion calling upon the plaintiff to produce the account upon which the note had been made by defendant. This was accordingly done by plaintiff; and the account is now before us. It was introduced in evidence by plaintiff, but it was produced on defendants' motion.

The evidence in regard to the account in question shows that the bank had regularly rendered accounts to its customers, including the defendant firm, who were its regular customers. That these statements were accompanied with the vouchers, all delivered to the customers.

One of the debtors to the plaintiff bank (defendant Blanks) testified:

Q. Mr. Blanks, what, if any, objection was there at any time that you ever heard before the answers filed in this case, to your signing notes for overdrafts of the E. C. Drew Investment Company, or other obligations due by the company?

A. There was never any objection at all, never any complaint made by any member at all.

Q. What was done with the notes and checks given by the Drew Investment Company to and drawn on the Merchants' & Farmers' Bank?

A. They were delivered when the accounts were rendered.

A. Yes, sir; as near as I can testify, the accounts were surrendered very frequently, and I could not say that every time I knew that they were handed or given to Mr. Drew, but I can say that a very large percentage of the times the checks and vouchers were handed to Mr. Drew.

A. No, I have never heard of any complaint from any member of the E. C. Drew Investment Company as to the accounts, except that at one writing they thought the interest excessive. The books will show this.

Q. Prior to the filing of this account, on December 27th last, state whether or not there was any conversation between yourself, Mr. Reynolds, and Mr. Drew, or either of them, between the date of this demand and May 25, 1907, relative to the adjustment of this matter.

A. Yes, sir; several conversations. Of

course, I don't remember the exact dates, but they were between May and December.

Q. You and Mr. Reynolds?

A. Drew and Reynolds and Parker, and the just named Reynolds and Parker and myself several times.

Q. During any of these conversations, what denial, if any, was made to the correctness of the amount as evidenced by this note?

A. There was never any to the amount.

Q. What denial, if any, did they make to your authority as a member to give this note in settlement of this account?

A. None at all, Mr. Theus, none in the world. There was no complaint made so far as I was concerned.

Q. What I want to know especially, Mr. Blanks, is what denial, if any, either of these gentlemen made as to your authority as a member of the partnership to execute this note.

A. There was never any objection at all to my doing it. I think I had their perfect confidence, and there was never any objection received about my doing it one way or the other.

Now with reference to his being the treasurer of the company this witness swears:

Q. Mr. Blanks, I notice that you signed this note as treasurer of the E. C. Drew Investment Company. When were you treasurer of that company?

A. Well, Mr. Sholars, when the company first went into business it was generally understood that Mr. Drew was to have the general management and I should be the treasurer, and the account should be with the Merchants' & Farmers' Bank. It was just in a general way. There never was any document drawn up to that effect.

The next witness, who was the cashier of the bank and assisted in keeping the books, swore to the correctness of the books. True, under the cross-examination, the witness, we infer, was confused, but not to the extent of discrediting the account. Other witnesses, officers and employees of the bank, testified and sustained the correctness of the account.

We have the testimony of Blanks, debtor, as to its correctness.

Croyier, cashier, in the first place, stated:

Q. Mr. Croyier, you say the account is correct?

A. To the best of my knowledge.

Kilpatrick, president, at the time cashier, says that the account taken from the book is correct to a cent.

In Concluding.

1st. The settlement in the nature of
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things, between the bank and its customers, must have some decisive effect. The bank surrenders its vouchers to the customer, and within reasonable time he ought to report his complaint to the bank if he has any cause. No objection was urged by defendant before the suit was filed. The defendants were members of a partnership. Its assets were large. They surely kept books as memoranda of some kind. Is it possible that a business partnership, composed of business men, permitted such an asserted mistake without the least timely objection? In testifying they did not seek to prove discrepancy such as that argued. The statement filed by defendant, relied upon, is not a continuing or connected account with the regular statement; it is at once discredited by failure to include one item of an amount of \$17,000 admitted incorrect,—a rather large amount overlooked, too large to inspire confidence in the account. The regular statement of the bank furnished is of debits and credits. It is a succinct account. It contains all the items. Not one was pointed out by defendants as erroneous. We agree with the district judge that plaintiff is entitled to the amount claimed.

The Partnership.

Whether the partnership was ordinary or commercial presents the next issue before us for decision. Defendants' contention is that it was an ordinary partnership. The plaintiff concedes the force of the argument of defendants in support of their contention in this particular. We must say that the plaintiff is only mildly insistent upon this subject. It was stated that the defendant firm sold trees which they had cut on their own lands. It appears that it was one transaction. Preparing an article for the market that forms part of the realty owned, and afterwards selling it, does not have the effect of changing an ordinary partnership into a commercial partnership, particularly if it consists of one act during a short period in many years of the existence of a partnership. One transaction of a commercial character may perhaps be considered the act of a commercial partnership *quoad* the transaction; but it does not have the effect of changing an ordinary partnership into a commercial partnership. Even planting corporations sometimes engage in transactions of a commercial nature in connection with their planting, without creating the least impression of a change in the purpose of the partnership. It follows that those who deal in lands, buy standing timber and sell it under the facts and circumstances before mentioned, are not commercial partners. The buying of immovable and the sale of trees thereon was an incident in the business of the partnership.

True, a partnership engaged in buying and selling logs is a commercial partnership, and the partners are bound *in solido*, but that provision of the law has no application here, for the partnership cannot be considered as having engaged in such business. The one transaction before mentioned cannot render the partners liable for each other's acts in matter of the object for which the partnership was formed.

The Judgment from which the Defendants Appealed.

Having decided that the amount of the judgment is due, and that the members of the partnership of Drew & Company are bound jointly, we take up, in the next place, the grounds urged against the legality of the judgment. They are that time was granted after the judgment had been rendered, and that the nonsuit entered could not be allowed after the judgment had been rendered. A nonsuit was entered as to J. P. Parker and R. B. Blanks, two of the members of the defendant partnership, after the judge had announced his judgment in open court, but before the judgment had been signed.

The following is the entry in the minutes:

June 20, 1908, judgment rendered in favor of plaintiff. (See decree.) "Judgment read and signed June 22, 1908. On motion of plaintiff's counsel, nonsuit is entered as to J. P. Parker and R. B. Blanks; judgment against defendants."

Manifestly, the usual order was granted on the first day, and an order was given to write the judgment. It was signed on the 22d, before the nonsuit was entered. The contention of defendant is that the judgment was fraudulently obtained. This is not sustained in any way. The facts as to the nonsuit are: An agreement was entered into between the bank and Blanks and Parker, in accordance with which the nonsuit was allowed. In this agreement Blanks and Parker admitted the amount claimed, but stated that "owing to the financial conditions at the time, they were unable to pay, and therefore arranged with plaintiff for an extension of time, and they thereby avoided encumbering their property with a judicial mortgage; that it was entered into without prejudice to the rights of the plaintiff bank to institute and maintain a future action for the recovery of the indebtedness sued for in said action." (Excerpt from the agreement in accordance with which the nonsuit was entered.)

In the judgment appealed from, the court rendered judgment for the amount claimed against defendant Drew, less costs and fee of attorney, and reserved the right of plain-

tiff to sue the defendants Blanks and Parker. The appellee joined in the appeal, and in this court moved to have the judgment amended by reading the interest from 5 to 8 (difference) per cent and the fee of attorney. The judgment appealed from is amended by changing it from a judgment *in solido* against the defendants to one jointly due by them. It is therefore ordered, adjudged, and decreed that the judgment appealed from is amended by condemning the defendants John E. Reynolds and E. C. Drew, jointly, to pay the amount of the indebtedness found by the district court, each one fourth. It is further ordered, adjudged, and decreed that as amended, and after canceling the words "*in solido*," the judgment is affirmed. Plaintiff and appellee to pay the costs of appeal.

A rehearing having been granted, Monroe, J., on June 28, 1910, handed down the following additional opinion:

A rehearing was granted in this case because the court doubted whether, upon the facts presented, two former members of an ordinary partnership that had been dissolved should be held liable on a note issued in the name of the firm, by another former member, and without their knowledge; and a re-examination of the record has converted the doubt into a conviction that they cannot be so held.

The facts are as follows: The E. C. Drew Investment Company was an ordinary partnership composed of Drew, Blanks, Parker, and Reynolds, and it kept its account for a number of years in the Merchants' & Farmers' Bank, of which Blanks was president and Parker vice president. Drew, in general, managed the business,—drawing checks, making notes, attending to affairs in the office, etc.—but Blanks took part, more or less, in transactions with the bank, though to what extent the record does not inform us. It was, however, perhaps due to his influence that the account of the firm was generally overdrawn. On October 23, 1907, the firm was dissolved, by consent; the understanding of the parties being that Drew and Blanks were to convert the assets into money as rapidly as they could, and apply the proceeds to the payment of the debt, in the form of an overdraft, due the bank, and, in the meanwhile, that Drew was to pay from the funds collected, or, possibly, by checks against the overdrawn account, some outstanding debts, amounting to less than \$500, and the expense of an office, as, also, a small salary to himself,—the employees of the firm being discharged. It was well understood that no obligations were to be created in

the line of business, save when necessary to make a sale, and it is not asserted that any obligations of that kind were created. Some sixteen or seventeen months after the dissolution, some other banking concern bought a majority of the stock of the Merchants' & Farmers' Bank, changed the name to that of Bank of Monroe, and placed it under different control; Blanks, however, retaining some stock and being made vice president, and Parker (also retaining some stock) being made a director. In selling his stock (or the greater part of it) to the new concern, Blanks appears to have guaranteed some of the accounts, and, among them, that of the E. C. Drew Investment Company (guaranteed to the extent 55 per cent), and the new cashier, who afterwards became president of the bank, began at once trying to reduce them to something definite and tangible. In that situation, Blanks executed the note here sued on, by way of liquidating the overdraft account of the Drew Company, signing it, "The E. C. Investment Company, by R. B. Blanks, Treas." He could hardly have been the treasurer of the company at any time, for there was only an ordinary partnership, and, even if he had held such a position, the bank had no reason to suppose, so far as we can see, that a treasurer would have authority to make notes in the name of the company by which he was employed. It is not asserted or pretended that either Drew or Reynolds, the defendants now before the court, authorized the giving of the note, or knew anything about it until this suit was brought. On the contrary, the president of the bank, after the note was given, endeavored to get them to give notes in settlement of what he referred to as the account or overdraft, and Drew expressed his willingness to join his former partners in such a note, but Reynolds declined to give a note of any kind.

Civil Code, art. 2872, referring to ordinary partners, provides: "Art. 2872. . . . And no one of them can bind his partners, unless they have given him power so to do, either specially or by the articles of partnership." And, in regard to the authority of a partner after the dissolution of the partnership, this court has said: "A partner's power to bind his copartners by note or by acknowledgment, or to use the social name, ceases with the dissolution. Any subsequent power is derived, not from the previous relations of the parties, as partners, but from a new contract, one of mandate." *Meyer v. Atkins*, 29 La. Ann. 586. "After the termination of the partnership, no admission or acknowledgment by one of the partners, of the correctness of an account made before the dissolution of the

partnership, is legal evidence against the other members of the firm." *Conery v. Hayes*, 19 La. Ann. 325. After the dissolution of the partnership, neither partner has authority, without special mandate so to do, to bind his former partners, either in the renewal of a partnership debt, the imposition of a new obligation on it, or to in any manner vary the form or character of the obligation already existing. *Dodd v. Bishop*, 30 La. Ann. 1180. See also *Vancleave v. Nelson*, 49 La. Ann. 621, 21 So. 734.

Counsel for plaintiff say that the note was given to close an account; that the account is in the record; and that, if plaintiff is not entitled to judgment on the note, it ought to have judgment on the account. The account is in the record, however, in spite of defendants' objection that there is no allegation of the petition authorizing its admission, which appears to us to have been well taken, since this is a suit on the note, and not on the account. Another objection was that the correctness of the account had not been shown, which also appears to have been well taken, since defendant produced a statement of the account of the Drew Company made by the cashier, at the time, of the Merchants' & Farmers' Bank, showing that between January 14, 1904, and April 26, 1905, the firm was debited with \$42,660.92, whereas in the statement of account filed by plaintiff, the amount debited during that period is \$94,804.63, a difference of over \$50,000. Being asked whether he was able to explain the discrepancy, the witness answered that he was not. So far, therefore, from its being shown that the account is correct, it seems to us to be affirmatively shown to be incorrect. Plaintiff's next contention is that the acts of the Drew Company did not constitute a dissolution of the partnership, and, if they did, that no notice was given to the bank, and that the members of the firm continued to be liable for what was done in the firm's name. We find no conflict in the evidence on the subject of the dissolution of the firm. There were four partners; they were all present; and the three who have testified say that they agreed to dissolve, and did dissolve.

There is no evidence to the contrary; and we think the dissolution is established. The question how far the defendant may be liable for other notes made in the name of the firm between October 23, 1905, and May 25, 1907, is not just now before us for decision. During that period, however, Blanks, a member of the dissolved firm, was president of the bank, and Parker,

another member, was vice president, and when, a month or two after the bank had passed into the hands of the present owners, the note here sued on was made, Blanks was vice president of the bank, and Parker a member of the board of directors. Mr. Kilpatrick, who was president of the bank when the case was tried, and had been its cashier since the date of its reorganization, does not intimate in his testimony that he did not know of the dissolution of the firm. He does say that Blanks gave the note at his request, and that Parker was informed of the giving, but that for some reason, not explained, Drew and Reynolds were not informed, and that, during several months after the note had been given, he endeavored to get them to close the "account or overdraft," as he continued to call the debt, by giving their notes or in some other way. If, however, he had considered that the note given by Blanks was the note of the firm, bound all its members, and closed its account, it appears to us that he put himself to a good deal of unnecessary trouble; and, as his testimony proves the contrary, we will not impute to him such lack of intelligence, but will rather assume that he was aware that the note held by the bank was of no value, so far as the former partners, other than Blanks, who had signed it, were concerned.

The third and last contention of the learned counsel for the bank is that, conceding that the firm was dissolved, and that the bank knew it, the note was still good, because Blanks was authorized to make it in his capacity as liquidator. We think not. He had no other authority, as liquidator, than such as was conferred on him, expressly or impliedly, by his co-partners, and that did not include the authority to bind them by the giving of a note.

For the reasons thus given, we are of opinion that plaintiff can take nothing by this suit.

It is therefore ordered, adjudged, and decreed that the decree heretofore rendered in this case be set aside; that the judgment appealed from be annulled, avoided, and reversed; and that there now be judgment in favor of defendant Emanuel C. Drew, and against the plaintiff, Bank of Monroe, rejecting the demand of the bank and dismissing this suit, at its cost in both courts, without prejudice, however, to its right to bring suit against defendant on the account or overdraft of the E. C. Drew Investment Company.

Breaux, Ch. J., dissents.
32 L.R.A. (N.S.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE B. HACKNEY, Plff. in Err.,
v.

WEST JERSEY & SEASHORE RAILROAD COMPANY.

(78 N. J. L. 454, 78 Atl. 747.)

Street railway — driving on track — negligence.

Plaintiff was driving alongside of a trolley track a wagon load of brush, about 14 feet wide, 10 feet long, and 6 feet above the plaintiff's head. His wagon was closely followed by another wagon similarly loaded. The brush was so placed as to prevent plaintiff from the place he was seated from seeing behind him or on either side of him. After stopping to listen for a signal, he, without changing his position so that he could see behind him, turned his team to pass over a crossing across a trolley track, and his horses were struck by a car which was approaching closely behind his wagon. Held that plaintiff was guilty of contributory negligence.

(Parker, Minturn, and Bogert, JJ., dissent.)

(November 15, 1909.)

Headnote by REED, J.

Note. — *Driving across street railway where view of approaching car is obstructed, as contributory negligence.*

It is generally held that a person attempting to drive across a street railway track, where his view is obstructed, is bound to exercise such care as an ordinarily prudent person would exercise under similar circumstances.

In *Kolb v. St. Louis Transit Co.* 102 Mo. App. 143, 76 S. W. 1050, it was held a question for the jury whether the plaintiff looked, and did not see the car at the time he drove upon the track, or whether, without looking, he drove upon it in face of the approaching car, where he testified that, before reaching the track, he looked both ways, but neither saw nor heard the car approaching, his view being obstructed by foliage of near-by trees.

So, the question of contributory negligence was held to be for the jury in *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908, where a driver coming out of a private driveway, being unable to see along the street car track owing to intervening buildings, trees, etc., looked up the track for an approaching car and, seeing none, got on his wagon and drove onto the track, where he was struck by a car.

In *Warren v. Bangor, O. & O. T. R. Co.* 95 Me. 115, 49 Atl. 609, a driver familiar with the locality, who was struck by a car while attempting to drive across a track on a dark night, was held guilty of contribu-

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. John W. Wescott for plaintiff in error.

Messrs. Bourgeois & Sooy, for defendant in error:

Plaintiff was guilty of contributory negligence in driving upon the track under the conditions then surrounding him, without looking to see if the track was clear.

Solatinow v. Jersey City, H. & P. Street R. Co. 70 N. J. L. 154, 56 Atl. 235; Hannon v. North Jersey Street R. Co. 65 N. J. L. 547, 47 Atl. 803.

torry negligence, although objects along the road obstructed his view until within 50 feet of the track, it appearing that if he had listened before reaching the point commanding a view of the approaching car, or had looked after reaching that point, he could have avoided the accident. The court said in effect that while it was not the absolute duty, as a matter of law, for a traveler to look and listen for an approaching car before crossing the tracks of a street railway, it may still be determined as a matter of fact that in some situations the exercise of ordinary care and prudence will require that precaution.

Whether plaintiffs, whose team was struck by an electric car while they were attempting to cross the track in a canopy top wagon on a cloudy night, were guilty of contributory negligence in not waiting for smoke which was caused by a passing freight engine and which obstructed their view to disappear, was a question for the jury. Dalton v. New York, N. H. & H. R. Co. 184 Mass. 344, 68 N. E. 830.

In Dungan v. Wilmington City R. Co. 4 Penn. (Del.) 458, 58 Atl. 868, plaintiff sought damages against a railway company for injuries to his horse and carriage as the result of a collision with a street car. Verdict was for defendant. The court charged that a person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality, and act accordingly. If, as he approaches the crossing, his line of vision is unobstructed, he is bound to look for approaching cars, and if his line of vision is obstructed, he should exercise increased care and caution in proportion to such conditions.

So, in Dey v. United R. Co. 140 Mo. App. 461, 120 S. W. 134, plaintiff was held guilty of contributory negligence, where, he knowing that street cars were running both ways with great frequency at a high rate of speed, his view of the car tracks being obstructed until he was within 25 or 30 feet of the tracks, drove his team toward the tracks at such a rate of speed that he was unable to check it soon enough to avert a 32 L.R.A. (N.S.)

Reed, J., delivered the opinion of the court:

This writ brings up a judgment upon a verdict for the defendant in error, directed by the trial court.

The facts appearing upon the trial are these: Mr. Hackney, the plaintiff, on November 17th, 1906, between 9 and 10 o'clock in the forenoon, was driving along Atlantic avenue, in Atlantic City, a team attached to a wagon loaded with brush. The brush was loaded on shelvings, and the plaintiff was sitting on a seat supported by the shelvings on the front of the wagon, about midway between the sides. The load of brush was about 12 to 14 feet wide, 10 feet long, and 6 feet above the head of the driver. The plaintiff says: "The brush was

collision with a car which was 100 feet distant when he first observed it.

In Consolidated Traction Co. v. Chenoweth, 61 N. J. L. 554, 35 Atl. 1067, the jury having been instructed that the driver of a fire wagon, injured in a collision with a street car, was bound to exercise the care that an ordinarily prudent person would exercise under the circumstances, it was held no error to refuse requested instructions to the effect that if permanent obstacles prevented observation, he was bound to regulate the speed of his horses so as to be able to stop them if it was not safe to go on the track, and to delay going on the track until he could assure himself of safety; and that his judgment should have been formed while it was possible for him to have acted prudently in view of the then condition, and not after he was in a position of peril. Generally, as to liability of street railway company for injuries caused by collision with fire apparatus, see note to Dole v. New Orleans R. & Light Co. 19 L.R.A. (N.S.) 623.

And one who attempts to drive across the track of an electric street railway while seated so far back in a covered wagon that he cannot see the approaching car, which otherwise he might easily see, is guilty of contributory negligence barring a recovery for injuries caused by a collision with such car. Boerth v. West Side R. Co. 87 Wis. 288, 58 N. W. 376; Helber v. Spokane Street R. Co. 22 Wash. 319, 61 Pac. 40.

So, where a person driving a loaded produce wagon along a street in the same direction as an approaching car, after looking out of the side of the wagon, and having failed to see any car coming, drove on about 60 feet and then, without again looking, attempted to cross the track obliquely, and was struck by an electric car, he was held guilty of contributory negligence. Ehrisman v. East Harrisburg City Pass. R. Co. 150 Pa. 180, 17 L.R.A. 448, 24 Atl. 596. And see HACKNEY v. WEST JERSEY & S. R. Co.

Wheelahan v. Philadelphia Traction Co. 150 Pa. 187, 24 Atl. 688, is ruled by the preceding case. In this case plaintiff was

right up abreast of me." Some of the limbs extended 2, 3, or 4 feet where they went over in front of him. Thus embowered, he drove southerly down the avenue toward Ventnor, driving on the right-hand side of defendant's double trolley tracks which lie on Atlantic avenue. He drove on until he reached a cross street known as Frankford avenue. At that point he wished to cross over the trolley tracks so as to be able to proceed with his load down to the beach. He attempted to cross the tracks at this Frankford avenue crossing, and in the attempt was struck by a trolley car, and his horses were killed. This crossing of the railroad track, the plaintiff says, is about 10 or 12 feet in length. From what appears in other parts of the testimony he evidently meant that it was a plank crossing 10 or 12 feet wide. Plaintiff says that on approaching this crossing he had to drive out near the curb, so that in starting to make the turn toward the crossing he could make the curve as long as possible, and thus bring the hind wheels of his long-gear wagon in upon the crossing. He says he "stopped his team before he entered the track to see if he could see anything, and that he couldn't see nothing, so he spoke to his horses, and they went on, and, as he entered the track, the

trolley struck him." He also says the trolley gave no whistle, bell, or warning.

Respecting the conduct of the motorman who was driving the colliding car, there was testimony from which the jury could have inferred negligence. It is in testimony that, when the car was approaching the crossing the attention of the motorman was not directed to the track over which his car was about to pass, but that he was looking down. One witness, a carpenter who was working upon a building about 200 feet from the crossing, says he noticed the team of the plaintiff as he started toward the track, and also noticed the conductor,—obviously meaning the motorman,—and he seemed to be preoccupied with some of the mechanism of the car, as he supposed, and, as he got directly opposite the hind part of plaintiff's wagon, he suddenly raised his head and threw the brake on, but the momentum of the car was such that she slid on and upset the wagon. Another witness, who was driving a wagon also loaded with brush, behind the plaintiff's wagon, says that just before reaching the crossing the motorman stood with his head down, looking down at the floor. This testimony was uncontradicted, and it does not appear what diverted the attention of the motorman from the track in

negligent in not leaning forward in his wagon so as to get an unobstructed view, the hood to his wagon preventing a view further than 25 or 30 feet.

In *Roth v. Metropolitan Street R. Co.* 13 Misc. 213, 34 N. Y. Supp. 232, plaintiff's driver, before attempting to cross defendant's tracks, stopped his wagon to allow two cars to pass. The wagon was loaded with trunks in such a manner that he could not see on either side. Not hearing any gong, he suddenly turned his horse upon the track and the wagon was struck by a car approaching from behind. It was held that negligence was predicable of the manner in which the wagon was loaded, as the duty of the driver to look for approaching cars before crossing the track was thereby rendered impossible.

In *Fritz v. Detroit Citizens' Street R. Co.* 105 Mich. 50, 62 N. W. 1007, it was held that one riding in a covered carriage, and thereby prevented from looking behind, could not recover against a street railway company when he turned suddenly upon the track in front of a car and was injured.

The question whether one driving a load of barrels was contributorily negligent was for the jury, where it appeared that he occupied such a position that he could not see what was behind without moving to the edge of the load, and that, without doing so, he turned his horses upon the track to pass a vehicle, when the load was struck by a street car, the testimony as to the distance between the wagon and ap- 32 L.R.A. (N.S.)

proaching car varying. *Blakeslee v. Consolidated Street R. Co.* 105 Mich. 462, 63 N. W. 401. In this case the court said: "If there was an intentional or wanton running into the load of barrels by the motorman after discovering plaintiff's perilous position, there would be room for the application of the doctrine that the negligence of the plaintiff was not contributory; but if that element was lacking and the accident involved only a want of ordinary judgment, prudence, or care, there is no room for it."

A person in a wagon covered on the sides, top, and back, who, because of the construction of her wagon, could not put her head out to look to the right or left without leaving her seat, is guilty of contributory negligence in driving upon a trolley track without exercising reasonable observation to ascertain whether there was danger from an approaching car. *Solatinow v. Jersey City, H. & P. Street R. Co.* 70 N. J. L. 154, 56 Atl. 235.

In *Horsman v. Brockton & P. Street R. Co.* 205 Mass. 519, 91 N. E. 897, it was held a question for the jury whether a driver, struck by a car running at a high rate of speed and without sounding the gong, at the point where a driveway crossed the street railway track, was guilty of contributory negligence in acting upon his judgment that he had ample time to cross the track, before any car running at the usual speed could reach the intersection, and upon his assumption that the motor-

front of him. It does appear that his attention was so diverted. Whether the plaintiff's wagon might have been seen by the motorman in spite of the other wagon similarly loaded, which was following the plaintiff's was a question for the jury. If he could have seen, then the question whether he should have anticipated the possibility of the plaintiff's turning across the track (as any driver had a right to cross the track at that point), and so have had his car under control, was also a question for the jury. So we think the direction of the verdict cannot be vindicated upon the ground that the defendant's servants were conclusively free from negligence.

The question, then, is whether the plaintiff himself was so clearly negligent, and whether his negligence so contributed to the accident, that the court properly directed a verdict against him upon that ground. It is manifest that the plaintiff did not look for a car coming from the direction of the colliding car, for he could not look in that direction at all. He had placed himself in a position where it was impossible for him to look in that direction. The brush on both sides of him, and over him, cut off all possibility of observation in that direction. His words are: "I could not see nothing on the side of me or behind me.

It (the brush) was right up abreast of me. It was right up there 6 feet high above my head from the seat I set on." He says that some of the limbs of the brush extended 2 to 4 feet where they went over him. It thus appears that he was incapable of looking in any direction save directly in front of him. For the purpose of observation behind, or on either side of him, he was as helpless as if he had been blindfolded. It is to be observed, as already stated, that he was not driving on a cross street, and directly across the railroad track, but was driving alongside of the railway track. Directly behind him was another wagon similarly loaded. When he turned in on the track, it is obvious that the car was close upon him, as the horses, and not the wagon were struck.

The query, then, is whether the driver of a vehicle who puts himself in such a situation can drive blindfolded across a trolley track, with no assurance that the track is clear for a safe distance, save that he hears no signal. The rule in regard to pedestrians crossing a trolley track is that such person must use his power of observation to discover approaching vehicles, and, if obstacles temporarily intervene so as to prevent observation, he must wait until the required observation

man would observe the custom of reducing speed and sounding the gong at driveways, and in failing to alight and look down the track again, it appearing that his view from the wagon was obstructed by trees and shrubbery for a distance of 85 feet from the track, but that, just before entering upon the obstructed portion he had looked down the track for 300 feet, at which time no car was in sight, and had then proceeded at moderate speed listening for vehicles.

A person attempting to cross a track without looking or listening or exercising any act of precaution for his safety, his view being obstructed by an intervening embankment, is guilty of contributory negligence precluding a recovery for injuries to himself and team, received in collision with an electric car. *Robinson v. Rockland, T. & C. Street R. Co.* 99 Me. 47, 58 Atl. 57. The court said: "If it was impossible on account of the bank to see a car, he had no right, in the exercise of ordinary prudence, to assume that it was impossible for a car to be behind the bank."

A woman killed by an electric car while attempting to drive across a track, at a moderate walk, a gentle horse attached to a vehicle with side curtains, was held guilty of contributory negligence, where she approached the railway through a ravine which obscured her vision until within some little distance of the track, but, before going on the track, she could have 32 L.R.A. (N.S.)

seen the car in time to have escaped injury had she looked or listened or exercised ordinary care. *Walsh v. Fonda, J. & G. R. Co.* 114 App. Div. 272, 99 N. Y. Supp. 773, affirmed in 187 N. Y. 563, 80 N. E. 1121.

A person driving in a wagon with curtains closed is guilty of contributory negligence in attempting to cross a street railway track without looking for a car at a point nearer than 75 yards from the crossing, whereby he is struck by a car approaching from behind. *Highland Ave. & Belt R. Co. v. Maddox*, 100 Ala. 618, 13 So. 615.

A person acquainted with defendant's tracks at the place where his mule was injured in collision with a street car is guilty of contributory negligence, if, with a building obstructing his view, and without looking or pausing and listening,—a course which, if adopted, would have enabled him to discover the peril in time to have prevented the injury,—he drove upon the track in a trot or quick walk. *Highland Ave. & Belt R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566.

As to right of driver of vehicle to assume that motorman will give him time to cross track, see note to *Williamson v. Old Colony Street R. Co.* 5 L.R.A. (N.S.) 1081.

And *Hicks v. Citizens' R. Co.* 25 L.R.A. 508, as to injuries by street car collisions with vehicles or horses. J. D. C.

can be made. Newark Pass. R. Co. v. Block, 55 N. J. L. 605, 22 L.R.A. 374, 27 Atl. 1067; Jewett v. Paterson R. Co. 62 N. J. L. 424, 41 Atl. 707; Fitzhenry v. Consolidated Traction Co. 64 N. J. L. 674, 46 Atl. 698; McGrath v. North Jersey Street R. Co. 66 N. J. L. 312, 49 Atl. 523; Hageman v. North Jersey Street R. Co. 74 N. J. L. 279, 65 Atl. 834, affirmed in 75 N. J. L. 939, 70 Atl. 1101; Eagen v. Jersey City, H. & P. Street R. Co. 74 N. J. L. 699, 11 L.R.A.(N.S.) 1058, 67 Atl. 24, 12 'A. & E. Ann. Cas. 911; Shuler v. North Jersey Street R. Co. 75 N. J. L. 824, 127 Am. St. Rep. 834, 69 Atl. 180.

In several of the cited cases it was held that the failure to conform to this requirement of observation by the pedestrian was a ground for nonsuit or direction of verdict. While this is a settled rule respecting the duties of a pedestrian crossing a trolley track, it has been said that it is not *per se* negligence for a driver of a vehicle not to look for a trolley car before crossing a street railway. In no case, however, has it been held that in no situation is it negligence *per se* for the driver of a vehicle to attempt to cross without looking. The rule is that the driver of a vehicle, as well as a pedestrian, must take reasonable care to avoid a collision before attempting to cross a trolley track. While the facilities for observation may be greater in the case of a pedestrian than in the case of a driver of a vehicle, yet the rule of reasonable care applies equally to both. When the failure to look in the driver of a vehicle is manifestly negligence, that driver is guilty of contributory negligence. *McHugh v. North Jersey Street R. Co.* — N. J. L. —, 46 Atl. 782; *Hannon v. North Jersey Street R. Co.* 65 N. J. L. 547, 47 Atl. 803. In *Denis v. Lewiston, B. & B. Street R. Co.* 104 Me. 39, 70 Atl. 1047, a wagon driven by the plaintiff was struck by a trolley car. The supreme court of Maine said that, while it was true that the rule of looking and listening had been held in that court not to be applicable to street railways, yet the driver is bound to exercise all reasonable care, and, in exercising this care, he may be required in many situations to look and listen. It was held in that case that the plaintiff, in not looking, was guilty of contributory negligence, and a new trial was directed. In the case of *Shiles v. Public Service Corp.* 77 N. J. L. 600, 72 Atl. 68, where the plaintiff, in looking through a small window in the back of his wagon to see if a trolley car was approaching, failed to see a rapidly approaching car, and by reason of such failure drove upon the trolley track, where he was struck, it was 32 L.R.A.(N.S.)

held that the question of plaintiff's negligence was for the jury. So, in *Migans v. Jersey City, H. & P. Street R. Co.* 76 N. J. L. 535, 70 Atl. 168, the plaintiff did look and saw a car 130 feet away, moving slowly, with the motorman looking directly toward the plaintiff; it was held that plaintiff's negligence was a question for the jury. In neither of these cases, however, was it suggested that, had the respective plaintiffs failed to look at all, they would not have been guilty of contributory negligence. In the present case the plaintiff, by the adjustment of his load and of his seat, had so placed himself that he could not look, and so did not look, and he took no pains to change his position and relieve himself from his condition of blindness, so that observation would be effectual before driving across the track. In doing this he was guilty of manifest negligence which contributed to the accident.

The judgment of the Supreme Court should be affirmed.

Gummere, Ch. J., Garrison, Swayze, Reed, Trenchard, Bergen, Voorhees, Verdenburgh, Vroom, Dill, Congdon, JJ., concur.

Parker, Minturn, and Bogert, JJ., dissent.

OHIO SUPREME COURT.

MINNIE FICKEL et al., Pliffs. in Err.,
v.

BERTHA B. GRANGER.

(— Ohio St. —, 93 N. E. 527.)

Divorce — alimony — character of.

1. "Alimony" is not due and payable as debt, damages, or penalty; but is an award by the court upon considerations of equity and public policy, and is founded upon the obligation, which grows out of the marriage relation that the husband must support his wife which obligation continues after legal separation without her fault.

Attachment — alimony — permissibility.

2. Alimony cannot either before or after payment thereof, be subjected to the payment of debts of the wife which existed prior to the allowance thereof.

(November 22, 1910.)

Headnotes by DAVIS, J.

Note. — Liability of alimony for debts.

The doctrine announced in *FICKEL v. GRANGER*, that alimony cannot be subjected to the payment of pre-existing debts of the

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in defendants' favor in an action brought to subject money awarded as alimony to the payment of debts of the defendant Minnie Fickel. Reversed.

Statement by Davis, J.:

On October 15, 1906, the plaintiff in error, Mrs. Fickel, was indebted to the defendant in error upon a judgment of the probate court of Cuyahoga county in the sum of \$1,051.37, which was subsequently reduced by a payment of \$200 on October 30, 1906, leaving a balance due to the defendant in error of \$851.37, with interest. On June 18, 1908, Mrs. Fickel was divorced

from her husband, Jacob Fickel, and was awarded \$1,200 alimony for her support and maintenance, and was awarded the sole custody, care, and control of the three minor children of the parties to said divorce suit. This amount of alimony was on the following day paid to her attorney, E. C. Schwan, one of the plaintiffs in error. On June 20th the defendant in error began this action, setting up in her petition "that said Minnie Fickel has no real or personal property subject to execution out of which said money can be collected, but that defendant E. C. Schwan is indebted to said Minnie Fickel in the amount of about \$1,200 for alimony received by said Schwan for said Minnie Fickel," and praying that said money in Schwan's hands be

wife, is also applied by Romaine v. Chauncey, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; Andrews v. Whitney, 82 Hun, 123, 31 N. Y. Supp. 164; and Kingman v. Carter, 8 Kan. App. 46, 54 Pac. 13.

It will be noted that in FICKEL v. GRANGER it seemed to be conceded that the wife's alimony was not subject to her pre-existing debts, where such alimony had not yet been paid over to her, but a different rule was sought to be applied where it appeared that the alimony had come into her possession. No other case has been found where this distinction has been raised. In the above cases, with the possible exception of the Whitney Case, it is fair to presume the alimony had not yet been paid over by the husband.

In Romaine v. Chauncey, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826, the court took occasion to say: "During the marriage the husband owes to the wife the duty of support and maintenance, although owing her no debt in the legal sense of the word; but, under the modern statutes, he does not owe to her the duty of paying her debts contracted before the marriage or thereafter, if they are solely hers, and not at all his. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree, and compels him to perform it, but does not change its nature. The divorce and consequent separation are wholly his own fault, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the duty are, indeed, changed; but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had a discretionary control has been changed into specific duty, over which not he, but the court, presides. . . . And so it follows that as, during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts, so, after the divorce, he must continue the support, but is not required to pay out of his means furnished 32 L.R.A. (N.S.)

for that purpose the wife's antecedent debt. The decree cannot logically work the miracle of transforming the duty which he does owe into one which he does not and never did owe; and yet that result is inevitable if the antecedent creditor is at liberty to swoop down upon the provision, and carry it away for his own use. That result accomplishes another thing. It perverts and nullifies the decree of the court, and leaves the judgment specifically made for one purpose to operate wholly for another, and so obstruct and destroy the humane intent of the law." The court then, after discussing the statutes granting alimony, and saying that their purpose was clearly to provide for the support of the wife, and not the payment of creditors, continued: "I can see the possibility and realize the plausible force of one criticism upon this view of the subject; and that is that there is a legal judgment which cannot be satisfied by execution, and the creditor has a right to pursue in equity the debtor's equitable assets, and the court has no right, upon some sentimental view of the subject, to withhold its aid. Exactly; all that is true. But it assumes the precise point of the dispute, that the wife's alimony is an equitable asset, liable generally as property to the payment of her debts. It is property in one sense, but not in the broad, general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence."

In Andrews v. Whitney, 82 Hun, 123, 31 N. Y. Supp. 164, where there had been an agreement for separation prior to the decree for divorce, it was claimed that the alimony provided for by the decree was but a continuation of the provisions in the agreement of separation; that the debt was incurred after that agreement and in reliance on the provisions, and that therefore the rule in the Romaine Case should not apply. The court, however, said: "By the decree the provision of the agreement as to the \$3,000 a year was abrogated. The security was on other property. The scope

subjected to the payment of her claim. It appeared on the hearing of said cause that Schwan had still in his hands \$800 of the \$1,200 received, having retained \$250 due him for fees in the divorce case and for other legal services, and having paid \$150 to Mrs. Fickel and on her behalf to other persons. Mrs. Fickel claimed \$500 in lieu of a homestead, which was conceded to her; and the contention was therefore over the remainder of the alimony, to wit, \$300, which the plaintiff in error contended could not be subjected to the payment of the claim of defendant in error. The court of common pleas held with the plaintiff in error and dismissed the petition. Upon appeal, a majority of the circuit court were

of a different opinion, and they ratified the payment by Schwan of the \$500 to Mrs. Fickel, as her statutory exemption in lieu of a homestead, but ordered him to pay said balance of \$300 to the defendant in error, and rendered judgment against both plaintiffs in error for costs. To reverse the judgment of the circuit court, this petition in error is prosecuted.

Mr. E. C. Schwan for plaintiffs in error.
Messrs. Laubscher & Kees, for defendant in error:

Money awarded as alimony, or pension money, may be subjected to payment of the wife's debts after it has been actually paid over to her.

of the allowance was different. In the agreement it was conditional upon Mrs. Whitney not marrying again during the life of Mr. Whitney. In the decree it was absolute. In the agreement the trustee agreed to indemnify the husband against certain liabilities. That was done away with by the decree. In the agreement the allowance was in part in consideration of her releasing upon request her inchoate right of dower, and was to be accepted in lieu of dower or share in the property or estate of her husband. There is no such condition in the decree. The release of right of dower was provided for by another instrument, and for a consideration entirely outside of the decree. The sum of \$4,500 was paid by Mr. Whitney to assist Mrs. Whitney or her attorneys in arranging her debts. This is stated in the release to be its consideration. The referee finds that only a portion of the sum of \$4,500 was for such release, and the remainder was for other considerations. So that we must assume that the annual allowance in the decree was alimony pure and simple. It is clear that it was so intended. It came from the husband, and was intended only for future debts. Mr. Whitney was not liable for the plaintiff's debt. He made all the payments the agreement called for. I think that the rule of the *Romaine Case* applies." Another reason given by the court for its refusal to appropriate a portion of the alimony to the payment of the wife's debts was in answer to the position taken by the lower court, that the alimony and the income of a trust fund in favor of the wife should all be taken as the income of a trust fund, and that the surplus of such income beyond the sum that might be necessary for the support and maintenance of the wife and those dependent upon her could be reached under the provisions of the statutes as to uses and trusts. The court, after assuming that the statute might be applicable in this case, said that the question would then arise whether the proper rule had been applied in order to ascertain the surplus. The court then, after citing a case in which it was said that the surplus which can be reached by

creditors is that which is "beyond what is necessary for the suitable support of the debtor and those dependent upon him in the manner in which they have been accustomed to live," continued: "In a divorce case the amount of alimony is fixed having special reference to the manner in which the wife has been accustomed to live. A sum is fixed suitable for the support of the wife, having regard to the circumstances of the respective parties. Code Civ. Proc. § 1759. If, in a creditors' suit, this question can be reconsidered, it would certainly be appropriate to have in special view the manner in which the wife had been accustomed to live. That was not done in this case. The evidence offered by the plaintiffs on that subject is not on that basis, nor does the finding of the referee purport to be on that basis. Nor can we properly infer a finding that on this basis will sustain the judgment. The evidence, so far as it goes, as to the amount necessary for her suitable support according to the rule laid down by Judge Rapallo, would indicate that the sum fixed by the referee as a proper and sufficient sum was too small. The further question is whether the judgment can be sustained as to the income of the \$8,000 trust fund. The right of Mrs. Whitney to that income is founded on the agreement of separation. If, as the plaintiffs claim, the transfer of this income was invalid, and the income inalienable . . . and the surplus reachable under the statute above referred to, then the same trouble arises as to the method in which the sum suitable for Mrs. Whitney's support was arrived at. If the amount of the alimony can be taken into account in determining whether the income of the \$8,000 trust fund is necessary for the suitable support of Mrs. Whitney and those dependent upon her, then the element of the manner in which she has been accustomed to live should be considered."

The *Romaine Case* was followed in *Locke v. Locke*. 71 Hun, 366, 24 N. Y. Supp. 1129, holding that a husband who was liable to his wife for the payment of a certain sum of alimony semiannually cannot set off against the payment thereof a judgment

Crosby v. Stephan, 32 Hun, 478; Kellogg v. Waite, 12 Allen, 529; Fulwiler v. Infield, 6 Ohio C. C. 36, 3 Ohio C. D. 338, affirmed in 52 Ohio St. 623, 44 N. E. 1140; State, Jardain, Prosecutor, v. Fairton Sav. Fund & Bldg. Asso. 44 N. J. L. 376; Cranz v. White, 27 Kan. 319, 41 Am. Rep. 408; Rozelle v. Rhodes, 116 Pa. 129, 2 Am. St. Rep. 591, 9 Atl. 160.

Davis, J., delivered the opinion of the court:

The question which is submitted to us in this case is this: Can money or property which has been awarded as alimony be subjected to pre-existing debts of the wife? It seems to be conceded that the question

on an accommodation note given by his wife to their son subsequent to the decree of divorce, and for which he, the husband, because of his indorsement thereof, had been held liable.

And where alimony *pendente lite* was allotted a wife and afterwards permanent alimony, the former having only been paid after much delay, the latter never having been paid at all, the husband cannot set off against the payment of the permanent alimony debts which the wife had incurred on account of her maintenance after the separation, and which the husband had been compelled to pay. Harmer v. Harmer, 3 Jur. N. S. 168, 5 Week. Rep. 413.

But in Foote v. Foote, — N. J. Eq. —, 68 Atl. 467, it was held that a husband can set off against the payment of unpaid alimony a sum which he was compelled to pay for the board of the wife and children.

But he cannot be allowed the value of furniture belonging solely to him, and of which the wife had possession. Foote v. Foote, *supra*. The court said that the husband might recover possession of it, but the purpose of alimony was to furnish money for the support of wife and children.

In Stevenson v. Stevenson, 34 Hun, 157, it was held that the payment by the husband of alimony decreed to be paid in instalments to the wife, to a receiver appointed for the wife in supplementary proceedings upon a judgment obtained against her by her creditors many years after the decree of divorce, vested the receiver with good title in the sums paid, and discharged the husband from any further payment thereof. In distinguishing this case it was said in Romaine v. Chauncey, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826: "A debt contracted by the wife after the decree, presumably for her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage, and before its judicial dissolution. In the latter case two new elements enter into the question: one, the imposition of an unfounded duty 32 L.R.A. (N.S.)

should be answered in the negative, except in cases where the alimony has come into the wife's possession; but we are of the opinion, for reasons which will be stated later, that at no time and under no circumstances can alimony be lawfully subjected to the payment of a pre-existing debt. There is a clear distinction in reason between debts antecedent and debts subsequent to the time of the allowance and payment of alimony. The latter class may be presumed to have been made on the credit of, and with reference to, the alimony; not so the former.

Alimony is an allowance for support, which is made upon considerations of equity and public policy. It is not property of

on the husband; and the other, a perversion of the decree from its definite and intended purpose, and from that authorized by the law."

In Lillia v. Airey, 1 Ves. Jr. 277, it was held that while a creditor of a wife living apart from her husband had a prima facie right in equity against her separate maintenance, such creditor cannot wantonly make advancements beyond the amount of the allowance to the wife, knowing that she is a weak woman, and then hold her separate estate or her husband liable for the debts thus incurred.

In Scheffer v. Boy, 5 Pa. Co. Ct. 158, it was held that the obligation of a divorced husband from whom alimony was due his wife was in the nature of a debt of record, and was subject to garnishment at the instance of a judgment creditor of the wife. In this case it does not appear whether the debt was incurred before or after the decree of divorce.

A case very closely related to the above, although not strictly in point, is Kempster v. Evans, 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327, holding that an instalment of alimony which was to become due at a future time under a decree was not assignable, and was thus not payable to one who had leased property to the wife subsequent to the decree of divorce.

Cases dealing with the question whether a wife may contract with her attorney in advance of a decree for divorce for the retaining by him of a part of the alimony recovered, of course present a totally different question and are not included here. For a case of this nature, see Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826. Whether an attorney of the wife has a lien on the alimony recovered also presents a somewhat different question, and is also excluded.

There are also cases where the husband sought to set off against the payment of the alimony what the court held the wife was entitled to, such as the use of furniture, etc. In these cases, of course, it cannot be said that a debt was owing from the wife to the husband, and they are therefore not in point in this note. G. V.

the wife recoverable as debt, damages, or penalty. *State ex rel. Cook v. Cook*, 68 Ohio St. 566, 58 L.R.A. 625, 84 N. E. 567. It is based upon the obligation, growing out of the marriage relation, that the husband must support his wife,—an obligation which continues even after a legal separation without her fault. Being thus founded upon public policy and created in equity, it cannot be diverted from the purpose of support without public injury; and therefore the courts which create the fund should see that it is not subjected to the rapacity of pre-existing creditors, who necessarily became such on the faith and credit of other funds. Such creditors have no claim on the support provided by the husband during the existence of the marriage relation. We see no reason for allowing such a claim upon the support which he is compelled by law to make, whether with or without legal separation. Substantially the same answer was made to this question by the court of appeals of New York in *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; and the same doctrine was announced in *Kansas in Kingman v. Carter*, 8 Kan. App. 46, 54 Pac. 13.

We do not think that this case runs parallel with the cases involving pension money, because § 4747 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3279) provides that money due to a pensioner shall inure wholly to the benefit of such pensioner only while it is in course of transmission to the pensioner, and because the pensioner's claim is wholly created by the statute.

Judgment of Circuit Court reversed, and judgment for plaintiffs in error.

Summers, Ch. J., and Spear, Shauck, and Price, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

LAYTON PURE FOOD COMPANY, Appt.,
v.

CHURCH & DWIGHT COMPANY.

(104 C. C. A. 475, 182 Fed. 35.)

Trademark — members of same class — baking powder and baking soda.

1. To sustain a charge of infringement, the owner of a trademark must have used it on the same class, but not necessarily on the same species of goods as the alleged infringer.

Baking soda and baking powder are in

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the same class, and the use of a trademark for the former on the baking powder of a manufacturer other than that of the owner is an infringement.

After one has acquired a trademark for one member of a class of goods, in this instance baking soda, another may not acquire the same trademark for another member of the class, in this case baking powder, although the former has not applied the trademark to that member.

Laches — suit for profits — infringement of trademark.

2. To a suit for an accounting for profits secured by an infringement of a trademark, the general rule of laches applies that suits will be stayed under ordinary circumstances after, and will not be stayed before, the time fixed by the analogous statute of limitations at law, but that if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of the suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the court will determine the extraordinary case in accordance with the equities which condition it.

But a suit for injunction against future infringement of a trademark is not subject to the general rules of laches and the statute of limitations, because repeated or continuous infringements establish no right to continue them, and mere delay in bringing suit to enjoin them does not prove an abandonment of his rights by an owner of a trademark, or an estoppel from preventing subsequent infringement.

Same — bar to profits.

3. The owner of a trademark on baking soda and baking powder, who had used it on the former, but never on the latter, learned that the defendant corporation was using it on baking powder, but not upon baking soda, about nine years before it brought suit for an injunction and an accounting.

Held, the complainant was entitled to an injunction against future infringement, but its accounting must be limited to the time subsequent to the commencement of the suit.

(September 19, 1910.)

APPEAL by defendant from a decree of the Circuit Court of the United States for the Eastern District of Missouri, enjoining it from infringing plaintiff's trademark. Modified and affirmed.

The facts are stated in the opinion.

Argued before Sanborn and VanDevanter, Circuit Judges.

Mr. A. C. Fowler, with Mr. E. E. Huffman, for appellant:

A trademark cannot be assigned apart

Note.—For use of tradename or trademark on articles other than those to which it is applied by owner, see note to *Virginia Baking Co. v. Southern Biscuit Works*, 30 L.R.A. (N.S.) 167.

from the good will of the business in connection with which it is used.

Hopkins, Trademarks, § 15; Paul, Trademarks, § 117; Kidd v. Johnson, 100 U. S. 620, 25 L. ed. 770; Bulte v. Igleheart Bros. 70 C. C. A. 76, 137 Fed. 492; Eiseman v. Schiffer, 157 Fed. 473.

A court of equity will not interfere where ordinary attention by a purchaser would enable him to distinguish one mark from the other.

Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; Richter v. Anchor Remedy Co. 52 Fed. 455; Hutchinson, P. & Co. v. Loewy, 90 C. C. A. 1, 163 Fed. 42; H. Mueller Mfg. Co. v. A. Y. McDonaly & M. Mfg. Co. 164 Fed. 1001; Liggett & M. Tobacco Co. v. Finzer, 128 U. S. 182, 32 L. ed. 395, 9 Sup. Ct. Rep. 60; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; P. Lorillard Co. v. Peper, 30 C. C. A. 496, 57 U. S. App. 585, 86 Fed. 956; Bass v. Henry Zeltner Brewing Co. 87 Fed. 468; Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 785; J. C. Hubinger Bros. Co. v. Eddy, 74 Fed. 551; Postum Cereal Co. v. American Health Food Co. 56 C. C. A. 360, 119 Fed. 848; G. W. Cole Co. v. American Cement & Oil Co. 65 C. C. A. 105, 130 Fed. 703; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Heinz v. Lutz Bros. 146 Pa. 592, 23 Atl. 314; Kann v. Diamond Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706.

In order for one trademark to be an infringement of another, there must be such similarity as to amount to a false representation that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the mark.

Upton, Trademarks, 136; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Heinz v. Lutz Bros. 146 Pa. 592, 23 Atl. 314.

In the absence of a clear showing of fraud and wilful infringement of a trademark, delay on the part of a complainant will disentitle him to any relief whatever.

Paul, Trademarks, § 106; Brown, Trademarks, § 497; Prince's Metallic Paint Co. v. Prince Mfg. Co. 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938; Dietz v. Horton Mfg. Co. 96 C. C. A. 41, 170 Fed. 865; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Amoskeag Mfg. Co. v. Garner, 55 Barb. 151; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; Virginia Hot Springs Co. v. Hegeman & Co. 138 Fed. 855; Coats v. Merrick Thread Co. 149 U. S. 564, 37 L. ed. 848, 13 Sup. Ct. Rep. 966; Godden v. Kimmell, 99 U. S. 210, 25 L. ed. 434; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Abraham v. Ordway, 158 U. S. 410, 39 L. ed. 1036, 15 Sup. Ct. Rep. 891; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 635, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, 23 Fed. 869; International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 A. & E. Ann. Cas. 407; Low v. Fels, 35 Fed. 361; Manhattan Medicine Co. v. Wood, 4 Cliff. 461, Fed. Cas. No. 9,026; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; Worcester Brewing Corp. v. Rueter & Co. 84 C. C. A. 665, 157 Fed. 217.

Messrs. Brown & Seward, with Messrs. Paul Bakewell and Luke E. Hart, for appellee:

A trademark or tradename will pass under a general conveyance of all the assets or effects of a firm, though not specifically designated.

Morgan v. Rogers, 19 Fed. 596; Atlantic Mill. Co. v. Robinson, 20 Fed. 218; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554, 52 L. ed. 616, 28 Sup. Ct. Rep. 350; Pepper v. Labrot, 8 Fed. 29; Prince's Metallic Paint Co. v. Prince Mfg. Co. 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938; Merry v. Hoopes, 111 N. Y. 420, 18 N. E. 714; Booth v. Jarrett, 52 How. Pr. 171; Kidd v. Johnson, 100 U. S. 620, 25 L. ed. 770.

A suit brought for infringement of a trademark involves the violation of an exclusive proprietary right in the trademark, and an intention on the part of the infringer to deceive is not essential.

Singer Mach. Mfrs. v. Wilson, L. R. 3 App. Cas. 376, 47 L. J. Ch. N. S. 481, 38 L. T. N. S. 303, 26 Week. Rep. 664; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Tarrant & Co. v. Johann Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; White v. Miller, 50 Fed. 277; Cuervo v. Landauer, 63 Fed. 1003; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599; Dale v. Smithson, 12 Abb. Pr. 237; Siegert v. Abbott, 72 Hun, 243, 25 N. Y. Supp. 590; Electro-Silicon Co. v. Hazard, 29 Hun, 369; Ganert v. Rupert, 62 C. C. A. 594, 127 Fed. 962; Liggett & M. Tobacco Co. v. Sam Reid Tobacco Co. 104 Mo. 53, 24 Am. St. Rep. 313, 15 S. W. 843; Filley v. Fassett, 44 Mo. 168, 100 Am. Dec. 275; Drummond

Tobacco Co. v. Addison Tinsley Tobacco Co. 52 Mo. App. 10; Collinsplatt v. Finlayson, 88 Fed. 693; Von Mumm v. Frash, 56 Fed. 830.

Exact similarity or a Chinese copy is not required to constitute infringement of a trademark.

Solis Cigar Co. v. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. 556; Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 847; Liggett & M. Tobacco Co. v. Hynes, 20 Fed. 885; Amoskeag Mfg. Co. v. Trainor, 101 U. S. 68, 25 L. ed. 998; Shaw Stocking Co. v. Mack, 21 Blatchf. 1, 12 Fed. 707; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Improved Fig Syrup Co. v. California Fig Syrup Co. 4 C. C. A. 264, 7 U. S. App. 588, 54 Fed. 175; Sterling Remedy Co. v. Eureka Chemical & Mfg. Co. 25 C. C. A. 314, 46 U. S. App. 709, 80 Fed. 105; Paul, Trademarks, § 191; Collinsplatt v. Finlayson, 88 Fed. 693; Gannert v. Rupert, 62 C. C. A. 594, 127 Fed. 962; Fuller v. Huff, 51 L.R.A. 332, 43 C. C. A. 453, 104 Fed. 141; Von Mumm v. Frash, 56 Fed. 830; Wirtz v. Eagle Bottling Co. 50 N. J. Eq. 164, 24 Atl. 658; Dixon Crucible Co. v. Guggenheim, 2 Brewst. (Pa.) 321; Cox, American Trade Mark Cases, 558, 559, 562; P. Lorillard Co. v. Peper, 30 C. C. A. 496, 57 U. S. App. 665, 86 Fed. 956; Collins Chemical & Mfg. Co. v. Capitol City Mfg. Co. 42 Fed. 64; Seixo v. Provezende, L. R. 1 Ch. 192, 12 Jwr. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357; Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200; McCann v. Anthony, 21 Mo. App. 83; Lockwood v. Bostwick, 2 Daly, 521.

Baking powder and baking soda belong to the same class of goods, and if the complainant's trademark is a valid trademark as applied to baking soda, it would be an infringement upon the complainant's rights for the defendant to use it upon baking powder.

Church & D. Co. v. Russ, 99 Fed. 277; Paul, Trademarks, § 202, pp. 355, 356; Walter Baker & Co. v. Harrison, 138 Off. Gaz. 770; American Tobacco Co. v. Polasek, 170 Fed. 117.

Laches will not bar this action.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Edward & John Burke v. Bishop, 175 Fed. 167; Sawyer v. Kellogg, 9 Fed. 601; Cuervo v. Jacob Henckell Co. 50 Fed. 471; Actiengsellschaft Vereinigte Ultramarin-Fabriken v. Amberg, 48 C. C. A. 264, 109 Fed. 151; Kilbourn v. Sunderland, 130 U. S. 518, 32 L.R.A.(N.S.)

L. ed. 1010, 9 Sup. Ct. Rep. 594; Pence v. Langdon, 99 U. S. 581, 25 L. ed. 421, 13 Mor. Min. Rep. 32; Alger v. Anderson, 78 Fed. 734; Hodge v. Palma, 15 C. C. A. 220, 37 U. S. App. 61, 68 Fed. 61; Gilka v. Mihalovitch, 50 Fed. 427.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree which enjoins the Layton Pure Food Company, the defendant below, from infringing the trademark of the Church & Dwight Company, which consists of the representation of a cow which was registered in 1876, No. 3,884, and again in 1883, No. 10,118, by John Dwight & Company, the predecessor in interest of the complainant, as "a distinguishing mark for our baking soda, saleratus, and baking powder." In the facsimile of the label which accompanies the declaration for the first registration the picture of the cow appears inclosed in an annular band upon which are printed the words "John Dwight & Company, Soda." On October 30, 1900, the complainant, a corporation which succeeded John Dwight & Company, registered the annular band as its trademark for the same goods, No. 35,359, and at various times it claimed and registered other trademarks for these goods, some of which are described in the opinion in the case between these parties for the infringement of the trademark in the representation of the annular band which is filed herewith. There is no material difference in the titles to the trademark for the picture of the annular band and that for the picture of the cow. The titles to both are founded upon an adoption in 1876 and a use by John Dwight & Company, thereafter until 1896, when the complainant succeeded them, and an adoption by the complainant in 1896, and its subsequent use of them. The only difference in the use by the defendant is that it commenced to use the picture of the cow in 1894 and the picture of the annular band in 1897.

There are two defenses, conditioned by evidence that does not differ materially, that are common to both suits. They are:

(1) That a party can have but a single trademark for the same class of goods, and that, as John Dwight & Company used each of these trademarks in association on the same labels with other devices and trademarks, some of which they or the complainant registered, they and it abandoned and thereby lost their right to the trademarks in suit; and (2) that the complainant, without giving notice of the assignment of the trademark to it, has used continuously the name "John Dwight &

Company," on some of its labels, although it succeeded that firm in 1896, dismantled its factory in New York city, and thereafter made its products at Solvay, near Syracuse, New York, and although John Dwight died more than four years before the bill in this suit was filed. For the reasons which have been stated at some length in the opinion regarding the infringement of the trademark in the annular band, these defenses cannot be sustained. There remain for consideration the contention that there was no infringement of the trademark in the cow, and that the complainant was guilty of laches fatal to this suit.

While the colors, words, and devices other than the representation of the cow upon the labels of the defendant differ from those upon the labels of the complainant, the picture of the cow is so dominant and striking a feature of the labels of each that a look at them is an ocular demonstration that the use of this picture on the labels of the defendant is well calculated to induce purchasers, exercising such care as buyers ordinarily use, to buy the articles offered under it in the belief that they are those of the same class made by the complainant, and the defendant cannot escape infringement on account of the difference in the dress of the goods. *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. ed. 828, 830; *Kann v. Diamond Steel Co.* 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706, 711; *Walter Baker & Co. v. Puritan Pure Food Co.* (C. C.) 139 Fed. 680, 682; *Walter Baker & Co. v. Delapenha* (C. C.) 160 Fed. 746, 750.

But the evidence is convincing that the complainant's use of the picture of the cow was practically limited to baking soda, while the defendant's use of it was restricted to baking powder, and counsel argue that these articles are in different classes, so that a trademark for one manufacturer for baking soda is not infringed by its use by another manufacturer for baking powder, and that, while the complainant has a trademark in the picture of the cow for baking soda, the defendant has acquired one in this picture for baking powder. Upon the question whether the articles are in the same class or in different classes, the witnesses directly contradict each other; but these pertinent facts were well established by the evidence. Baking soda and baking powder are used to leaven or raise dough in making bread. The active principle of each is bicarbonate of soda or baking soda. It is necessary to add some suitable acid, such as lactic acid, cream of tartar, acid phosphates, or alum to bicarbonate of soda to set its leavening power

at work, and baking soda is an article to which such an acid must be added in order to raise the dough to make the bread. Baking powder contains, mechanically mixed together, the bicarbonate of soda, some suitable acid to set its leavening power at work, and a filler or dryer. Baking soda and baking powder are both put up and sold in the form of a powder, and they are both used to make bread. The demand for baking soda is diminished by the use of baking powder, and the demand for baking powder is diminished by the use of baking soda. The filler commonly used to make baking powder is cornstarch, and baking powder is almost exclusively used in the household for making bread, while baking soda is also used to correct the acidity of milk, vegetables, a sour stomach, or indigestion,—uses to which baking powder may not be applied.

The general rule of law upon this subject is that the owner must have used his trademark on the same class, but not necessarily on the same species, of goods as the alleged infringer in order to entitle him to its protection against infringement. *Paul on Trade Marks*, § 202, and cases there cited. The issue here really harks back to the fundamental question that conditions every disputed infringement of a trademark, *viz.*: Is the defendant's use of the mark calculated to induce a purchaser exercising such care as buyers commonly use to purchase the goods of the defendant in the belief that they are those of the complainant? The Church & Dwight Company owned its trademark of the picture of the cow, and it had the right to its exclusive use on its baking soda to the full extent of the business it had acquired or could acquire therein. The use of that mark on baking soda or any article of its class manufactured by another in such a way as is calculated to diminish the complainant's business or restrict its trade by inducing purchasers to buy the article to which the mark is affixed, in the mistaken belief that that article is the product of the complainant, is necessarily an infringement of that right as well as a deception of the buyers. The facts that baking soda and baking powder are generally purchased and used for the same purpose, that the sale and use of one for the common purpose diminishes the sale and use of the other, and that the active element of each is the same, lead our minds to the conclusion that they must be in the same class, that the application of the complainant's trademark for baking soda to the baking powder made by another is calculated to induce purchasers to buy it as the product of the complainant, and that it is an infringement

of its trademark. This decision has not been reached without a careful consideration of the argument of counsel for the defendant to the contrary, of their earnest contention that, inasmuch as the complainant has never used its picture of a cow on baking powder, it was and is without right so to use it, and that the defendant, through its later and exclusive use of this mark on baking powder alone, had acquired a common-law trademark in it for use upon that article, and of the cases which they cite in support of these positions. *Filkins v. Blackman*, 13 Blatchf. 440, Fed. Cas. No. 4786; *Independent Baking Powder Co. v. Boorman* (C. C.) 175 Fed. 448, 455, and *Celluloid Mfg. Co. v. Read* (C. C.) 47 Fed. 712. But the conclusion we have reached seems to us to be not only right, but supported by the better reasons and the more persuasive authority.

In *Collins Co. v. Oliver Ames & Sons* (C. C.) 20 Blatchf. 542, 18 Fed. 561, 570, *Collins & Company* was a corporation of Connecticut, authorized to manufacture all articles of metal. It had made and sold in the United States and in Australia axes, hatchets, broadaxes, picks, and hoes which it had stamped with the name "Collins & Company," until it had acquired a right to be protected in the exclusive use of that trademark upon these articles. It had never made or marked, however, any shovels. In this state of the case, *Oliver Ames & Sons* made some shovels in the state of Massachusetts, stamped them "Collins & Company," and sold them in Australia, and Judge Blatchford held that it thereby infringed the trademark of *Collins & Company*. He said: "Clearly those who purchased shovels made by *Ames & Sons* and stamped '*Collins & Company*' would believe that such shovels were made by the plaintiff, for there was no other *Collins & Company* than the plaintiff. This was an unlawful appropriation of the plaintiff's trademark. It is true that the plaintiff up to that time had made no shovels. It is also true that *Ames & Sons* and the defendant have built up a business in shovels stamped '*Collins & Company*.' But the plaintiff had a right to make shovels, and it had made kindred articles of metal, and its good name and its reputation in its business were wholly connected with the use in its trade of the mark '*Collins & Company*.'"

In answer to the argument that because *Collins & Company* had never made shovels, and *Ames & Sons* and the defendant, after *Collins & Company* had used the mark on its products, had built up a trade in shovels under the name "*Collins & Company*," that mark in respect to shovels be-

came the defendant's property, Judge Blatchford said: "This view is specious, but unsound. The plaintiff having from 1843 the right to make any article of iron, steel, or other metal, and having gone on from that time, both before and after 1856, extending its manufacture beyond edge tools into digging tools, such as picks and hoes, and having always put the mark '*Collins & Company*' on its best quality of articles, the fact that it did not, before 1856, make a digging tool such as the shovels on which, in 1856, *Ames & Sons* put the mark '*Collins & Company*,' does not warrant the conclusion that that mark was not in 1856 the mark of the plaintiff's trade in respect to such shovels."

Few, if any, of the judges of this country have been more learned in the law of patents and trademarks than Judge Blatchford, and there is none whose opinions on these subjects command more respect. The application of his decision to the facts of this case is obvious. There have been decisions of the Patent Office to the effect that the following articles were in the same class: Timothy seed and clover seed (122 Off. Gaz. 1398); paste paints and ready-mixed paints (134 Off. Gaz. 1049); bitters and ground roots for making bitters (126 Off. Gaz. 2192); cigars and smoking and chewing tobacco (144 Off. Gaz. 275); saws, tools, files, hammers, and hatchets (141 Off. Gaz. 285); gasoline, vapor, coal, and wood stoves (134 Off. Gaz. 2245). The courts have determined that a trademark for smoking and chewing tobacco is infringed by its use on cigarettes. *Carroll v. Ertheiler* (C. C.) 1 Fed. 688; *American Tobacco Co. v. Polacsek* (C. C.) 170 Fed. 117, 120. And in *Church & D. Co. v. Russ* (C. C.) 99 Fed. 276, 280. Judge Baker considered the very questions in hand, and held that the use on another's baking powder of a manufacturer's trademark on baking soda was an infringement of the latter's right to the exclusive use thereof. This decision was rendered ten years ago, it accords with our opinion, has been cited approvingly in later decisions (*Enoch Morgan's Sons Co. v. Ward*, 12 L.R.A. (N.S.) 729, 81 C. C. A. 616, 619, 152 Fed. 690, 693; *Walter Baker & Co. v. Delapenha* [C. C.] 160 Fed. 746, 751), and, even if the questions it answers were doubtful, it would be unwise to depart from it now. Uniformity and certainty in rules of property are often more important and desirable than technical correctness.

Has the complainant been guilty of such delay and acquiescence in the defendant's use of the picture of the cow that it may not appeal successfully to a court of equity for relief? Laches is of the nature of es-

toppel. Its application is conditioned not by the lapse of time alone, but largely by such a change of defendant's position, induced by a complainant's delay and acquiescence in a disregard of his rights, as makes it inequitable to enforce them. It is without application or effect in a suit for infringement until the complainant has received knowledge, or such notice as, pursued with reasonable diligence, would have led to knowledge, of the infringement. *Sawyer v. Kellogg* (C. C.) 9 Fed. 601, 602; *Pence v. Langdon*, 99 U. S. 578, 581, 25 L. ed. 420, 421, 13 Mor. Min. Rep. 32; *Kilbourn v. Sunderland*, 130 U. S. 505, 518, 32 L. ed. 1005, 1010, 9 Sup. Ct. Rep. 594.

There is no evidence in this record that the complainant had any knowledge or notice of the use of the trademark here in issue by the defendant upon baking powder prior to the year 1898. In October of that year the complainant wrote to the Layton Pure Food Company, a partnership, the predecessor in interest of the defendant, that its attention had been called to the fact that they were using the picture of a cow on their baking powder; that they were thereby infringing its rights; and it requested them to discontinue the use of this trademark. After several letters had passed between the parties, the Layton Company declined to discontinue the use of the mark, on the ground that the complainant had never used it on baking powder. In 1900 the complainant wrote to the Layton Company that its claim that the use of the picture of the cow upon baking powder was an infringement of its trademark therein had been sustained by the decision of the United States circuit court, and sent them a copy of the opinion in *Church & D. Co. v. Russ* (C. C.) 99 Fed. 276, 280. The bill in this case was filed in June, 1907, more than eight years after notice to the complainant of the infringement, and more than six years after it notified the Layton Company of the decision in its favor in the *Russ* Case. Meanwhile the defendant, the corporation, succeeded its predecessor, the partnership, in 1901. It advertised and sold its baking powder under the picture of the cow without further notice or objection until 1907. The decree below is for an accounting and an injunction. As the decree for the accounting is for the recovery of money, it is governed by the general rule of laches, that courts of equity act or refuse to act in analogy to the statute of limitations relating to actions at law of like character, that under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations, but that

if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the court will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 56 U. S. App. 363, 85 Fed. 55, 62; *Idé v. Thorlicht, D. & R. Carpet Co.* 53 C. C. A. 341, 352, 115 Fed. 137, 148; *Brun v. Mann*, 12 L.R.A. (N.S.) 154, 80 C. C. A. 513, 522, 151 Fed. 145, 154. The analogous statute of limitations at law permits a suit within five years of the accrual of the cause of action. *Mo. Rev. Stat. 1899*, § 4273 (Anno. Stat. 1906, p. 2349).

The complainant's delay to commence suit for more than eight years after its knowledge of the infringement, the frank claim of the predecessor of the defendant in 1898, a claim not at that time clearly baseless, that they had the like right to use the picture of the cow on baking powder that the complainant had on baking soda, the continued use of the picture by that partnership after they received notice in 1900 of the *Russ* decision, the subsequent succession of the defendant corporation in 1901, the latter's continuous use of this picture and its sales of millions of packages of baking powder under it between that time and the filing of the bill in this suit in 1907, without farther objection or any attempt by the complainant to enforce its rights, constitute circumstances so extraordinary, show such an acquiescence by the complainant in the defendant's use of the trademark, as was well calculated to lull it into security and render it inequitable to require of the defendant now an accounting for its sales prior to the date of the filing of the bill. The decree will be modified accordingly so as to limit the accounting to the time subsequent to the filing of the bill, when the defendant had full knowledge of the rights of the complainant and of its purpose to enforce them. When a court of equity finds that, during the delay of one of the parties, their position has so changed in reliance thereon that the equitable relief which that party seeks cannot be granted without doing injustice, it will not exert its powers to save him from the consequences of his own neglect. *McLean v. Fleming*, 96 U. S. 245, 251, 258, 24 L. ed. 328, 833; *Menendez v. Holt*, 128 U. S. 514, 523, 524, 32 L. ed. 526, 528, 529, 9 Sup. Ct. Rep. 143; *Edward & John Burke v. Bishop* (C. C.) 175 Fed. 167, 175; *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.* 91 C. C. A. 363, 368, 165 Fed. 413, 418; *Manhattan Medicine Co. v. Wood*, 4 Cliff.

461, Fed. Cas. No. 9,026; Cahn v. Gottschalk, 14 Daly, 542, 2 N. Y. Supp. 13, 18; Low v. Fels, 35 Fed. 361, 362; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; Worcester Brewing Corp. v. Reuter & Co. 84 C. C. A. 665, 157 Fed. 217.

The decree for the injunction stands on different ground. The complainant is the owner of a trademark for baking soda and baking powder consisting of this picture of a cow, and this is valuable property. It is entitled to be protected in the exclusive use of this property. Every sale under this trademark of a package of baking powder manufactured by another is an infringement of the complainant's right and a trespass upon its property. While the delay of the complainant and its apparent acquiescence in past trespasses may make it inequitable to compel the defendant to account for the profit it derived from them, they confer upon it no right, either at law or in equity, to continue them. Neither the statute of limitations nor laches presents any defense to the prayer of the complainant for the prevention of future infringement. It is true that there are exceptional cases in which the owners of trademarks have acquiesced in the use of them by the public or by competitors for such a length of time and under such circumstances that their action has been held to estop them from denying that they had abandoned their trademarks, and to constitute a bar to an application for an injunction against an infringement of them. *French Republic v. Saratoga Vichy Spring Co.* 191 U. S. 427, 437, 48 L. ed. 247, 252, 24 Sup. Ct. Rep. 145; *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938, 943; *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151. But the record in this case presents no facts which bring it within this class of cases. The complainant notified the predecessors of the defendant in 1898, and again in 1900, of its claim to this trademark for baking powder, and requested them to cease its use. The defendant took its business and its rights with notice of and subject to that claim. There is no evidence that the complainant ever had the intention to abandon this claim except its delay for about nine years to commence its suit for the infringement, and that delay is insufficient to establish any intention to abandon it, or to deprive it of its right to prevent farther infringement. *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, 47 L. J. Ch. N. S. 459, 38 L. T. N. S. 380, 26 Week. Rep. 435. Repeated trespasses or infringements establish no right to continue to trespass or to infringe, and the de-

fendant may not be permitted to continue to use the trademark of the complainant. *McLean v. Fleming*, 96 U. S. 245, 247, 258, 24 L. ed. 828, 829, 833; *Menendez v. Holt*, 128 U. S. 514, 523, 524, 32 L. ed. 526, 528, 529, 9 Sup. Ct. Rep. 143.

This case must be remanded to the court below, with directions to modify the decree so as to limit the accounting to the time subsequent to the filing of the bill, and with that modification the decree is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

CHESAPEAKE & OHIO RAILROAD COMPANY, Plff. in Err.,
v.

J. REID WILLS.

(111 Va. 32, 68 S. E. 395.)

Proximate cause — wrong direction of passenger — leaving moving train.

The negligence of a railroad company in misleading a passenger into entering the wrong train is not the proximate cause of his injury in attempting, without direction or encouragement on the part of the carrier, to alight from the train after it is in motion and he has discovered the mistake.

(June 9, 1910.)

Note. — Liability for injury to passenger in alighting from moving train which he had boarded through negligence of carrier.

The liability of a carrier to one injured by alighting from a moving train which he had boarded by reason of being misdirected was denied in *Rothstein v. Pennsylvania R. Co.* 171 Pa. 620, 33 Atl. 379. In this case the train was apparently moving at such a speed as to make the passenger's act in jumping negligent under ordinary circumstances. The following is quoted from the opinion: "In this case the plaintiff was safe upon the train, and if his getting upon it instead of the New York train was due to the negligence of the company, he might have had an action against the latter for the expenses he incurred and the inconvenience to which he was subjected in consequence of its fault. But his presence on the train through the negligence of the company furnished no warrant or excuse for jumping from it as he did. We must therefore, for the purposes of this suit, consider his presence there as due to his own unassisted mistake, and regard the act of jumping from the car in the light of what occurred after he had gotten upon it."

But in *Newcomb v. New York C. & H. R. R. Co.* 182 Mo. 687, 81 S. W. 1069, it was held that the plaintiff was entitled to recover for injuries he sustained in alighting from a moving train upon a defective platform, where it appeared that he had board-

ERROR to the Circuit Court for Orange County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Williams & Browning for plaintiff in error.

Mr. F. Wilmer Sims, for defendant in error:

Where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars when they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice.

2 Woods, Railway Law, 1131, 1132; Thomp. Carr. 227-267; Beach, Contrib. Neg. 157, § 53; 3 Hutchinson, Carr, 3d ed. 1377, § 1179; 3 Thomp. Neg. § 3030; Walker v. Vicksburg, S. & P. R. Co. 41 La. Ann. 795, 7 L.R.A. 111, 17 Am. St. Rep. 422, 6 So. 916; 5 Am. & Eng. Enc. Law, 2d ed. pp. 664-666; Clayards v. Dethick, 12 Q. B. 439; Robson v. North Eastern R. Co. 12 Moak, Eng. Rep. 306, L. R. 10 Q. B. 271; Edgar v. Northern R. Co. 4 Ont. Rep. 201; East Tennessee, V. & G. R. Co. v. Conner, 15 Lea, 258; Taylor v. Missouri P. R. Co. 26 Mo. App. 336; Atlanta & W. P. R. Co. v. Smith, 81 Ga. 620, 8 S. E. 446; Shannon v. Boston & A. R. Co. 78 Me. 52, 2 Atl. 678; Galveston, H. & S. A. R. Co. v. Smith, 59 Tex. 406; Evansville & C. R. Co. v. Duncan, 28 Ind. 447, 92 Am. Dec. 322; Doss v. Missouri, K. & T. R. Co. 50 Mo. 37, 21 Am. Rep. 371; New York, P. & N. R. Co. v. Coulbourn, 69 Md. 360, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 208; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. 737; Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88; Newcomb v. New York C. & H. R. R. Co. 182 Mo. 687, 81 S. W. 1069; Kansas City, M. & B. R. Co. v. Matthews, 142 Ala. 293;

ed the wrong train through the failure of the carrier to have ushers present to give directions, and his misdirection by the porter of the car he entered. The objection was made that the negligence of the carrier complained of was not the proximate cause of the accident, but as to this contention the court said: "It was the cause of the plaintiff's getting on the wrong train; it was the cause of the plaintiff's being in the position from which, in trying to extricate himself, the injury resulted; unless, therefore, between the getting into that position and the accident, some other cause intervened, the act of the defendant which led the plaintiff into the position was the direct cause of the accident."

32 L.R.A. (N.S.)

39 So. 207; Newport News & O. P. R. & Electric Co. v. McCormick, 106 Va. 517, 56 S. E. 281.

Where a train of causes which results in injury to a person is set in motion by another, that other will be liable to the person injured, although the intervening act or omission of such person was the immediate cause of his receiving the injury, provided the circumstances surrounding him at the time, were such that his act or omission ought not to be imputed to him as a fault.

1 Thomp. Neg. § 64; Standard Oil Co. v. Wakefield, 102 Va. 832, 66 L.R.A. 792, 47 S. E. 830.

Keith, P., delivered the opinion of the court:

The defendant in error brought suit against the plaintiff in error to recover for an injury sustained in alighting from one of its trains. There was a demurrer to the declaration and to each of its three counts, which the court overruled, and upon a trial before a jury there was a verdict and judgment in favor of the plaintiff, to which a writ of error was awarded.

The only error assigned which we shall find it necessary to consider is to the ruling of the court upon the demurrer to the declaration.

The first declaration filed was demurred to, grounds of demurrer were assigned and argued, and the judge of the court entered an order overruling the demurrer. Thereupon the plaintiff, upon his own motion, was permitted to amend the declaration, and the defendant demurred to the amended declaration and each count, which demurrer was also overruled by the court.

The first count states that the plaintiff, on the 13th of July, 1907, was a passenger on the defendant's railway, to be carried from its station at Gordonsville to Louisa, in this state, for a certain fare, which was paid; that it was the duty of the defendant, with due and proper care and reason-

In St. Louis, I. M. & S. R. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230, intending passengers on the carrier's road who boarded the wrong train through the misdirection of the ticket agent were injured in alighting while the train was moving slowly, and it was held that it was for the jury to determine whether this conduct in leaving the train when they did amounted to negligence. There was a verdict for the plaintiffs, which was affirmed.

On general question of liability of carrier on account of misdirection of passenger by employee, see notes to St. Louis Southwestern R. Co. v. White, 2 L.R.A. (N.S.) 110, and Mace v. Southern R. Co. 24 L.R.A. (N.S.) 1178. W. A. S.

able diligence, to carry the plaintiff safely; but that it so carelessly and negligently managed its passenger trains that it misled the plaintiff and caused him to get upon a train that was not bound in the direction that he wished to go, but in an opposite and contrary direction; and that, immediately upon getting on board said train, the defendant then and there started it, and wrongfully carried the plaintiff away from his true destination; on a journey different from that upon which it was the duty of the defendant to carry him; whereupon, immediately upon the starting of the train, the plaintiff perceived that he was being carried by defendant away from his destination, and he ran at once to the exit of the passenger coach in which he was, and, when the train had not attained any speed, but was moving very slowly, the plaintiff then and there attempted to alight therefrom, and did not apprehend, nor would any ordinary, careful, and prudent man have apprehended, under like circumstances, any danger from alighting; and while thus attempting to alight, the plaintiff was thrown under the train by the careless and negligent conduct and management of the defendant in carrying him away from his destination, by reason whereof one of the legs of the plaintiff was crushed and broken so that amputation became necessary.

The second and third counts state the same cause of action, and enter into details setting out the manner in which the plaintiff had been misled into taking a train going in the opposite direction to that in which he desired to go, carrying him, in fact, to the west, when his point of destination was directly to the east. When it comes, however, to narrate what occurred when he discovered that he was being taken away from his true destination, his own conduct is described in the second and third counts substantially as was done in the first count.

It may be conceded, in the view that we take of this case, that the railroad company was guilty of actionable negligence in permitting such confusion in the movement of its trains to exist at Gordonsville as misled the plaintiff, acting with reasonable prudence and caution, into entering the wrong train. It may be conceded that it was the duty of the defendant to exercise reasonable care and caution so to inform passengers as to the movement and destination of its trains, as to enable those wishing to entrain to enter the train which would take them to the point they wished to reach. It may be further conceded that for the failure to perform that duty, the railroad company was responsible for what-

ever loss or damage the passenger sustained which could be reasonably expected to result from such negligent act. When, therefore, the plaintiff found himself moving in a direction the opposite of that in which he wished to go, he had, in the case supposed, a complete right of action against the defendant company to recover the damages flowing from the breach of the duty owed to him by the railroad company.

But that is not the injury for which this suit was brought. The plaintiff, finding himself moving from instead of toward his home, went at once to the door of the car and undertook to alight from the train while in motion, and suffered the injury which resulted in the amputation of his leg. It does not appear from the declaration that the defendant directed, requested, encouraged, or suggested that the plaintiff should step from the car while in motion. It does not appear from the declaration that the defendant was advised in any manner of the situation in which the plaintiff found himself. He acted solely upon his own responsibility in alighting from the train, and that act was the proximate cause of the injury which he received, and the negligent conduct of the railroad company in causing him to enter the wrong train, conceding that it was guilty of negligence, was the remote cause.

In *Shearman & Redfield on Negligence*, § 26, it is said: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation."

At §§ 28 and 29 the same author says: "Very great difficulty has been found in determining what damages should be considered as flowing in a 'natural and continuous sequence' from an act of negligence, especially when it is not a matter of contract liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen as the probable

consequence of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury. The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

In 32 Cyc. Law & Proc. p. 745, several definitions of "proximate cause" are given, among them as follows: "An act which directly produced, or concurred directly in producing, the injury; . . . that from which the effect might be expected to follow without the concurrence of any unusual circumstances; that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."

In 8 Am. & Eng. Enc. Law, 2d ed. p. 571, it is said: "In the law of damages the proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, where, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Where an efficient producing cause for injuries is found, it will be considered the proximate cause, unless another cause or causes, not incident to but independent of it, are shown to have intervened and produced the injury. The question must always be, therefore, whether there was any

intermediate cause disconnected from the primary act and self-operating, which produced the injury; an inquiry to be answered in accordance with common understanding. Where this question can be answered in the affirmative, the independent intervening cause will be regarded as the proximate cause, and the author of the original act discharged. . . . The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. It is not essential, therefore, for a plaintiff to show that an act claimed to have been the proximate cause of a certain result was the only cause. It is sufficient if it be established that the defendant's act produced or set in motion other agencies which in turn produced or contributed to the final result. Where, however, the connection is not immediate between the injurious act complained of and the consequence, such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act predominates over that of other causes and concurs to produce the consequence." These principles are in accordance with the decisions of this court.

In *Fowlkes v. Southern R. Co.* 96 Va. 742, 32 S. E. 464, it was said: "That the defendant was guilty of negligence is conceded, and that it is liable in damages for the direct consequences of that negligence is also conceded. . . . It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event, is regarded. . . . In other words, the law always refers the injury to the proximate, not to the remote, cause. . . . If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. . . . To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. . . . If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently

conjoined or concatenated as cause and effect to support an action."

And in *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070, Mr. Justice Miller said: "To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at the next station at which the train stops; and if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another in search of the conductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury and he cannot recover damages of the company therefor.

In this case the negligence of the railroad company consisted in such acts of omission and commission, alleged in the declaration, as resulted in the plaintiff getting upon the wrong train, and, upon the authority of the case just cited, there was an ample remedy for whatever wrong he had sustained by reason of the defendant's negligence. The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part. As we have seen, the declaration does not aver that any agent of the company directed, advised, encouraged, or even had knowledge of the plaintiff's intention to alight from the train; so that, between the negligent act of the railroad company and the injury suffered by the plaintiff, there was the intervening act of a responsible agent, that responsible agent being the plaintiff himself. While the plaintiff, as a result of the defendant's negligence, had taken the wrong train, but was in a place of safety, and of his own accord alighted from the train, it cannot be said that the injury which he then received was the natural and continuous sequence, unbroken by any new or independent cause, of the negligence of the defendant which caused him to enter the wrong train.

For these reasons, we are of opinion that 32 L.R.A. (N.S.)

the demurrer to the declaration and each count thereof should have been sustained; and, in view of the fact that the plaintiff filed a declaration to which the defendant demurred, and the court overruled the demurrer, and that the plaintiff, then, of his own motion, filed an amended declaration, in which he restated his cause of action, in the light of the objections which had been urged to his original declaration, it is to be presumed that he has made the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to amend; and this court, entering such judgment as the Circuit Court ought to have rendered, will sustain the demurrer, and enter a final judgment for the plaintiff in error.

Reversed.

Buchanan, J., absent.

Whittle, J.: I concur in the result reached by the president in this case. But I am of opinion that neither the original nor amended declaration states a case of actionable negligence against the defendant.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HESTER A. WALDRON et al., Appts.,

v.

SARAH A. WALLER et al.

(65 W. Va. 605, 64 S. E. 964.)

Executed deed — alteration — effect.

1. If, after execution, a deed for land be altered by the grantee or by his privy so as to make it describe land not granted

Headnotes by MILLER, P.

Note. — Alteration of deed after delivery.

- I. Alteration by stranger, 285.
- II. Alteration by party or one interested in deed.
 - a. Immaterial alterations, 285.
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 3. As modifying original instrument.
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This note is confined to deeds in the narrow sense of the word, that is, deeds

thereby, its operation as an executed contract is not affected, and the title vested by it is not disturbed. The effect of such unauthorized alteration is to deprive the party making it of all future benefits of an executory nature or obligation which he might have derived under the deed.

Same — equitable rights.

2. Such unauthorized alteration of a deed will not entitle the grantor by a suit in equity to set aside his deed, and be reinvested with the title to the land conveyed.

Same — redelivery — reacknowledgment.

3. If, after it has been executed and delivered, a deed for land, with the consent of the grantors, be altered so as to make it describe a larger boundary, in order to make it effective to convey the additional land, it should be redelivered, and, if it has been acknowledged before the alteration, it should be again acknowledged.

Reformation of altered deed — proceeding — relief.

4. In a suit by a grantor to set aside a deed and be reinvested with the title to the land conveyed, on the ground that the same has been altered without his consent, the grantee therein, on his cross-bill answer, charging that the land covered by the al-

teration represents the land actually purchased and paid for, and of which possession was given, and on which valuable improvements have been made, with the knowledge and consent of the grantor, may have specific execution of the original contract, and the grantor decreed to make a new deed correcting the mistake in the original deed, and, in default thereof by him, have a commissioner appointed to make, execute, and deliver such corrected deed on his behalf.

(April 27, 1909.)

A PPEAL by complainants from a decree of the Circuit Court for Mingo County dismissing a bill filed to set aside a certain deed of real estate executed by them. Modified.

The facts are stated in the opinion.

Mr. G. R. C. Wiles for appellants.

Messrs. Douglas W. Brown and Stokes & Bronson for appellees.

Miller, P., delivered the opinion of the court:

Hester A. and M. H. Waldron, May 2, 1906, sued Sarah A. Waller and her four infant children in the circuit court of Min-

of conveyance, including mortgages and leases.

I. Alteration by stranger.

The rule of law may be said now to be well established in this country at least, that an alteration made in a deed by a stranger, that is, by one not a party thereto, or in nowise interested therein, will not affect the deed. *Pry v. Pry*, 100 Ill. 466; *Wickes v. Caulk*, 5 Harr. & J. 36; *Young v. Young*, 157 Mich. 80, 120 N. W. 264; *Ames v. Brown*, 22 Minn. 257; *Moore v. Ivers*, 83 Mo. 29; *Holladay-Klotz Land & Lumber Co. v. T. J. Moss Tie Co.* 89 Mo. App. 556; *Den ex dem. Wright v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 209; *Gleason v. Hamilton*, 138 N. Y. 353, 21 L.R.A. 210, 34 N. E. 283; *Marcy v. Dunlap*, 5 Lans. 365; *Robertson v. Hay*, 91 Pa. 242.

But this seems not to have been the ancient rule, since it was declared in *Pigot's Case*, 11 Coke, 27a, that "when any deed is altered in a point material by the plaintiff himself or any stranger without the privy of the obligee, . . . the deed thereby becomes void."

And in *Davidson v. Cooper*, 11 Mees. & W. 778, 1 Dowl. & L. 377, 12 L. J. Exch. N. S. 467, Lord Abinger declared: "There is no doubt but that in the case of a deed any material alteration, whether made by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made."

And such was declared to have been the 32 L.R.A. (N.S.)

old rule in *Chessman v. Whittemore*, 23 Pick. 231; *Jackson ex dem. Malin v. Malin*, 15 Johns. 293; *Hutchins v. Scott*, 2 Mees. & W. 809, Murph. & H. 194, 6 L. J. Exch. N. S. 186.

II. Alteration by party or one interested in deed.

a. Immaterial alterations.

An alteration in a deed, to render it void even when made by a party must be a material one, that is, one that causes the deed to speak a language different in legal effect than that which it spoke originally. *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244. Accordingly, it was held that filling in a blank space left for expressing a consideration was not a material alteration, and would not affect the validity of a deed.

So, in the following cases, the alterations, parenthetically shown, were held to be immaterial alterations, not affecting the deeds in suit. *Coit v. Starkweather*, 8 Conn. 289 (addition of the word "junior" to the name of the grantee); *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219 (erasure of the Christian name of a grantor as written, and the insertion of his true name, to correct a clerical error); *Barrett v. Thorndike*, 1 Me. 73 (increasing the acreage in a tract of land conveyed by metes and bounds); *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67 (correcting a mistake in the name of an adjoining owner of the land conveyed); *Burnham v. Ayer*, 35 N. H. 351 (changing the direction in which the boundary line of the land was said to run, so as to make it conform to the

go county, seeking to set aside and vacate a certain deed made by them April 13, 1904, to the said Sarah A. Waller and George Waller, her husband, and to have the title to the lots conveyed reinvested in them, by which deed, in consideration of \$1 in hand paid and acknowledged, and the further sum of \$100 to be paid in six months, evidenced by note, they released and quitclaimed to said grantees all their rights, title, and interest in and to a certain lot of land in Fairfax, Mingo County, conveyed to them December 8, 1902, by A. J. Gauze and wife, describing it by metes and bounds; and also purporting to convey, with covenants of general warranty, a certain lot adjoining the first, bounded as follows: "Beginning at a stake on the

line of the Norfolk & Western Railway right of way, at a point 36 feet from the line of the lot now owned by the said Eva Deskins; thence with the line of said right of way 25 feet to a stake, running in a northwesterly direction; then south 61.30 degrees and 5 minutes west about 150 feet, to the water edge of Tug river; thence with the meanders of said river to a bunch of grape vines at the corner of the lot now owned by the said Sarah A. Waller, standing near the water edge; thence with the line of said lot to the beginning,"—the object of said deed being, as recited on its face, to settle and compromise a chancery suit then pending in said court, involving a dispute as to boundary line of said lots; and also seeking to set aside another deed

facts); *Re Howgate* [1902] 1 Ch. 451, 71 L. J. Ch. N. S. 279, 86 L. T. N. S. 180 (the erasure of the Christian name of the grantee, and insertion of his true name).

But the strict old rule of the common law would not permit a party thereto to alter a deed even in an immaterial point. Thus, in *Pigot's Case*, 11 Coke, 27a: "If the obligee himself alters the deed, . . . although it is in words not material, yet the deed is void."

"If the alteration be made by the party himself, that owneth the deed, albeit it be in a place not material, and that it tend to the advantage of the other party, and his own disadvantage, yet the deed is thereby become void." *Shep. Touch.* 69.

And this ancient rule was declared to be the settled law of New Jersey in *Jones v. Crowley*, 57 N. J. L. 222, 30 Atl. 871, upon the authority of *Den ex dem. Wright v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Vanauken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509, and *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

b. Material alterations.

1. Effect upon instrument as an executed conveyance.

The rule of law as established by the overwhelming weight of authority is that no alteration of a deed after it has once been delivered will have any effect upon the grantee's title.

Thus, in *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22, 30 So. 466, it was declared to be the law in that state that an alteration in a deed after delivery, with or without the consent of the grantee, would not affect the title to the land conveyed by the deed.

And in *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78, 28 So. 963, it was held that a grantee was not divested of title by the alteration of a deed, and that the original instrument remained a muniment of title, and was without explanation evidence of title, and might be used as such.

And in *Gibbs v. Potter*, 166 Ind. 471, 32 L.R.A. (N.S.)

77 N. E. 942, 9 A. & E. Ann. Cas. 481, and in *Stanley v. Epperson*, 45 Tex. 644, it was declared to be well settled that the alteration of a deed after its delivery, though done by the consent of the parties, would not divest the original grantee of title, or revest such title in the grantor.

And in *Jackson ex dem. Collier v. Jacoby*, 9 Cow. 125, it was held that a fraudulent, even a felonious, alteration of a deed, would not divest the estate conveyed by it.

And in *Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118, it was held that no subsequent alteration in a deed, "by whomsoever made or with whatever purpose," could revest the grantor with title.

And in *Hancock v. Dodd*, — Tenn. —, 36 S. W. 742, it was held that no alteration by a grantor after the delivery of a deed could change its effect, since all title and interest he had in the land had passed out of him, and he had no further interest to convey, and no more right to change or alter the deed than a stranger, and that nothing that he could do, direct, or assent to could change the effect of his original deed.

So, in *John v. Hatfield*, 84 Ind. 75, it was held that where the husband of a grantee in a deed inserted his own name as an additional grantee, without the consent of his wife, such alteration was a mere spoliation, which did not affect the rights of his wife even as against a bona fide purchaser from the husband, unless she had been guilty of fraud or negligence whereby such purchaser was misled.

And in *Booker v. Stivender*, 13 Rich. L. 85, it was held that where a deed was altered, with the consent of the parties, by adding a clause reserving certain timber on the premises conveyed, the insertion was inoperative to reinvest the grantor with the title to the timber.

In *Hunt v. Nance*, 122 Ky. 274, 92 S. W. 6, an alteration in a deed apparently with the consent of the parties thereto, whereby a conveyance in fee simple was changed to a life estate, was held, in an action by creditors of the grantor against the land

made May 26, 1904, by said George Waller to the said Sarah A. Waller and her said infant children, conveying to them the same lot, and for general relief. On final hearing March 8, 1907, on bill, answer of Sarah A. Waller, and separate answer of said infant defendants, by guardian *ad litem*, and depositions taken and filed, the court below, being of opinion that the plaintiffs were not entitled to the relief prayed for, dismissed their bill, and they have appealed.

It is conceded with respect to the deed of April 13, 1904, as originally executed and delivered, one of the calls in the boundary of the last lot conveyed, which reads, "thence south 55 degrees and 5 minutes west about 150 feet, to the water edge of

Tug river," was changed before recordation so as to read, "thence south 61.30 degrees and 5 minutes west about 150 feet, to the water edge of Tug river," and that, as recorded, it has on its face, following the acknowledgment, a memorandum made April 23, 1904, by the county surveyor, of a resurvey of the lot conveyed changing said course from "S. 55° 5' " to "S. 61.30° W." However, in the deed from George R. Waller to Sarah A. Waller and children, made May 26, 1904, the description of the lot is the same as in the original.

The only evidence taken on behalf of defendants is the testimony of Gaujot, the surveyor who made the resurvey, who says, respecting this survey and the change made by him in the deed, that on the day

in question, not to affect the conveyance as between the grantor and grantee. The court declined to decide whether the alteration should be treated as mere surplusage not affecting the conveyance as originally intended and made, or whether it vested the remaindermen with an interest in the land.

So, the title conveyed by a deed of trust is not affected by any alteration made therein by the trustee, nor are the trusts declared therein extinguished thereby, even though the grantee had a contingent interest therein. *Flinn v. Brown*, 6 S. C. 209.

So, in the following cases, which are offered as furnishing further illustrations of the rule here discussed, the title originally conveyed was held not to be affected:

—where the description of the property conveyed was changed by erasure or interlineation or by both methods: *United States v. West*, 22 How. 315, 16 L. ed. 317; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Burnett v. McCluey*, 78 Mo. 676; *McLindon v. Winfree*, 14 N. C. (3 Dev. L.) 262; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569;

—where the grantor's name was erased. *Fitzgerald v. Wynne*, 1 App. D. C. 107; *Slaterry v. Slaterry*, 120 Iowa, 717, 95 N. W. 201; *Turner v. Warren*, 160 Pa. 336, 28 Atl. 781;

—where a new grantee was substituted in place of the original one. *Fletcher v. Mansur*, 5 Ind. 267; *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942, 9 A. & E. Ann. Cas. 481; *Berry v. Kinnard*, 14 Ky. L. Rep. 578, 20 S. W. 511; *Stanley v. Epperson*, 45 Tex. 644; *Wilson v. Owens*, 26 Grant, Ch. (U. C.) 27;

—where part of the grantee's name was erased. *Jackson ex dem. Gould v. Gould*, 7 Wend. 364;

—where the name of one of the grantees was erased. *Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118;

—where another name was added as grantee. *Clark v. Creswell*, 112 Md. 339, 76 Atl. 579;

—where there had been erased a word

descriptive of the calling of the party to whom property reserved in a deed had theretofore been granted. *Doe ex dem. Beanland v. Hirst*, 3 Starkie, 60.

But in *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214, it was held that where the law required a valuable consideration to support a deed, an erasure of all consideration from such an instrument rendered the deed insufficient as a foundation for a claim of title.

2. Effect upon instrument as an executory contract.

(a) In general.

It may be safely said to be a well-established rule of law, inasmuch as no decision can be found to throw any doubt upon it, that, while a material alteration of a deed after delivery may not affect it as an executed conveyance, it effectually destroys, on the part of the person responsible for the alteration, any subsequent rights arising to him.

One of the best and clearest statements of this rule of law is to be found in the note to *Master v. Miller*, 1 Smith, Lead. Cas. 8th Am. ed. 1310: "An alteration after execution made by one claiming a benefit under the deed, or by his privy, destroys the instrument as to him, and he can never sue upon it; . . . The instrument, as far as the wrongdoer is concerned, is from that time destroyed and extinguished; its past operation is not contracted; executed contracts evinced by it are not rescinded; estates and titles vested by transmutation of possession, whether by common law or the statute of uses, are not divested; but no future benefit can be derived by that party from the deed, and no covenants, obligations, or other executory contracts can be enforced by him . . . through its instrumentality."

So, in *Robbins v. Magee*, 76 Ind. 381, it was held that in an action upon a deed which had been fraudulently altered, no

he resurveyed the lot and made the change in the description, and made the memorandum thereof on the deed, he received a message to come to Naugatuck, and when he got there he found the Wallers wanted him to run out the true course of the lot which he understood had been recently purchased by them from the Waldrons; that he did the surveying in the presence of M. H. Waldron, and that, in running these courses and distances, he found that the change in the course as shown in the memorandum and made by him on the deed was necessary; that Waldron was present at the time and consented that the change should be made, and, when made, that he consented to the redelivery of the deed, and was present when he redelivered the

deed to the Wallers; that he took supper with the Waldrons the same evening, and heard Waldron talk the matter over with Mrs. Waldron and tell her he had made the change in the deed, and heard her say, "It was all right with her;" that before making the resurvey they waited for Waldron to come, and when he came he pointed out the monuments to him by which to make it; and that the making of the change in the deed was perfectly satisfactory to the Waldrons.

Besides their own depositions, the plaintiffs took the testimony of Henry P. Clark, a relative, and of their son, E. H. Waldron. Waldron admits his presence at the survey, as well as that of Clark, but denies that he consented to the change, and both he and

affirmative defense could be maintained by the person who made the alteration.

And in *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299, it was held that while the fraudulent alteration of a deed by the grantee would not have the effect to revest the title in the grantor, the deed itself would be avoided thereby, so that the grantee could not sustain any suit founded upon the deed as an existing and valid instrument.

This rule finds support also in *Herriek v. Malin*, 22 Wend. 388, in which it was held that a deed, though materially altered, was admissible in evidence for the purpose of showing that the legal title to the property had once passed by such deed, when it existed as an unimpeachable instrument before alteration, and where it was not offered in evidence for the purpose of recovering thereon as upon a contract.

And in *Stewart v. Aston*, 8 Ir. C. L. Rep. 35, the court declared it to be beyond all doubt that no alterations, even if made by the party offering the deed in evidence, could prevent its being received in evidence for the purpose of ascertaining the state in which it was when it was executed, and for the purpose of showing that it did pass an estate at the moment of its execution; and that while alterations after delivery would have the effect of avoiding the deed as to matter subsequent to the title given at its execution, yet they would not avoid the deed as to the title then given when it was in a perfect state. "As to any subsequent rights, as to anything that accrued after the alteration, it is null and void from the moment it is altered."

(b) Covenants.

And the authorities are agreed that a party responsible for the alteration of a deed cannot maintain an action upon its covenants. *Sharpe v. Orme*, 61 Ala. 263; *Cheesman v. Whittemore*, 23 Pick. 231; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Smith v. McGown*, 3 Barb. 404; *Withers v. Atkinson*, 1 Watts, 236; 32 L.R.A. (N.S.)

Churchill v. Capen, — Vt. —, 78 Atl. 734; *North v. Henneberry*, 44 Wis. 306.

In *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. 440, it was held that a fraudulent alteration of a deed by the grantee erasing a clause reserving the minerals in the land conveyed destroyed all his right under the covenants, and "also, of course, the paper as evidence of the covenants," though it did not divest the title which had passed by the instrument any more than the actual destruction of the paper would, or render it inadmissible in evidence to prove the passing and vesting of such title.

And in *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427, it was held that where an estate which might exist without a deed, such as a fee simple estate in land, was conveyed by deed, the fraudulent alteration of the deed would destroy it, but not the estate conveyed by the deed. For example, "if the deed be a quitclaim, the party loses nothing; if it contain covenants, he loses all right to an action on these; but the title is not divested."

So, in *Arrison v. Harmstead*, 2 Pa. St. 191; *Wallace v. Harmstad*, 15 Pa. 462, 53 Am. Dec. 603; and *Wallace v. Harmstad*, 44 Pa. 492, all of which grew out of alterations made in certain ground rent deeds, by the grantor therein filling up a blank space left for defining the time in which the rent reserved should be extinguished with the words, "within the space of ten years," such alteration was held to extinguish the rent reserved, and to pass the land to the grantee discharged of the covenant and therefore to preclude recovery for the rent by the grantor or by a purchaser from him, though the latter had no notice of the change.

And this was most probably the principle upon which the court proceeded in *Flitcraft v. Commonwealth Title, Ins. & T. Co.* 211 Pa. 114, 60 Atl. 557, in holding that one who conveyed property to another as "trustee" was entitled to the cancela-

Mrs. Waldron deny the alleged conversation the same evening in the presence of Gaujot, as testified to by him, and they also deny that she then consented to the change as made, or that either of them knew the change had been made until a short time before suit brought, but, on the contrary, Waldron testifies (his testimony being objected to by defendant for incompetency) that in a conversation with George Waller, now deceased, he refused his request to make the change, but did say to him that, if Mrs. Waldron wanted to change it, he could get her to make a new deed. Mrs. Waldron admits that her husband was her agent, and acted for her in the transaction with the Wallers. The witness Clark admits he carried the chain for Gaujot in

making the resurvey, that Waldron was present, but that he heard him say to George Waller he would not make a new deed, or change it, that he should go and see Mrs. Waldron, and if she would change it it would be all right. He admits that when the resurvey was being made there seemed to be no dispute as to the lines, and that after Gaujot got through his surveying, Waldron seemed satisfied.

It does not appear from any evidence in the case what was the real object of making the change in the deed. It is intimated in the evidence of the surveyor that the change was necessary in order to make it close; but in the answer of Mrs. Waller calling for affirmative relief, and which she asks may be treated as a cross bill, and

tion of conveyances and mortgages made by the grantee after he had erased the word "trustee" in the deed to him. It was declared that, even if the original deed had given the grantee power of disposition, his right to exercise it would have been avoided and nullified by the unauthorized alteration.

(c) Leases.

The same principles of law govern alterations in leases. Thus, in *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165, it was held that an erasure in a lease made by the lessee would destroy all his future rights under that lease. To quote from the opinion: "And although it might not divest an estate already vested, and might not have operated on his acts committed before the alteration was made (questions, however, which are not now to be decided), in *odium spoliatoris*, he must be considered as having destroyed the evidence of his title fraudulently, and thereby lost all his subsequent claim under and by virtue of the same, either to retain the possession, or preclude the plaintiff from entering on the premises leased."

And in *St. Louis Gunning Advertising Co. v. Baptiste*, 135 Mo. App. 503, 116 S. W. 438, it was held that a lessee could not recover for a breach of the provisions found in the lease, if, after execution and delivery, and without the knowledge of the lessor, he changed the dates of the beginning and termination of the term.

In *Ver Steeg v. Becker-Moore Paint Co.* 106 M. App. 257, 80 S. W. 346, the court refused to give effect to a lease, where it appeared that, after its delivery to the lessee, the latter changed it so as to accord to it the privilege of subletting and to bind the lessor to keep an alley in repair, and these alterations were not communicated to the lessor, upon the ground that no contract was ever made. The court said: "The lessee declined to accept the lease on the terms provided in the instruments transmitted to it. The terms, if accepted, would have created a contract of a certain 32 L.R.A. (N.S.)

character; but modifications were inserted which, in law, were tantamount to a rejection of the proposed contract, and required the assent, in turn, of the lessor, for a contract to be formed."

On the other hand, in *Hutchins v. Scott*, 2 Mees. & W. 809, *Murph. & H.* 194, 6 L. J. Exch. N. S. 186, where the lease of a house originally gave the house a wrong street number, it was held that the insertion of the true number would not affect the lease, so far as concerned its admissibility to prove the terms of the holding.

(d) Mortgages.

The rule that an alteration destroys any rights under a deed that might subsequently arise in favor of the party responsible for the alteration is peculiarly applicable to these instruments; mortgages, in this country at least, being generally considered merely as security for the payment of the debt, with a right of lien upon the mortgaged premises to enforce payment, and not as conveying title to the mortgaged premises as a deed would do, whatever may have been the effect at common law.

In *Cutler v. Rose*, 35 Iowa, 456, where a mortgagee, against the wish and intention of the mortgagor, fraudulently secured the latter's wife to sign the mortgage, which included the homestead, the alteration was held to be material, and to avoid the mortgage.

And in *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406, it was held that the material alteration of a mortgage by the mortgagee, whereby he increased the stated consideration in the mortgage and inserted therein an additional obligation, without the knowledge or consent of the mortgagor, rendered the mortgage void and unenforceable as a security for the payment of any portion of the indebtedness therein described.

And in *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235, where a mortgagee, without the knowledge of the mortgagor, changed the numbers of the lots mortgaged, so as

to which there was no special replication controverting the allegations thereof, she alleges that the strip of land purchased by her and her husband was not correctly described in the deed as originally made; that the change or alteration made therein by Gaujot was necessary to make it conform to the contract of purchase; that the land covered by the deed as changed and altered is the exact lot of land which the plaintiffs sold to her and her husband; and that the change was made in the deed with the knowledge and consent of the plaintiffs, and without any fraudulent purpose or intent on the part of the grantees; that since then she has placed on the property large and valuable improvements, costing many hundreds of dollars, and has been in

the actual possession and occupancy of the property described with the full knowledge and acquiescence of the plaintiffs therein, until the institution of this suit; and that they are now seeking, with fraudulent purposes and by means thereof, to obtain from her and her children, for the paltry sum of \$100, the original purchase money tendered, property worth thousands of dollars.

What then are the rights of the parties? The bill seems to have been framed and to proceed upon the theory that where a deed of conveyance has been altered by or at the instance of the grantee, in a material matter, such alteration not only destroys the deed, but also entitles the grantor to be reinvested with the title to the land

to cover the homestead of the mortgagor, it was held that the alteration avoided the mortgage even in the hands of a bona fide holder.

And in *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299, an alteration by a mortgagee against the wish of the mortgagor, whereby the sum secured thereby was payable on demand instead of in a specified time, and interest was payable semiannually instead of annually, was held to make the mortgage unenforceable, even in the hands of an assignee of the mortgagee with no notice of the alteration.

And in *McIntyre v. Velte*, 153 Pa. 350, 25 Atl. 739, the filling up by the mortgagee of a blank for the period after default in which a scire facias might issue, with the words "twenty days," was held to be a material alteration which avoided the mortgage absolutely.

In *Powell v. Pearlstine*, 43 S. C. 403, 21 S. E. 328, it was held that the fraudulent insertion by the mortgagee of a second tract of land in his mortgage rendered the mortgage void altogether.

And in *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131, it was held that the alteration of a mortgage by the mortgagee by the insertion of additional property, without the consent of the mortgagor, had the effect of destroying the validity of the instrument, even as to the property first included.

And in *Kalteyer v. Mitchell*, — Tex: Civ. App. —, 110 S. W. 462, it was held that where a deed of trust given to secure a note barred by the statute of limitation, thus making the note payable immediately, was altered without the consent of the grantor, so as to make the note payable in two years and to reduce the rate of interest, the deed of trust was thereby invalidated.

So, in *Coles v. Yorks*, 28 Minn. 464, 10 N. W. 775, it was held that a mortgage of a homestead executed by a husband and wife was avoided by the addition, without the knowledge or consent of the wife, of the words "the further sum of \$50, solici-

tors' fees, in case of foreclosure of this mortgage," though made by the husband with the knowledge and consent of the mortgagee, and in his presence.

On the other hand, in *Kendall v. Kendall*, 12 Allen, 92, it was held that, inasmuch as an alteration by the grantee in a deed could not affect his title, a mortgage of land was not rendered invalid by the fraudulent addition by the mortgagee of the name of the mortgagor's wife. There was no attempt to enforce the mortgage against the wife.

In *Lemay v. Johnson*, 35 Ark. 225, it was held that the filling in by the mortgagee of a blank in a mortgage, with a date not the date of its execution, did not avoid the mortgage, where it appeared that, at the time of its execution, it was agreed between the parties that the mortgage should be dated some subsequent date.

In *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632, in which the specified holding was that where a deed of trust was changed with the consent of the parties thereto, by adding an additional note to be secured thereby, a new deed taking effect from the time of the alteration was not thereby created, effect was given to the deed of trust in its original form.

3. As modifying original instrument.

(a) In general.

This rule would therefore render an alteration in a deed ineffectual to accomplish the purpose for which the alteration was made.

Thus, in *Moelle v. Sherwood*, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426, it was held that where a deed was changed in the description of the property conveyed, after its delivery and record, no operation and force could be given to the deed as a conveyance of the premises contained in the changed description.

And in *Montag v. Linn*, 23 Ill. 551, where a deed altered in the description of the lands conveyed was offered to establish the title to the property contained in the

as conveyed. This, however, is not the law. As stated by Mr. Devlin (1 Devlin, Deeds, § 460): "The true rule seems to be that if the deed is altered after execution by a party claiming some benefit under it, or by his privy, its operation as an executed contract is not affected." And that: "Titles vested by it are not disturbed, but the party making the alteration is deprived of all future benefits that he might have derived from it, and cannot enforce any executory obligation contained in it." When the title to land has once vested, any alteration in the deed, made by the grantee, though material, will not deprive him of his title or reinvest it in the grantor. If anything is destroyed by the alteration, it is the deed, and not the title.

A deed may be altered, mutilated, changed, or wholly destroyed, so as to be no longer competent evidence or capable of being introduced in evidence, yet the title vested by the grant is not thereby destroyed. 1 Devlin, Deeds, § 461a, and cases cited; 13 Cyc. Law & Proc. pp. 721, 722, and cases; Seibel v. Rapp, 85 Va. 30, 6 S. E. 478; Vaughn v. Moore, 89 Va. 925, 17 S. E. 326; Grayson v. Richards, 10 Leigh, 57; Furguson v. Bond, 39 W. Va. 561, 20 S. E. 591. This is not a case like that of Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515, and cases of that class, relied on by plaintiffs, where an altered instrument is offered in evidence by a party in support of some right of action claimed by him under it. In such a case the ma-

changed description, it was held that the alteration was fatal to any such use of the deed.

In *Marr v. Hobson*, 22 Me. 321, it was held that where a deed was avoided because of the nonperformance of a condition, and was thereafter recorded with the condition erased, no effect could be given to it in its altered form.

So, in *Havens v. Osborn*, 36 N. J. Eq. 426, an injunction was granted restraining the defendants from setting up or claiming any title to certain property under a deed which had been altered so as to include the property in question.

In *Cole v. Pennington*, 33 Md. 476, the court refused to give effect to a condition indorsed upon a deed by the husband of the grantee without the latter's knowledge or authority, and without consideration.

In *Owen v. Mercier*, 14 Ont. L. Rep. 491, 10 A. & E. Ann. Cas. 457, an unauthorized insertion of a condition in a deed when returned to the grantor for the sole purpose of correcting the description, and a redelivery in such condition, was held to give the grantor no right to enforce the condition.

(b) Effect of consent by parties to alteration.

There are, however, a few decisions which enunciate the rule that an alteration will be made effective, and the deed be given operation as altered, if the parties had consented thereto.

In *Respaas v. Jones*, 102 N. C. 5, 8 S. E. 770, it was held that after the execution and delivery of a deed, but before its probate and registration, and before any intervening rights had accrued, the deed as between the grantor and the grantee could be changed in any way that might be agreed upon between them.

And in *Doe ex dem. Campbell v. Roe*, 9 N. C. (2 Hawks) 33, 11 Am. Dec. 738, it was held that where the deed was executed in blank as to date and consideration, and the omissions were afterwards filled up, the deed could not operate as 32 L.R.A. (N.S.)

color of title, unless the alterations were made with the knowledge and consent of the grantor.

And in *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067, the court, without discussing this question, upheld a title founded upon a deed which had been altered by adding a section number in the description of the land conveyed, and by inserting upon the margin of the deed a further description, where it appeared that the alteration had been ratified by the grantor, and he had never afterwards exercised any act of ownership over the land in controversy. The land originally intended to be conveyed lay in both section numbers, but whether the land in controversy in the suit was also in both section numbers, or in the one originally in the deed, or in the one inserted, cannot be ascertained from the opinion.

And this proposition, that the consent of the parties will give force to an alteration in a deed, seems to find some support in *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111, in which the court, in discussing the effect of the erasure of the grantee's name by himself, and the substitution in its place of his wife's name, without the consent of the grantor, said: "It seems clear to us that without his consent no alteration by the grantee could have been effectual to vest the title in his wife."

And this view of the opinion last cited is strengthened by the conclusion reached in an earlier case in the same jurisdiction, *Bassett v. Bassett*, 55 Me. 125, 127, in which it was held that if a deed, once completed and delivered, was surrendered for the purpose of alteration, which was made, and the deed again delivered with the intent that it should be operative as altered, the law would give it that effect.

Redelivery was also made a condition of giving effect to an alteration in a deed made with the consent of the parties thereto, in *Eadie v. Chambers*, 24 L.R.A. (N.S.) 879, 96 C. C. A. 561, 172 Fed. 73, 18 A. & E. Ann. Cas. 1096, in which it was held that a deed altered so as to convey a one-half interest in certain land, instead of a

terial alteration in the instrument deprives the holder responsible for it of any executory rights or right of action thereon, and destroys its evidential force and effect. 1 Devlin, Deeds, § 480; *Burgess v. Blake*, 86 Am. St. Rep. 78, and monographic note (128 Ala. 105, 28 So. 963).

But what effect may be given to a deed so materially altered as to the property not originally covered or conveyed by it? The authorities we think make it clear that, although such alteration may have been with the consent of the grantors, the deed cannot operate to invest in the grantee land not covered by the original grant, without a redelivery of the deed by them, and, if it has been acknowledged before the alteration, the deed should be again acknowledged. 1 Devlin, Deeds, § 462a, citing among other cases, *Moelle v. Sherwood*, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426. The evidence of the surveyor in this case tends in a slight degree, but we think not sufficient, to show a redelivery of the deed to the grantees after the alteration was made by him, and there is no claim that after the modification of the deed it was reacknowledged, and only by a reacknowledgment by Mrs. Waldron, a married woman, could she be divested of her title in the land not covered by the original deed.

But could and should any relief have been granted plaintiffs on their bill? It is clear they cannot, as prayed for, be re-invested with the title to the land covered by their original deed. They have not framed their bill with the view of removing a cloud from the title to that part of the lot not covered by the original deed, and we do not think that, on the bill and evidence and the prayer for general relief, they are entitled to any such relief.

But is Mrs. Waller upon her cross-bill answer entitled to have the alleged mistake in the original deed now corrected

so as to cover the lot according to the altered description therein, and according to the original contract as she alleges it? She specifically alleges in her answer that the original contract covered the lot as now described in the altered deed, and for which she and her husband paid full consideration, and were put in the actual possession of the property, and that they have placed valuable improvements thereon, with the knowledge, consent, and acquiescence of the plaintiffs. These allegations of her answer are not controverted by the plaintiffs, and, if constituting good grounds for relief and well pleaded, must be taken as true. We think the allegations of this answer sufficient, for if the contract was as alleged, and there was a mistake in the original deed, and defendants have been in possession of and improved the lot with the knowledge, consent, and acquiescence of the plaintiffs, there has been such partial execution of the original contract as to entitle defendants to specific execution thereof, and to a correction of the deed in conformity thereto, and to be quieted in their right and title to the lot.

A decree will therefore be entered here, in modification of the decree appealed from, that the plaintiffs do, within thirty days from the date this cause is redocketed in the circuit court, make, execute, and deliver to defendants a deed of correction describing the last-mentioned lot therein according to the description thereof contained in the original deed of April 13, 1904, as recorded, and that, if they shall fail to do so, then, that a special commissioner be appointed by the circuit court for that purpose, who shall make, execute, acknowledge, and deliver to defendants such a deed for and on behalf of plaintiffs; and the cause will be remanded to the circuit court for the purpose of seeing that the mandate of this court is faithfully executed; and the appellees, who have substantially prevailed

three-fourths interest, as originally called for, would pass title to the less amount if it was redelivered. The court said that if the three-fourths interest was vested in the grantee by the deed as originally made, the alteration could at the utmost operate no further than to divest him of a one-fourth interest.

And in *Prettyman v. Goodrich*, 23 Ill. 330, the alteration of a deed by the insertion of an additional tract of land, with the consent of the parties, was held to be valid as altered, where the grantor made a second delivery thereof.

And in *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958, it was declared that, if a deed was altered after delivery by the consent of both parties, 32 L.R.A. (N.S.)

and again delivered after the change, the deed would be valid as altered.

But the cases last cited cannot with reason be considered as exceptions to the general rule here discussed, inasmuch as the conditions prescribed by them to give validity to the deed as altered really called for a new instrument. As said by the United States Supreme Court in *Moelle v. Sherwood*, 148 U. S. 21, 37 L. ed. 351, 13 Sup. Ct. Rep. 426, in discussing the effect of an alteration in a description of the property conveyed: "To give effect to the deed as one of the newly described property, it should have been re-executed, reacknowledged, and redelivered. In other words, a new conveyance should have been made."

J. A. C.

here, will have costs incurred in this court, as well as in the circuit court, whose decree, except as modified, will be affirmed.

Petition for rehearing denied June 9, 1909.

NEW YORK COURT OF APPEALS.

HENRY VON BREMEN et al., Doing Business as Von Bremen, Asche, & Co., Appts.,

FRANK MACMONNIES et al., Doing Business as MacMonnies & Von Elm, Respts.

(200 N. Y. 41, 93 N. E. 186.)

Partnership — good will — sale — estoppel.

1. A member of a partnership who voluntarily conveys the good will of the business for a valuable consideration cannot, upon establishing a competing business, solicit trade from old customers of the partnership.

Same — voluntary sale.

2. A sale of good will by members of a partnership must be deemed to be voluntary, where they were free to sell or not at their discretion, although it occurred within a few weeks of the termination of the partnership agreement, to avoid liquidation.

Same — sale to old customers.

3. A member of a partnership is not, by voluntarily selling its good will for a valuable consideration, estopped from dealing with old customers of the partnership whose patronage, apart from that of the general public, he does not solicit, nor with persons mentioned in a trade list which had been compiled by the old firm and abstracted by him.

(November 22, 1910.)

A PPEAL by plaintiffs from an order of the Appellate Division of the Supreme Court, First Department, affirming, as modified, a judgment of a Special Term for New York County, Part IV., in their favor, in an action brought to enjoin certain acts of defendants tending to destroy the good will of a business transferred to them by defendants. Modified.

The order granting leave to appeal certified the following questions to this court:

Note.—As to effect of sale of business and good will as a limitation on the right of vendor to engage in competing business, see note to *Gordon v. Knott*, 19 L.R.A. (N.S.) 762.

And as to the effect upon the right of individual partners of sale by the firm of good will of the business, see note to *Southworth v. Davison*, 19 L.R.A. (N.S.) 769.

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First. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants, restraining them from soliciting the trade of the customers and the persons, firms, and corporations who purchased merchandise from the firm of Von Bremen, MacMonnies, & Company, of which the plaintiff Von Bremen and the defendants were co-partners. Second. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from soliciting the trade of the persons, firms, and corporations named on the list of trade established by the firm of Von Bremen, MacMonnies, & Company, and abstracted by the defendants, as found by the court in its decision. Third. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the customers and the persons, firms, and corporations purchasing merchandise from the firm of Von Bremen, MacMonnies, & Company, of which the plaintiff Von Bremen and the defendants were copartners. Fourth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations mentioned on the list of trade compiled by the firm of Von Bremen, MacMonnies, & Company, and abstracted by the defendants, as found by the court in its decision. Fifth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations who were customers of or purchased merchandise from the firm of Von Bremen, MacMonnies, & Company, of which the plaintiff Von Bremen and the defendants were co-partners, and whose trade was solicited by the defendants since selling their interests in the said firm to the plaintiff Von Bremen. Sixth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations mentioned on the list of trade compiled and established by the firm of Von Bremen, MacMonnies, & Company, abstracted by the defendants, as found by the court in its decision, whose trade has been solicited by the defendants.

Mr. Gustav Lange, Jr., for appellants:

Defendants, by their sale, precluded themselves from in any way interfering with any of the advantages the old firm enjoyed,

including the right to solicit the trade of or deal with the customers of the old firm, and such persons, firms, or corporations whose trade was regularly solicited, and who were named on the list of trade of the old firm.

Goetz v. Ries, 123 N. Y. Supp. 433, affirmed 127 App. Div. 940, 111 N. Y. Supp. 1120; Kates v. Bok, 139 App. Div. 640, 124 N. Y. Supp. 297; People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685; Slater v. Slater, 175 N. Y. 143, 61 L.R.A. 796, 96 Am. St. Rep. 605, 67 N. E. 224; Witkop & H. Co. v. Boyce, 61 Misc. 128, 112 N. Y. Supp. 874; Steinfeld v. National Shirt Waist Co. 99 App. Div. 286, 90 N. Y. Supp. 964; Kellogg v. Totten, 16 Abb. Pr. 35; Sanford Dairy Co. v. Sanford, 114 App. Div. 862, 100 N. Y. Supp. 270; Re Case, 122 App. Div. 343, 106 N. Y. Supp. 1086; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Caswell v. Hazard, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707; Re Silkman, 121 App. Div. 202, 105 N. Y. Supp. 872; Penal Code, § 642, sub. 6, 7; Trego v. Hunt [1896] A. C. 7, 65 L. J. Ch. N. S. 1, 73 L. T. N. S. 514, 44 Week. Rep. 225, 12 Eng. Rul. Cas. 442; Gillingham v. Beddow [1900] 2 Ch. 242, 69 L. J. Ch. N. S. 527, 64 J. P. 617, 82 L. T. N. S. 791; Labouchere v. Dawson, L. R. 13 Eq. 322, 41 L. J. Ch. N. S. 427, 25 L. T. N. S. 894, 20 Week. Rep. 309; Curl Bros. v. Webster [1904] 1 Ch. 685, 73 L. J. Ch. N. S. 540, 52 Week. Rep. 413, 90 L. T. N. S. 479; Jennings v. Jennings, [1898] 1 Ch. 318, 67 L. J. Ch. N. S. 190, 77 L. T. N. S. 786, 14 Times L. R. 198, 46 Week. Rep. 344; Hutchins v. Page, 204 Mass. 284, 134 Am. St. Rep. 656, 90 N. E. 565; Marshall Engine Co. v. New Marshall Engine Co. 203 Mass. 410, 89 N. E. 548; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586; Gordon v. Knott, 199 Mass. 173, 19 L.R.A. (N.S.) 762, 85 N. E. 184; Webster v. Webster, 180 Mass. 310, 62 N. E. 383; Hutchinson v. Nay, 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974; Old Corner Book Store v. Upham, 194 Mass. 105, 120 Am. St. Rep. 532, 80 N. E. 228; Foss v. Roby, 195 Mass. 292, 10 L.R.A. (N.S.) 1200, 81 N. E. 199, 11 A. & E. Ann. Cas. 571; Munsey v. Butterfield, 133 Mass. 492; Acker, M. & C. Co. v. McGaw, 144 Fed. 864; Knoedler v. Boussod, 47 Fed. 466; Knoedler v. Gleanzer, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895; Ranft v. Reimers, 200 Ill. 386, 60 L.R.A. 291, 65 N. E. 720; Burkhardt v. Burkhardt, 5 Ohio Dec. Reprint, 185; Moody v. Thomas, 1 Disney 32 L.R.A. (N.S.)

(Ohio) 294; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Wentzel v. Barbin, 189 Pa. 502, 42 Atl. 44; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Southworth v. Davison, 106 Minn. 119, 19 L.R.A. (N.S.) 769, 118 N. W. 363, 16 A. & E. Ann. Cas. 253; Smith v. Gibbs, 44 N. H. 335; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; Lindley, Partn. 2d Am. ed. ** 439, 440; 5 Michigan Law Review, p. 295.

The injunction would not be in restraint of trade for the reason that it does not prevent the defendants from going into business, and is simply directed to the restraining of the defendants from the continuance of such practices as will injure or depreciate the value of the property which they have sold to the plaintiffs, which the plaintiffs have acquired in good faith, and does not restrain them from doing business with any other persons, or in any way not specifically enumerated in the injunction.

McCall Co. v. Wright, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516, affirmed in 133 App. Div. 62, 117 N. Y. Supp. 775; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Southworth v. Davison, 106 Minn. 119, 19 L.R.A. (N.S.) 769, 118 N. W. 363.

Mr. Frederick Allis, with Mr. George W. Titcomb, for respondents:

The parties did not sell, nor intend to sell, with the good will sold in this case, an exclusive right to plaintiffs to solicit the old customers, nor to impose on defendants a covenant not to solicit them.

4 Am. & Eng. Enc. Law, pp. 368, 369; Filkins v. Whyland, 24 N. Y. 338; Eighmie v. Taylor, 98 N. Y. 288; Zanturjian v. Boornazian, 25 R. I. 155, 55 Atl. 199; Nims, Unfair Competition, pp. 111, 347; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Diamond Match Co. v. Roeber, 106 N. Y. 480, 60 Am. Rep. 464, 13 N. E. 419; United States Cordage Co. v. William Wall's Son's Rope Co. 90 Hun. 434, 35 N. Y. Supp. 978; Ward v. Ward, 40 N. Y. S. R. 793, 15 N. Y. Supp. 913; Dayton v. Wilkes, 17 How. Pr. 510; Close v. Fleisher, 8 Misc. 301, 28 N. Y. Supp. 737; United States v. Bethlehem, 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450; Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348; Brawley v. United States, 96 U. S. 168, 24 L. ed. 622; United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Lowrey v. Hawaii, 206 U. S. 221, 51 L. ed. 1033, 27 Sup. Ct. Rep. 622; Murdock v. Gould, 193 N. Y. 369, 86 N. E. 12; Middleworth

v. Ordway, 191 N. Y. 404, 84 N. E. 291; Burgess v. Wickham, 3 Best & S. 669, 33 L. J. Q. B. N. S. 17, 8 L. T. N. S. 47, 11 Week. Rep. 992; Anson, Contr. 246; Taylor, Ev. § 1085.

No restriction should be implied on free business competition, including the right to solicit former customers of the old firm, because the sale was involuntary, not a free sale.

Trego v. Hunt [1896] A. C. 7, 65 L. J. Ch. N. S. 1, 73 L. T. N. S. 514, 44 Week. Rep. 225, 12 Eng. Rul. Cas. 442; Hutchinson v. Nay, 187 Mass. 265, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974; Old Corner Book Store v. Upham, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228.

Willard Bartlett, J., delivered the opinion of the court:

On May 10, 1904, one of the plaintiffs, Henry Von Bremen, and the defendants Frank MacMonnies and William Von Elm, entered into a copartnership under the firm name of Henry Von Bremen & Company, subsequently changed to Von Bremen, MacMonnies, & Company, for the transaction of an importing and commission business in buying, taking on commission, and selling all sorts of fancy groceries, which copartnership, by the terms of the agreement, was to continue until the 30th day of April, 1909. On February 10, 1909, the defendants sold to the plaintiff Henry Von Bremen "all their right, title, and interest in all the assets, good will, trademarks, and other property of every name and nature wheresoever located, of the firm of Von Bremen, MacMonnies, & Company, together with all debts and things in action due or owing by or from any person or corporation to said firm." The consideration for this transfer was the payment of \$44,000, which was \$1,500 more than the book value of the property transferred. There was no specific valuation of the good will. The plaintiffs, Henry Von Bremen and Herman T. Asche, under the firm name of Von Bremen, Asche, & Company, have succeeded to the business thus purchased by the plaintiff Henry Von Bremen individually. Shortly after his purchase, the defendants formed a partnership under the firm name of MacMonnies & Von Elm, for the transaction of a similar business in fancy groceries. In the competition which thus arose, the defendants have done or threatened to do various acts which the plaintiffs contend have a tendency to lessen or destroy the good will of the business which they acquired from the defendants by means of the transfer which has been mentioned. The present suit was brought to enjoin such acts. The trial court, by its 32 L.R.A. (N.S.)

interlocutory judgment, granted a portion, but not the whole, of the relief for which the plaintiffs prayed. It enjoined the defendants from using the cable address of the old firm, which was "MacMonnies;" from using a list of 2,200 dealers in fancy groceries which had been compiled by the old firm; and from using labels, brands, trademarks, bottles, tins, and other packages such as were exclusively owned or controlled by the old firm. The interlocutory judgment also directed an accounting for the profits realized by the defendants, and an assessment of the damages sustained by the plaintiffs.

Upon their appeal to the appellate division, the plaintiffs obtained some additional relief, but still not as much as they desired. The injunction granted at special term was extended so as to enjoin the defendants from soliciting the agency for the sale of articles of which the old firm had the exclusive agency, and from soliciting orders for goods packed under special labels, trademarks, and brands devised for the old firm for special customers. One member of the appellate division thought that the defendants should also be restrained from soliciting any of the customers of the old firm, but a majority of the court refused to go as far as this. The principal question presented by the plaintiffs' appeal to this court is whether the injunction should be thus extended.

The answer to this question depends upon the meaning to be given to the term "good will" in the transfer of the business of the old firm of Von Bremen, MacMonnies, & Company to the plaintiff Henry Von Bremen, on February 10, 1909. If the law assigns a definite meaning to the term as used or implied in the voluntary transfer of a business, it must be presumed that such was its signification in this contract. We have to inquire, then, what are the restraints which the law imposes upon the assignor of the good will of a business, who transfers the same voluntarily, and not as the result of bankruptcy proceedings or under like compulsion.

The principal definitions of good will were fully stated and discussed by Judge Vann in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685, and it is not necessary to repeat that statement or discussion here. Of all the noteworthy definitions the narrowest is probably that of Lord Eldon, who, in 1810, defined good will as "the probability that the old customers will resort to the old place." *Cruttwell v. Lye*, 17 Ves. Jr. 335, 346, 11 Revised Rep. 98. On the other hand, one of the broadest definitions is that

suggested, in 1859, by Vice Chancellor Page-Wood, who declared that good will included "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." Again, he said: "Good will . . . must mean either advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." *Churton v. Douglas*, Johns. V. C. (Eng.) 174, 28 L. J. Ch. N. S. 841, 7 Week. Rep. 365, 19 Eng. Rul. Cas. 666.

Whatever definition of good will may be adopted, however, it appears to have been uniformly held that in case of a transfer thereof, the assignor, in the absence of an express agreement to the contrary, may carry on a similar business in the same locality. The question which has given most trouble to the courts in such cases has related to the right of the vendor of the good will to solicit business from the customers of the old firm. In England the controversy on this subject extends from the case of *Labouchere v. Dawson*, L. R. 13 Eq. 322, 41 L. J. Ch. N. S. 427, 25 L. T. N. S. 894, 20 Week. Rep. 309, decided by Lord Romilly, master of the rolls, in 1872, to *Trego v. Hunt* [1896] A. C. 7, 65 L. J. Ch. N. S. 1, 73 L. T. N. S. 514, 44 Week. Rep. 225, 12 Eng. Rul. Cas. 442, decided by the House of Lords in 1895. *Labouchere v. Dawson* was the case of a sale of a brewery business upon the death of one of two partners. The surviving partner set up business as a brewer,—there being no stipulation to prevent him from so doing,—and solicited orders from customers of the old firm. Lord Romilly held that, although he might go into the brewing business himself and publicly advertise that business, he could not lawfully apply to any customer of the old firm, "either privately by letter, personally, or by a traveler, asking them to continue their custom with the defendant, and not go to the vendees. Another distinguished master of the rolls, Sir George Jessel, laid down the same rule in *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596, 49 L. J. Ch. N. S. 601, 42 L. T. N. S. 751, decided in 1880, and went still further, declaring that he was prepared to hold, if the question had been raised, that the assignor of the good will could not even deal with the customers of the old firm, although they came to him unsolicited. The same learned judge carried this view of the law into effect in a subsequent case 32 L.R.A. (N.S.)

(*Leggett v. Barrett*, L. R. 15 Ch. Div. 306, 51 L. J. Ch. N. S. 90, 43 L. T. N. S. 641, 28 Week. Rep. 962), where he granted an injunction which forbade the vendor of a business not only from soliciting trade from the customers of the former firm, but also from dealing with such customers at all. The court of appeal, however, vacated the latter part of the injunction. Shortly afterward the same court held that the doctrine of *Labouchere v. Dawson*, supra, against the solicitation of business from customers of the former concern, did not apply and should not be extended to cases of compulsory alienation, so that "if the assignees of a bankrupt sell his business and good will, the purchaser cannot restrain the bankrupt either from commencing a similar business himself, or from soliciting his old customers to deal with him in his new business." *Walker v. Mottram*, L. R. 19 Ch. Div. 355, 51 L. J. Ch. N. S. 108, 45 L. T. N. S. 659, 30 Week. Rep. 165.

Although the decision last cited apparently sanctioned the rule laid down in *Labouchere v. Dawson*, the doctrine of that case was distinctly overruled by two out of the three judges of the court of appeal (*Baggallay and Cotton*, L. JJ., against *Lindley*, L. J.) in *Pearson v. Pearson*, L. R. 27 Ch. Div. 145, 54 L. J. Ch. N. S. 32, decided in 1884. The rule that the vendor of a partnership business may not solicit trade from the customers of the old firm was rejected, and an injunction which had been granted prohibiting such solicitation was dissolved upon appeal. The law as thus declared remained unquestioned for more than ten years. It was during this period that the case of *Ward v. Ward*, 40 N. Y. S. R. 793, 15 N. Y. Supp. 913, was decided by the general term of the supreme court in the first department, expressly following *Pearson v. Pearson* as the latest expression of judicial opinion in England on the subject. The question does not appear ever to have reached this court until now. It finally went to the House of Lords in 1895, in the case of *Trego v. Hunt*, supra, where it received elaborate consideration in opinions by Lord Herschell, Lord Macnaghten, and Lord Davey, resulting in a disapproval of the decision of the court of appeal in *Pearson v. Pearson*, and a restoration of the doctrine of *Labouchere v. Dawson*.

The substance of the decision of the House of Lords in *Trego v. Hunt* may be briefly stated. The sale of the good will of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same na-

ture as before. The obligations imposed upon the vendor in the case of the sale of the good will are not necessarily the same under all circumstances. Lord Herschell conceded it to be the settled law that, whenever the good will of a business was sold, the vendor did not, by reason only of that sale, come under a restriction not to carry on a competing business. In cases where a partnership has been dissolved by effluxion of time or death, he thought it would be absurd to hold that those who formerly constituted the firm or their survivors should be restrained from carrying on what trade they pleased. But it does not follow "that, because a man may by his acts invite all men to deal with him, and so amongst the rest of mankind invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. . . . It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. . . . But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the good will away from the persons to whom it has been sold, and to restore it to himself." Lord Herschell deemed it immaterial to consider whether, on the sale of a good will, "the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him, and to restore it to the vendor." He was satisfied that the obligation existed, and that it ought to be enforced by a court of equity.

Lord Macnaghten, in his opinion in *Trego v. Hunt*, thus summarizes the various ways in which the doctrine of Labouchere v. Dawson may be supported: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would

be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale; to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The good will which the owner thereof parts with *in invitum*, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination pursuant to the articles of copartnership, is a lesser property than the good will which is the subject of a voluntary sale and transfer by the owner for a valuable consideration. In the first class of cases the former owner remains under no legal obligation restricting competition on his part in the slightest degree; in the second class of cases the former owner, by his voluntary act of sale, has excluded himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from customers of the old business. To this extent this good will is a more valuable property than the good will of a business which goes to a trustee in bankruptcy, or a receiver or survivor of a partnership in liquidation. The good will which is the subject of a voluntary sale is therefore a different thing from the good will which the owner parts with perforce or under compulsion. This is a necessary implication from the principle upon which *Labouchere v. Dawson* and *Trego v. Hunt* were decided.

The necessity for the distinction which the law thus makes may readily be illustrated. If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale, not to solicit trade from customers of the old firm, merchants who had been in trade as partners of undesirable associates would constantly find themselves, by the mere fact of the dissolution of the firm they desired to leave, disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free, affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself, as against the vendee, of any special knowledge or advantage derived by him from the business whose good will he has voluntarily sold.

Courts of high repute in this country have adopted the same view as that of the House of Lords in *Trego v. Hunt*, in reference to the right of a voluntary assignor of the good will of a business to solicit trade from old customers. It obtains in Massachusetts, New Jersey, Michigan, Rhode Island, Illinois, and Pennsylvania. *Hutchinson v. Nay*, 187 Mass. 262, 68 L.R.A. 180, 105 Am. St. Rep. 390, 72 N. E. 974; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Ranft v. Reimers*, 200 Ill. 386, 60 L.R.A. 201, 65 N. E. 720; *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44. Connecticut seems to be the only state in which a court of last resort has entertained a contrary view. *Cottrell v. Babcock Printing Press Mfg. Co.* 54 Conn. 122, 6 Atl. 791. The rule thus sanctioned in England and in so many states of the Union commands our approval, and we feel bound to give it our assent in answering the questions certified to us in the present case.

It is suggested in the opinion of the appellate division that the sale of the good will in this case was not really voluntary, but should be regarded as compulsory, inasmuch as it merely anticipated by a few weeks the actual termination of the copartnership, and was made as an alternative of a liquidation. It seems to us, however, under the findings, that it must be deemed to have been a voluntary transaction no matter how powerful were the motives which led the parties to enter into it. It was a thing which they were at liberty to do, or to refrain from doing; and hence the sale was of a character which falls within the doctrine that has been discussed.

The interlocutory judgment must therefore be modified by extending the injunction so as to forbid the defendants from soliciting business from any customers of the former firm of Von Bremen, MacMonnies, & Company, and as thus modified, affirmed, with costs to the appellants.

The answers to the certified questions are as follows: The first and fifth questions are answered in the affirmative; the second question is not answerable, inasmuch as it does not appear whether or not the names on the list of trade therein mentioned were all those of former customers of the firm of Von Bremen, MacMonnies, & Company; the third, fourth, and sixth questions are answered in the negative.

Cullen, Ch. J., and Haight, Vann,
32 L.R.A.(N.S.)

Werner, Hiscock, and Chase, JJ., concur.

Ordered accordingly

MICHIGAN SUPREME COURT.

METROPOLITAN LIFE INSURANCE COMPANY

v.

LOUIS FREEDMAN, Exr., etc., of Jacob Freedman, Deceased, Appt.

(159 Mich. 114, 123 N. W. 547.)

Insurance — untrue statements — ignorant applicant — duty to know.

1. That an ignorant applicant for life insurance did not actually know of false statements in the application as to his age and rejection by other companies will not prevent a cancellation of the policy for fraud, if the application is made a part of the contract and the statements therein are warranted, while the policy goes into his possession and is retained by him, since it is his duty to know that the representations in the application are true.

Same — estoppel — taking premiums — absence of knowledge.

2. A beneficiary in a life insurance policy who secures its issuance by means of false representations as to the age of insured and as to his rejection by other companies cannot avoid a cancellation of the policy on the ground that the company took premiums after having the means of knowing the falsity of the statements, if the means of knowledge came from information furnished by one not the agent of the company, but who was aiding the beneficiary in securing the insurance.

Same — cancellation — return of premium.

3. To entitle an insurance company to cancellation of a policy because of fraudulent statements in the application, it must return the premiums paid, although the contract provides that in case of such statement all payments shall be forfeited.

(December 10, 1909.)

Note. — Right of insured to return of premium where policy is void or voidable because of misrepresentations on his part.

This note is confined to cases where it was sought to avoid the policy because of untruthful statements upon the part of the insured, by which the insurer was induced to issue the policy, and does not include those cases such as *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358; and *Virginia F. & M. Ins. Co. v. J. I. Case Threshing Mach. Co.* 107 Va. 588, 122 Am. St. Rep. 875, 59 S. E. 369, involving the question whether the insured was entitled

A PPEAL by defendant from a decree of the Circuit Court for Wayne County in complainant's favor in a suit to cancel a policy of life insurance and to enjoin the prosecution of a pending action which had been brought to recover thereon. Modified.

The facts are stated in the opinion.

Messrs. Sloman & Sloman, for appellant:

Forfeitures of insurance policies are not favored by the courts, which, in construing them when a forfeiture is claimed, will preserve, if possible, the equitable rights of the holders.

Miner v. Michigan Mut. Ben. Asso. 63 Mich. 338, 29 N. W. 852; Bonenfant v. American F. Ins. Co. 76 Mich. 653, 43 N.

W. 682; Perry v. John Hancock Mut. L. Ins. Co. 143 Mich. 290, 106 N. W. 860.

Where the company's agent fills in the answers in an application, especially of an illiterate person who is unable to read or is ignorant of the language, the insured may rely on the agent's assurance that his answers are correctly written, and the insured is not bound to know the contents of the application.

3 Cooley, Briefs on Insurance, 2574; Miller v. Phoenix Mut. L. Ins. Co. 107 N. Y. 292, 14 N. E. 271.

Where the agent of the company assumes to write out the answers upon his own knowledge of the facts, rather than from the answers given by the deceased,

to a return of the premiums paid, where the policy was avoided because of the breach of some condition precedent.

Nor does the note include cases discussing the return of premiums as a condition of the cancellation by the insurer of an insurance policy giving it that right upon notice to the insured, that question being treated in the note to Davidson v. German Ins. Co. 13 L.R.A.(N.S.) 884.

Where insurer seeks rescission on ground of misrepresentation.

The conclusion reached in *METROPOLITAN L. INS. CO. v. FREEDMAN*, that to entitle an insurer to a rescission of a contract of insurance upon the ground of fraudulent statements on the part of the insured, it must first tender back the premium paid, finds support in *American Cent. L. Ins. Co. v. Rosenstein*, — Ind. App. —, 88 N. E. 97, in which it was held that an insurance company which elected to rescind the policy sued upon, for fraud, must seasonably return or offer to return premiums paid to it for the alleged invalid insurance.

And in *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297, it was declared that there was no doubt about the proposition that the insurer should refund the amount paid by the insured with interest, upon it being decreed a cancellation of a policy of insurance issued by it, upon the ground of fraud on the part of the insured in obtaining the same.

This rule finds support also in the following English cases, all of which were actions for the rescission of policies of insurance because of fraud, in which decrees were issued granting the relief asked for, with costs to the insurer, and the money received for premiums to go in part thereof: *Whittingham v. Thornburgh*, 2 Vern. 206; *De Costa v. Scandret*, 2 P. Wms. 170; *Prince of Wales etc., Asso. Co. v. Palmer*, 25 Beav. 605.

And in *Schoneman v. Western Horse & Cattle Ins. Co.* 16 Neb. 404, 20 N. W. 284, there is a *dictum* that if a policy is obtained by fraud, the insurer should tender

back the premium and ask for the cancellation of the policy.

And in *Delavigne v. United Ins. Co.* 1 Johns. Cas. 310, there is a *dictum* that if an insurer seeks release in a court of equity against the policy of insurance, on the ground of fraud, it would be obliged, according to the course of that court, to refund the premiums before any aid would be afforded it.

Where insurer defends on such ground in an action on the policy.

But an insurer is not required to tender the premium paid in order to maintain a defense based upon fraudulent statements of the insured in an action upon a policy, in the absence of a statute providing otherwise. *United States L. Ins. Co. v. Smith*, 34 C. C. A. 506, 92 Fed. 503; *National Mut. F. Ins. Co. v. Duncan*, 44 Colo. 472, 20 L.R.A.(N.S.) 340, 98 Pac. 634; *Provident Sav. Life Assur. Soc. v. Wayne*, 131 Ky. 84, 93 S. W. 1049; *Venner v. Sun Life Ins. Co.* 17 Can. S. C. 394.

Missouri, however, has a statute which requires the insurer, if it intends to avail itself, in an action upon the policy, of the defense of misrepresentation in the securing or obtaining of the same, to deposit in court the amount of the premiums paid. And in *Eavin v. Empire L. Ins. Co.* 101 Mo. App. 434, 74 S. W. 366, it was held that to make such defense effective, the defendant was required to deposit the amount it had received in court for the benefit of the plaintiff, whether the misrepresentations were innocent or fraudulent, or were made warranties by the terms of the policy.

Action by insured to recover premium.

The authorities are unanimous in declaring that where a policy was secured by a fraudulent misrepresentation on the part of the insured, he cannot, after the fraud has been discovered and the policy avoided, maintain an action for the return of the premiums paid by him. *Ætna L. Ins. Co. v. Paul*, 10 Ill. App. 431; *Hoyt v. Gilman*,

the company is not in a position to claim that the same are untrue.

Pudritzky v. Supreme Lodge, K. of H. 76 Mich. 428, 43 N. W. 373; *Temminck v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469; *Van Houten v. Metropolitan L. Ins. Co.* 110 Mich. 684, 68 N. W. 982.

The doctrine of estoppel applies to warranties or representations, if the statements, though false, were answered by the agent.

Miller v. Phoenix Mut. L. Ins. Co. 107 N. Y. 298, 14 N. E. 271; 3 Cooley, Briefs of Insurance, 2562; *Hayes v. Saratoga & W. F. Ins. Co.* 81 App. Div. 287, 80 N. Y. Supp. 888.

In the absence of evidence that the attention of the assured was called to them, unanswered statements in the application do not constitute such a warranty as will defeat recovery on the policy, though the policy provided that when there was no answer, it was agreed that the warranty was true without exception.

Metropolitan L. Ins. Co. v. Moravec, 116 Ill. App. 271.

Assertions in the application in the form of printed answers are unanswered questions.

Brown v. Greenfield Life Asso. 172 Mass. 498, 53 N. E. 129; 2 Cooley, Briefs on Insurance, 2074.

Where a life insurance agent assumes the responsibility of filling out a blank application, and the applicant, presuming that he had acted honestly, signs it without knowledge of its contents, a recovery may be had upon the policy, though certain representations made may be materially false.

Copeland v. Dwelling-house Ins. Co. 77 Mich. 560, 18 Am. St. Rep. 414, 43 N. W. 991; *Temminck v. Metropolitan L. Ins. Co.* supra.

If the answers are truthful, but not taken down truthfully, the leaving of the application with the policy in the assured's possession does not charge him with notice of its contents.

Boetcher v. Hawkeye Ins. Co. 47 Iowa, 259; *Donnelly v. Cedar Rapids Ins. Co.* 70 Iowa, 693, 28 N. W. 607.

8 Mass. 336; *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 588; *Fay v. Prudential Ins. Co.* 80 App. Div. 350, 80 N. Y. Supp. 683; *Himely v. South Carolina Ins. Co.* 1 Mill, Const. 154, 12 Am. Dec. 623; *Wilson v. Duckett*, 3 Burr. 1361.

Thus, in *Schwartz v. United States Ins. Co.* 3 Wash. C. C. 170, Fed. Cas. No. 12,505, it was declared that "upon general principles of law, as well as of sound policy and morality, it may be safely laid down as a rule, that if the insured, by deception and false pretenses, induces others to undertake a risk which, had the truth been disclosed, they would not have taken at all, or would have done so on different terms from those agreed upon, . . . it is such a fraud as ought to defeat his right to maintain this action for the premium."

So, in *Elliott v. Knights of Modern Macabees*, 46 Wash. 320, 13 L.R.A.(N.S.) 856, 89 Pac. 929, it was held that one who, by fraudulent statements concerning his age, secured a mutual benefit certificate which provided for forfeiture of assessments in case of false statements on that subject, could not, after his fraud was discovered and the certificate declared forfeited, recover the assessments paid.

But where the misstatements made by the insured were not wilfully false, so that there was no fraud on his part and the policy by its terms was void *ab initio*, so that the risk never attached, the insured is entitled to a return of the premiums. *Clark v. Manufacturers' Ins. Co.* 2 Woodsb. & M. 472, Fed. Cas. No. 2,829; *Delavigne v. United Ins. Co.* 1 Johns. Cas. 310; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465; *Low v. Union Cent. L. Ins. Co.* 6 Ohio Dec. Reprint, 1088; *Feise v. Parkinson*, 4 Taunt. 640, 13 Revised 32 L.R.A.(N.S.)

Rep. 710, 14 Eng. Rul. Cas. 530; *Ander-son v. Thornton*, 8 Exch. 425.

In none of the decisions cited in the last paragraph, except in the Ohio cases, does it appear from the opinion that the policy provided for the forfeiture of premiums upon avoidance of the policy; but the existence of such provision would be immaterial in a contract which never took effect, as was said in *Connecticut Mut. L. Ins. Co. v. Pyle*, supra, in answer to the contention that the premium must be left to be disposed of according to the terms of the insurance contract: "No such terms exist. There is no contract between Pyle as the 'insured' and the company as the 'insurer.' Under this policy Pyle never was insured, and the company never was an insurer of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy."

But in *Low v. Union Cent. L. Ins. Co.* 6 Ohio Dec. Reprint, 1088, it was held that where a life insurance policy was not void *ab initio* because of a misstatement of the insured as to his age, but simply voidable on the election of the company, then an express provision in the contract that all premiums theretofore paid should be forfeited would apply, and the insured would not be entitled to a return of the premiums.

In *McDonald v. Metropolitan L. Ins. Co.* 68 N. H. 4, 73 Am. St. Rep. 548, 38 Atl. 500, it was held that the insured was entitled to recover the premium paid by him, less the value of insurance enjoyed by him, upon a life insurance policy avoided by reason of false representations of material facts, made without design on the part of the applicant, and with full knowledge of the insurer's agent.

J. A. C.

Stipulations that answers are correctly recorded are not binding, notwithstanding provisions that the agent cannot modify or alter the contract.

Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763.

It was the complainant's duty, in order to rescind this contract, to give the defendant notice of its intention with reasonable promptness, and to return at least the unearned premium.

Home Ins. Co. v. Curtis, 32 Mich. 402.

The doctrine that whether the applicant understood what he was signing or not, he would be presumed to know the contents, since a copy was left with him attached to the policy, does not apply to a person who could not read or write.

State Ins. Co. v. Gray, 44 Kan. 735, 25 Pac. 197; *Boetcher v. Hawkeye Ins. Co.* 47 Iowa, 259; *Donnelly v. Cedar Rapids Ins. Co.* 70 Iowa, 693, 28 N. W. 607; *Miller v. Phoenix Mut. L. Ins. Co.* 107 N. Y. 292, 14 N. E. 271.

Messrs. Maybury, Lucking, Emmons, & Helfman, with *Messrs. Haug & Yerkes*, for appellee:

It was warranted as true that Jacob was but fifty-nine years of age, that he had never been rejected, and that he was then in sound health. Each of these was absolutely false. It was further agreed that if they were not "strictly correct and wholly true, the policy shall be void." The information sought to be thus elicited was essential and necessary to enable the complainant intelligently to decide whether this policy should or should not be issued. It was completely deceived and misled. The policy is void.

Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104; *Ferris v. Home Life Assur. Co.* 118 Mich. 486, 76 N. W. 1041; *Genrow v. Modern Woodmen*, 151 Mich. 250, 114 N. W. 1009; *Moore v. Mutual Reserve Fund Life Assn.* 133 Mich. 526, 95 N. W. 573; *Rhode v. Metropolitan L. Ins. Co.* 129 Mich. 112, 88 N. W. 400; *Tobin v. Modern Woodmen*, 126 Mich. 161, 85 N. W. 472; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; *Perry v. John Hancock Mut. L. Ins. Co.* 143 Mich. 290, 106 N. W. 860; *Haapa v. Metropolitan L. Ins. Co.* 150 Mich. 467, 16 L.R.A.(N.S.) 1165, 121 Am. St. Rep. 627, 114 N. W. 380; *Mudge v. Supreme Court I. O. F.* 149 Mich. 467, 14 L.R.A.(N.S.) 279, 119 Am. St. Rep. 686, 112 N. W. 1130; *Malicki v. Chicago Guaranty Fund Life Soc.* 119 Mich. 151, 77 N. W. 690; *Ketcham v. American Mut. Acci. Assn.* 117 Mich. 521, 76 N. W. 5; *Standard Life & Acci. Ins. Co. v. Sale*, 61 L.R.A. 32 L.R.A.(N.S.)

337, 57 C. C. A. 418, 121 Fed. 664; *Security Mut. L. Ins. Co. v. Webb*, 55 L.R.A. 122, & note, 45 C. C. A. 648, 106 Fed. 808.

Louis was the active agent in the perpetration of the fraud,—he paid the premiums; he is also the sole beneficiary of the policy. His knowledge and participation in the deception render the policy void.

March v. Metropolitan L. Ins. Co. 186 Pa. 646, 65 Am. St. Rep. 887, 40 Atl. 1100; 2 Cooley, Briefs on Insurance, 2022; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 47 L. ed. 446, 23 Sup. Ct. Rep. 294; *National L. Ins. Co. v. Minch*, 53 N. Y. 144.

A complete copy of the application was contained in the policy. It was thus in the hands of Jacob and Louis during its entire life. It was their duty to correct the false statements contained therein. Their failure to do so demonstrates their fraudulent design. The beneficiaries cannot now avoid the consequences of these acts.

Haapa v. Metropolitan L. Ins. Co. 150 Mich. 474, 16 L.R.A.(N.S.) 1165, 121 Am. St. Rep. 627, 114 N. W. 380; *Genrow v. Modern Woodmen*, 151 Mich. 250, 114 N. W. 1009; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Maier v. Fidelity Mut. Life Assn.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Michigan Mut. L. Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584.

If wilful fraud be shown, the premiums paid need not be returned.

16 Am. & Eng. Enc. Law, 2d ed. p. 954; *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 587; *Bliss, Life Ins.* 2d ed. § 415, p. 251; 2 Phillips, Ins. chap. 22, § 4; *May, Ins.* § 567; *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 472, Fed. Cas. No. 2,829.

Brooke, J., delivered the opinion of the court:

Complainant files its bill to procure the cancellation and delivery of a policy of insurance issued by it upon the life of Jacob Freedman, and to enjoin the further prosecution of a suit at law upon said policy pending at the time the bill was filed. From a decree in favor of complainant, defendant appeals.

It is claimed by the complainant that the policy in question was fraudulently obtained from it at the instance of Louis Freedman, a son of the deceased, executor of his estate, and sole beneficiary of the insurance, under his father's will. The

fraud complained of is that in the application for insurance the deceased made false statements, (1) as to his age; (2) as to rejections by other companies; (3) as to his health. The record is very voluminous. We believe that to exhaustively analyze the testimony, pro and con, upon a disputed question of fact, would be of no value to the profession. It has, however, been examined with care, and from such examination we think it conclusively appears that at the time the application was written Jacob Freedman was many years past the age of fifty-nine (the age given in the application). It further appears that applications for insurance on his behalf had been rejected by other insurance companies prior to the date of the application for insurance in the complainant company. His application to the Metropolitan Company contained a representation and warranty to the contrary.

It is urged on behalf of the defendant that the deceased was an ignorant man of foreign birth, quite unable to read or write the English language, and speaking it but brokenly, and therefore it is not probable that he ever knew of the fraudulent character of the representations contained in the application, or made them wilfully and with intent to deceive. We do not think this position is tenable. It makes little difference in our opinion whether Jacob Freedman himself actually knew that the statements contained in this application, signed by him, were false, or ignorantly permitted himself to be used by his son Louis as a tool for the accomplishment of a fraud. The real defendant in this cause is Louis, the son, and it is entirely clear that he knew that his father's age was greater than was represented, and that other insurance had been refused. This is apparent from the fact that the applications which were rejected were made at the instance of Louis, and in them he was named as beneficiary. In any event, a complete copy of the application (containing the false representations) was set out on the third page of the policy, which was in the possession of either Jacob, the insured, or Louis, his son, from the time it was issued until Jacob died. It was Jacob's duty to know that the representations therein contained, and which constituted the inducement for the issuance of the policy, were true, and his silence during the life of the policy is persuasive proof of a fraudulent intent. *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Haapa v. Metropolitan L. Ins. Co.* 150 Mich. 467, 16 L.R.A. (N.S.) 1165, 121 Am. St. Rep. 627, 114 N. W. 380; *Genrow v. Modern Woodmen*, 32 L.R.A. (N.S.)

151 Mich. 250, 114 N. W. 1009; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Maier v. Fidelity Mut. Life Asso.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566. The defendant sought to show that the complainant had actual knowledge of the rejections, or might have learned of them by exercising reasonable diligence, before issuing the policy, or, at any rate, before accepting the second premium.

It is urged, therefore, that complainant is estopped from setting up defendant's fraud, particularly in view of the fact that complainant accepted a second premium when it knew, or might have known, the facts now relied upon by it. This contention would have force if the proofs sustained it. We are of the opinion that they do not. One Newton Burnham, an agent for the John Hancock Insurance Company, after insuring Jacob Freedman in his own company, seems to have aided Louis Freedman in the attempt to secure additional insurance on Jacob's life. In furtherance of that design, he notified soliciting agents of other companies (including complainant) that policies might be written on Jacob's life. He undoubtedly did this in some instances after he knew that insurance had been refused, but he was not the agent of the complainant, and owed it no duty. He did communicate the fact of the rejections to Louis, and, after such knowledge was communicated to Louis, he (Louis), caused further applications to be made. It would, we think, be a novel doctrine to permit Louis to urge the fraud of his co-conspirator in excuse or palliation of his own wrongdoing.

Paragraph 11 of complainant's bill is as follows: "That the first two annual premiums upon said policy were paid to your orator, and such payments amount to the sum of \$421.60, and, notwithstanding that said policy provided that, if any statement in the application herein referred to is not true, all premiums paid shall be forfeited to the company, and notwithstanding your orator is lawfully entitled to retain said premiums, yet your orator is now ready to tender into court the sum of \$421.60, and which sum the complainant is now ready to pay to the said Louis Freedman, executor, when so directed by this court; and your orator hereby offers to pay and tenders the same unto the register of this court, to be paid to the said defendant, Louis Freedman, executor, when so directed by this court." The last paragraph of the decree in the circuit court is as follows: "It is further decreed that said policy is by this court declared to be null and void on account of fraud; there-

fore, that premiums shall be retained by the said complainant, but that no costs shall be awarded in this cause to either party." We are of the opinion that in the disposition of the premiums paid the learned circuit judge was in error. While it is true that where the policy is obtained by means of fraudulent misrepresentations, the premiums cannot be recovered back by the insured (see 2 May on Insurance, 4th ed. § 567, and cases cited), we think a different rule obtains where the company seeks to avoid the contract on the ground of fraud. In that event, the complainant must recognize the maxim that he who seeks equity must do equity. It would, indeed, be strange if the complainant could say: "This contract was obtained from me by fraud. Therefore it is void,—void, except as to the provision therein contained that, in the event of fraud, the premiums paid should be retained by the company. As to that provision, it is valid." No authorities need be cited to show the untenable character of such a claim. At the time the bill was filed, the complainant itself recognized this fact, and it cannot now be heard to urge the contrary. The complainant should have recovered costs in the court below.

The decree of the Circuit Court will be modified, in that the complainant will be required to repay the amount of the two premiums collected, with interest thereon from the date of filing its bill. Complainant will recover costs of the Circuit Court to be taxed. Defendant will recover costs of this appeal.

Blair, Ch. J., Grant, Moore, McAlvay, Jr., concur.

Petition for rehearing denied February 3, 1910.

MICHIGAN SUPREME COURT.

HELEN H. NEWBERRY

v.

CITY OF DETROIT, Plff. in Err.

(— Mich. —, 129 N. W. 699.)

Tax — street improvement — liability of park.

A municipal park is not exempt from assessment for paving an adjoining street, where the statute constitutes as the assessment district the parcels of land situated on the street, and directs the cost of paving to be assessed according to frontage.

(February 1, 1911.)

32 L.R.A. (N.S.)

RROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover an alleged illegal paving assessment made by defendant against certain lots owned by plaintiff. Reversed in part.

The facts are stated in the opinion.

Mr. P. J. M. Hally, with Mr. Walter Barlow, for plaintiff in error:

A public square or park is not assessable for special benefits for public improvements.

Big Rapids v. Mecosta County, 99 Mich. 351, 58 N. W. 358; Worcester County v. Worcester, 116 Mass. 193, 17 Am. Rep. 159; Hartford v. West Middle Dist. 45 Conn. 462, 29 Am. Rep. 687; State v. Hartford, 50 Conn. 89, 47 Am. Rep. 622; People ex rel. New York v. Board of Assessors, 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90; Smith v. Buffalo, 159 N. Y. 432, 54 N. E. 62; Herman v. Omaha, 75 Neb. 489, 106 N. W. 593; State v. Several Parcels of Land, 79 Neb. 638, 113 N. W. 248; Public Schools v. Trenton, 30 N. J. Eq. 681; Polk County Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416; People ex rel. Doyle v. Austin, 47 Cal. 353.

Plaintiff having made no objection to the assessments, and having paid them,

Note. — Liability to local assessment for benefits, of property exempt from general taxation.

Since the preparation of the note on this question appended to the case of City Street Improv. Co. v. University of California, 18 L.R.A. (N.S.) 451, the following decisions have been reported:

Following what appears to be the better rule, it was held in Lagrange v. Troup County, 132 Ga. 384, 64 S. E. 267, 16 A. & E. Ann. Cas. 885, that where general power is given a municipality to levy local assessments upon the property benefited by street improvements, and there is no provision clearly showing that public property shall be subject to such assessment, there is an implied exception in favor of its exemption.

Land owned by a board of education, and used for school purposes, was held exempt from a special assessment for the construction of a sewer, in State ex rel. Board of Education v. McGonagle, — Utah, —, 112 Pac. 401, under a statute which provided that "all property, real and personal, held by the board of education, shall be exempt from general and special taxation, and from all local assessments for any purpose."

And so cemetery lots or family burial plots exempt by statute from "any tax whatever" were held privileged from special assessment for street opening in Re Seattle, 59 Wash. 41, 109 Pac. 1052.

It was held in Huntsville v. Madison County, 166 Ala. 389, 52 So. 326, that general statutory power to levy assessments for public improvement, without an express pro-

will not now be heard by the court to complain of them, although the payment was made under protest.

Michigan Sav. Bank v. Detroit, 107 Mich. 246, 65 N. W. 101; *Detroit River Sav. Bank v. Detroit*, 114 Mich. 81, 72 N. W. 14; *Detroit v. Jacobs*, 145 Mich. 395, 108 N. W. 671; *Hinds v. Belvidere Twp.* 107 Mich. 664, 65 N. W. 544; *First Nat. Bank v. St. Joseph*, 46 Mich. 530, 9 N. W. 838; *Meade v. Haines*, 81 Mich. 265, 45 N. W. 836; *Williams v. Saginaw*, 51 Mich. 120, 16 N. W. 280; *Peninsula Iron & Lumber Co. v. Crystal Falls Twp.* 60 Mich. 510, 27 N. W. 666; *Shaw v. Ypsilanti*, 146 Mich. 712, 110 N. W. 40; *W. F. Stewart Co. v. Flint*, 147 Mich. 697, 111 N. W. 352; *Farr v. Detroit*, 136 Mich. 200, 99 N. W. 19; *Fitzhugh v. Bay City*, 109 Mich. 581, 67 N. W. 904; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Atwell v. Barnes*, 109 Mich. 10, 66 N. W. 583; *Lundbrom v. Manistee*, 93 Mich. 170, 53 N. W. 161; *Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698.

Messrs. Miller, Smith, Paddock, & Perry, for defendant in error:

Voigt park should have been assessed its proportionate part of the paving cost.

28 Cyc. Law & Proc. p. 1131; *Lefevre v. Detroit*, 2 Mich. 587; *Franklin County v. Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; *Cooley, Taxn.* § 458, 572, 573; *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *Baltimore v. Green Mountain Cemetery*, 7 Md. 517; *Hassan v. Rochester*, 67 N. Y. 528; *McLean County v.*

Bloomington, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624; *State, Protestant Foster Home Soc., Prosecutor v. Newark*, 35 N. J. L. 157, 10 Am. Rep. 223; *San Diego v. Linda Vista Irrig. Dist.* 108 Cal. 189, 35 L.R.A. 34, 41 Pac. 291; *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431; 2 Dill. Mun. Corp. §§ 776, 777; *Re Mt. Vernon*, 147 Ill. 359, 23 L.R.A. 807, 35 N. E. 533; *City Street Improv. Co. v. University of California*, 153 Cal. 776, 18 L.R.A.(N.S.) 451, 96 Pac. 801; *Hamilton, Special Assessments*, § 318; *Board of Improvement v. School Dist.* 56 Ark. 354, 16 L.R.A. 418, 35 Am. St. Rep. 108, 19 S. W. 969; *McLean County v. Bloomington*, 106 Ill. 213; *Scammon v. Chicago*, 42 Ill. 192; *Higgins v. Chicago*, 18 Ill. 280; *Re Church Street*, 49 Barb. 457; *Edwards v. W. Constr. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006.

McAlvay, J., delivered the opinion of the court:

This litigation arose on account of a claimed illegal paving assessment made by defendant against certain lots owned by the plaintiff, and abutting upon Edison avenue in the city of Detroit, to pay the cost of paving such avenue. Voigt park occupies the entire block on Edison avenue between Second and Third avenues. From the stipulated facts in the case it appears: "That on or about September 3, 1907, . . . the common council of the city of Detroit passed a resolution to pave Edison

vision authorizing a levy against state or county property used for public purposes, did not warrant such a levy against a county courthouse for paving and curbing the adjoining street.

Under the system of county and municipal government existing in Florida, statutory authority given to a city to impose and enforce special assessments for local street improvements does not extend to a county courthouse square, located in the city, and used for governmental purposes, unless an intent to include such property clearly appears from the statute. *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421.

But a recent Louisiana case holds that the exemption of a courthouse square from general taxation does not extend to a special assessment for paving sidewalks, levied against all abutting real estate. It was said that the act empowering cities, towns, and parish sites to levy and collect special taxes against all real estate abutting sidewalks and curbings, for the purpose of paying the cost of paving the same, included, inasmuch as it did not except, courthouse squares, because without such squares parish sites cannot exist. *Franklin v. Washington Parish*, 126 La. 2, 52 So. 172.

The lands of a cemetery association were 32 L.R.A. (N.S.)

held liable to assessment for constructing a sidewalk, in *Gouverneur v. Gouverneur Cemetery Asso.* 136 App. Div. 37, 120 N. Y. Supp. 221, a majority of the court taking the view that the act exempting from "any tax or assessment" lands used for cemetery purposes had been impliedly repealed by the village law providing that for local assessments for improvements in villages no real property, with a single named exception, should be exempt.

In *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590, the exemption of public property from special assessment was brought in question through the contention of property owners on a street to be paved that in computing the total frontage of the street, certain property of the United States, the city of Deadwood, and some school districts, should not be included. The court sustained the contention that the property owned by the United States government was exempt from the special assessment, but held that such assessment was not a tax within the meaning of the state Constitution exempting the property of municipality, county, and state from taxation, so as to relieve the city of Deadwood and the school districts from the assessment in question. W. A. S.

avenue in said city, from Second avenue to Hamilton boulevard, and that the lots and parcels of real estate fronting the portion to be improved were declared to be and constituted the local assessment district. . . . That in and by said roll the whole cost of such paving was assessed against the lots fronting on said Edison avenue between Second avenue and Hamilton boulevard (except for the cost of paving the intersections of cross streets), and no part of such costs were assessed against Voigt park." The stipulation shows that this was a public park, belonging to the park system of the city, fronting upon and extending along Edison avenue about 820 feet, and that the lots of plaintiff which abutted upon Edison avenue, as described in the declaration, were assessed in the sum of \$8,446.96. Plaintiff, on February 9, 1909, petitioned the common council to refer the assessment roll back to the board of assessors for revision and correction, because the whole cost of the paving was assessed against the lots, and no part against Voigt park, with a frontage of 820 feet, claiming that the park should be assessed, and that her assessment was out of proportion to the benefit conferred, and that the assessment roll was contrary to law. This petition was denied. Later, when the assessments had become payable and a lien upon these lots, plaintiff, under protest in writing, paid the sum so assessed in full, February 27, 1909. On March 2, 1909, she presented to the common council in due form her claim for the repayment to her of the sum of \$8,446.96, the amount paid. This claim was denied. This suit in assumpsit was brought by her to recover that amount. At the close of the case both parties asked for an instructed verdict. The motion of plaintiff was granted, and a judgment was entered against the city in her favor for the full amount of the sum paid. The defendant, upon a writ of error, brings the case here for review, asking a reversal upon errors assigned.

The principal reason upon which defendant relied for a directed verdict in its behalf was "because Voigt park was not assessable for paving Edison avenue, and that the property of the private parties fronting on said avenue so paved was properly assessed for the (entire) cost of said pavement." This is the material question to be considered.

This assessment was made under authority of the charter of the city of Detroit, which reads: "For the purpose of such assessment the lots and parcels of real estate situate on said street and fronting the portion thereof ordered to be improved shall constitute one local assessment dis-

trict, the cost and expense of the paving to be assessed according to frontage." Detroit Charter 1904, §§ 265-267, pp. 182-184.

Defendant, admitting that the authorities apparently are not in harmony upon the material question presented, urges that, in those states where special assessments against real estate owned by municipalities are declared valid, there was constitutional or statutory provision authorizing such assessments, but that in this state there is no such authority, and that this court has so held in the case of *Big Rapids v. Mecosta County*, 99 Mich. 351, 58 N. W. 358. It must be conceded, if that case decides all that is claimed for it, defendant's contention is correct. This court said in the opinion: "The general tax law of the state exempts from taxation all public property belonging to the United States, to this state, or to any county, village, township, or school district within this state. . . . The Constitution of this state contains no provision upon the subject, and in this respect differs from the Constitutions of some of the states. . . . Aside from express exemptions there are also exemptions implied by law. Implied exemptions exist where property is owned and held by the state, its political subdivisions, and its municipalities for governmental purposes,"—citing *Cooley on Taxation*, 2d ed. 172. This authority, which is relied upon in the foregoing extract from the opinion, in the same paragraph says: "But a municipal corporation may hold property, not for governmental purposes, but for the mere convenience of its people," which the text writer states has been held "not presumptively excluded from taxation when it is restricted to special assessments." From this we must conclude that the intention of the court was to be in harmony with the authorities cited, and that only properties owned by municipalities for governmental purposes were included in its holding as exempt.

Construing the language of the charter relative to assessments for paving, we do not find any exemption of public grounds. In cases which hold the extreme doctrine that no property of the state is exempt from special assessments, and also those which hold that certain properties belonging to the public are exempted by statute from taxation, the decisions are harmonious in holding that the exemptions apply "only to the taxes mentioned in the general tax law." This rule was recognized by this court in *Big Rapids v. Mecosta County*, supra. We cite some of the leading authorities which favor the rule: *Cooley, Taxn.* §§ 458, 572, 573; *San Diego*

v. Linda Vista Irrig. Dist. 35 L.R.A. 34. note; Adams County v. Quincy, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 424; Re Mt. Vernon, 147 Ill. 359, 23 L.R.A. 807, 35 N. E. 533; Hassan v. Rochester, 67 N. Y. 528; Essex County v. Salem, 153 Mass. 141, 26 N. E. 431; New Orleans v. Warner, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44. The great weight of authorities upholds this doctrine. In view of this rule, which was recognized, and the language of the opinion, we conclude that this court in *Big Rapids v. Mecosta County*, supra, decided that in this state the exemption of municipal property from special assessments extended only to such property as is held for governmental purposes. The Voigt park property was not so held by defendant.

The requirement of the law under which this assessment was made is that it must be according to the frontage upon Edison avenue. Detroit Charter 1904, pp. 182-184. Voigt park occupies about one fourth of this entire frontage. It was not assessed. The entire cost was assessed against the remaining three-fourths, and not according to the frontage of each abutting lot. The law governing these assessments cannot be allowed if any frontage is omitted. This park frontage abutting upon the avenue should have been assessed for this paving. It was not exempt from such assessment. To so hold in this case would not extend the rule to include the ornamental strips of land in the center of the boulevards or other highways in the city. They can in no sense be considered as abutting lots, and included within the provision of the charter, "for the purpose of such assessment the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved shall constitute one local assessment district."

In the trial court plaintiff recovered for the entire amount paid by her upon this special assessment, with interest. The record shows that a duplicate assessment roll was made up and produced in evidence by defendant, showing what the amount of the assessment against plaintiff would have been had Voigt park been assessed, and the difference between that amount and the amount actually assessed, to be \$2,136.28. Defendant's contention was that this amount, with interest at 5 per cent from February 27, 1909, the date of payment, was the amount for which plaintiff would be entitled to recover if the court held that Voigt park should have been assessed. The correctness of this computation was not questioned by plaintiff. In that court the case was decided 32 L.R.A. (N.S.)

upon the ground that the assessment was not made according to frontage, and was wholly invalid. In this court, however, counsel for plaintiff in his oral argument stated that, if it is held that the park property should have been assessed, plaintiff only asked to recover the excess paid by her, with interest. This agreement between the parties makes further discussion relative to the question unnecessary. As already decided, the park property was not exempt from this assessment, and therefore should have been included in the assessment roll. Plaintiff had not waived any rights, and had done nothing to estop her from recovering in this case.

For the reasons stated, the judgment is, accordingly, reduced, and the questions involved being questions of law, a judgment will be entered in this court in favor of plaintiff and against defendant for the sum of \$2,136.28, with interest at 5 per cent from February 27, 1909, to date, with costs to defendant.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,
v.

WILLIAM GORMAN, Appt.

(— Minn. —, 129 N. W. 589.)

Criminal law — receipt of verdict — presence — waiver.

The defendant was on trial for a felony, and was personally present at all times until the jury retired to consider of their verdict. He then left the court room, being on bail, and unlawfully absented himself therefrom. The court, eighteen hours after the jury had agreed upon a verdict, and after exhausting all reasonable means to secure his presence in court, received the verdict in his absence. Held that by his conduct he waived his right to be present, and that the court did not err in so receiving the verdict, nor in asking the jury, when they came into court after they had agreed, to be patient until the defendant arrived.

(February 3, 1911.)

Headnote by START, Ch. J.

Note. — *Right of accused to waive his presence at time of receiving verdict upon trial for felony.*

The earlier cases passing upon the question here presented are collated and discussed in a note to *State v. Way*, 14 L.R.A. (N.S.) 603.

A recent case, *Sherrod v. State*, 93 Miss. 774, 20 L.R.A. (N.S.) 509, 47 So. 554, holds that one on trial for a capital offense cannot waive his right to be present when the

A PPEAL by defendant from an order of the District Court for Hennepin County, denying a new trial after his conviction of assault in the second degree. Affirmed.

The facts are stated in the opinion.

Mr. John F. Bernhagen, for appellant: The accused must be present when the verdict is received.

State ex rel. Battle, 7 Ala. 259; Cook v. State, 60 Ala. 39, 31 Am. Rep. 31, 3 Am. Crim. Rep. 304; Waller v. State, 40 Ala. 325; State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102; State v. France, 1 Overt. 434; Nomaque v. People, 1 Breese (Ill.)

109, 12 Am. Dec. 157; People v. Perkins, 1 Wend. 91; State v. Hurlbut, 1 Root, 90; People v. Beauchamp, 49 Cal. 41; People v. Kohler, 5 Cal. 72; People v. Higgins, 59 Cal. 357; Smith v. People, 8 Colo. 457, 8 Pac. 920, 5 Am. Crim. Rep. 615; Green v. People, 3 Colo. 68; Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247, 20 So. 242; Palmquist v. State, 30 Fla. 73, 11 So. 521; Lovett v. State, 29 Fla. 356, 11 So. 172; Adams v. State, 28 Fla. 511, 10 So. 106; 1 Bishop, Crim. Proc. 2d ed. §§ 271, 273, 1180; Bishop, New Crim. Law, § 998, subd. 4; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Harris v. People, 130 Ill. 457, 22 N. E.

verdict is rendered, even by voluntarily absents himself from the court room in case he is on bond; and it is entirely immaterial that the verdict actually returned is for an offense not capital. Chief Justice Whitfield's opinion contains a very clear statement of the law on the subject as applied to both capital and noncapital offenses.

While State v. Cherry, — N. C. —, 70 S. E. 294, was an indictment for a felony, it is not within the scope of this note, since the only point involved was an exception to the judgment of the court, who sentenced the defendants in their absence from the court. But what was said therein is interesting on the point here annotated. It seems that during the progress of the trial the defendants ran away, and yet, notwithstanding that fact, the trial went on and a verdict was rendered while they were in parts unknown, and without objection from their counsel. In the course of the opinion rendered, Mr. Justice Hoke points out that in capital trials the presence of the prisoner is essential at all stages thereof, and cannot be waived, but that, in felonies less than capital, the right to be present may be waived by the accused personally. Then he goes on to state that the decisions in North Carolina are to the effect that when the accused voluntarily absents himself, and more especially when he has fled the court, such conduct may be considered and construed as a waiver, and in that event the presence of the accused is not regarded as essential to a valid trial and conviction.

However, in another recent case the inference is quite clear that while a defendant in a felony case—an indictment for murder—has a right to be present at the time the verdict is rendered, and, under a statute, must be present, yet, if his absence is voluntary or wilful, the verdict may be received. Derden v. State, 56 Tex. Crim. Rep. 396, 133 Am. St. Rep. 986, 120 S. W. 485. In this case, however, a new trial was granted because the verdict was read and received in the prisoner's absence, and while he was making his way from his boarding house to court in response to a communication that the jury was ready to report. The court was of the opinion that it could not

be contended seriously that the absence of the defendant was wilful; and as to whether he was voluntarily absent the court said: "We do not believe he was voluntarily absent, whether we accept the ordinary meaning of the word or its legal significance. . . . Under any possible definition of the word it is implied of necessity that the absence must have resulted from choice or exercise of the will. An unavoidable absence would not be voluntarily; an unintentional absence, where, under the circumstances, his presence could not be reasonably required, would not be voluntary. Even an absence, though in somewhat serious negligence, which was neither purposeful, deliberate, or under circumstances from which such an intention could be presumed, would not be voluntary. So that, under any view of the case, as we believe, the absence of appellant in this case was not a voluntary absence. It is not such absence as would have justified the court in receiving the verdict of the jury, and, while the result may seem to be based upon slight substantial ground, it is a provision of law, and it does not lie within our province to deny to a citizen of this state a right which in express terms the law gives him. To do so would be the grossest usurpation."

And in Humphrey v. State, 3 Okla. Crim. Rep. 504, 106 Pac. 978, the case was reversed and remanded because the record filed in the case did not affirmatively show that the prisoner, who was upon trial on an information charging him with murder, was present when the verdict against him was returned in open court. It did not appear that there was any question of waiver of presence in the case, although another Oklahoma case is quoted from to the effect that neither a defendant nor his counsel can waive the presence of the former at any stage of the trial.

As to the right of accused to waive his presence at time of receiving verdict upon trial for misdemeanor, see note to State v. Waymire, 21 L.R.A. (N.S.) 56.

As to the right of an accused person to be present during his trial, and his waiver thereof, see the note to Gore v. State, 5 L.R.A. 834. E. M. S.

326; *Brooks v. People*, 88 Ill. 327; *State v. Young*, 86 Iowa, 406, 53 N. W. 272; *State v. Smith*, 44 Kan. 75, 8 L.R.A. 774, 21 Am. St. Rep. 266, 24 Pac. 84; *State v. Muir*, 32 Kan. 481, 4 Pac. 812, 5 Am. Crim. Rep. 599; *Allen v. Com.* 86 Ky. 642, 6 S. W. 645; *Temple v. Com.* 14 Bush, 769, 29 Am. Rep. 442; *State v. Christian*, 30 La. Ann. 367; *State v. Ford*, 30 La. Ann. 311; *Finch v. State*, 53 Miss. 303; *Rolls v. State*, 52 Miss. 391; *Stubbs v. State*, 40 Miss. 716, 1 Am. Crim. Rep. 608; *Long v. State*, 52 Miss. 23; *State v. Schoenwald*, 31 Mo. 147; *State v. Buckner*, 25 Mo. 167; *State v. Braunschweig*, 36 Mo. 397; *People v. Perkins*, 1 Wend. 91; *Maurer v. People*, 43 N. Y. 1; *Dougherty v. Com.* 69 Pa. 286; *Prine v. Com.* 18 Pa. 105; *Stewart v. State*, 7 Coldw. 338; *Andrews v. State*, 2 Sneed, 550; *Clark v. State*, 4 Humph. 254; *State v. France*, 1 Overt. 434; *Brown v. State*, 38 Tex. 482; *Richardson v. State*, 7 Tex. App. 486; *State v. Mannion*, 19 Utah, 505, 45 L.R.A. 638, 75 Am. St. Rep. 753, 57 Pac. 542; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Lewis v. United States*, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; *State v. Myrick*, 38 Kan. 238, 16 Pac. 330; *Gilligan v. Com.* 99 Va. 816, 37 S. E. 962; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791; *State v. Conkle*, 16 W. Va. 736; *State v. Sutfin*, 22 W. Va. 771; *State v. Greer*, 22 W. Va. 800; *French v. State*, 85 Wis. 400, 21 L.R.A. 402, 39 Am. St. Rep. 855, 55 N. W. 566, 9 Am. Crim. Rep. 348.

Messrs. **George T. Simpson**, Attorney General, and **James Robertson**, for respondent:

The defendant, by voluntarily absenting himself from the court room, waived his right to be present at the rendering of the verdict.

State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; *State ex rel. Battle*, 7 Ala. 259; *Waller v. State*, 40 Ala. 325; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31, 3 Am. Crim. Rep. 304; *Dix v. State*, 147 Ala. 70, 41 So. 924; *Gore v. State*, 52 Ark. 285, 5 L.R.A. 832, 12 S. W. 564; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Hill v. State*, 118 Ga. 21, 44 S. E. 820; *Sahlinger v. People*, 102 Ill. 241; *State v. Wamire*, 16 Ind. 357; *State v. Way*, 76 Kan. 928, 14 L.R.A. (N.S.) 603, 93 Pac. 159; *State v. Perkins*, 40 La. Ann. 210, 3 So. 647; *Com. v. McCarthy*, 163 Mass. 458, 40 N. E. 776; *Wilson v. State*, 2 Ohio St. 319; *Fight v. State*, 7 Ohio pt. 1, p. 180, 28 Am. Dec. 626; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Hill v. State*, 17 Wis. 675, 86 Am. 32 L.R.A. (N.S.)

Dec. 736; *Lynch v. Com.* 88 Pa. 189, 32 Am. Rep. 445; *Frey v. Calhoun Circuit Judge*, 107 Mich. 130, 64 N. W. 1047; *Gales v. State*, 64 Miss. 105, 8 So. 167; *Sherrod v. State*, 93 Miss. 774, 20 L.R.A. (N.S.) 509, 47 So. 554; *Derden v. State*, 56 Tex. Crim. Rep. 396, 133 Am. St. Rep. 986, 120 S. W. 485; *United States v. Loughery*, 13 Blatchf. 267, Fed. Cas. No. 15,631; *Falk v. United States*, 15 App. D. C. 446; *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185; *Stoddard v. State*, 132 Wis. 520, 112 N. W. 453, 13 A. & E. Ann. Cas. 1211; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *Jackson v. State*, 49 N. J. L. 252, 9 Atl. 740, 7 Am. Crim. Rep. 82.

Start, Ch. J., delivered the opinion of the court:

The defendant was indicted and convicted in the district court of the county of Hennepin of an assault in the second degree, and it was adjudged that as punishment therefor he be confined at hard labor in the state's prison for a term of five years. He appealed from an order denying his motion for a new trial. The appeal does not involve any question of the sufficiency of the evidence to establish his guilt, or any error in his trial up to the time the jury, through the officer in charge of them, notified the court that they had agreed upon a verdict. The alleged error relied upon for a reversal of the order is that the court erred in communicating with the jury before receiving the verdict, and in receiving it in the absence of the defendant.

The defendant was duly arraigned upon the indictment, pleaded not guilty, gave the usual bail bond, and was released from custody. He was personally present in court when his case was called for trial, and was so present at all times until after the jury were instructed, and retired in charge of an officer to consider the case, on April 1, 1910. The jury on the same day, and at 5:30 P. M. advised the court that they had agreed upon a verdict; but, the defendant not then being in court, they were kept out all night. On the next morning at 10:30 o'clock, they were called into court, at which time proceedings were had to the effect following:

The Court: Send for the defendant. Now, gentlemen, we will have to ask you to be patient until the defendant arrives.

A Juror: May I address the court?

The Court: Yes; but we cannot take any verdict, you understand.

A Juror: Well, this seems to be a rather peculiar proceeding. Suppose the defendant does not show up for several days

or weeks; what then? Are we to remain as prisoners?

The Court: We do not want to discuss the case in the absence of the defendant. You will not be detained a great while longer. You can remain in your places, if you can be more comfortable. I think we will have the court room cleared for the present, and keep the jury in this room. Would you rather remain here in this room?

They signified that such was their wish. At 11:45 A. M. the court said to the jury: "The defendant is not present. Ever since the court was informed that you had agreed on a verdict and were ready to deliver it last night, . . . we have been ransacking the town to discover the whereabouts of the defendant. Having exhausted every means to have him here, we will receive the verdict at this time." The jury then returned the following verdict: "We, the jury, find the defendant guilty of the crime of assault in the second degree." The defendant and his sureties were then called and his bond declared forfeited, and a bench warrant issued for his arrest. He was arrested on April 17, 1910, and judgment awarded upon the verdict as stated. He wilfully absented himself from the court from the time of the submission of the case to the jury until finally arrested on the warrant.

Was it error to receive the verdict in the absence of the defendant in view of the exceptional circumstances under which it was received? This is an important question, and one of the first impression in this state. On a trial for a felony the defendant shall be personally present. Rev. Laws, 1905, § 5358. The reception of the verdict in such a case is a material part of the trial to the defendant; for he is entitled, on request, to have the jury polled. Section 5373, Id. If the defendant be in custody, and is not personally present when the verdict is received, it is reversible error; for the court, and not he, in such a case commands his jailer. Where, however, he has been released on bail, he orders his own movements outside of the court room. Can he in such a case wilfully absent and conceal himself, and then urge that a verdict received in open court in his absence, after waiting and searching eighteen hours for him after the jury have agreed, is void because he was not present when it was received? This is the precise question presented by the record. We are of the opinion, on principle and authority, that it must be answered in the negative. The defendant cannot take advantage of his own wilful wrong, to defeat the ends of justice, and must be held to have waived 32 L.R.A. (N.S.)

by his misconduct his right to be present when the verdict was received. Com. v. McCarthy, 163 Mass. 458, 40 N. E. 766; Frey v. Calhoun, Circuit Judge, 107 Mich. 130, 64 N. W. 1047; Sahlinger v. Illinois, 102 Ill. 241; State v. Perkins, 40 La. Ann. 210, 3 So. 647; Stoddard v. State, 132 Wis. 520, 112 N. W. 453, 13 A. & E. Ann. Cas. 1211; State v. Way, 76 Kan. 928, 14 L.R.A. (N.S.) 603, 93 Pac. 159; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Lynch v. Com. 88 Pa. 189, 32 Am. Rep. 445.

Many of the cases cited in support of the defendant's contention belong to the class which hold, and rightly so, that where the accused is in custody, and is not present when the verdict is received, it is reversible error. There are, however, a few cases, comparatively, which hold that it is immaterial whether the absence of the accused is voluntary or otherwise, and that a verdict cannot be received in his absence under any circumstances. We cannot follow these exceptional cases, for they are unsound in principle and an apotheosis of technicality.

It is further urged by the defendant that the statement made to the jury when they came into court was reversible error. We hold otherwise. This was not a case where the judge went to the jury room and communicated with the jury, as was done in the case of *Hoberg v. State*, 3 Minn. 262, Gil. 181, but one where the jury had agreed upon their verdict, and had come into court, and were impatient to deliver it. No further instructions were given to the jury, nor any reference made to the case, except an appeal to the jury to be patient until the defendant arrived. It was not until the court had decided to receive the verdict that the jury were informed that the defendant was not present, and that every means to find him had been exhausted; and immediately upon saying this the verdict was received.

Order affirmed.

Jaggard, J., took no part.

KENTUCKY COURT OF APPEALS.

COURIER-JOURNAL COMPANY, Appt.,

v.

M. A. PHILLIPS.

(— Ky. —, 134 S. W. 446.)

Libel — truth as defense.

1. No recovery can be had for publication in good faith of defamatory matter, if the publication is substantially true.

Note. — For truth as a defense to civil action for libel or slander, see note to *Hutchins v. Page*, 31 L.R.A. (N.S.) 132.

Same — good faith — establishment.

2. The good faith of a newspaper in publishing defamatory matter may be established by showing that it was furnished by a reliable reporter of long experience, and was accepted and published as a news item in reliance upon its truth.

(February 21, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Powell County in plaintiff's favor in an action brought to recover damages for the alleged publication of a libel. Reversed.

The facts are stated in the opinion.

Mr. John D. Adkinson, with Messrs. Bennett H. Young and Jouett & Jouett, for appellant:

Defendant was entitled to a peremptory instruction.

Sinclair v. Illinois C. R. Co. 129 Ky. 828, 112 S. W. 910; Elkins v. New Livingston Coal Co. (Ky.) 115 S. W. 203.

Messrs. C. F. Spencer and Hazelrigg & Hazelrigg for appellee.

Lassing, J., delivered the opinion of the court:

The Louisville Courier-Journal in its issue of April 12, 1908, published the following article:

Call "Counterfeiter" and Attracts Crowd,
Which Joins Intensely Exciting Hue
and Cry.

Gus Neurath Says He Saw Man Pass Counterfeit Money—Fugitives Run into Arms of Police.

"Stop, counterfeiter!" shouted Gus Neurath, bailiff of the city court, in stentorian tones, at Fifth and Jefferson streets shortly after 10 o'clock last night. Two hundred people, including the bailiff, two lieutenants of police, and a little man who was always in front and repeatedly turned upon and slapped by the objects of the chase, pursued two men from Fifth and Jefferson streets to Sixth street and Congress alley. When it was all over M. A. Phillips of Stanton, Kentucky, was arrested on charge of passing counterfeit money and carrying concealed a deadly weapon; his nephew, Samuel Scott, on a charge of suspected felony; and the little man, clamoring for an action at law for his slaps.

The trouble had started in Weyler & Kurz saloon, at Fifth and Jefferson streets. Neurath chanced to stop there with several friends, and was invited by Phillips to take a drink at his expense. Neurath says that he noticed that the dollar bill which Phillips put on the counter in payment for

the drinks was a counterfeit. He accordingly swallowed the treat, but not the alleged transgression. Scarcely had Phillips and Scott, who was with him, left the saloon in pursuit, summoning all the counterfeiterers within the radius of his 'bailiff's' voice to halt under penalty of the law. Phillips and Scott immediately took to their heels, with a crowd that grew in a twinkling to 200 after them. A little man, who gave his name as S. H. Gills, led the chase. Whenever he came close enough to the fugitives, he was slapped in the face, he said, and fell back a few yards.

The hue and cry came down Jefferson street and in Sixth street, rousing from their desks, at Central Police Station, Lieutenants Doran and Wehrle, who had just been lamenting the dullness of the night and hoping that Ki Ki, the desperate, would come in their direction. Two seconds later the two lieutenants, both coatless and portly, were vying with each other in vaulting the railing in front of the station. A moment later they had stopped and arrested the two fugitives, with the slapped and clamorous Gills joining them at the triumphant finish.

Phillips admitted having passed the dollar bill in question, but declared that he had done so unaware of its questionable character, having himself received it at Lexington. He declared that he was a lawyer and that he lived in Stanton, Kentucky. When arrested he had a revolver in his possession. Scott, whose home is said to be in Mt. Sterling, was held on charge of suspected felony. He says that he was merely accompanying Phillips, and denies the charge against him.

Conceiving that a wrong had been done him by reason of this publication, M. A. Phillips brought suit in the Powell circuit court against the paper for libel. Upon motion all of the printed article was stricken out, except the following:

Calls "Counterfeiter" and Attracts Crowd,
Which Joins Intensely Exciting
Hue and Cry.

Gus Neurath Says He Saw Man Pass Counterfeit Money—Fugitives Run into Arms of Police.

"Stop, counterfeiter!" shouts Gus Neurath, bailiff of the city court, in stentorian tones, at Fifth and Jefferson streets shortly after 10 o'clock last night. When it was all over, M. A. Phillips of Stanton, Kentucky, was arrested on charges of passing counterfeit money and carrying concealed a deadly weapon.

The defendant answered, and for defense

pleaded the truth of the publication. On this issue the case was tried out before a jury, with the result that plaintiff recovered a verdict for \$1,500. The paper appeals.

Three grounds are relied upon for reversal: First, error in not instructing the jury peremptorily to find for the defendant; second, misconduct of plaintiff during the trial; and, third, that the verdict is excessive.

The facts as developed by the testimony are as follows: Plaintiff, who lived in Stanton, Kentucky, had gone to Louisville to assist his son out of some character of trouble in which he had become involved on account of a strike among the employees of the street car company. He had been in Louisville several days, and, on the night before the publication complained of, in company with a relative named Scott, went into a saloon and there met Gus Neurath, bailiff of the city court, whom he asked to join them in a drink. The drinks were served, and plaintiff tendered in payment what appeared to be a silver dollar. The necessary change was given him, and he and Scott left. Immediately that he was gone, Neurath asked the barkeeper to let him see the dollar given him by plaintiff. When it was exhibited he pronounced it a counterfeit. Thereupon he summoned a man named Hart to assist him, and together they went in search of plaintiff and Scott. They found them in a lodging house not far away, and calling them out, Neurath told plaintiff that they were wanted for passing counterfeit money. Plaintiff assured the officer that, if it was counterfeit, it was a mistake, and that he would rectify it. But despite his protests, as well as those of Scott, they were started down the street toward the station house. After going a short distance, Scott broke away from Hart and ran down the street, pursued by Hart and several others, who were attracted by the shout of Neurath, "Stop, counterfeiter!" or "Stop, counterfeiters." Neurath says that at the same time plaintiff tried to get away from him, but that he grabbed and held him. This plaintiff denies. The shouting and chase attracted quite a crowd, and Scott was soon captured by two police officers into whose arms he ran. Neurath and Phillips caught up with him, and together they were taken to the station house, and the charges of passing counterfeit money and carrying concealed a deadly weapon were placed against plaintiff. A small pistol was found in his hip pocket. Phillips gave bond, and later each charge was dismissed.

By his rulings during the trial, and in his instructions, the court limited the consid-

eration of the jury to three questions: (1) Was there a cry of "Counterfeiter" made with reference to Phillips? (2) Was a crowd attracted, which joined in the hue and cry? (3) Was it true, or substantially true, that the bailiff, Neurath, cried out with reference to Phillips, "Stop, counterfeiter!"

On these pivotal points, appellee testified as follows:

And about that time Scott broke and ran. I stayed with Neurath, and Neurath caught hold of me. . . . I had a little double Derringer pistol in my right hip pocket, and he got hold of that. He caught onto it that way [indicating], and he held to me. I protested. . . . "By God," he says, "you have got to go to jail," and he held onto me.

Q. Mr. Phillips, is it not true that at the time you were being held there and Scott ran, that there was a cry of "Counterfeiter?"

A. Yes, sir.

Q. Was anybody there? Was there a crowd?

A. I did not see but very few.

Q. Well, how many?

A. Well, I could not see over a dozen people. There was a man by the name of Stringer there, who went over to the station, and I tried to find him, but can't find him.

Q. Did Gus Neurath cry out "Counterfeiter?"

A. He hollered "Counterfeiter" or "Stop, counterfeiter," or something like that, meaning Scott; they was then after Scott.

Jacob Wehrle testifies to a conversation between Neurath and Phillips at the jail, as follows:

Q. What passed between him and Neurath?

A. He said that Neurath had no right to arrest him. There was some argument about breaking away. Neurath asked him why he wanted to break away.

Q. What did Phillips say?

A. Phillips said he had no warrant. He said, "You had no right to arrest me, and that is the reason I wanted to get away. You have no right to arrest me at all."

Upon the same point, Robert Donahue testifies:

Q. Do you know what charge was preferred against him,—what he was arrested for?

A. Well, it was about between 9 and 10 o'clock on Saturday night. I was coming down Jefferson street to the barber shop below Jefferson on Fifth. When I was going into the barber shop door, I

heard somebody holler, "Catch them counterfeiters," and I seen a man running down there, and I seen some man running up Jefferson street and run in towards Market. Mr. Hart was in behind him. I heard somebody say that the man that Neurath had was trying to get away from him, too.

Q. Did you go back to where he was?

A. Yes, sir; and he was trying to get away from Mr. Neurath. They were using some kind of language there. There was such a crowd I could not understand what they were saying; but what attracted my attention was, as I was going into the barber shop, somebody hollered, "Catch them counterfeiters."

Several other witnesses testified to hearing the bailiff call out, "Stop, counterfeiter," or "Stop, counterfeiters."

In answer to the question where he and Hart went with Scott and Phillips after arresting them, Neurath testifies as follows:

We proceeded from Fifth. We got to Fifth and Jefferson, and Mr. Hart had Mr. Scott, and I had hold of Mr. Phillips,—of his back pocket this way [indicating]. I felt his pistol, a Derringer pistol, and I suspected that he try to hurt us; and I thought Scott might try to get this pistol, and I got between them. And when we got nearly to the Willard Hotel on Fifth street, he wrenched away from Hart, and about that time Phillips wrenched away from me.

Q. Did you make any attempt to catch them?

A. I did, sir; I said, "Catch them counterfeiters."

Q. Of whom were you speaking when you said, "Catch the counterfeiters?"

A. Mr. Phillips and this man Scott.

It will thus be seen that all the witnesses are practically agreed that the bailiff, Neurath, called out, "Stop counterfeiter" or "Stop, counterfeiters," and the only difference between the testimony of Neurath and Phillips is that Phillips says that when Neurath cried, "Stop, counterfeiter," he did not refer to him, whereas Neurath says he did. A crowd did gather and join in the pursuit, and Phillips says he was informed that he was arrested for passing counterfeit money; and he admits he had a pistol in his pocket when arrested. Thus, not only is the publication proven to be substantially true, but every material allegation thereof literally true. For, while appellee says that when Neurath called out, "Stop, counterfeiter," he meant or referred to Scott, Neurath says he meant

appellee, and that at that time appellee also was trying to get away. This appellee denies, but does say that when Scott ran Neurath "caught hold of me," and "held onto me;" and, following a statement that Neurath told him with an oath he had to go to jail, said, "He held onto me." Wehrle says that at the jail, when Neurath asked appellee why he wanted to break away from him, appellee responded, because "you had no right to arrest me. That is the reason I wanted to get away." Donahue says he heard someone say, about the time that Scott was caught, that "the man that Neurath had was trying to get away from him, too," and that when he went to where Neurath and appellee were, "he was trying to get away from Neurath."

When read in the light of the attendant circumstances and the testimony of the witnesses present, we are constrained to accept as true what Neurath says he meant, and to whom he referred, when he called out, "Stop, counterfeiter." It was appellee who had given the dollar that was pronounced spurious; it was appellee against whom the charge of passing counterfeit money was preferred; and when one man had escaped and he claims the other was about to do so, Neurath says he meant to stop appellee when he called out, "Stop, counterfeiter." Appellee, of course, cannot know to whom Neurath referred, and his opinion cannot be permitted to weigh against and overthrow the positive testimony of Neurath to the contrary. This is especially so when the veracity and credibility of the witness Neurath are not called in question. The publication did not assert that appellee had passed counterfeit money, or that he was a counterfeiter, but merely that he was charged with having done so, and that the arresting officer, when he called out, "Stop, counterfeiter," referred to appellee. Appellant assumed the burden of proving that these acts occurred, and that these statements were made as published. In our opinion the proof offered fully supports its defense.

The establishment of the truth of the matter complained of as libelous is a complete defense. *Cooley, Torts*, 3d ed. p. 416; *Townshend, Slander*, 306; *Malone v. Carrieco*, 16 Ky. L. Rep. 155; and *Rollins v. Louisville Times Co.* 28 Ky. L. Rep. 1054, 90 S. W. 1081. And where a publication made in good faith is shown to be substantially true, there can be no recovery. *Vance v. Louisville Courier-Journal Co.* 95 Ky. 41, 23 S. W. 591; *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665; and *Rollins v. Louisville Times Co.* 28 Ky. L. Rep. 1054, 90 S. W. 1081. Appellant having shown that the report upon which

the article was based was furnished by a reliable reporter of long experience, and that it accepted and published the article in good faith as a news item, relying upon its truth, and the evidence showing that the article was substantially true, the motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Whole court except O'Rear, J., sitting.

OKLAHOMA SUPREME COURT.

KANSAS CITY, MEXICO, & ORIENT
RAILWAY COMPANY, Plff. in Err.,
v.
JOHN L. COX.

(— Okla. —, 108 Pac. 380.)

Carrier — loaded car — attachment of risk.

1. The mere fact that the owner of goods has loaded them in a car for shipment, even though the carrier, by the owner's direction, has placed the car in a position convenient for such purpose, will not of itself be sufficient to make the carrier an insurer of the goods loaded. Before the delivery will be deemed complete, the owner must

Headnotes by KANE, J.

Note. — What constitutes delivery of freight to carrier.

As to what constitutes delivery to a carrier, so as to pass title from consignor to consignee, see note to Ramsey & G. Mfg. Co. v. Kelsea, 22 L.R.A. 415.

This note does not include cases upon the question of delivery as affected by the rules of agency; that is to say, decisions as to whether delivery to particular agents, servants, or employees is delivery to the carrier. Cases upon what constitutes delivery as between connecting carriers have also been omitted. For the purposes of this note, the rule is assumed as will settled that, in order to render a transportation company liable as a common carrier, there must be a completed delivery to the company.

In general.

Delivery to a carrier as such has been held established under the following circumstances:

—goods delivered at a railroad depot, depot agent notified, and his attention directed to their destination. Southern R. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333;

—empty bottles in cases deposited on a platform outside the defendant's freight 32 L.R.A. (N.S.)

not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Same — relation of parties — negligence.

2. The strict rules making the carrier an insurer of freight have no application where the relation of the parties is not that of carrier and consignee or owner; and in such cases the carrier is liable only for losses resulting from its own negligence.

(March 8, 1910.)

ERROR to the District Court for Woods County to review a judgment in plaintiff's favor in an action brought to recover damages for loss of certain goods destroyed by fire while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Messrs. John A. Eaton and Dudley W. Eaton for plaintiff in error.

Kane, J., delivered the opinion of the court:

This was an action commenced by the defendant in error, as plaintiff below, against the plaintiff in error, defendant below, to recover damages for the destruction by fire of a certain lot of broom corn. After both sides had introduced their evidence and rested, the court instructed the jury that the evidence introduced showed that the railroad company was responsible for the carload of broom corn as a common

house, ready for shipment, where agent is notified to that effect. Stapleton v. Grand Trunk R. Co. 133 Mich. 187, 94 N. W. 739;

—goods properly packed and addressed to the consignee left by a shipper at freight depot, with a freight handler apparently in charge and accustomed to receive freight. Lord v. Maine C. R. Co. 105 Me. 255, 74 Atl. 117;

—wool delivered to freight house, sacked, and marked with weights and numbers and the name and address of the consignee, with notice of its delivery to carrier's agent through the information that "that pile of wool was for Boston." Nichols v. Smith, 115 Mass. 332;

—engine transported to a derrick in the company's yards by the direction of the freight agent, and in process of loading on a car under the direction of the carrier's servants. Merritt v. Old Colony & N. R. Co. 11 Allen, 80;

—agent of express company as a common carrier agreed to receive certain goods for shipment in a union railroad depot, the warehouse of an express company being full, and shipper ceasing to control of them from that time. Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783;

—owner, by direction of the station agent, deposited cotton upon the carrier's platform, part of it having been tagged by

carrier, and was therefore an insurer of the property; that under such circumstances it was the duty of the jury to return a verdict for the plaintiff for the value of the broom corn, stating the value thereof to be \$575.25. The jury, without retiring, brought in a verdict in accordance with the instructions of the court, upon which judgment was duly entered. To reverse this judgment, this proceeding in error was commenced.

It is stated by counsel for plaintiff in error, in their brief, and, as counsel for defendant in error have filed no brief calling our attention to any discrepancy in the statement, we take it to be true, that there was evidence introduced at the trial reasonably tending to prove that on the 26th

or 27th of January, 1906, pursuant to the order of the plaintiff, a car was placed upon the side track by the defendant at a broom corn platform erected by the defendant on the east side of one of its side tracks, for the purpose of enabling shippers to conveniently and easily load the car with broom corn; that on the next day Mr. Greenlee, acting as the agent for the plaintiff, loaded some broom corn in said car. On the next day, to wit, the 28th day of January, six more bales were loaded. On the 29th day of January, more broom corn, enough to finish the carload, was loaded into the car, after which the door to the car was closed. After finishing loading the car, the plaintiff, or the party employed by him to do the loading, closed the door

a servant of the carrier, and part actually loaded on a car. *East Line & R. River R. Co. v. Hall*, 64 Tex. 620;

—cotton delivered upon railroad platform with knowledge of carrier's agent, where, by custom, such delivery was uniformly regarded by shippers and the railroad as a delivery to the latter for immediate shipment. *Ft. Worth & D. C. R. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21.

A delivery of cotton on the platform of a compress company was held a delivery to the railroad company as a common carrier, in *Texas Midland R. Co. v. H. L. Edwards & Co.* — Tex. Civ. App. —, 121 S. W. 570, where the facts showed that the railroad company had no facilities at its depot for the reception of this cotton, and that it maintained a spur track to the platform of the compress; that the usual custom and course of dealing between cotton shippers on the one hand, and the compress company and railroad on the other, was for all cotton intended for foreign shipment, as was that in question, to be delivered at the compress platform; that, by the general usage, the owner of cotton would give shipping instructions in writing to the compress company, and no shipping instructions were necessary to the railroad agent, the compress company marking and tagging the cotton. It was also the custom for the superintendent of the compress company to perform the duties of a receiving clerk for the railroad in receiving and checking up cotton, and the cotton in question had been checked up and bills of lading O.K'd by this superintendent.

Where a railroad company built a platform at a flag station, and provided its own arrangements for the care and protection of freight, it was held liable in *Meyer v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 So. 218, for goods left there to be shipped in accordance with the usual course of business, it appearing that plaintiffs, who were large shippers of cotton, deposited a certain shipment on the platform and notified the usual agent that it was ready to ship. 32 L.R.A. (N.S.)

It was held in *Montgomery & E. R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, that, if it had been the constant and habitual practice and usage of the railroad company to receive cotton for shipment when it was deposited for it on its inclosed grounds, without special notice of such deposit, that is sufficient to show a public offer by it to receive goods in that mode, and to constitute an agreement between shippers and the railroad by which cotton, when so deposited, should be considered as delivered to the latter without any further notice.

A carrier which, by contract or usage, selects a compress company as its agent to receive cotton that is to be shipped over its road, and issues bills of lading therefor on presentation of the compress company's receipts, is in possession of the cotton when the bill of lading has been executed, so as to be liable as a carrier for the loss of the cotton. *Deming v. Merchants' Cotton-press & Storage Co.* 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

There was held to have been such evidence of delivery to a carrier as to entitle plaintiff to go to the jury in *Copeland v. Southern R. Co.* 76 S. C. 476, 57 S. E. 535, where he testified as to the delivery of cotton on defendant's platform, but that no notice or shipping directions were given defendant's agent and no receipt or bill of lading taken; that the cotton in question was part of a lot the remainder of which he was waiting to procure before shipping any of it, and that in such cases he generally got a receipt from the agent when he had completed the shipment; that he did not act differently with this lot of cotton; and that the agent never gave him personal notice that cotton left on the platform under such circumstances was at the owner's risk; and that the cotton would have been shipped the next morning but for its destruction by fire.

But it has been held that there was a failure to show delivery to a carrier;

—where cotton was placed on a platform owned by a city adjacent to a carrier's track, but not receipted for by the carrier,

of the car, and notified Mr. Cox, the plaintiff, that the car was loaded, but did not notify the agent of the company that the car was loaded, and did not give the agent any information as to the destination of the car or the name of the consignee. The last time that Mr. Cox saw the car was Saturday, January 27th, about noon, at which time the car was all loaded except fifteen bales. Cox did not notify the agent of the company that the car was loaded, nor did he notify him who the consignee of the car was to be, or where it was to go. The railway company had not issued a bill of lading, and Cox had not paid the freight. Cox had been for some time shipping broom corn from Fairview, and it was his custom when the cars were loaded to notify the

agent that they were loaded, and give him the name of the consignee, the route the car was to take, and its destination; but none of these things had been done with reference to this car. The car was destroyed by fire about 2 o'clock in the morning of January 30th, the facts up to that time being as above stated. We are of the opinion that this evidence was sufficient to carry the case to the jury.

From the authorities cited by counsel for plaintiff in error, it seems clear that, before the railway company could be held liable as a common carrier, it must appear that it had been notified that the broom corn was ready for shipment, or appraised of the name of the consignee. Hutchinson on Carriers, 3d ed. § 125, pp. 122, 123,

or in its control. *Brown v. Atlanta & C. Air Line R. Co.* 19 S. C. 39;

—where cotton was placed on a platform built for such purpose by a railroad company at a ginhouse, and connected with its main line by a spur track, the carrier having failed to furnish a car for the cotton as agreed by its agent. *Anderson v. Mobile & O. R. Co.* — Miss. —, 38 So. 861;

—where the deposit by a cartman of certain articles on the stoop of the defendant's freight house was with a direction to one of the freight handlers that the shipper would be down later and order where they should go. *Spade v. Hudson River R. Co.* 16 Barb. 383;

—where a cutter sent to carrier's depot by owner's servant, freight having been prepaid, was so carelessly placed on platform by servant that passing train demolished it. *Grosvenor v. New York, C. R. Co.* 39 N. Y. 34;

—where goods were left at an inn where a common carrier lodged and from whence he set out. *Selway v. Holloway*, 1 Ld. Raym. 46.

So, evidence tending to show a custom and course of dealing according to which cotton intended for shipment was placed on a railway platform with the intention and expectation of the shipper and the railroad company that the same was placed there for shipment, when instructions were given to that effect, or the party was ready for the shipment to be made, but not showing that such storage and delivery of the cotton upon the platform was, by virtue of a custom or course of dealing, to be thereafter regarded as there in the actual possession of the common carrier, was held insufficient to establish a delivery to the carrier, in *Missouri, K. & T. R. Co. v. Beard*, 34 Tex. Civ. App. 188, 78 S. W. 253.

The question of the delivery to a carrier of certain bales of cotton was involved in the case of *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132, where the railroad company was defendant in an action for failure to deliver to the consignee cotton of the quality called for in the bill of lading. 32 L.R.A. (N.S.)

ing. Commenting on the question of delivery to the carrier, the court said: "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them, until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter [the shipper] on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation, until designated and set apart by Potter or his agents."

In *Pitlock v. Wells, F. & Co.* 109 Mass. 452, it was held that if the plaintiff took a package of money to the express company's office in New York, to be forwarded to Boston, and merely deposited it upon the defendant's counter without direction, there was no delivery to the defendant as a common carrier. It appeared in this case that Boston was not upon the express company's route, and this apparently was a consideration upon the question of delivery in the manner claimed for. The court said: "If a man goes into an express office or into a common carrier's office and says nothing, but throws a package down, and the party says nothing in reply to him, and his mind is not called

states the rule as follows: "When the owner of the goods has done all in his power, and all that he is required to do by his understanding with the carrier or the usage of the business, to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu*, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. The mere fact, therefore, that the owner of the goods has loaded them on a car, even though the carrier by the owner's directions has placed the car in a position convenient for such purpose, will not of itself be sufficient to constitute a delivery. Before the delivery will be deemed complete, the owner must not only

have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Thus, where it was the course of business for a railroad company, when required to do so, to send its cars upon a side track at the place of shipment, to receive cotton for transportation, and for the shipper there to load upon them the freight, make out a manifest, and leave it with the agent of the company, who then had the bales counted, signed bills of lading, and sent locomotives to remove the cars thus loaded, and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put

to the fact as to where the package goes, then, unless that package is within the business of the party, unless it is on the route of the party, he becomes responsible for that package not as a common carrier, but as a mere custodian or bailee of it."

A carrier is not liable for a shipment of cotton while still in the control of a compress company, and of which the carrier has not received the actual custody, even though the latter has issued bills of lading therefor. *Martin v. St. Louis, I. M. & S. R. Co.* 55 Ark. 510, 19 S. W. 314; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 130 U. S. 223, 35 L. ed. 164, 11 Sup. Ct. Rep. 554.

As affected by lack of shipping contract.

The signing of a bill of lading is not essential to the complete delivery of a shipment of freight to a railroad company, in order to make it liable as a carrier. In other words, if a shipment has passed entirely out of the control of the owner so far as anything remains for him to do before transportation can begin, and has come within the unconditional control and direction of the railroad, the question of actual delivery is not dependent on the issuing of a bill of lading. *Illinois C. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Southern R. Co. v. Johnson*, 2 Ga. App. 30, 58 S. E. 333.

There is a delivery to the carrier where freight properly marked for shipment is placed in the carrier's freight depot for immediate transportation, with an agreement for shipment the following morning, although no shipping or written contract is issued at the time of such delivery. *Meloche v. Chicago, M. & St. P. R. Co.* 116 Mich. 69, 74 N. W. 301.

And where an article of freight is left with the agents of a railroad company with a view to shipment the following day, and is placed by them on the platform from which freight is loaded on the cars, there is a delivery, although no bill of lading is issued at the time. *Gulf, C. & S. F. R. Co. v. Compton*, — Tex. Civ. App. —, 38 S. W. 220.
32 L.R.A. (N.S.)

If cotton tendered to a carrier for immediate shipment is deposited upon a railroad platform for loading into cars, and the agents of the railroad company assent to such deposit, and receive the cotton into its custody upon the platform, in preparation to loading it on its cars after it has been checked over and bills of lading issued, there is a complete delivery, even though bills of lading have not been signed. *St. Louis, I. M. & S. R. Co. v. Burrow*, 89 Ark. 178, 116 S. W. 198.

There was held to have been a delivery to the defendant railroad as a carrier, in *Coyle v. Western R. Corp.* 47 Barb. 152, where it was shown that a quantity of barrels was received at one of the freight houses of the company at the usual place for transacting such business, by persons in its employ, the defendant's agent himself being present when a portion of the property was delivered, and directing where it should be put. It had been the custom of the railroad to give receipts for all freight taken in, and this was omitted as to the property in question, but the court held that the taking of a receipt was not essential to complete the delivery, and likewise that the failure to count, check, and enter the barrels for shipment could not in any way affect the delivery.

Partial delivery.

Where part only of a shipment of goods is delivered to a railroad company, such part to be held until the receipt of the remainder, the goods in the hands of the company are held by it only in the capacity of warehouseman, such delivery being incomplete. *Missouri P. R. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712.

And so, when goods are deposited with a carrier's agent with the understanding that they are to be held until one of the articles is crated, the company is not liable for the shipment as a carrier. *Fisher v. Lake Shore & M. S. R. Co.* 17 Ohio C. C. 491, 9 Ohio C. D. 413.

At warehouse.

Where property is in the possession of

upon the company's cars in this manner by the shipper, and the company's agent informed of the fact. And where the owner of lumber ordered a car in which to load lumber for the purpose of shipment, and the carrier, in pursuance of such order, placed a car on one of its side tracks for such purpose, and after the car was loaded, but before the carrier had been notified that it was ready for shipment, or had been apprised of the name of the consignee, it caught fire, and the lumber was destroyed, it was held that, as the carrier had not been notified that the car was ready for shipment, nor the name of the consignee given him, there was not such a delivery of the goods as to render him liable as a common carrier."

a carrier for transportation, and nothing further remains for the owner to do before shipment, the carrier is liable as such for its loss, though the property remains in its warehouse or depot. *Grand Tower Mfg. & Transp. Co. v. Ullman*, 89 Ill. 244.

Goods deposited with a carrier by their owner for shipment, and placed in the carrier's warehouse for its own convenience, to await the usual trains, are held by the carrier in its capacity as such, and in such capacity it is liable for their loss. *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222.

Where there is an arrangement between a shipper of grain and a carrier by which grain is consigned to an elevator for storage, and from there loaded upon cars as supplied by the carrier over a switch running to the elevator, storage charges to be paid by the shipper, such arrangement has been held so far a substitution by the carrier of the elevator for freight houses of its own, that, under an express contract for the carriage of grain at a fixed rate until notice to the contrary, a delivery of grain at and its transfer into the elevator, accompanied by notice from the shipper that it was so delivered and stored ready to be transported according to the contract, is a delivery to the carrier. *Thayer v. Burchard*, 99 Mass. 508.

And in *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427, in correcting a charge which advised the jury that the liability of a carrier did not commence while goods were still in a warehouse, the court said: "The general and well-settled rule in relation to the responsibility of a common carrier is that it commences whenever and as soon as goods have been delivered to and accepted by him solely for the purpose of their transportation. And this is to be so although they are not immediately put in *itineris*, but are first, for his own convenience and as only preparatory to the voyage or journey, temporarily deposited on his wharf or in his store. In such case the deposit is a mere accessory to the carriage, and does not postpone the commencement of his liability 32 L.R.A. (N.S.)

The case last referred to in the text is *Basnight v. Atlantic & N. C. R. Co.* 111 N. C. 592, 16 S. E. 323. Mr. Justice MacRae, who delivered the opinion of the court, in discussing this proposition, says: "Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load lumber to go to Philadelphia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of the 24th of December, but did not notify defendant's agent that the car was ready for shipment, nor of the name of the consignee. Treating the loading of the car upon defendant's track as a delivery to defendant, and an acceptance, it was not

as a common carrier to the time when they shall be actually put in motion towards the place of their destination."

But the storing of grain in a carrier's warehouse and on adjacent platforms, with the mere permission of the carrier and on its promises to ship the grain as soon as cars could be procured, is not a delivery to the carrier for transportation, where the latter issues no receipts for such grain, and the shipper continues to look after and take care of it. *Illinois C. R. Co. v. Hornberger*, 77 Ill. 457.

Wheat deposited in a railroad company's warehouse awaiting orders for transportation has not been delivered to the company as a common carrier. *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515.

Taking goods intended for shipment to a carrier's warehouse after business hours, when no one was in charge and the same was closed and locked for the night, and depositing them inside by opening an upper door, is not a delivery which will bind the carrier. *Spofford v. Pennsylvania R. Co.* 11 Pa. Super. Ct. 97.

The weighing of grain into cars in a warehouse, preparatory to shipping on a vessel, each car being tallied, and the weight agreed upon by the warehouseman and the mate of the boat before such car left the warehouse to be drawn to the dock by the warehouseman, and thence discharged into the vessel, did not constitute a delivery so as to bind the carrier before the grain was actually on board its vessel. *Glass v. Goldsmith*, 22 Wis. 488.

The mere delivery of warehouse receipts to a carrier, with an order on the warehouseman for the surrender of the goods to the carrier, does not constitute a delivery of the goods to the latter. *Stewart v. Gracy*, 93 Tenn. 314, 27 S. W. 664.

In *Reed v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 176, where the delivery of certain shipments of peaches was in question, it appeared that the plaintiffs occupied a portion of the defendants' warehouse as a place of deposit for their peaches, that they overhauled them while in this warehouse, sorted and prepared them

yet ready for transportation, for the defendant had not been notified of its readiness, nor to whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. *O'Neill v. New York C. & H. R. R. Co.* 60 N. Y. 138; *Wells v. Wilmington & W. R. Co.* 51 N. C. (6 Jones, L.) 47, 72 Am. Dec. 556; *Angell, Carr.* § 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation."

Besides the foregoing authorities, counsel cite *Stapleton v. Grand Trunk R. Co.* 133 Mich. 187, 94 N. W. 739; 5 Am. & Eng. Enc. Law, p. 184; *Grosvenor v. New York C. R. Co.* 39 N. Y. 34; *Tate & Co. v. Yazoo & M. Valley R. Co.* 78 Miss. 842, 84 Am. St. Rep. 649, 29 So. 392; *St. Louis, I. M. & S. R. Co. v. Murphy*, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; *Missouri P. R. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712; and several other cases,—all of which seem to be in point in their fa-

vor. The relation of common carrier and shipper not having arisen, the railway company's liability was that of a warehouseman, and it was only liable for failure to exercise ordinary care. It was error to charge it with a higher degree of responsibility. "The strict rules making the carrier an insurer of the safe delivery of goods intrusted to it have no application where the relation of the parties is not that of carrier and consignee or owner, or where the relation, though previously existing, had come to an end at the time the delivery was made. In such cases the carrier is liable only for losses resulting from its own negligence." 5 Am. & Eng. Enc. Law, 2d ed. p. 212.

There were several other errors assigned by counsel; but, upon the relation of the parties being fixed, they are not liable to appear again. We do not therefore feel called upon to discuss them.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

Dunn, Ch. J., and Hayes and Turner, JJ., concur. Williams, J., disqualified, not sitting.

for transportation, sold and otherwise disposed of them after they had been deposited there. And, further, that when the plaintiffs put their peaches on board the cars at the depot, they rendered an account of the number of baskets and crates to the authorized agent of the defendants, who thereupon made or caused to be made an entry thereof on the forwarding book. The court, charging the jury, said: "If the plaintiffs merely used the warehouse of the defendants as a matter of convenience to themselves as a place of deposit for their fruit to await transportation, when it should be put in a proper condition or state of preparation for that purpose, or to take the chances for cars on which to ship it, no responsibility thereby attached to the defendants. The mere fact of the deposit of the peaches in that portion of the defendants' warehouse which was in the exclusive possession of the plaintiffs, or on the platform or side tracks of the railroad, would not constitute such a delivery to and acceptance by the defendants as would fix their responsibility as common carriers. In other words, if the plaintiffs still held the possession and continued to exercise the exclusive control over the peaches, until they were placed on the cars, and the agent of the defendants was furnished by the plaintiffs with the amount or quantity of baskets and crates shipped, the defendants are not responsible for any loss or injury that occurred before that time. . . . But if there was consent or an agreement on the part of the defendants to consider and recognize a deposit in the warehouse occupied by the plaintiffs, or on

the platform or side tracks of the railroad, a delivery to them and an acceptance by them, or if there was such an agreement, arrangement, or understanding between the plaintiffs and the authorized agent of the defendants, it would be a sufficient delivery and acceptance to fix the liability of the defendants, and their liability would commence from the time of such delivery or deposit."

And so, in *Truax v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 233, the court, instructing the jury as to what would constitute a delivery of a shipment of peaches, said: "But peaches placed by the owner in the old granary or storehouse at Smyrna station, the use of which had been granted to him as a privilege and for his own convenience, to await shipment next day, should not be considered a delivery to the railroad company, so as to charge them as common carriers. Nor can the mere placing of them on the ground at or near the railroad station, without their being taken in charge by the agent of the company, be considered such a delivery. But if the peaches were placed on the ground and left there for transportation by direction of the proper right of the company, it would amount to a sufficient delivery and acceptance to charge them as common carriers."

On side-tracked car.

Where the shipper undertakes to load goods upon the cars, such loading is not so inconsistent with the carrier's possession and control as to postpone the time

of delivery until the loading is complete. And the carrier's liability attaches when the freight is offered.

Thus, in *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79, which was an action for the recovery of damages due to the destruction of a quantity of baled hay, it was held that the delivery of the hay in the defendants' freight house was sufficient to put upon the company the liability of a common carrier, although it remained for the shipper to load as cars were furnished. It was said in the course of the opinion: "Although a railroad company may not be able promptly to transport freight delivered to it, and there may be considerable delay and even long storage of the freight until cars can be furnished, nevertheless it takes on the character of a common carrier the moment the property is delivered and received by it for immediate transportation. It can make no difference whether the railroad company was to place this hay in its cars, or whether the shippers were to do that work. Whoever was to load the hay into the cars, it was delivered and received for immediate shipment not for storage, not to be kept for the shippers, and not subject to their control, and it was not in their custody. It was simply left in the freight house of the railroad company until it could furnish cars for its transportation. It was there for immediate shipment, with nothing more to be done than to place it in the cars, and whether that work was to be done by the railroad company or by the shippers can make no difference in reason or principle."

In *Pittsburg, C. C. & St. L. R. Co. v. American Tobacco Co.* 126 Ky. 582, 104 S. W. 377, a shipment of tobacco which had been loaded upon the company's car furnished by it on a private switch, notice of the loading having been given to the railroad when it was taking place or just previous thereto, was held to have been delivered to the defendant. As to the place of delivery the court said: "We do not deem it material that appellant did not own nor control the siding where it had placed its car to receive the tobacco. It had assumed to receive it at that point, and had caused its car to be placed there for that purpose. It thereby constituted the warehouse side track the place for the reception of the freight, and is bound by the fact as much so as if it had been upon its own siding or at its regular freight station in the city. . . . Where the parties adopted such point as the proper place for the loading of such freight, and the goods are actually loaded onto the cars placed at that point by the carrier for that purpose, the result, as fixing the carrier's liability upon its contract to safely carry and deliver the goods, is no wise different from what it would be if it had received goods into its freight depot for the same purpose." And as to the sufficiency of the notice it was said: "Nor do we find merit in appellant's contention

that it was not notified of the loading of the tobacco after it was loaded. It was notified of the shipper's purpose to load it at the warehouse, and placed its car there to receive it. It signed the bill of lading evidencing its receipt, which was of itself notice that the car had been or was being loaded. When the car was loaded and sealed a further notice of that fact was not necessary to apprise the carrier of what it already knew, namely that it was ready for shipment; for notice might be given in advance or might even be waived. When the tobacco was actually delivered into the carrier's car, in accordance with the bill of lading, its physical delivery to the carrier for the purpose of transportation was completed."

The defendant railroad company, in *Pine Bluff & A. River R. Co. v. McKenzie*, 75 Ark. 100, 86 S. W. 834, was held liable for the loss of certain cotton seed, the court deciding that there had been a delivery to the company in view of the fact that the cars were left on its side track in pursuance of the usual custom, with an implied agreement that they would be removed the following day, if loaded, and carried to their destination, and that they were loaded and notice of that fact given to the carrier.

In *Texarkana & Ft. S. R. Co. v. Rosebrook-Josey Grain Co.* 52 Tex. Civ. App. 156, 114 S. W. 436, a railway company carried on a service of switching cars over its switch tracks to and from the transfer tracks of other lines of railroads, to warehouses and places of business located along its switch tracks. It had also adopted the custom of receiving cars when loaded on its switch tracks, and undertaking to deliver them to the transfer tracks at other points in the railway yards, and it was held that certain cars which had been loaded and sealed had been delivered to the company, everything having been completed which the shipper could do, and the agent of the railroad having been notified and having agreed to move them.

There was held to have been a delivery to a railroad company as a carrier of a shipment of cotton, in *Illinois C. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301, where, according to the custom, the shipper had been furnished a car on a convenient side track in accordance with his request, had loaded the same, notified the company's agents to that effect, and presented to them manifests of the number of bales and amount of charges.

In *St. Louis, I. M. & S. R. Co. v. Murphy*, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419, a shipper of cotton notified the carrier that he required a car, and, as was their custom, the company placed one at his disposal on its own switch at a flag station. When he had finished loading the shipper closed the car, filled out the blank form of receipt to be signed by the conductor, and notified the same agent who had furnished the car that the cotton was loaded and ready for shipment. The court

held that he had done all that was required of him before shipment, and that what remained was exclusively the work of the carrier. It appeared that the conductor was to come along, take the car, check the cotton, and issue the receipt, and that the car was to be moved before the consignee presented his receipt to the agent and received the bill of lading, so that, in view of the custom, the delivery was not affected by the absence of the bill of lading, and the carrier was liable for loss of the shipment while the car remained on the switch.

But the mere loading of a car furnished by a carrier on one of its switches, without notice to the carrier's agents that it is ready for shipment nor of the name of the consignee, is not a delivery. *Basnight v. Atlantic & N. C. R. Co.* 111 N. C. 592, 16 S. E. 323.

Where there was a custom for shippers of cotton to load cars left upon a convenient siding, flag a freight, and deliver such car or cars to its conductor with an account of the shipment, there could be no delivery to the carrier until the conductor of the freight which was to take the car had notice of the items, its destination, and its readiness for transportation. *Tate v. Yazoo & M. Valley R. Co.* 78 Miss. 842, 84 Am. St. Rep. 649, 29 So. 392.

It was held in *Houston & T. C. R. Co. v. Hodde*, 42 Tex. 467, that cotton which had been loaded by the shipper upon cars switched to his private warehouse was not in the possession of the carrier, where the latter had no notice that the cotton was ready for shipment, and the carrier's agent had not taken count of the same and given receipts for it, as was the custom as soon as the cars were ready.

The delivery of a car of goods which had been loaded at the shipper's warehouse on a side track constructed for his convenience was in question in *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* — Tenn. —, — L.R.A.(N.S.) —, 134 S. W. 613. The view of the court is best expressed in the language of the opinion: "It will be noted that two things remained to be done in order to complete the relationship of shipper and carrier as to the car in controversy. One of these things was to be done by the shipper; that is, the preparation and presentation for signature of the bill of lading. This was never done by it. One thing also remained to be done by the carrier to complete the relation, to wit, the taking of the car into possession. This could have been done by the carrier in two ways,—if it had signed the bill of lading, which act would have amounted to constructive possession, inasmuch as the material was already loaded into the car, and the car was standing on the siding accessible to the main track. Or if the carrier had taken actual possession of the car by pulling it out onto the main track, this would be taking of possession by the carrier; but inasmuch as one thing remained to be done by the shipper, and one thing remained to be done by the carrier, 32 L.R.A.(N.S.)

in order to complete the relation of carrier and shipper, the conclusion appears that this relationship did not exist between the parties to this suit as to the car in controversy. Until these two things were done, necessary to create the relationship, the possession of the material in the car and the possession of the car was with the complainant."

And where it was the unvaried custom for a railroad to require from all shippers a bill of lading before forwarding goods received for shipment, the loading of certain goods on the company's car, although the packages were addressed properly to a consignee, was held not a delivery to the railroad as a carrier. *Louisville & N. R. Co. v. United States*, 39 Ct. Cl. 405. It appeared in this case that the goods were loaded upon the company's car at a navy yard, and conveyed by an electric company to the yard of the railroad, all without the knowledge of the latter company, and without shipping directions. Failing to receive such instructions by the afternoon of the following day, the agent caused the shipment to be unloaded and stored, awaiting instructions. While in the storehouse and before bill of lading or other instructions were received, the goods were destroyed.

In *Burrowes v. Chicago, B. & Q. R. Co.* 85 Neb. 497, — L.R.A.(N.S.) —, 123 N. W. 1028, it appeared that the plaintiff desired to move his traveling show to the next town, and applied to the railroad company for a car. This he partly loaded, but kept out certain things needed over night, intending to finish the loading the following morning. Meantime the car was destroyed by fire, and the court denied the company's liability as a carrier, saying as to the fact of delivery: "It seems clear in the case at bar that there was no delivery of the plaintiff's goods for immediate shipment; that while it is true the car was on defendant's side track, yet it was in the possession of the plaintiff. He had only loaded a part of the goods for shipment, and it had been agreed that the remainder of them should not be loaded until the following morning, at a time subsequent to the destruction of the car by fire. No bill of lading had been issued by the company, no receipt for the goods had been given, and it still remained for the plaintiff to finish loading the car, to notify the defendant when he had done so, to furnish weights and contents after which the rate for transportation was to be fixed by the agent, before the car was sealed and ready to go forward to its place of destination."

It was held in *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335, that the railroad company was not liable as a carrier for a shipment of baled hay destroyed while standing upon cars in the yards of the company, because there had been no delivery, the hay having been held after it was loaded at the request of the shipper, until he could see the buyer.

In the absence of custom to the contrary, the mere loading of property upon a car is not a delivery to the carrier where its agent, upon being notified of the loading, refuses to receive the shipment. *Yoakum v. Dryden*, — Tex. Civ. App. —, 26 S. W. 312.

At unusual place.

It has been held generally that the deposit of goods intended for shipment along or near the tracks of a common carrier, or elsewhere than at the regular places fixed for receiving freight, is not a delivery to the carrier so as to render it liable for such goods previous to their receipt into its actual custody.

Thus, it was held in *Wells v. Wilmington & W. R. Co.* 61 N. C. (6 Jones, L.) 47, 72 Am. Dec. 556, that the deposit of some barrels of turpentine on the roadside where articles were sometimes taken aboard the defendants' trains, but where there was no depot or agent, was not a delivery, notwithstanding the promise of a conductor to stop and take up the shipment.

The deposit of goods at a switch where there is no agent, depot, or platform is not a delivery, where the custom of the carrier has been to receive goods for shipment from such point only after they have been loaded directly upon the car. *Kansas City, M. & B. R. Co. v. Lilly*, — Miss. —, 8 So. 644.

The delivery of cord wood to a carrier was in question in *Wilson v. Atlanta & C. R. Co.* 82 Ga. 386, 9 S. E. 1076, where the wood in question was piled along the line of the carrier's road preparatory to shipping, but immediate transportation was not expected, no definite time was fixed, and the quantity was such that several trains would be required to handle the shipment. The court held that there was no delivery, because it clearly appeared that, under the system which both parties had in contemplation, it was expected that the shipper would load the cars himself, or have it done by the company at his expense, before the delivery was consummated. In the course of the opinion it was said: "The great and controlling question in the case was as to whether the wood was delivered to the company and accepted by it for shipment. The court charged the jury, in substance, that delivery is complete when, actually or in legal effect, the possession is surrendered to the carrier, and the owner abandons all control over the goods until the carriage is complete, and that not until this has been done does the responsibility of the carrier commence, either for loss or detention. Also, that if deposit along the line was made for the convenience of the owner in delivering at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, the wood was not accepted for shipment, and the carrier's responsibility would not begin 32 L.R.A. (N.S.)

until something more was done to accomplish the bailment. Also, that if plaintiff's vendors deposited the wood in this way, and continued to exercise acts inconsistent with its exclusive possession and custody by the company as a common carrier, the bailment would not begin until there was a complete surrender by the plaintiff to the carrier for shipment. Under the facts in evidence, and according to the authorities, these instructions were correct."

While ordinarily there can be no delivery of freight to a carrier by depositing the same elsewhere than at stations, if goods are deposited for immediate transportation at an agreed point, such deposit constitutes a good delivery to the carrier, whose liability commences from the time of such deposit. *Georgia S. & F. R. Co. v. Marchman*, 121 Ga. 235, 48 S. E. 961.

And where, by express arrangement or by implications through established usage, shipper and carrier have agreed upon the deposit of goods for transportation at a particular place, a deposit made in conformance with the custom constitutes a delivery to the carrier, without the necessity of giving notice. *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344.

In *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264, there was held to have been a delivery to the carrier of certain goods which had been deposited at a depot by agreement with the express company, where the company had due notice thereof.

And where the delivery of property to carrier at a place other than the regular receiving office is by the direction or with the assent of the company's agent, there is a delivery to the company. *Phillips v. Earle*, 8 Pick. 182.

In an action for breach of contract in failing to transport a large quantity of staves and heading, it was held that the deposit of such staves contiguous to the railway company's track, at the usual or properly designated place, with a request to the company to furnish cars and receive the property, relieved the shipper from making any further delivery or offer to deliver. *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370.

Where it has been customary for an express company to receive for shipment packages left at a railroad depot with employees of the railroad, a delivery in accordance with such custom is a delivery which will bind the express company as a common carrier. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

The rule that the placing of goods in a condition to be carried at the usual place of loading, and in pursuance of the usage of the parties, constitutes a delivery, was applied in *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296, where the shipment in question was a quantity of baled hay piled at a point adjacent to the carrier's tracks.

On vessels.

Where freight to be transported on board a vessel cannot be loaded immediately on board, and lighters are sent by the vessel to bring the goods from the wharf, such goods are delivered to the ship from the time they are placed on the lighter. *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, 16 L. ed. 599; *Insurance Co. of N. A. v. North German Lloyd Co.* 106 Fed. 973; *Campbell v. The Sunlight*, 2 Hughes, 9, Fed. Cas. No. 2,368; *The Edwin v. Naumkeag Steam Cotton Co.* 1 Cliff. 322, Fed. Cas. No. 4,301; *The Oregon*, Deady, 179, Fed. Cas. No. 10,553.

Where the slings used for hoisting freight from a lighter to the deck of a boat, including the horses, belong to the boat or to the stevedores, the responsibility of the lighterman ceases, and the duty of the carrier begins, when the cargo is properly placed on the slings and hooked to the tackle. *The Cordillera*, 5 Blatchf. 518, Fed. Cas. No. 3,229a.

A delivery of goods upon the wharf at which a vessel is loading is a delivery to the vessel, which will bind her owners as common carriers. *The Oregon*, Deady, 179, Fed. Cas. No. 10,553.

It was held in *Petersburg, N. N. & N. S. B. Line v. Norfolk-Virginia Peanut Co.* 24 L.R.A.(N.S.) 569, 96 C. C. A. 383, 172 Fed. 321, that a lien exists against a vessel for the safe carriage of cargo from the time it is delivered to the vessel's agent on the wharf, and his bill of lading is issued therefor, so that it will be liable for the loss of the property in attempting to transfer it from the wharf to the vessel in a lighter.

But the liability of a canal boatman for a box of goods was denied in *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475, for lack of proof of delivery, it appearing that the box in question was one of a shipment of five claimed to have been deposited on the dock near the boat, but that notice of four boxes only was received by the carrier, as evidenced by the receipt and the invoice.

Live stock.

Where cattle, in contemplation of a shipment, are placed in stock pens provided by a railroad company for that purpose, there is a delivery to the company, so that it becomes liable as a carrier provided it has notice. In such cases, said the court in *Mason v. Missouri*, P. R. Co. 25 Mo. App. 473, "the deposit is a mere accessory to the carriage, and does not postpone his liability as a common carrier to the time when they shall be actually put in motion toward their place of destination."

It was held in *Lackland v. Chicago & A. R. Co.* 101 Mo. App. 420, 74 S. W. 505, that the receipt by the defendant railroad company of certain live stock in its pens, that being the usual place for receiving such freight for shipment, as directed by the representative of the company, con-

stituted a complete delivery to the railroad as a carrier.

Cattle which had been placed in pens maintained by a carrier for receiving stock, by direction of a railroad company's agent, and partly loaded on the cars, were held to have been received by the company as a carrier, in *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

Evidence showing that cattle were placed in a carrier's pens at or about the time the shipment should have been made, and the carrier's agent notified of the fact, who said it was all right, but that the train was late, was held fairly to tend to show a delivery of the stock, in *Nelson v. Chicago, B. & Q. R. Co.* 78 Neb. 57, 110 N. W. 741.

Where but one of three cars of live stock was loaded in time for the departure of the defendant's regular stock train, the delay not being the fault of the shipper, it was held that, in showing the stock to be partly loaded in the car and the remainder in defendant's pens, there was undoubtedly a delivery to the defendant for shipment. *Moss v. Missouri, K. & T. R. Co.* — Mo. App. —, 134 S. W. 1070.

But it was said in *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 402, 100 Fed. 359, to be a sound legal proposition that the delivery of live stock in the pens constructed in a railroad company's yard for that purpose, to await shipment, is not a delivery which makes the railroad liable as a carrier.

And live stock placed in the pens provided for that purpose by a railroad company, for the mere convenience of the owner, with the intention on his part to remove them for feeding the following day, previous to shipment, are not in the possession of the company as carriers. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816, 103 N. W. 678.

The evidence in *Ft. Worth & D. C. R. Co. v. Riley*, — Tex. App. —, 1 S. W. 446, was held insufficient to show a delivery of certain cattle to the defendant as a carrier, it appearing that they were placed in pens belonging to the carrier with the mere permission of its agent, who failed to give a bill of lading, but promised to do so the following day.

It was held in *Bowie v. Baltimore & O. R. Co.* 1 MacArthur 94, that the owner of certain horses did not deliver them to the defendant railroad so as to render the company liable for injuries to the horses in loading on the cars, because the management of the loading was in the hands of the owners' own servants.

Nor is the redelivery to the carrier where cattle are placed in stock pens provided by the railroad company for that purpose, except where the carrier itself undertakes to load the cattle upon the cars. *Kansas City, P. & G. R. Co. v. Barnett*, 69 Ark. 150, 61 S. W. 919.

A carrier was held liable for injuries to a horse received while loading by the

breaking of a defective chute leading from the stock pen into the car, in McCullough v. Wabash Western R. Co. 34 Mo. App. 23. Although the owner himself did the loading, the court said the delivery of the horse at this pen and on the chute provided by the railway company, and by its agent designated as the appliance to be used in loading the car, was a sufficient delivery upon which to charge the company if it proved defective and damage resulted. This decision apparently goes no further than to hold the carrier to the liability of warehouseman, for the point as to the delivery is thus qualified: "It was not such a delivery, perhaps, as imposed the rigorous liability of an insurer, but it was such as would impose liability for defects in the car, chute, or other appliances provided by the company for transportation of the plaintiff's stock." W. A. S.

TENNESSEE SUPREME COURT.

AMERICAN LEAD PENCIL COMPANY,
Appt.,
v.
NASHVILLE, CHATTANOOGA, & ST.
LOUIS RAILWAY.

(— Tenn. —, 134 S. W. 613.)

Pleading — variance — contract — custom.

1. An action against a carrier for loss of a carload of goods because of its failure to remove it promptly when loaded, as required by contract, cannot be sustained merely by proof of usage or custom to remove cars under such circumstances, where knowledge of it is not shown to have been brought home to the officers of either the shipper or the carrier who were clothed with authority to make a contract.

Carrier — tender for shipment — liability.

2. Notifying a carrier that a car on a private switch is loaded and ready for transportation is not a delivery of the goods to it, so as to charge it with liability as carrier, where no bill of lading has been presented for signature, and its rule is not to move loaded cars from the station until a bill of lading has been signed, and the car had not been taken into its possession.

Proximate cause — burning of freight — act of shipper.

3. The act of the employee of a shipper in overturning an oil stove and setting fire to a warehouse in front of which is situated a carload of merchandise ready for shipment, but which had not yet been delivered to the carrier, which fire communicates to and consumes the car, and not the negligence of the railroad company promptly to

move the car when it was loaded, is the proximate cause of the loss of the goods in the car.

(February 4, 1911.)

APPEAL by plaintiff from a decree of the Chancery Court for Davidson County, dismissing a bill filed to recover damages for loss of a carload of goods by fire alleged to have been caused by defendant's failure to remove it when loaded, as required by a contract between it and plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Smithson & Armstrong and Vertrees & Vertrees for appellant.

Mr. Frank Slemons, for appellee:

The delay in removing the car was not the proximate cause of the injury.

State v. Ward, 9 Heisk. 105.

Whatever may have been the fault of the railway company, before the plaintiff can recover, it must be free from negligence or fault which contributed to its loss.

Chattanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616; Nashville R. Co. v. Norman, 108 Tenn. 326, 67 S. W. 479; Barr v. Southern R. Co. 105 Tenn. 544, 53 S. W. 849.

Where delay is the remote cause of the injury, no damages can be recovered on that account.

Ashe v. DeRossett, 50 N. C. (5 Jones, L.) 299, 72 Am. Dec. 552; Batchelder v. Sturgis, 3 Cush. 201; Lowenstein v. Chappell, 30 Barb. 241; 1 Sutherland, Damages, § 46.

Mr. Claude Waller also for appellee.

Buchanan, J., delivered the opinion of the court:

The American Lead Pencil Company filed its original bill in the chancery court of Davidson county against the Nashville, Chattanooga, & St. Louis Railway. This bill was based on the alleged breach of a contract, and the alleged loss to complainant of a carload of pencil and penholder material, the value of which is set out in the bill to be \$2,900; but the proof shows the value of the contents of the car to have been \$2,451.97.

This carload of material was destroyed by fire on October 24, 1904, while it was standing on a siding near the warehouse of complainant in the town of Lewisburg, Tennessee. The car had been placed on the siding by defendant at complainant's request, in order that the material might be loaded into the car. The loading was finished on October 22, 1904, near the hour of noon.

Complainant's contention, averred in the

Note. — As to what constitutes delivery of freight to carrier, see note to Kansas City, M. & O. R. Co. v. Cox, ante, 313. 32 L.R.A. (N.S.)

bill, was that, whensoever complainant should apply for an empty car in which to ship his products, defendant was bound to furnish the car under the contract forthwith and as soon as it could be done, and that, upon receipt of notice from complainant that said car was loaded and ready for shipment, the defendant was bound forthwith to remove the car from the spur track, or siding, and start the same toward its destination promptly.

Complainant averred in its bill that, when the carload of material in controversy was loaded and ready to be moved from the siding, it (the complainant) gave to the defendant immediate notice thereof, but that the defendant failed to promptly move the car from the siding, and allowed several of its freight trains to pass and leave the car standing on the siding, and that this default on the part of defendant was the proximate cause of the loss of the car by fire.

The fire which consumed the car and its contents originated in the warehouse office of complainant, as the result of the accidental overturning of a coal-oil heating stove. This stove was overturned by one of the employees of the complainant.

The defendant answered the bill, and denied the existence of the contract sued on, and denied all of the material averments of the bill, and further set up, by way of defense, the statute of limitations of three years; but this defense of the statute of limitations was abandoned on the filing of an amended and supplemental bill by the complainant showing matter in avoidance of the statute.

Proof was taken on both sides, and on final hearing the chancellor dismissed the bill, and made a memorandum of his opinion a part of the record in the cause.

The complainant appealed to this court.

After a very careful review of all the evidence in this cause, we are unable to reach the conclusion that any contract of like tenor and effect to that averred in the bill was ever in existence between these parties. No one of the witnesses who testified in the cause had ever seen such a contract, or had any knowledge of its existence. A usage, or course of dealing, of like character to that which the bill avers was required by the contract, undoubtedly did exist between the parties, as shown by the proof, and there was much evidence that this usage was a custom between the parties, and this usage seems now to be relied on by the complainant as constituting the contract set out in the bill.

We cannot bring ourselves to the conclusion that a bill which bases the complainant's right to recover upon the breach

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of a contract can be sustained by proof of a usage and no proof of a contract, or by proof of a custom and no proof of a contract. A contract is created by act of the parties. It may be either expressed or implied. It may be either written or oral. It must result from a meeting of the minds of the parties in mutual assent to its terms. It must be founded on a sufficient consideration. It must be mutual, free from fraud or undue influence, not against public policy, and sufficiently definite. See 9 Cyc. Law & Proc. pp. 241, 242, and note 1, p. 141.

Usage and custom, on the other hand, in legal contemplation, differ radically in many respects from a contract. Usage is a repetition of acts, and is distinguished from custom in that usage is a fact, while custom is a law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists in the repetition of acts, and custom arises out of this repetition. Esriche's Dict. of Jurisprudence, quoted in *Cutter v. Waddingham*, 22 Mo. 206-248, and cited in 12 Cyc. Law & Proc. p. 1030, note 1.

Usage, then, as we have seen above, is the germ which, by constant repetition, and general use, and great antiquity, develops into custom; and custom, when fully developed, is a law. The distinction thus drawn between contract and usage or custom is quite apparent. Where a contract between parties is shown to have existed, and is indistinct or ambiguous or uncertain in its terms, usage or custom on the particular point will be accepted, like the general law, not in contradiction of the stipulations of the contract, but in explanation of what is indistinct in it, and as furnishing the rule where it is silent. See *Charles v. Carter*, 96 Tenn. 614, 36 S. W. 396. Usage ought never to be allowed to vary or contradict the written instrument, either expressly or by implication. See *Bedford v. Flowers*, 11 Humph. 242. But usage cannot make a contract where there is no contract, nor prevent the effect of the settled rules of law. See *Charles v. Carter*, supra.

It follows from the foregoing that to permit the complainant to maintain its bill based upon the breach of a contract by proof of the breach of a usage is to permit complainant to profit by a variance between its bill and its proof. The proof does not connect the defendant with the loss, if the contract was in fact nonexistent, and if there was no contract, there was no breach; and so, on the proof, the defendant would stand wholly disconnected from the loss of the property.

It is a fundamental principle that the

proof must correspond with the allegations in the pleadings. *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062; *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99; *Foster v. Jackson*, 8 Baxt. 434.

In the last-named case, the court said: "While technical forms in pleadings are not now required, still the parties should be confined to the case made in the pleadings; the proof should correspond with the allegations; the parties ought not to be allowed to charge one case in their pleadings and prove a case substantially different; and we think a charge that an attorney collected the money on a debt due his client, and failed to pay it over, is substantially different from proof that he did not collect the money, but might have done so with due diligence.

Now, reverting to the case at bar, we think there is quite a substantial difference between the averment in the bill of a loss occasioned by breach of a contract, and proof of a loss not occurring as a breach of contract at all, but of a loss occurring, as the complainant claims under its proof, by breach of a usage, which is a wholly different and distinct thing in its legal essence from a contract. We do not mean to be understood in this opinion as saying that circumstances might not arise where the courts would hold parties to a usage or to a custom,—to have created by their course of dealing an implied contract; but under the facts of this case it is clear that there was no contract between the parties to this suit, either express or implied.

The parties to this suit are respectively corporations,—one a manufacturing corporation, and the other a railroad corporation. It is not shown by the evidence in this record that the usage, shown to have existed by the proof, was ever brought to the attention of any officer of either of these corporations clothed with authority to make a contract such as is set out in the bill. The usage in this case, adopted by the inferior employees of these corporations for the convenience and mutual accommodation of the employees in handling shipments, cannot be held to have the force and effect and dignity in law of a solemn contract, either express or implied, between these corporations.

It follows from these views that there was a fatal variance between the averments of the complainant's bill and its proof, on account of which variance there could be no recovery by the complainant in the court below.

There is another view of the case, how-

ever, upon which we are equally clear that the complainant was not entitled to a recovery on the proof in this cause, leaving out of view altogether the question of contract.

The risk of a common carrier begins on delivery and acceptance of the goods. *Chitty*, Contr. 73-78; *Watson v. Memphis & C. R. Co.* 9 Heisk. 255; *Stewart v. Gracy*, 93 Tenn. 315, 27 S. W. 664.

If something remains to be done by the shipper after the goods are put into the hands of the agent of the carrier before they are to be transported, the carrier does not become liable as carrier until the goods are ready for shipment.

See 6 Cyc. Law & Proc. p. 414, and authorities cited in note 60; *Basnight v. Atlantic & N. C. R. Co.* 111 N. C. 592, 16 S. E. 323; 2 Am. & Eng. Enc. Law, p. 808; *O'Neill v. New York C. & H. R. R. Co.* 60 N. Y. 138; *Wells v. Wilmington & W. R. Co.* 51 N. C. (6 Jones, L.) 47, 72 Am. Dec. 556.

Was the delivery to the defendant as a common carrier ever completed?

Under the proof in the cause, it appears that the warehouse of complainant was located about 400 feet from the main line of the defendant, and for the convenience of complainant in 1896 a spur track was built by the defendant from the main line to the warehouse, and alongside of the same, so that defendant could switch cars alongside the warehouse, thereby enabling complainant to make convenient loading of the car. When complainant had sufficient material to load a car, it would notify defendant's agent by telephone or in writing, and a car would be delivered alongside the warehouse and there loaded by complainant, who would then notify defendant's agent that the car was ready to be pulled out, and after that, at convenient time before the car would leave Lewisburg, complainant would make out a bill of lading in writing in triplicate, and take it to the depot and have it signed. This signing of the bill of lading was usually done after the car was pulled out on the main line, and always before the car left Lewisburg; the defendant insisting on this, and refusing to pull the car out of Lewisburg until the bill of lading was signed. The complainant had scales and weighed each car, and these weights were required to be inserted in the bill of lading. No bill of lading was ever made out by the complainant for the car in controversy in this suit. There was ample time on Saturday, the 22d, after the car was loaded, there was ample time on Sunday, the 23d, there was ample time on Monday, the 24th, before the car burned, for the complainant to have

made out this bill of lading, and to have had it signed by the agent of the defendant; but this was not done, and it is admitted by the manager of the complainant, in charge at the time of the fire, that it was not done. He also admits that the defendant company always refused to move a car from Lewisburg until the bill of lading had been signed; but he claims that the defendant should have moved the car out onto the main line on Saturday or Monday, and complainant's contention is that, if this had been done, the car would not have been destroyed by the fire which consumed complainant's warehouse.

It will be noted that two things remained to be done in order to complete the relationship of shipper and carrier as to the car in controversy. One of these things was to be done by the shipper; that is, the preparation and presentation for signature of the bill of lading. This was never done by it. One thing also remained to be done by the carrier to complete the relation; to wit, the taking of the car into possession. This could have been done by the carrier in two ways,—if it had signed the bill of lading, which act would have amounted to constructive possession, inasmuch as the material was already loaded into the car, and the car was standing on the siding accessible to the main track; or, if the carrier had taken actual possession of the car by pulling it out onto the main track, this would be taking of possession by the carrier; but inasmuch as one thing remained to be done by the shipper, and one thing remained to be done by the carrier, in order to complete the relation of carrier and shipper, the conclusion appears that this relationship did not exist between the parties to this suit as to the car in controversy. Until these two things were done, necessary to create the relationship, the possession of the material in the car and the possession of the car was with the complainant. It was at his warehouse, on a siding constructed for his convenience, and most assuredly not in possession of the carrier until the carrier did either one of the two things necessary, as above shown, to transfer the possession or charge it with the possession of the car under the law.

Manifestly, on these facts, the complainant could not base a claim against the defendant under the common-carrier liability as an insurer of the goods. The controversy then narrows to this point. The complaint insists that the defendant caused the loss by not moving the car promptly when notified. The defendant answers that it was under no contract obligation to move the car, either express or implied, and that

the suit is on contract. The complainant then says that, under the usage, "you are bound to move it promptly." The defendant replies: "You did not sue on the usage. Violation of the usage is not the basis of your suit."

On each of these contentions it seems to us that the defendant has the best of the argument, and when the point is reached where we can say on this evidence that the relation of carrier and shipper did not exist between complainant and defendant as to this car, the complainant is deprived of the benefit of all the authorities on which it bases its contention as to the liability of the defendant; for it is believed that no one of the authorities upon which it relies was based on a state of facts where the relationship of common carrier and shipper did not exist. Assuming, then, that this relationship did not exist, how does the case stand as to the proximate cause of the loss? The proof is without controversy on this point. One of the complainant's employees overturned a coal-oil heating stove in the office of complainant's warehouse. The fire from the stove ignited the oil. The flames enveloped the complainant's warehouse, from which they caught and ultimately destroyed the carload of material in controversy in this suit.

At the time of the fire, as we have seen, the car was in the possession of the plaintiff, and not in the possession of the defendant. The loss occurred before the relationship of carrier and shipper existed. The loss is traceable directly to the act of one of the complainant's employees, and the complainant's act is therefore the act which wrought the destruction of its property. Its act was the proximate cause of the injury. *State v. Ward*, 9 Heisk. 105; *Lamont v. Nashville & C. R. Co.* 9 Heisk. 60; *Edgar v. Rio Grande Western R. Co.* 32 Utah, 330, 11 L.R.A.(N.S.) 738, 125 Am. St. Rep. 867, 90 Pac. 745; *Cooley, Torts*, 2d ed. 73-76; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 130, 24 L. ed. 398; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 587, 11 C. A. 253, 24 U. S. App. 7, 63 Fed. 400; *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *Memphis Street R. Co. v. Wilson*, 108 Tenn. 618, 69 S. W. 265; *Nashville R. Co. v. Norman*, 108 Tenn. 331, 67 S. W. 479; *Saunders v. City & Suburban R. Co.* 99 Tenn. 135, 41 S. W. 1031; *Barr v. Southern R. Co.* 105 Tenn. 547, 58 S. W. 849.

In the case of *Lamont v. Nashville & C. R. Co.* 9 Heisk. 59, this court said: "None of the cases cited in support of this conclusion go to the extent of holding

that the delay to ship or start goods to their destination within a reasonable time, after left for transportation, will amount to such neglect as of itself to make the carrier liable for the loss occasioned proximately by the 'act of God.'

"On the contrary, all the cases cited are cases in which the assumed negligence, or want of due diligence and care, occurred at the time of the loss, and while the goods were *in transitu*."

If mere delay to ship or start goods to their destination within a reasonable time after they are left for transportation does not amount to such neglect as will make the carrier liable for the loss of goods occasioned proximately by the act of God, it is difficult to see how we could hold that mere delay on the part of this defendant company to remove this car as promptly as it might have done, when the car was not in its possession, not *in transitu*, not covered by a bill of lading, and when the complainant had not surrendered possession of it, will amount to an act of negligence by defendant which we can say was the proximate cause of the loss of the car by the fire.

Even in cases where the relationship of common carrier does exist, the common carrier is not liable where the loss is caused by the shipper's act, whether that act be one of negligence, or misadventure, or misfortune.

See Hutchinson, Carr. 1st ed. §§ 265-328; Elliott, Railroads, § 1454; St. Louis, I. M. & S. R. Co. v. Law, 68 Ark. 218, 57 S. W. 258; Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597; Coweta County v. Central R. Co. 4 Ga. App. 94, 60 S. E. 1018; 6 Cyc. Law & Proc. p. 379; 5 Thomp. Neg. § 6404.

The decree of the Chancellor will be affirmed, with costs.

TEXAS COURT OF CRIMINAL APPEALS.

ISAAC FORCY, alias Will Jones,
v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 131 S. W. 585.)

Forgery — order for goods.

1. An order upon a merchant purporting to be signed by one having credit with him, requesting the filing of an order to a certain amount, is the subject of forgery, and one who, without authority, signs the customer's name to such instrument, and presents it, and receives goods upon it, will be guilty of that offense, although it is not made 32 L.R.A. (N.S.)

payable to bearer, and does not in terms obligate the customer to pay for the goods.

Appeal — statement in motion — evidence of facts.

2. A mere statement in a motion for new trial of a prosecution for forgery, that there was a variance between the instrument set out in the indictment and that produced at the trial, is not sufficient to warrant a presumption by the appellate court that such variance existed, if there is nothing in the evidence or findings to show that it did exist.

(October 26, 1910.)

Note. — Order or request for goods as subject of forgery.

On the question of order for goods in carrier's possession as subject of forgery, see State v. Webster, post, 337, and note thereto appended.

Distinction between "order" and "request," —early English cases.

The statute of 7 Geo. II. chap. 22, denounced the forgery of a warrant or order for the delivery of goods, and the courts held that, to be within this act, the order should purport to have been made by a person having authority to command the delivery, and to have been compulsory upon the person having the goods in possession, or the existence of such conditions should be shown by averment; and that a mere request to supply goods on credit, compliance with which was optional with the addressee, was not within the act. This view was taken in *Rex v. Clinch* (1791) 1 Leach, C. L. 540, 2 East, P. C. 938, where the court seemed to regard the presence of the foregoing requisites as negatived by the fact, among others, that the writing was addressed to no one. It appeared in evidence that the person whose name was signed owned the goods, but the case fell for the lack of averment to that effect in the indictment.

So, the requirements of this statute, as so construed, were held to be satisfied neither by a signed paper intended to induce a tradesman to let bearer have certain goods and oblige (*Rex v. Williams*, [1775] 1 Leach, C. L. 114, 2 East, P. C. 937); nor by one directed to a shopkeeper reading: "I desire you to let this woman have [certain goods], and I will see it paid for." *Mitchell's Case*, Fost. C. L. 119, 2 East, P. C. 936.

Of course, the requirements of the act were held to be satisfied by a paper reading: "Please deliver my work to bearer," and intended to obtain delivery of articles belonging to the person whose name was thereto signed. *Rex v. Jones* (1764) 1 Leach, C. L. 53, 2 East, P. C. 941.

—as affected by act 1 Wm. IV.

The rule that a mere request for the delivery of goods was not an indictable of-

A PPEAL by defendant from a judgment of the District Court for Caldwell County convicting him of forgery. Affirmed.

The facts are stated in the opinion.

Messrs. R. B. Ellis, S. R. Graves, and O. Ellis, Jr., for appellant.

Mr. John A. Mobley for the State.

Ramsey, J., delivered the opinion of the court:

This is the third appeal of this case. On the last trial from which this appeal is prosecuted, had in the district court of Caldwell county on the 10th day of November, 1909, appellant was convicted and his punishment assessed at confinement in the penitentiary for a period of three years.

fense which obtained under the foregoing statute was abrogated by the act of 1 Wm. IV. chap. 66, § 10 (a), which made it an offense to forge any "order or request for the delivery or transfer of goods." Of course, an instrument so uncertain or ambiguous that a request could not be spelled from it, was not within the meaning of this act. Thus, it was held in *Reg. v. Ellis* (1850) 4 Cox, C. C. 258, that a paper bearing only the inscription: "W. Trin. 2 s," was not on its face a request for the delivery of goods within this act, and could not be made such by parol. So, it was held in *Rex v. Cullen* (1831) 5 Car. & P. 116, 1 Moody, C. C. 300, that a signed paper reading: "Per bearer, two 11-4 superfine counterpanes," was not an order or request for the delivery or transfer of goods, for the reason that it was not addressed to any person and did not contain a request in words.

It would seem that little importance should be attached to the statement in the foregoing case that it was necessary that the paper be addressed to some person, for, if such declaration is not mere surplusage or *dictum*, it has been overruled, or at least is outweighed, by later cases decided under the same act. Thus, it was held in *Rex v. Carney* (1832) 1 Moody, C. C. 351, that a signed paper presented to a shopkeeper, and reading: "Be so good as to let bearer have [certain goods], and you will oblige," was a request within the act of 1 Wm. IV., although not addressed to anyone. So, it was held in *Reg. v. Pulbrook* (1839) 9 Car. & P. 37, that a paper reading: "Aug. 3, '39— one 16- in. helmet scoop — one 4 qt. kettle — Jas. Hayward," was within the meaning of the act, though not addressed to any person.

That under the statute 1 Wm. IV. it was not necessary that the person whose name was signed should have a disposing or controlling power over the goods, and that, on the other hand, it was sufficient that that writing contained a request for goods on credit, is indicated by the last two cases cited, and is more strongly established by the fact that the act was held 32 L.R.A. (N.S.)

The important question for decision in the case is as to the sufficiency of the indictment, which is assailed from many angles; and as related to this perhaps the most important question is whether any indictment could be predicated on the instrument alleged to have been forged. As the decision may become important in the future as a precedent, we set out the indictment in its entirety. It is as follows:

"The grand jurors for the county of Caldwell, state aforesaid, duly organized as such at the October term, A. D. 1909, of the district court for said county, upon their oaths in said court present: That on or about the 10th day of June, A. D. 1908, and anterior to the presentation of this indictment, in the county of Caldwell and state

to embrace a paper addressed to a tradesman, and purporting to be signed by a customer in the following words: "Please to let bearer William Gof have a spillshoul and drafting tool for me" (*Reg. v. James* [1838] 8 Car. & P. 292); and one reading: "Please let the bearer W. P. have for J. R. four yards of linen. J. R." (*Rex v. Evans* [1833] 5 Car. & P. 553).

It was held in *Reg. v. White* (1840) 9 Car. & P. 282, that a signed paper requesting the addressee to "Please let the lad have a hat about 9 s., and I will answer for the money," was none the less a request for the delivery of goods because it might also have been an undertaking for the payment of money.

This act was, of course, held to include a paper reading: "Permit self and company to taste wine," purporting to have been signed by merchant having wine stored where presented. *Reg. v. Illidge* (1849) 2 Car. & K. 871, *Temple & M. C. C. 127*, 1 Den. C. C. 404, 18 L. J. Mag. Cas. N. S. 179, 13 Jur. 543, 3 Cox, C. C. 552.

A case which, although decided under the act of 1 Wm. IV., reflects the rigid attitude taken by the courts under the act of 7 Geo. II., is *Reg. v. Newton* (1838) 2 Moody, C. C. 59, where a conviction for forging a signed order reading: "Mr. Land, please send" certain goods, was set aside because called "an order" in the indictment, which failed to aver a disposing power in the person whose name was signed, it being directed, however, that a new indictment should be drawn denominating the instrument a "request" within the statute of 1 Wm. IV.

Probably similar considerations were regarded as controlling in *Reg. v. Egan* (1843) 1 Cox, C. C. 29, where it was held that a signed paper addressed to another, reading: "I hereby authorize my servant man, Abraham Egan, to procure a watch of you," was improperly described in the indictment as "an order and request for the delivery of goods," apparently upon the ground that the conjunctive was employed.

of Texas, R. Jacobs & Sons was then and there a firm composed of the following members, to wit, R. Jacobs, J. G. Jacobs, and Leon Jacobs, the said firm then and there being engaged in the mercantile business, and having for sale goods, wares, and merchandise for cash and on credit. That Harvey Roamell did then and there have credit with said firm as aforesaid, and that on or about the 10th day of June, A. D. 1908, Isaac Forcy, alias Will Jones, did then and there unlawfully, wilfully, and knowingly and fraudulently pass as true to the said R. Jacobs, a member of said firm aforesaid, thereby passing to said R. Jacobs & Sons, a false and forged instrument in writing which had theretofore been made without lawful authority,

—repudiated or ignored by American courts.

It should be observed that while the act of 1 Wm. IV. operated to render a mere request for goods, even on credit, the subject of forgery, there was no inclination on the part of the courts, at least none was manifested, to relax the distinction between "order" and "request."

On the other hand, the American courts have, from the beginning, repudiated or ignored this distinction, and a consideration of the subjoined cases forces the conclusion that any instrument calling for the delivery of goods, not so incomplete or ambiguous as not to have been embraced within the statute of 1 Wm. IV., is the subject of forgery in this country. And this statement is justified not only by the common-law decisions, but also those governed by the varying statutes.

Thus, the rule of the early English cases that, to constitute the offense, the order must be one importing a right on the part of the person who was supposed to have made it, and a duty on the part of the person on whom it was made, and that no offense was committed where the instrument left a compliance or refusal optional, and applied rather to the favor and the justice of the person on whom it is drawn, was repudiated in *Hoskins v. State*, 11 Ga. 92, holding that a statute making it an offense to forge an order for money or goods embraced a signed paper reading: "Please let W. H. have \$15 worth in your store, and oblige."

A statute forbidding the forgery of any instrument by which any pecuniary demand or obligation shall be, or shall purport to be, created, or by which any person may be affected, bound, or in any way injured in his personal property, embraces an order for goods on credit wrongfully signed in the name of another, although it is directed to no particular person. *Noakes v. People*, 25 N. Y. 380. A fortiori it embraces an order by the supposed signer to another, reading: "You will please send by the bearer the three pieces

and with intent to injure and defraud, and was then of the tenor following:

"June the 10, 1908,
to Mr. R. Jacobs & sons
please fill this order for me
17 \$ 35 ¢ Harvey romal."

"That in said false and forged instrument aforesaid, if true, the term 'Mr. Jacobs & sons' was intended for and meant 'R. Jacobs & Sons.' That the word, to wit, 'oder,' in said instrument aforesaid, was intended for and meant the word 'order.' That the figures and characters, to wit, '17 \$ 35 ¢,' in said instrument aforesaid, was intended for and meant '(17.35) seventeen and $\frac{35}{100}$ dollars, of the value of seventeen and $\frac{35}{100}$ dollars, and the name, to wit, 'Harvey romal,' in said instrument,

of silk if left at your place yet." *Harris v. People*, 9 Barb. 664.

Under this statute it is a matter of perfect indifference whether it possesses or not the legal requisite of a bill of exchange, or an order for the payment of money or the delivery of property, and the question is whether upon its face it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged; and it is not essential that the person in whose name it purports to have been made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it as genuine, or have a remedy over upon it. *People v. Krummer*, 4 Park. Crim. Rep. 217. This statement was referred to with approval in *People v. James*, 110 Cal. 155, 42 Pac. 479, where the language of the statute, if any existed, was not made to appear.

It is not necessary that the order purport to have been made by one having a right to call upon the addressee or drawee, in order to render one punishable for the forgery thereof under a statute specifying drafts "for the payment of money, or delivery of goods or other valuable articles." *United States v. Bates*, 2 Cranch, 1, Fed. Cas. No. 14,542 (Please let bearer have \$3.50 worth of goods out of your store, and oblige). This case was cited with approval in *United States v. Book*, 2 Cranch, 294, Fed. Cas. No. 14,624, where one was found guilty of the forgery of a paper reading: "Let bearer have pair of boots." So, it was cited with approval in *United States v. Brown*, 3 Cranch, 268, Fed. Cas. No. 14,658, holding that the statute embraced a paper reading: "Please let the bearer have such articles as he may choose on my account to the value of \$30 also \$20 in cash."

In *State v. Holly*, 2 Bay, 262, it was contended by counsel that an act making it a felony to make any forged warrant or order for the delivery of goods contemplated only situations in which the person whose name was signed should have a disposing power over such goods; but the court,

was intended for and meant the name 'Harvey Roamell,'—all of which the said instrument aforesaid, if true, meant and was intended for an order from Harvey Roamell aforesaid upon R. Jacobs & Sons aforesaid, in favor of the bearer thereof then and there, the said Isaac Forcy, alias Will Jones, whereby the said R. Jacobs & Sons should deliver goods, wares, and merchandise to the value of \$17.35 to the bearer of said instrument in writing as aforesaid, then and there Isaac Forcy, alias Will Jones, and the said Harvey Roamell then and there becoming liable in payment therefor to said R. Jacobs & Sons, and which said instrument in writing, the said Isaac Forcy, alias Will Jones, then and there well knowing to be false and forged,

did then and there pass the same as true, with intent to injure and defraud against the peace and dignity of the state."

On the trial it was shown that the firm of R. Jacobs & Sons was composed of R. Jacobs, J. G. Jacobs, and Leon Jacobs, and that they were engaged in the mercantile business in the town of Luling, in Caldwell county, Texas, and that I. Mason was a clerk employed by said firm on the 10th day of June, 1908, when the transaction occurred out of which this prosecution grew. That on this day appellant, Isaac Forcy, came into the store of R. Jacobs & Sons and represented himself as Will Jones, and presented to them the written order copied in the indictment, representing to R. Jacobs that it was an order

nevertheless, said that the statute embraced an instrument directing the addressee to deliver the goods to a certain person or bearer, and to charge the same to the account of the person whose name was thereto signed. Same case apparently reported in 1 Brev. 35.

A communication directed to another reading: "Would you let me have [certain property], and I will settle with you when I come to town," is an order for property within the meaning of a forgery statute, irrespective of whether the person whose name is thereto signed has any disposing power over the goods ordered. *People v. Phillips*, 118 Mich. 699, 74 Am. St. Rep. 436, 77 N. W. 245.

On the authority of the foregoing case, it was held in *People v. Palmer*, 127 Mich. 383, 80 N. W. 831, that the statute embraced an order for goods on credit, sent by the defendant to a firm which employed him as salesman, the forgery apparently being perpetrated by placing thereon a forged signature of the person purporting to be the purchaser.

The case of *Hale v. State*, 1 Coldw. 167, 78 Am. Dec. 488, involved two charges, one for the forgery of an instrument signed in the name of one person and directing another to let a third have a certain value in goods, and charge the same to the person whose name was signed, and another to let a third person have certain articles, and oblige. It was held that these instruments were within the meaning of the statute defining forgery to be the making of any writing to the prejudice of another's right, the court saying that, to complete the offense, it is not necessary that the purpose be consummated, but that it is sufficient if the fraudulent intent existed, and injury might have resulted if the object had been accomplished. This decision overrules *Walton v. State*, 6 Yerg. 377, which followed the English cases, and held that, to bring the fraudulent making of an order within such statute, it must appear that the person whose name was thereto signed had a disposing power over the goods.

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In other cases it has been declared that it is not necessary that the person by whom it purports to have been drawn shall have had any disposing power over the goods. *People v. Way*, 10 Cal. 336; *State v. Cooper*, 5 Day, 250; *Com. v. Fisher*, 17 Mass. 46.

There seems to be but one dissent from this proposition, and that is to be found in *West v. State*, 45 Fla. 118, 33 So. 854, holding that an indictment charging the forgery of a paper requesting a physician to attend the defendant, and purporting to have been signed by a third person, was insufficient where it failed to show that the medicine for which the order called was the property of the person whose name appeared to have been signed to the paper, or that, if not his property, the forged order purported to obligate such person to pay for it.

Other cases, while not expressly discussing the English doctrine, have about as effectually cast it aside, by ignoring it, and reaching a conclusion that could not readily be justified under such doctrine.

Thus, invoking the common-law definition of forgery, declaring it to be "a false making, a making *malò animo*, of any written instrument, for the purpose of fraud and deceit," and holding that this rule had not, by the enactment of forgery statutes, been superseded as to writings not embraced therein, the court in *Com. v. Ayer*, 3 Cush. 150, held that the forgery of a conditional order for goods was an indictable offense under the common-law rule. (Please pay M. or bearer \$45 in goods when he shall have finished painting the house, etc.).

It was held in *State v. Lamb*, 65 N. C. 419, that to render a paper an order for the delivery of goods, within the meaning of the statute denouncing forgery, it must appear, among other things, that the supposed drawer had a disposing power over the goods; and that therefore a signed order directed to another, reading: "Please send me" certain enumerated articles of merchandise, was a mere request, and not an order within the meaning of the stat-

given on the firm of R. Jacobs & Sons by Harvey Roamell. It appears that Mr. Jacobs of that firm was unable to read, and thereupon handed the order to Mr. Mason with instructions to fill same, and that same was filled, and appellant received the goods, wares, and merchandise to the value of \$17.35, and that the amount of the order was charged to Harvey Roamell. It was shown that Roamell had not signed the order in question, nor had he authorized anyone to sign his name to same, and that he had never seen such an order, and further, that he had credit with R. Jacobs & Sons, and that he did not even know appellant.

While many special objections were made to the sufficiency of the indictment, we

think the substantial question in the case is: Could this instrument be the subject of forgery? If this is answered in the affirmative, we think the allegations in the indictment sufficiently explanatory of the purport of the instrument and of the fact which would give it validity. There is in the books much curious learning on the subject of forgery, and the office of the tenor and purport clauses in the indictment for this offense have been refined upon by courts until it is sometimes difficult for one to grasp and comprehend the office of either, and these refinements have sometimes, it seems to us, gone to the extent of overshadowing and dwarfing the substance of the matter required to be alleged. What instruments may be the sub-

ute. It was, however, held in this case that the defendant was guilty of the crime of forgery at common law. A similar decision is to be found in *State v. Leak*, 80 N. C. 403. That the forgery of such an instrument is an offense at common law was reiterated in *State v. Lane*, 80 N. C. 407, and *State v. Hall*, 108 N. C. 776, 13 S. E. 189.

A signed instrument in the following form is the subject of forgery: "Mr. Sage: Please let this boy have a single rig, — a good one, — and oblige. I will bring it back myself." *Hickson v. State*, 61 Neb. 763, 54 L.R.A. 327, 86 N. W. 509.

The report of the case of *Linville v. Com.* 7 Ky. L. Rep. 43, is an abstract in which it is stated merely that an indictment for forgery alleging that one's name was signed by the accused to an order for goods on another without authority, and was presented by the accused to such other for the goods, which were obtained, with the intent to defraud, was sufficient.

So, the repudiation of the English doctrine was similarly manifested in cases decided under various statutes, but especially in those involving statutes denouncing the forgery of an "order" for goods.

Thus, a writing directing another to "deliver my son one pair of walking shoes, and charge the same to me," is an order for the delivery of goods within the meaning of a statute denouncing forgery. *Com. v. Fisher*, 17 Mass. 46.

So, also, is a signed paper directed to another, reading: "Let the bearer trade \$13.25, and you will much oblige." *People v. Shaw*, 5 Johns. 236.

So, an instrument requesting one to "Please let J. have \$1 in trade, and oblige, C. H. Rogers, P. S. will pay Thursday," is an order for money or other property within the meaning of a statute denouncing forgery. *Johnson v. State*, 47 Fla. 35, 36 So. 166.

Forgery may be committed of a signed order upon another to "give cloth to" a third person, although no quantity of value is specified, where, to constitute forgery, the statute makes it essential only that 32 L.R.A. (N.S.)

the false instrument carry on its face the semblance of that for which it was counterfeited, and that it shall not be obviously invalid, void, and of no effect. *King v. Kalaluhii*, 3 Haw. 417.

And it seems that a signed order requesting another to "Let the bearer have \$3 worth of goods, and oblige me. I will pay you in tobacco," is within the meaning of a statute making it an offense to forge any writing to the prejudice of another's rights. *State v. Tingler*, 32 W. Va. 551, 25 Am. St. Rep. 830, 9 S. E. 935.

A writing requesting another: "Please to let the bearer trade \$10 at your store, and oblige," although not within the specific enumeration of instruments which are the subject of forgery in a statute denouncing that offense, is embraced within the general clause: "or other writing to prevent equity and justice" in such statute. *State v. Cooper*, 5 Day, 250.

It should be observed that what has been said of the cases just cited applies also to cases turning upon or discussing considerations indicated by the headings to other subdivisions of this note.

For instance, some cases, inferentially at least, negative the necessity for a disposing power in the alleged maker or drawer, by making the question whether the instrument could, if genuine, have been the subject of civil liability on the part of the person whose name was thereto signed, the criterion for the determination of whether the instrument is the subject of forgery. In this connection, see also *West v. State*, supra, under "repudiated or ignored by American courts;" and *Shannon v. State* and *Moore v. State*, infra, under "necessity for extrinsic averments."

—criterion that instrument purport to create liability or pecuniary demand.

Thus, upon the theory that a paper, if genuine, could be made the basis of civil liability upon the part of one whose name was thereto signed, it was held in *Johnson v. State*, 62 Ga. 299, that a paper which read: "You can let Griffin trade, you can

ject of forgery has also quite frequently received judicial interpretation. These instances and illustrations are numerous, and not always wholly consistent. We think in later times the niceties of pleading in prosecutions for forgery have not always been recognized; that the trend of modern decisions is to look rather to the substance than to the form that such instruments may take. We cannot be unmindful of the fact that, with the progress of civilization and the frequency in commerce with which business is transacted by notes, bills, and letters of credit, it is essential to the protection of the citizen and the integrity of commerce that a reasonable and sensible rule in prosecutions for forgery should be established. In olden times

trade was either a matter of barter or for money in hand. In these times, as we know, but a small per cent of commercial transactions is carried on and completed in any other form than by note, bond, checks, orders, and drafts. While having due regard for the safety of the individual citizen who may be prosecuted for forgery of any of the manifold instruments conveying or undertaking to convey moneys and property, it is essential that at least some fair regard shall be had to the protection of the great body of our people who are interested in the honesty and integrity of these instruments.

It has everywhere been held, under any view that may be taken of the case, that an instrument void on its face cannot be

give him of his own, he have got a good crop, if you choose you gave him account of his own charge," was within the meaning of a statute denouncing the forgery of "any other instrument not herein provided for," and that, the paper not being an order in writing for money or goods or other things of value as contemplated by another section of the statute, the fact that it was called an order in writing in the indictment did not render it such, and could not operate to prevent the conviction under the first-mentioned section.

Upon the authority of the foregoing case it was held in *Burke v. State*, 68 Ga. 157, 4 Am. Crim. Rep. 579, that a signed paper reading: "Please let the boy have \$2 worth of what he wants," was not so incomplete and imperfect as to afford no ground for recovery in a civil suit, and as to prevent it from becoming the subject of forgery.

It was held in *State v. Outs*, 30 La. Ann. 1155, merely that the forgery of an order for merchandise was an offense under the Louisiana statute. So, an instrument reading: "Please let J. J. have \$10 worth of dry goods, \$10, and send the bill," was held in *State v. Morgan*, 35 La. Ann. 293, to be not a request, but an order upon which a charge of forgery could be predicated, upon the theory that it was an instrument which, if genuine, could have been made the subject of civil liability upon the part of the person whose name was thereto signed. So, also, as to a paper reading: "Please let George have \$18 worth, and charge the same to Mr. George Garrett," although the signature of the latter was not formally appended to the foot of the instrument. From a passing remark in *State v. Stephen*, 45 La. Ann. 702, 12 So. 883, it is possibly to be inferred that the Louisiana statute expressly denounces the forgery of instruments for the payment of money or delivery of goods. It is expressly stated in *State v. Alexander*, 113 La. 747, 37 So. 711, that the statute designates an order for money or goods as a subject of forgery, and it is therein held that an order directing another to:

"Let this girl have what she want, I see to the debt being paid," falls directly under the designation of the statute.

So, upon the theory that the instrument, if genuine, would have been the subject of liability upon the part of the person whose name was thereto signed, it was held in *Chidester v. State*, 25 Ohio St. 433, that a signed order directed to another, reading: "Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for," was within the meaning of a statute making it an offense to forge any order, warrant, or request for the delivery of goods and chattels.

And an instrument requesting one to "Please let J. have \$1 in trade, and oblige, C. H. Rogers, P. S. Will pay Thursday," is the subject of forgery, under the criterion that it is a writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Johnson v. State*, 47 Fla. 35, 36 So. 166.

So, a signed paper requesting the addressee to "Please let A. Garmire have team to go to Mongo, and charge same to me," was held in *Garmire v. State*, 104 Ind. 444, 4 N. E. 54, 5 Am. Crim. Rep. 238, to be not merely a request for the delivery of property, but a writing containing an obligatory promise to pay for property, and therefore to be within the Indiana forgery statute, which specified any order, warrant, or request for the payment of money, or any other instrument of writing.

This matter of the criterion of civil liability may also be regarded as raised in the following cases, where the fact of personal disability was urged to defeat a conviction.

Thus, in *Wilcoxson v. State*, 60 Ga. 184, it seems not to have been urged that a paper directed to a storekeeper requesting him to let the bearer have a certain value in goods, and to charge it to the account of the person whose name was thereto signed, was not the subject of forgery, and the real question seemed to be as to the propriety of a conviction in the view of the fact that the person whose name was signed

made the subject of forgery. Such was the case of *Howell v. State*, 37 Tex. 591. The instrument there considered was as follows: "2 hides \$4 Sitman." This instrument, it is correctly held, could not be the subject of forgery, in that it was addressed to no one, undated, signed by no one, did not purport to affect any financial obligations or to transfer any property. This case received at least a qualified approval in the case of *Anderson v. State*, 20 Tex. App. 597. There the instrument sought to be made the subject of forgery was in this language: "George Woods: Martin Baysinger says to let Wiley Anderson have \$10 worth of goods, and he will stand for it." Considering this instrument, the court says: "Now, would the

instrument in question here be proof in any legal proceeding? We do not think it would without the aid of extrinsic evidence. It is signed by no one. It does not show whose act it is. It merely states what Martin Baysinger said to another person, without disclosing who that person was. It is without date. If it were proved that Baysinger himself wrote the instrument, or that he authorized another to write it, it would be a guaranty upon which he would be liable. But we understand the rule to be that the instrument must be such upon its face that, if it were genuine, it would be evidence of the facts it sets out." This case was, in *Rhudy v. State*, 42 Tex. Crim. Rep. 225, 58 S. W. 1007, distinguished and in effect overruled,

was a married woman; but the court, in answer to the argument that the instrument for that reason had no legal efficacy, invoked the rule of law in Georgia that, when a married woman signs a promissory note or an order for money or goods, the legal presumption is that she has a separate estate out of which she intends to pay it.

An order for a bill of goods directed to another is not deprived of its character as a subject of forgery by the fact that the person whose name is thereto forged is subject to the disabilities of *feme covert*, where the fraudulent purpose and object of the instrument have been effected. *Heath's Case*, 2 N. Y. City Hall Rec. 54.

Indians cannot escape conviction for the forgery of an order reading: "Please give to bearer five gal. beer, and oblige," upon the theory that, inasmuch as the furnishing of intoxicating liquor to Indians is prohibited by law and made a felony, the order in question was without legal efficacy, and not the subject of forgery because, even if genuine, it was not an instrument which the defendants were capable in law of making use of; and the paper may be held the subject of forgery for the reason that in the hands of another than an Indian it was susceptible of being made the engine of fraud and injury. *People v. James*, 110 Cal. 155, 42 Pac. 479.

In some jurisdictions, instruments by which, if genuine, a civil liability could have been created, are expressly declared by statute to be the subject of forgery. In this connection, see also *Noakes v. People*; *Harris v. People*, and *People v. Krummer*,—*supra*, under "repudiated or ignored by American courts;" and the Texas cases cited *infra*, under the heading, "Defective instruments" and its subdivisions.

Thus, it was held in *Horton v. State*, 53 Ala. 488, that a paper reading: "Let Mr. A. have to the amount of \$5 in goods, and I will settle with you next week," was an instrument by which, if genuine, a pecuniary demand could be created with-

in the meaning of a statute relating to forgery, and not an order for the delivery of goods within the meaning of another clause of that statute, for the reason that it was a mere authority to one to sell, and another to purchase, goods on the credit of the drawer, and imported an obligation only on the part of the latter.

It was held in *Anderson v. State*, 65 Ala. 553, that an order reading: "Let Wash. have one pint of whisky," was an instrument by which a pecuniary demand purported to have been created within the meaning of such statute.

So, this statute was held in *Allen v. State*, 74 Ala. 557, to embrace an instrument reading: "Let Mr. Allen, the bearer, have what articles he wants; present bill to be paid on first of month, at my office."

A communication reading: "Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it, let him have a cheap bureau, as cheap as possible, and I will see that you get so, and oblige, much a week," is not so imperfect, obscure, and incapable of perpetrating a fraud, as not to be the subject of forgery. *Hobbs v. State*, 75 Ala. 1.

And a paper reading: "Please let K. J. trade nine dollars \$975 cents nine dollars 75 cents to bee chird to E. O. R. on merchandise," is within the rule that forgery may be committed of a writing which, if genuine, might apparently be of legal evidence or the foundation of a legal liability. *Agee v. State*, 113 Ala. 52, 21 So. 207.

A writing requesting the addressee to "Let the bearer, William Jones, have the amount of (\$15) dollars, and charge the same to me,—either goods or money as he wants, and oblige," would, if genuine, have created a pecuniary liability upon the part of the person whose name was thereto signed, so as to render it the subject of forgery; and it is not deprived of that character by the fact that it was not accepted, and that the goods were not delivered thereon. *Keeler v. State*, 15 Tex. App. 111. In other Texas cases, elsewhere

and in the still later case of *Huckaby v. State*, 45 Tex. Crim. Rep. 577, 108 Am. St. Rep. 975, 78 S. W. 942, it is still more decisively and effectively overruled. It is not the law of this state that an instrument must on its face, in the absence of extrinsic and explanatory averments, of necessity, import a financial obligation before it can be made the subject of forgery. On this question Judge Henderson, speaking for the court, says: "Appellant also questions the indictment because it does not import an obligation on its face, and if it was the subject of forgery, this should be shown by extrinsic and explanatory averments. It is the rule in this state, where the instrument does not show on its face that it imports an obligation in re-

gard to money or property, but is the subject of forgery, and can be shown to be such by extrinsic averments, that these extrinsic or explanatory averments must be alleged." *Cagle v. State*, 39 Tex. Crim. Rep. 112, 44 S. W. 1097; *Womble v. State*, 39 Tex. Crim. Rep. 24, 44 S. W. 827, 11 Am. Crim. Rep. 438; *Crawford v. State*, 40 Tex. Crim. Rep. 344, 50 S. W. 378, 11 Am. Crim. Rep. 432; *Colter v. State*, 40 Tex. Crim. Rep. 165, 49 S. W. 379; *Black v. State*, 42 Tex. Crim. Rep. 585, 61 S. W. 478.

In the case of *Kennedy v. State*, 33 Tex. Crim. Rep. 183, 26 S. W. 78, the whole general subject of imperfect and incomplete instruments came before this court, where Judge Davidson, in reviewing the authorities, says: "Instruments of writing may

cited, it is shown that the Texas statute makes the creation of liability, in the case of genuineness, the criterion, and probably this statute is really accountable for the application of the criterion in the *Keeler Case*.

Defective instruments—generally.

See also English cases cited at the beginning of the note.

In order to be the subject of forgery, it is unnecessary that the order be addressed to any person by name. *State v. Gullette*, 121 Mo. 447, 26 S. W. 354; *Morearty v. State*, 46 Neb. 652, 65 N. W. 784 (where supposed signer owned goods).

And an error in the first initial of the name of the person who was sought to be made the apparent drawer does not prevent the act from being that of forgery. *Hall v. State*, 55 Tex. Crim. Rep. 267, 116 S. W. 808.

So, it was held in *Peete v. State*, 2 Lea, 513, that one might be convicted of forging an instrument reading: "May let Lorie Rogers have nineteen (19) dollars in goods, and charge to me. W. Cpell," although it was addressed to no one, and the name of the person whose signature was intended to be forged was W. Capell.

A mistake in spelling in a signed request to let another have a certain value in "groceries" does not deprive the paper of the character of an order for goods and chattels, for the forgery of which an indictment may be laid. *Myers v. State*, 101 Ind. 379.

It is not necessary that the instrument charged to have been forged purport on its face to be an order for the delivery of goods; but it is sufficient if it is a means by the use of which goods can be obtained. *State v. Alexander*, 113 La. 747, 37 So. 711.

Indeed, it has been said that no matter how defective the forgery may have been, it is enough if there is a possibility of fraud, and that it does not lie in the mouth of the forger to claim immunity for his crime because, if the person he sought to

impose upon had been vigilant, he would not have been deceived. *State v. Gullette*, supra.

For, to constitute the offense, it is not necessary that the fraud be consummated, for the offense is complete by the false making of the writing, without the concurrence of damage or injury. *Hobbs v. State*, 75 Ala. 1; *Crawford v. State*, 31 Tex. Crim. Rep. 51, 19 S. W. 766.

It is essential only that there be an intent to do fraud. *State v. Hall*, 108 N. C. 776, 13 S. E. 180.

Frequently an instrument has been found so defective that it has not been regarded as showing on its face that it was capable of being made an instrumentality of fraud. In such circumstances, courts have been called upon to determine whether the prosecution may or must show the fraudulent tendency by the averment of extrinsic facts; and, of course, this is a matter to be determined from an examination of the instrument in a particular case.

—permissibility of extrinsic averments.

In *Stewart v. State*, 113 Ind. 505, 16 N. E. 186, it was held that under the statute denouncing the forgery of any order for the payment of money or property, or any other instrument of writing with intent to defraud any person, the offense could be predicated of a signed paper requesting another to "Please let this boy have a suit of cloth;" and the court held the indictment sufficient upon the ground that extrinsic facts showing the fraudulent tendency were averred, and that their sufficiency had not been called into question.

That the Texas statute provides that, to constitute forgery, the instrument must be such that, if it were genuine, it would create a pecuniary obligation, or would transfer or in some manner affect property, is indicated in the case of *Anderson v. State*, 20 Tex. App. 595, which holds that this requirement was not satisfied, and that the offense of forgery was not committed, by the fabrication of an instrument reading as follows: "George

create pecuniary obligations, affect property in some manner, and be the subject of forgery, without being directed or addressed to any particular person. This question was fully investigated in the unreported case of *Dixon v. State* (decided by the court of appeals of Texas at its Austin term, 1889, opinion by White, P. J., 26 S. W. 500). In *Roscoe's Criminal Evidence* it is said: "The prisoner was indicted for uttering a forged instrument for the delivery of goods, in words and figures following: 'Gentlemen: Be so good as to let bearer have 5½ yards of blue to pattern, etc., and you will oblige W. Reading, Mortimer St.'" The request was not addressed to anyone. The prisoner being convicted, the recorder respited the

judgment, to take the opinion of the judges on the question whether, as the request was not addressed to any individual person by name or description, it was a request for the delivery of goods, within the words and true intent of the statute. All the judges who were present at the meeting held the conviction right.' *Roscoe, Crim. Ev. 555, 556, 583; Rex v. Carney, 1 Moody, C. C. 351. In Reg. v. Pullbrook, 9 Car. & P. 37, the judges held that an instrument merely specifying the goods may be shown to be a request, by the custom of the trade. See Reg. v. Rogers, 9 Car. & P. 41; Reg. v. Snelling, Dears. C. C. 219. In Snelling's Case, supra, the following instrument was held to be the subject of forgery, though addressed to no one: 'Sirs: Please to pay*

Woods: Martin Baysinger says to let Wiley Anderson have \$10. worth of goods, and he will stand for it."

It was, however, held in *Rollins v. State*, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759, that an instrument evidently intended to be addressed to Appollas and Halsal, and to have been drawn by Joel Eller, but reading as follows: "Apolas and Halsal, please let Mr. G. B. Rollins Have 4800d. in goods, and oblige. Charge to me. Joel E3ler," was not absolutely void upon its face, and could be made the predicate for forgery by the allegation of extrinsic facts from which the court could see that, if it were genuine, it would create a pecuniary liability.

On the authority of the *Rollins Case*, it was held in *Williams v. State*, 24 Tex. App. 342, 6 S. W. 531, that an instrument reading: "Mr. allen bounds please let Aran Williams have 1 par shose 1 par pants, and charge the same by this . . . p c Stubbs," was not so vague and uncertain as to be incapable of being made the subject of forgery by proper averments in the indictment.

In *Roberts v. State*, — Tex. Crim. Rep. —, 53 S. W. 864, an indictment containing explanatory averments was held sufficient to charge the crime of forgery of the following instrument, purporting to have been signed by another: "L. H. Knight. deuir sir. Let Wesley Roberts Have 1 Half gallon Alk holl, and I will see it paid just the same."

—necessity for extrinsic averments.

It was held in *Shannon v. State*, 109 Ind. 407, 10 N. E. 87, that a signed paper requesting another to let a third person "have one dress pattern, and oblige," was not within the statute denouncing the forgery of any order, warrant, or request for the payment of money, or any other instrument of writing; and that, to bring it within the common-law rule that forgery may be committed of any instrument of writing which, if genuine, would or 32 L.R.A. (N.S.)

might operate as the foundation of another man's liability, the indictment should, because of the instrument's uncertainty, show extrinsic facts from which the court might judicially see its fraudulent tendency.

So, applying the rule that an indictment for forgery must show that the instrument on its face is naturally calculated to have some effect, or must show extrinsic matter from which the court may see its fraudulent tendency, the court in *State v. Cook*, 52 Ind. 574, held that an indictment for the forgery of a signed instrument requesting another to let a third person have "\$2 worth on my credit" was insufficient, for want of averment of extrinsic facts, to show the fraudulent tendency of the instrument.

The instruments in the Indiana cases just cited scarcely seem to justify the conclusion reached, at least if weight is to be given decisions in other jurisdictions.

The better rule seems to be that if there is a possibility of some person being defrauded by the false making of the instrument, and this is apparent from its face, no averment of extrinsic matter is necessary to render the indictment sufficient. *Morearty v. State*, 46 Neb. 652, 65 N. W. 784 (Please let bearer have the trunk I put in your house at five thirty this P. M. Signed.).

In *Hendricks v. State*, 26 Tex. App. 170, 8 Am. St. Rep. 403, 9 S. W. 555, 557, 8 Am. Crim. Rep. 279, it was held that an instrument reading: "Mr. Goldstone: Please let Bare Have the sume of \$5 Dollars in Grosses, and charge the same to DR F T Cook," was such that, if genuine and acted upon by the drawee, it could have been the subject of civil liability upon the part of the person whose name was signed, and that therefore a conviction for the forgery thereof could be had under an indictment containing no explanation of its terms in the light of extrinsic facts.

And the same conclusion was reached in respect of a signed order requesting the addressee to "Let the bearer have \$2.50 worth of goods, and charge the same to me."

to the bearer, Mrs. J., the sum of 854f 10s. for me. James Ramsey.' In *Noakes v. People*, 25 N. Y. 382, it was said: 'It is insisted on by the counsel for the prisoner, in support of the first request to charge, that the instrument set out in the indictment is not upon its face the subject of forgery, as it is not addressed to anyone. If it be essential that an order or request for delivery of goods, to make it the subject of forgery, should on its face be directed to a particular person, there then would doubtless be force in this objection. A reference to the language of the section of the statute would seem to indicate that there is not much force in this argument. . . . The paper under consideration would therefore seem to fall within the very words of the statute, and is precisely of that character which the legislature, by the forgery of, and the passing and uttering of which, intended to subject the offender to indictment and punishment.' Over objection that it was addressed to no one, the following order was held in Tennessee to be the subject of forgery: 'May: Let Lorie Rogers have nineteen (19) dollars in goods, and charge to me. W. C. Pell.' *Peete v. State*, 2 Lea, 513; *Wharton, Crim. Law*, §§ 680-695. Mr. Desty says: 'An order is subject of forgery, as an order for payment of money, though no considera-

tion be expressed; and a writing not addressed to any particular person may be an order for the payment of money.' And further that 'an order for the delivery of goods is subject to forgery, although not addressed to anyone, or a request to deliver goods to bearer.' *Desty, Crim. Law*, pp. 606, 607, § 150, and notes 1-3, for numerous cited authorities; *State v. Baumon*, 52 Iowa, 68, 2 N. W. 956. See also, *Hendricks v. State*, 26 Tex. App. 179, 8 Am. St. Rep. 463, 9 S. W. 555, 557, 8 Am. Crim. Rep. 279; *Dovalina v. State*, 14 Tex. App. 324. If the instrument affects property, it is the subject of forgery. *Alexander v. State*, 28 Tex. App. 186, 12 S. W. 595. In the case before us, whether the instrument was or was not addressed to the treasurer of Harrison county is not material,—does not affect the validity of the document."

The true rule on this subject is thus tersely stated by Judge Hurt in the case of *Fonville v. State*, 17 Tex. App. 368: "Again, it is not required that the instrument, if true, should in fact discharge or defeat the obligation; it will be the subject of forgery if its tendency is such." We have found no better statement of the general rule than that contained in *American and English Encyclopedia of Law*, 2d ed. vol. 13, p. 1093, where it is said: "An instrument which is void on its face is not

Reddick v. State, 31 Tex. Crim. Rep. 587, 21 S. W. 684.

On the other hand, extrinsic averments were held necessary in the following cases, but it should be observed that they involved instruments much more objectionable from the standpoint of defectiveness than those involved in the Indiana cases:

Thus, the following instrument was held to be one which on its face, and without explanatory averment in the way of inuendo, did not import such an obligation as was the subject of forgery: "Mr. Brin, Ples let John Womble hame ine thing that he wornt. J. O. Thompson." *Womble v. State*, 39 Tex. Crim. Rep. 24, 44 S. W. 827, 11 Am. Crim. Rep. 438.

So, also, as to a signed instrument reading: "Mr. Thompson. dear sir if you please let the negro have some cind of a buggy he is alwrit if you will give him untill foll he wil pay for I will see that he will pay for it myself you neants to be afraid of him if you will let him have it let him have a pair of harness too if you have one any cheper than that \$35 one let him hove it." *Colter v. State*, 40 Tex. Crim. Rep. 165, 49 S. W. 379.

So, extrinsic averments were held necessary in an indictment for the forgery of an instrument by an alteration adding thereto the words appearing after the signature of the supposed drawer, so that it read as follows: "Mr. Lynch please let Dave Polk have 1 pr shoes, and charge the 32 L.R.A. (N.S.)

same to me, and oblige. I. L. Matthews. to bits of shagger one pound of dacco one dress patton." *Polk v. State*, 40 Tex. Crim. Rep. 668, 51 S. W. 909.

A signed order directed to another requesting him to "Let the bearer have one of your smallest, with load, and charge to me," is not on its face an order for goods or chattels within the meaning of the statute; and an indictment for the forgery thereof is insufficient where it does not contain averments of extrinsic facts showing the purpose of the instrument. *Carberry v. State*, 11 Ohio St. 410.

So, an instrument reading: "J. B. Vail, . . . Please give bearer coat, and oblige, J. B. Vail," was held in *Moore v. State*, 13 Ohio C. C. 10, 7 Ohio C. Dec. 70, not to be prima facie, an order or request for the delivery of goods or chattels, within the meaning of the forgery statute, for the reason that the instrument, if genuine, was not calculated to create a liability upon the part of Vail; and it was further held that it could not be made the basis of a charge of forgery in the absence of averments showing wherein the instrument was capable of working a fraud.

For another case holding extrinsic averments necessary, see *Head v. State*, — Tex. Crim. Rep. —, 72 S. W. 394, a report of which contains a facsimile of an almost illegible instrument whose purport was alleged to be that of an order for merchandise.

L. A. W.

as a general rule the subject of forgery, because it has not the capacity of effecting fraud. The rule, however, is subject to this qualification: That if the instrument does not appear to have any validity or show that another might be injured by it, but extrinsic facts exist by which the holder might be enabled to defraud another, then the offense is complete, and an indictment averring the existence of the extrinsic facts will be sustained."

Now, we know that in this case the instrument was the means of defrauding R. Jacobs & Sons. In view of the conditions existing at the time, it was well designed to have this effect. R. Jacobs & Sons were merchants and doing, as the facts show, a credit business. Harvey Roamell had credit with them. Appellant by his own conduct construed this instrument to be an order on R. Jacobs & Sons for merchandise. This, in view of the situation of the parties, was the only construction that could intelligently be given to the instrument. While not in terms made payable to bearer or to appellant, it is in effect an order payable to bearer, in that, from the fact that Roamell sent it, it is certain that the goods were not to be delivered to him, and the order could be made effective only by delivering the merchandise to the person presenting the order. It was therefore to all intents and purposes an order payable to bearer. That it was an order for goods, and not for the payment of money, is a fair inference not only from the situation of the parties, but from the nature of the instrument itself. We think that anyone could understand that, where an instrument such as this comes to a merchant with the request to fill an order, it would not be understood to be a request to pay money, and, when this is interpreted in the light of the fact that R. Jacobs & Sons were merchants, and not bankers, it becomes even more apparent. Again, it is suggested that there is no promise or obligation in the instrument itself on the part of Roamell either to pay the money or to make himself responsible therefor. The answer to this is that it is well settled in this state, and indeed is the universal rule founded on the most obvious equity, that, where one surrenders property or pays out money on request and for the benefit of another, the law implies a promise and obligation of payment. *Broad v. Paris*, 66 Tex. 119, 18 S. W. 342. If we are correct in these views, it must follow that the instrument is such a one as could be made the basis of forgery, and, if this much be conceded, it seems clear that the explanatory averments are amply sufficient to sustain the indictment.

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2. Again, it is averred that there is a variance between the instrument set out in the indictment and the one produced on the trial. This matter is not presented in such manner as to be the subject of review. The instrument made the subject of forgery is set out *in hæc verba* in the indictment. In the statement of facts we find the following: "The instrument alleged to have been forged was then offered in evidence and identified by I. Mason, and that said firm of R. Jacobs & Sons was doing business on the 10th day of June, A. D. 1908, in Luling, Caldwell county, Texas." There is also a bill of exceptions in the record reciting the fact that "appellant requested the court in writing to affirmatively instruct the jury to acquit the defendant on the ground that the evidence fails to support the allegations in the indictment (all of which more fully appears in the defendant's motion to instruct the jury to acquit), and the court, after considering said motion, overruled the same." In the absence of any description of the instrument in the statement of facts different from that as set out in the indictment, or a finding of the court to the effect that there was a variance, we would not be authorized to presume such variance from the mere statement of the claim that there was such in motion for new trial. It has been many times held that a mere statement of a fact in motion for new trial or in bill of exceptions is not the equivalent of findings that the fact so stated is true.

We have been much interested in the discussion of the questions involved by counsel for appellant. They have exhausted the authorities on the subject, but, after a careful study of this matter and a very careful consideration of the case, we have come to the conclusion that the appeal is without merit, and that the judgment of conviction ought to be affirmed, as it is now done.

McCord, J., not sitting.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA

GEORGE WEBSTER.

(— S. C. —, 70 S. E. 422.)

Forgery — uttering order on carrier.

One who knowingly presents to the carrier a forged order for intoxicating liquor which had been ordered in the name of the one

whose name is signed to the order is guilty of uttering a forged instrument both with respect to the carrier, who is induced to make a wrong delivery of the property, and to the consignee, where, had the order been genuine, he might have been subjected to a penalty for violation of the law regulating dealings in intoxicating liquors.

(March 3, 1911.)

APPEAL by defendant from a judgment of the General Sessions Circuit Court for Anderson County, convicting him of forgery. Appeal dismissed.

The facts are stated in the opinion.

Messrs. Martin & Earle, for appellant:

While this case shows a palpable effort to evade the dispensary law, it is wholly insufficient to make out a case of forgery.

People v. Munroe, 24 L.R.A. 33 & note, 100 Cal. 664, 38 Am. St. Rep. 323, 35 Pac. 326; 19 Cyc. Law & Proc. p. 1380; Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886; McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76; Franklin F. Ins. Co. v. Bradford, 201 Pa. 32, 55 L.R.A. 408, 88 Am. St. Rep. 770, 50 Atl. 286; Waterman v. People, 67 Ill. 91, 1 Am. Crim. Rep. 225; Townsend v. State, 9 Am. Crim. Rep. 302, note; Alexander v. State, 28 Tex. App. 186, 12 S. W. 595; Garmire v. State, 104 Ind. 444, 4 N. E. 54, 5 Am. Crim. Rep. 239; State v. Evans, 15 Mont. 539, 28 L.R.A.

Note. — Order for goods in carrier's possession as subject of forgery.

The general question of whether an order for goods is the subject of forgery was considered in the note appended to Forey v. State, ante, 327. That note shows that apparently the greatest difficulty which the courts have experienced has been with regard to whether the instrument must purport to be signed by a person who had a disposing power over the goods which constituted the subject-matter, in order to render the instrument the subject of forgery. Even the early English decisions which denied that forgery could be committed by the making of a mere request for the delivery of goods on the credit of the person whose name was appended to the writing, compliance with which was optional upon the part of the addressee, held that where the person whose name was signed had a disposing power over the subject-matter of the instrument, the crime of forgery could be predicated thereof. And it seems that there has never been any question as to the correctness of this rule.

Now the cases which have been found to fall within the foregoing title, also fall within this rule, for the instruments involved purported to have been signed by one who had an apparent right to claim the property. The same may be said of STATE v. WEBSTER for the reason that the person

127, 39 Pac. 850; People v. Tomlinson, 35 Cal. 506; 13 Am. & Eng. Enc. Law, 2d ed. p. 1087.

Mr. P. A. Bonham for the State.

Gary, A. J., delivered the opinion of the court:

This is an appeal from the sentence imposed upon the defendant for uttering a forged instrument of writing.

The third count of the indictment, under which the defendant was convicted, charges that he did "wilfully utter and publish as true a certain false, forged, and counterfeited writing, and instrument of writing, commonly called an order, of the tenor as follows: 'Belton, S. C. Nov. 13th 1909. Please let this man have my express, oblige, yours truly, Eliot Jefferson,'—he, the said George Webster, then and there well knowing the same to be forged, with intent to defraud Southern Express Company, a corporation, and Eliot Jefferson." There was testimony tending to show that Steve Webster, a brother of the defendant, ordered 2 gallons of whisky, to be sent from Virginia to Eliot Jefferson at Belton, South Carolina; that Ebb Webster, another brother, at the request of Steve Webster, wrote the alleged forged instrument; that Steve and Ebb Webster requested George Webster, the defendant, to present the said order to the express company for the pack-

whose name was signed to the writing was the nominal consignee of goods in the hands of the carrier.

Thus, in Mackguire v. State, 91 Miss. 151, 44 So. 802, it was held that an instrument in the following words: "Mr. Express Agent: Please let this boy have my jug. Willie Foster,"—was one which, on its face, was of legal efficacy, and such that forgery could be predicated of it under the Mississippi statute without the allegation of extrinsic facts in the indictment, the court pointing out that it appeared from the face of the order that it was made upon the express company, a common carrier, bound to deliver the property in its charge to the consignee, that the consignee was Willie Foster, and that the jug was his property. In determining that the writing was within the meaning of the Mississippi statute, the court referred to France v. State, 63 Miss. 281, 35 So. 313, in which reference is made to a statute denouncing the forgery of any writing being or purporting to be the act of another by which any right shall be in any manner affected, or by which any person might be affected or in any way injured in his person or property. The Mackguire Case was made the basis of the decision in Scott v. State, 91 Miss. 156, 44 So. 803, involving a prosecution against another defendant in respect of the same writing.

L. A. W.

age; that the defendant stated to the agent of the express company that Eliot Jefferson had sent the order for the whiskey, although the defendant knew such statement to be false; that this false statement induced the agent to deliver the package to the defendant, who carried it to Steve Webster; that Steve Webster paid for the liquor and the express charges for transportation.

The defendant appealed upon the following exceptions:

"(1) That his Honor erred in not directing a verdict of not guilty upon the third count of the indictment, upon the ground that there was no evidence that the act therein charged was done with intent to defraud.

"(2) That his Honor erred in not directing a verdict of not guilty upon the third count upon the ground that there was no evidence that the act was done wilfully or with guilty knowledge.

"(3) That his Honor erred in refusing motion for a new trial upon the ground that there was no evidence of intent to defraud.

"(4) That his Honor erred in refusing motion for a new trial upon the ground that there was no evidence that the act was done wilfully, and with guilty knowledge.

"(5) Because his Honor erred in refusing to grant a motion for new trial upon the ground that the evidence makes no case for violation of the forgery statute, but shows a palpable attempt to violate the dispensary law.

"(6) Because his Honor erred, in ruling that the witness Ebb Webster could not go into the details of a conversation with George Webster that would show the information that defendant had in regard to the instrument in question, and that would bear upon the question of wilfulness and guilty knowledge; said testimony being competent for that reason."

All the exceptions except the sixth will be considered together.

There are a few general principles which it may be well to state before applying the facts. In order to constitute forgery by uttering or publishing a forged instrument of writing, three important factors are requisite: (1) It must be uttered or published as true or genuine. (2) It must be known, by the party uttering or publishing it, as false, forged, or counterfeited. (3) It must be with intent to prejudice, damage, or defraud another person. *State v. Murray*, 72 S. C. 508, 52 S. E. 189. "The purpose of the statute against forgeries is to protect society against the fabrication, falsification, and the uttering, publishing, and passing of forged instruments, 32 L.R.A. (N.S.)

which, if genuine, would establish or defeat some claim, impose some duty, or create some liability, or work some prejudice in law to another, in his rights of person or property." *People v. Tomlinson*, 35 Cal. 503; *State v. Cordray*, 200 Mo. 29, 98 S. W. 1, 9 A. & E. Ann. Cas. 1110. "It is a well-settled rule at common law that an instrument may be the subject of forgery, though it does not in fact work any legal injury upon the person whose name is forged." *People v. Abeel*, 3 A. & E. Ann. Cas. 287, note. "The writing need not be such as, if genuine, would be legally valid. If it is calculated to deceive and intended to be used for a fraudulent purpose, this is enough." 13 Am. & Eng. Enc. Law, 2d ed. p. 1093. "As the offense consists in the mere intention, it is not necessary that anyone should have been actually injured or defrauded by the forged writing. It is enough that it may probably or possibly be done." 13 Am. & Eng. Enc. Law, 2d ed. p. 1085. "It is no defense, however, to a prosecution for forgery, that the person committing it was, or considered himself, justly entitled to what he would obtain by means of the forgery." 13 Am. & Eng. Enc. Law, 2d ed. p. 1084. "Forgery may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or evidence of his right. It is sufficient if the instrument forged, supposing it to be genuine, might have been prejudicial." 19 Cyc. Law & Proc. p. 1380. "Where goods were received by a common carrier for transportation, and their possession then demanded by the agent of the shipper's mortgagee, after condition broken, but the carrier declined to surrender the possession, and, after retaining them until next day, then shipped the goods to their destination, the carrier is not liable to the mortgagees." (Syllabus.) *Kohn v. Richmond & D. R. Co.* 37 S. C. 1, 24 L.R.A. 100, 34 Am. St. Rep. 726, 16 S. E. 376. In that case Mr. Chief Justice McIver used this language: "It seems to us that the whole case turns upon the question whether a carrier resting under very stringent obligations to his bailor is bound to assume the burden, where a third person makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, of showing not only that such third person is the rightful owner but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the

goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title. The most that could be properly required of the carrier would be to hold the goods, notifying his bailor of the demand which had been made upon him, and let the claimant contest with the bailor the question of ownership." Concurring in said opinion, Mr. Justice McGowan said: "It seems to me that when a common carrier is intrusted with property for transportation, his first responsibility is to the person who has intrusted him with the property; and upon claim of the property by a third party, that he should not be required, at his risk, to judge between the parties as to the ownership of the property. He should, however, always and at once yield to the force of legal process which intervenes and takes the property, thus relieving the carrier from the responsibility of being judge in the matter."

Not only was Eliot Jefferson the consignee, but at the time the package was delivered to the defendant by the express company the legal title was in him, and had been vested in him, by the buyer, who had ordered the whisky to be sent to him. Therefore the person who paid for the whisky, and ordered it to be sent as aforesaid, had at most only an equitable title. Under such circumstances, Eliot Jefferson alone had the right to demand the delivery of the package, and the effect of the alleged forged order was to deprive the express company of the right to make the proper delivery. If the delivery had been made to Eliot Jefferson, it would only have been necessary for the express company to show such delivery in order to escape liability; but, when the alleged forged order induced it to deliver the whisky to the defendant, the burden was cast upon it to show that the legal owner had not been thereby damaged, thus materially and prejudicially changing the status of the express company by imposing upon it an additional liability, and casting upon it a burden which otherwise would not have existed. The order was also calculated to affect the rights of Eliot injuriously. In order to constitute forgery, it is not essential that the writing is calculated to affect another's right of property injuriously. It is sufficient if it may injure another in his personal rights. At the time the writing was uttered the question had not been determined by the Supreme Court whether a person had the right to keep liquors in his possession for his personal use, and the circuit judges differed in opinions as to such right. In his argument the ap-

pellant's attorney says: "That the Websters plainly used Jefferson's name in order to avoid the dispensary law." Steve Webster admitted upon the stand that the liquor in question was taken from his possession by the police, and that he was fined \$50 for its unlawful transportation. If the order had been genuine, it was calculated to place Eliot Jefferson in the same category, and might have subjected him to confiscation of the whisky on the ground that it was contraband, also to fine and imprisonment for keeping it in unlawful possession, or transporting it in contravention of the statute. These exceptions are therefore overruled.

The last exception cannot be sustained, for the reason that, even if there was error, it has not been made to appear that it was prejudicial.

Appeal dismissed.

Jones, Ch. J., and Woods and Hydrick, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANDREW C. REGGIO

v.

WINSLOW WARREN, Trustee, etc., of
Andrew Carney, Deceased,
and

MARY FRANCES CARRIDIA et al.

(207 Mass. 525, 93 N. E. 805.)

Trust — settlement agreement — rescission — mistake — negligence.

1. A bill to rescind, on the ground of mutual mistake, an arrangement between trustees by which, instead of converting the estate into cash, and giving one of the number who was a beneficiary under the trust, a share of the money, they undertook to conserve the estate and give him a promissory note to represent his share, which they had no authority to do, is not subject to demurrer because it shows that complainant made no attempt to ascertain his rights, but unjustifiably relied upon representations of his cotrustees, where there is nothing to show that his neglect will or can result in any injury to the trust estate or the other beneficiaries.

Rescission — mistake of law — right to relief.

2. That the mistake was one of law will not prevent equity from relieving one of several trustees of a trust fund, who was also a beneficiary, from an agreement between them which all thought to be valid,

Note. — For relief from mistake of law as to effect of instrument, see note to *Dolvin v. American Harrow Co.* 28 L.R.A. (N.S.) 785.

that, in order to conserve the fund, they would give him a promissory note instead of cash for his share of the estate, in consideration of his releasing them and the estate from other liability, which they had no authority to do, and which was therefore void, where rescission of the agreement will result in no loss to the estate or other beneficiaries, while refusal to rescind will enable the other beneficiaries to enrich themselves at his expense.

Same — restoration of cash received.

3. That a beneficiary of a trust who released the estate from other liability upon receiving a note for the amount due him from the trustees, which was void for lack of authority, receives a small amount of cash, does not prevent his maintaining a bill to rescind for mutual mistake, and he is not required to return the amount so received before relief will be granted, where he was absolutely entitled to the cash, and the trustees would have to pay it back at once were it returned to them.

(January 6, 1911.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a bill to procure the cancelation of a release given by plaintiff to defendants and himself, as trustees under the will of Andrew Carney, deceased, and to declare void a certain promissory note given in the course of a settlement made by plaintiff, as one of the beneficiaries under the will, and as trustee, with his cotrustees. Decree for plaintiff.

The facts are stated in the opinion.

Mr. John F. Cusick, for complainant:

The promissory note, the basis of the release in issue, was not a valid and enforceable promissory note, binding the trust estate to pay.

Warren v. Pazolt, 203 Mass. 351, 89 N. E. 381.

The trustees had no doubt as to their legal right to give a valid note, binding the estate; therefore the mistake in this case should be treated as a mistake of fact.

Hunt v. Rhodes, 1 Pet. 13, 7 L. ed. 32; Cooper v. Phibbs, L. R. 2 H. L. 149, 16 L. T. N. S. 678, 15 Week. Rep. 1049, 22 Eng. Rul. Cas. 870; Beauchamp v. Winn, L. R. 6 H. L. 223, 22 Week. Rep. 193, 22 Eng. Rul. Cas. 889; Re Oliver [1905] 1 Ch. 197, 74 L. J. Ch. N. S. 62, 53 Week. Rep. 215, 21 Times L. R. 61; Eaglesfield v. London-derry, L. R. 4 Ch. Div. 693; Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; Eustis Mfg. Co. v. Saco Brick Co. 198 Mass. 218, 84 N. E. 449; Order of United C. T. v. McAdam, 61 C. C. A. 22, 125 Fed. 358; Griswold v. Hazard, 141 U. S. 260, 25 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Blakemore v. Blakemore, 32 L.R.A. (N.S.)

19 Ky. L. Rep. 1619, 44 S. W. 96; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; Blake-man v. Blakeman, 39 Conn. 320.

A court in equity has power in proper cases to grant relief in mistakes of law.

Bingham v. Bingham, 1 Ves. Sr. 126; Hall v. Reed, 2 Barb. Ch. 500; Stone v. Godfrey, 5 De G. M. & G. 81, 2 Eq. Rep. 866, 23 L. J. Ch. N. S. 769, 18 Jur. 524; Jones v. Clifford, L. R. 3 Ch. Div. 779, 45 L. J. Ch. N. S. 809, 35 L. T. N. S. 937, 24 Week. Rep. 979; Rogers v. Ingham, L. R. 3 Ch. Div. 351, 35 L. T. N. S. 677, 25 Week. Rep. 338; Clifton v. Cockburn, 3 Myl. & K. 99; Allcard v. Walker [1896] 2 Ch. 363, 65 L. J. Ch. N. S. 660, 74 L. T. N. S. 487, 44 Week. Rep. 661; Livesay v. Livesay, 3 Russ. Ch. 287, 6 L. J. Ch. 13; McCarthy v. Decaix, 2 Russ. & M. 614, 2 Clark & F. 568, note; Kerr, Fr. & Mistake, 396; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589, 1 Pet. 1, 7 L. ed. 27; Freichnecht v. Meyer, 39 N. J. Eq. 551; Macknet v. Macknet, 29 N. J. Eq. 54; Swedesboro Loan & Bldg. Assn. v. Gans, 65 N. J. Eq. 132, 55 Atl. 82; Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868; Freeman v. Curtis, 51 Me. 140, 81 Am. Dec. 564; McMahon v. Miller, 192 Mass. 241, 78 N. E. 457; State v. Paup, 13 Ark. 137, 53 Am. Dec. 303; Snell v. Atlantio F. & M. Ins. Co. 98 U. S. 85, 25 L. ed. 52; Hausbrandt v. Hoßler, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494; Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290, 13 Mor. Min. Rep. 120; Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919; Din-widdie v. Self, 145 Ill. 290, 33 N. E. 892; Debenham v. Sawbridge [1901] 2 Ch. 109, 70 L. J. Ch. N. S. 525, 49 Week. Rep. 502, 84 L. T. N. S. 519, 17 Times L. R. 441; Pusey v. Desbouvrie, 3 P. Wms. 315, 10 Eng. Rul. Cas. 351; Strickland v. Turner, 7 Exch. 208, 22 L. J. Exch. N. S. 115; Couturier v. Hastie, 5 H. L. Cas. 673, 25 L. J. Exch. N. S. 253, 2 Jur. N. S. 1241, 6 Eng. Rul. Cas. 204.

Money paid voluntarily, however, under mistake of fact, is recoverable either in law or equity.

Freeman v. Jeffries, L. R. 4 Exch. 189, 38 L. J. Exch. N. S. 116, 20 L. T. N. S. 533; Atty. Gen. v. Ray, L. R. 9 Ch. 397, 43 L. J. Ch. N. S. 478, 30 L. T. N. S. 373, 22 Week. Rep. 498; Cox v. Prentice, 3 Maule & S. 344, 16 Revised Rep. 288; Colonial Bank v. Bank of Nova Scotia, L. R. 11 App. Cas. 84, 55 L. J. P. C. N. S. 14, 54 L. T. N. S. 256, 34 Week. Rep. 417.

Mr. Moorfield Store, for defendant Warren:

When a debtor gives a new security which is void or is avoided, the creditor may sue him on the original contract.

Leonard v. First Cong. Soc. 2 Cush. 462; National Granite Bank v. Tyndale, 176 Mass. 547, 51 L.R.A. 447, 57 N. E. 1022; Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334.

Equity will relieve against a mistake of law where justice requires it, especially where the mistake is not as to the general law of the land, but as to the rights of private parties in particular circumstances.

Stone v. Godfrey, 5 De G. M. & G. 76, 23 L. J. Ch. N. S. 769, 18 Jur. 524; Naylor v. Winch, 1 Sim. & Stu. 564, 2 L. J. Ch. 132, 24 Revised Rep. 227; Griawold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Re Saxon Life Assur. Soc. 2 Johns. & H. 408; Eaglesfield v. Londonderry, L. R. 4 Ch. Div. 693; Cooper v. Pibbs, L. R. 2 H. L. 149, 16 L. T. N. S. 678, 15 Week. Rep. 1049, 22 Eng. Rul. Cas. 870; Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; Cochran v. Willis, L. R. 1 Ch. 58; Pom. Eq. Jur. § 842.

Messrs. Elbridge R. Anderson, George A. Sweetser, and Thomas L. Wiles, for other defendants:

No one can be relieved from a mistake in equity where there is negligence.

Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Davies v. London & P. Marine Ins. Co. L. R. 8 Ch. 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Blanks v. Clark, 68 Ark. 98, 56 S. W. 1063; Smith v. Mariner, 5 Wis. 551, 68 Am. Dec. 73; White v. Sherman, 168 Ill. 598, 61 Am. St. Rep. 132, 48 N. E. 128; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Western German Sav. Bank v. Farmers' & D. Bank, 10 Bush, 669; Wilson v. Western North Carolina Land Co. 77 N. C. 445; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374; Wood v. Patterson, 4 Md. Ch. 335; Belt v. Mehen, 2 Cal. 159, 56 Am. Dec. 329.

The alleged mistake is a mistake of law, and not of fact.

Warren v. Pazolt, 203 Mass. 351, 89 N. E. 381; Wilcox v. Lucas, 121 Mass. 21, 3 Mor. Min. Rep. 380; Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; Eustis Mfg. Co. v. Saco Brick Co. 198 Mass. 212, 84 N. E. 449; Hart v. Hart, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8; Powell v. Smith, L. R. 14 Eq. 85, 41 L. J. Ch. N. S. 734, 20 Week. 32 L.R.A. (N.S.)

Rep. 602; Re Railway Time Tables Pub. Co. L. R. 42 Ch. Div. 98; Cooper v. Pibbs, L. R. 2 H. L. 149, 16 L. T. N. S. 678, 15 Week. Rep. 1049, 22 Eng. Rul. Cas. 870.

It was the duty of the complainant trustee to know what the powers of the trustees were under the will.

Tuttle v. First Nat. Bank, 187 Mass. 533, 105 Am. St. Rep. 420, 73 N. E. 560; Loring v. Brodie, 134 Mass. 453; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; Loring v. Salisbury Mills, 125 Mass. 138; Smith v. Burgess, 133 Mass. 511.

Sheldon, J., delivered the opinion of the court:

We assume, under the language of the reservation, that these remaindermen, who, at their request, have been admitted as parties defendant, did not waive their demurrer by going to a hearing on the merits.

They contend that the bill upon its face shows negligence in the plaintiff, on the grounds that he did nothing to ascertain by his own investigation the facts upon which his right depended, or to determine what his rights were; that he relied merely on the assurances of his cotrustees, believing in their judgment and wisdom, and now resting upon an allegation that he and "all of the trustees believed that under said will and under the circumstances which then existed said trustees had full power and authority, the complainant assenting, to retain in the manner aforesaid the sum to which the complainant was entitled, upon the death of Pamela J. Reggio, and instead of distributing the same in cash to the complainant, to give said complainant a promissory note as aforesaid, which note should be in all respects valid and binding upon the trust estate." These defendants insist that there is no allegation in the bill that he had a right to rely on or to believe his cotrustees, nothing to show upon what the belief of the trustees or his own belief was based, or to indicate that it was a reasonable belief or one that should have been relied on.

The bill does not proceed upon any allegation of deceit or fraud; and the decisions in which it has been held that there are fraudulent representations of such a character that one cannot be justified in believing them or in acting upon them are not applicable. Even in such cases the strictness of the old rule has been somewhat relaxed, in order that parties guilty of actual fraud may not too easily escape from liability for their wrongdoing by setting up the undue guilelessness of their victim. Way v. Ryther, 165 Mass.

226, 229, 42 N. E. 1128; Kilgore v. Bruce, 166 Mass. 136, 138, 44 N. E. 108; Mabardy v. McHugh, 202 Mass. 148, 150, 23 L.R.A. (N.S.) 487, 132 Am. St. Rep. 484, 88 N. E. 894, 16 A. & E. Ann. Cas. 500, and cases cited. This bill proceeds purely on the ground of a mutual mistake on the part of persons who were in confidential relations with each other, who were not undertaking to deal with each other at arm's length, and who desired to give to the plaintiff and his sister their legal rights in such a manner as to avoid causing thereby any loss to the body of the trust estate by forcing its property and securities upon a depressed and reluctant market. There was here no violation of any legal duty owed by the plaintiff to the other parties, his cotrustees, with whom he was dealing; there was nothing to indicate that his acting upon their common belief, and refraining from requiring them to pay to him in cash the money to which he was entitled, could result, or that it has resulted, in any loss or injury to the trust estate or to these remaindermen. He is not to be charged with any such laches or acquiescence as was found in *Stone v. Godfrey*, 5 De G. M. & G. 76, 23 L. J. Ch. N. S. 769, 18 Jur. 524. Under more stringent circumstances it could not be said that the bill showed such negligence on his part as to preclude him from obtaining relief. See the cases collected in 2 Pomeroy, *Equity Jurisprudence*, § 856. The demurrer cannot be sustained on this ground.

These defendants also contend that the mistake set forth in the bill was a pure mistake of law, for which no redress can be given. It is a general doctrine that, as it is the duty of everyone to conform his conduct to the requirements of the law, so all men must be treated, alike in courts of civil and of criminal jurisdiction, as being aware of the duties and obligations which are imposed upon them by the law, and that ordinarily one cannot successfully ask for affirmative relief or defend himself against an otherwise well-founded claim, on the bare ground that he was either ignorant of the law, or mistaken as to what it prescribed. *Powell v. Smith*, L. R. 14 Eq. 85, 41 L. J. Ch. N. S. 734, 20 Week. Rep. 602; *Rogers v. Ingham*, L. R. 3 Ch. Div. 351, 35 L. T. N. S. 677, 25 Week. Rep. 338; *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564; *Rice v. Dwight Mfg. Co.* 2 Cush. 80; *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507; *Wheaton Bldg. & Lumber Co. v. Boston*, 204 Mass. 218, 226, 90 N. E. 598. But it is now well settled that this rule is not invariably to be applied. In some cases where great injustice would be done by its enforcement, 32 L.R.A. (N.S.)

this has been avoided by declaring that a mistake as to the title to property or as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of a deed, or as to the duties or obligations created by an agreement, was really a mistake of fact, and not strictly one of law, and so did not constitute an insuperable bar to relief. *Wilcox v. Lucas*, 121 Mass. 21, 25, 3 Mor. Min. Rep. 380; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958; *Eustis Mfg. Co. v. Saco Brick Co.* 198 Mass. 212, 84 N. E. 449; *Blakeman v. Blakeman*, 39 Conn. 320; *McCarthy v. Dechaix*, 2 Russ. & M. 614, 621, 2 Clark & F. 568, note. In other cases, a distinction between ignorance or mistake as to a general rule of law prescribing conduct and establishing rights and duties, and one as to the private right or interests of a party under a written instrument, has been laid down; and it has been declared that while relief could not be given by reason of a mistake of the former kind, one of the latter kind, shared by both parties to an agreement, and resulting in a loss of the rights of one of them, may be set aside at the suit of the injured party, though no fraud was practised upon him. The distinction taken is between the general law of the country, for ignorance of which no one is excused, and private rights which depend upon the existence of particular facts and the rules which the law declares as to those facts. *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170, 16 L. T. N. S. 678, 15 Week. Rep. 1049, 22 Eng. Rul. Cas. 870; *Beauchamp v. Winn*, L. R. 6 H. L. 223, 22 Eng. Rul. Cas. 889; *Re Oliver* [1905] 1 Ch. 191, 197, 198, 74 L. J. Ch. N. S. 62, 53 Week. Rep. 215, 21 Times L. R. 61; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303. In other cases, sometimes as the ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving of relief to one injured by reason of a mistake of law, but that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law, and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress. *Freichnecht v. Meyer*, 39 N. J. Eq. 551; *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Hausbrandt v. Hoffer*, 117 Iowa, 103, 94 Am. St. Rep. 289, 90 N. W. 494, quoting and following *Stafford v. Feters*, 55 Iowa, 484, 8 N. W. 322, and *Ring v. Ashworth*, 3 Iowa, 458; *Snell v. Atlantic F. & M. Ins. Co.*

98 U. S. 85, 25 L. ed. 52. To the same effect see *Swedesboro Loan & Bldg. Asso. v. Gans*, 65 N. J. Eq. 132, 55 Atl. 82, in which the old rule as to ignorance of the law is said to be subject to so many exceptions that it is quite as often inapplicable as applicable; *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029, in which the court declares it to be well settled that a mistake as to law may, under certain circumstances, afford ground for relief in equity; and *Allcard v. Walker* [1896] 2 Ch. 369, 381, 65 L. J. Ch. N. S. 660, 74 L. T. N. S. 487, 44 Week. Rep. 661, in which the proposition that relief never can be given in respect to a mistake of law was called inaccurate. So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct; and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or of fact, entertained by both parties. *Park Bros. & Co. v. Blodgett & C. Co.* 64 Conn. 28, 29 Atl. 133; *Blakemore v. Blakemore*, 19 Ky. L. Rep. 1619, 1620, 44 S. W. 96; *Dinwiddie v. Self*, 145 Ill. 290, 305, 33 N. E. 892; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Order of United C. T. v. McAdam*, 61 C. C. A. 22, 125 Fed. 358, 368; *Stone v. Godfrey*, 5 De G. M. & G. 76, 90, 23 L. J. Ch. N. S. 769, 18 Jur. 524; *Naylor v. Winch*, 1 Sim. & Stu. 552, 564, 1 L. J. Ch. 132, 24 Revised Rep. 227; *Re Saxon Life Assur. Soc.* 2 Johns. & H. 408, 412. This doctrine frequently has been applied to cases of the reformation of contracts; *a fortiori*, it is to be applied to cases in which justice can be obtained only by a complete rescission. *Canedy v. Marcy*, 13 Gray, 373; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290; *Griswold v. Hazard*, 141 U. S. 260, and cases cited on page 284, 35 L. ed. 678, 688, 11 Sup. Ct. Rep. 972, 999; *Carrell v. McMurray* (C. C.) 136 Fed. 661. Cases in which a release has been either avoided or restricted in its operation by a limitation of its general words rest really upon the same principle. *Remsen v. Hilton*, 2 Ves. Sr. 305; *Lyall v. Edwards*, 6 Hurlst. & N. 337, 30 L. J. Exch. N. S. 193; *Turner v. Turner*, L. R. 14 Ch. Div. 829, 42 L. T. N. S. 495, 28 Week. Rep. 859, 44 J. P. 734; *Re Garnett*, L. R. 31 Ch. Div. 1. So, one who has made an election under a will may rescind it upon proof that he acted under a misapprehension of his legal rights, or even in ignorance of the fact that he was bound to make an election. *Wat-*

son v. Watson, 128 Mass. 152; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Pusey v. Desbouvrie*, 3 P. Wms. 315, 316, 10 Eng. Rul. Cas. 351; *Salkeld v. Vernon*, 1 Eden, 64.

The correct doctrine, both upon principle and authority, was stated by the supreme court of Michigan in *Renard v. Clink*, 91 Mich. 1, 3, 30 Am. St. Rep. 458, 51 N. W. 692, 693: "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. . . . But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting those assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." And this statement by the court is amply supported by a full and apt citation of cases.

The approved text writers have taken the same view. *Kerr* (*Fraud & Mistake*, 4th ed. 467) thus sums up his treatment of the subject: "When, therefore, a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired." *Pomeroy*, in his treatise on *Equity Jurisprudence*, after an elaborate discussion of the question in the light of the decided cases, lays down substantially the same proposition in language which has been cited and approved in many of the decisions already referred to. 2 Pom. Eq. Jur. § 849. And see further the note to 1 Story, Eq. Jur. § 111.

These principles are decisive of the present contention. As to this point the bill, reduced to its lowest terms, presents the question whether one who has innocently left in the hands of trustees money, being a part of the trust fund, to which he was

legally entitled, and the payment of which he could have enforced, and in consideration thereof has received from the trustees merely a void promise that it shall be paid to him from the trust estate in future, with interest at a fixed rate, which promise both he and the trustees believed to be valid and binding, and who thereupon has given to them a release and discharge running both to them and to the trust estate, from all liability except upon the void promise, can, upon discovering the invalidity of the promise, avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due, it appearing that the trust estate has parted with nothing of value in or by reason of the transaction, and that the only effect of refusing the relief asked for will be to deprive him of the money to which he had the lawful right, and which all parties supposed that they had secured to him by what they had done, and correspondingly to enrich the trust fund at his expense, and to secure to the beneficiaries in remainder a large amount of money to which they had no claim, and to which it never was intended or imagined by themselves or anybody else that they should acquire any claim. The bare statement of this question is enough. We are led irresistibly to the conclusion that the demurrer cannot be sustained upon this ground.

Nor can these remaindermen derive any benefit from such cases as *Tuttle v. First Nat. Bank*, 187 Mass. 533, 105 Am. St. Rep. 420, 73 N. E. 580; *Loring v. Brodie*, 134 Mass. 453; *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804, or the decisions in which one who has made an unauthorized loan to a city or town has been denied recovery either upon the invalid note which he has taken, or upon the money counts, by proof that the money had been applied to the use of the town. The case at bar differs from those cases in the fact that here there was not an unauthorized loan to the trustees which created no liability against the trust estate, but there was an antecedent liability of the trust estate to the plaintiff, which he might have recovered from that estate by appropriate proceedings, and which never has been paid. If he had given no release, the fact that he had accepted a void note for the amount that was due to him would not have prevented him from enforcing the original obligation. *Leonard v. First Cong. Soc.* 2 Cush. 462, 464; *Small v. Franklin Min. Co.* 99 Mass. 277, 2 Mor. Min. Rep. 33; *Weddigen v. Boston Elastic Fabric Co.* 100 Mass. 422; *National Granite Bank v. Tyndale*, 176 Mass. 547, 51 L.R.A. 447, 57 N. E. 1022; *Central Nat.* 32 L.R.A. (N.S.)

Bank v. Copp, 184 Mass. 328, 68 N. E. 334. Nothing now stands in his way but the release which it is the object of his bill to set aside. That differentiates the case from the decisions upon which the remaindermen rely. Of course, so far as the enforcement against the trustees of the note bearing a fixed rate of interest was concerned, the plaintiff did stand in a position similar to that of the plaintiffs in the actions referred to. That is the reason of the language used in the opinion of the court, in *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381, in speaking of the transaction as a loan of money upon the note. But that was said with reference merely to the note itself and its enforcement against the trust estate, and not with reference at all to the question now considered. Whether the trustees could be held personally liable upon the note need not be considered. See *Dunham v. Blood*, supra.

We do not doubt that the bill presents a proper case for relief in equity. There needs no discussion or citation of authorities to show this. That there may have been a partial consideration for the giving of the release in the comparatively small amount paid in cash at the same time that the note for a much larger amount was delivered does not, under the circumstances, make it impossible to give relief. *Johnson v. Johnson*, 3 Bos. & P. 162, 6 Revised Rep. 736. Nor does the bill show that it will be impossible upon rescission to put the parties *in statu quo*, as in *Clarke v. Dickson*, El. Bl. & El. 148, 27 L. J. Q. B. N. S. 223, 4 Jur. N. S. 832. It was not necessary to offer to return the money which the plaintiff has received. What was paid at and before the giving of the release was rightly paid upon his original demand; what has been paid upon the note should in equity be applied upon the same demand. He need not go through the vain ceremony of repaying or offering to repay these sums, when it at once would become the duty of the trustees to return to him the amount of these payments with a much larger additional sum. And see *Beauchamp v. Winn*, L. R. 6 H. L. 223, 232, 22 Eng. Rul. Cas. 889; *Long v. Athol*, 196 Mass. 497, 506, 17 L.R.A. (N.S.) 96, 82 N. E. 665; *O'Shea v. Vaughn*, 201 Mass. 412, 422, 87 N. E. 616, et seq.

There is no ground upon which the demurrer can be sustained. What has been said upon the demurrer covers most of the points that have been raised upon the merits.

Upon careful exaction of the evidence, we are of opinion that all the findings of fact made by the single justice must stand. In view of the relations between the parties

and the existing circumstances, we doubt whether any contrary findings could have been supported.

There is nothing in the transactions relating to the Carney Building to prevent giving to the plaintiff the relief for which he asks. That was an independent matter, which has been fully heard, and it has been found that the trustees are not liable to the *cestuis que trust* by reason thereof. *Warren v. Pazolt*, supra. Certainly we cannot hold them indirectly for what it has been held does not impose upon them any liability. Nor can we make the plaintiff suffer as a beneficiary for the errors of judgment in which he has shared as a trustee, but for which neither he nor the other trustees are to be held liable as trustees.

We do not deem it desirable to discuss further the considerations which have been suggested by the ingenuity of counsel. We have weighed carefully all the arguments that have been addressed to us in behalf of these defendants, and have examined all the decisions to which they have referred us, although all of these have not been cited. We have found nothing to lead our minds to a different conclusion from that which we have reached, or that can prevail against the manifest equities in favor of the plaintiff. A decree must be entered for the plaintiff as prayed for, with costs against the intervening defendants.

So ordered.

LOUISIANA SUPREME COURT.

DANIEL P. McMAHON

v.

NEW ORLEANS RAILWAY & LIGHT
COMPANY, Appt.

(127 La. 544, 53 So. 857.)

Street railway — protection of passenger on platform.

1. Where a passenger is permitted to stand on the front platform of a motor car, he has the right to assume that, if there is any danger to him requiring the closing of the gates of the platform, they will be closed; and the same duty of closing these gates, when it is necessary for the protection of a passenger, rests upon an interurban railroad as upon a strictly city railroad.

Same — rounding curve — care required.

2. The employees of a railroad company must use every care commensurate with the danger to a passenger, and where a motorman of a street car fails to sufficiently

slow down his car in rounding a curve, and a passenger who has been standing on the platform with the motorman is thrown out by the consequent jolting and is injured, the railroad company is liable.

Same — violation of rules.

3. The fact that the rules of a railroad company provide that passengers may stand on the platform only when there are no seats in the car will not preclude a passenger from obtaining damages for the negligence of the car crew, because there were seats in the car, and the passenger was riding on the platform with the sanction of the employees of the railroad company.

Damages — personal injury — rules for measuring.

4. While there should be some similarity in the awards of damages for like injuries, still there is no exact rule for the measurement of damages, and the facts of each case must be the basis on which the amount in each case is predicated.

(Provosty, J., dissents.)

(November 14, 1910.)

Note. — *Duty to provide and keep gates on street cars or interurban cars closed.*

The question whether a street railway company is negligent in failing to construct and maintain guard railings on the back platform of a street car, of sufficient height to protect passengers from passing cars, is one of fact for the jury to determine. *Gage v. St. Louis Transit Co.* 211 Mo. 139, 109 S. W. 13 (passenger struck while protruding his head outside the car).

So, in *Matz v. St. Paul City R. Co.* 52 Minn. 159, 53 N. W. 1071, an action to recover damages for the death of a passenger, caused by falling over the dasher of the platform of a horse car, it was held a question for the jury whether defendant, which permitted and invited passengers to ride on the rear platforms of its cars, was negligent in not protecting the platforms with guards of sufficient height to prevent passengers from falling off.

So, where a passenger is knocked off the lower step of the front platform of a crowded car, by the jolting of the car, the absence of a guard or fender on the front platform is a fact which may be taken into consideration, with other facts, in determining the question of the company's negligence. The court will not say, however, as a matter of law, that the failure of the company to furnish such a guard is negligence. *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 524.

In *Morgan v. Los Angeles Pacific Co.* 13 Cal. App. 12, 108 Pac. 735, where a passenger was knocked off the step of an overcrowded car next to a parallel track, by the projecting handle bar of a car going in the opposite direction, an instruction that there was no law requiring the company to maintain a safety bar on the side of the

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Dart, Kernan, & Dart, for appellant:

The motorman in charge of an electric car does not owe passengers the duty of maintaining a uniform rate of speed after the car is a few hundred feet of a place where he has been signaled to stop.

McGann v. Boston Elev. R. Co. 199 Mass. 446, 18 L.R.A.(N.S.) 506, 127 Am. St. Rep. 509, 85 N. E. 570.

car on which plaintiff was riding, so far as it went, correctly stated the law, and did not preclude plaintiff from showing negligence in not providing a safety bar under the circumstances. The court said: "There is neither statute nor ordinance, nor, as we are advised, legal precedent, requiring the defendant to place and keep in place a safety bar, either in the entrance where plaintiff was riding, or in entrances of this class generally. The instruction did not preclude the plaintiff from showing, or the jury from considering, whether or not it was negligence upon the part of defendant not to provide a safety bar under such circumstances as existed here. An appropriate instruction in this regard would no doubt have been given by the court had it been requested, but the trial court would not have been justified in saying as a matter of law that the absence of the safety bar in this case was negligence *per se*."

In Halverson v. Seattle Electric Co. 35 Wash. 600, 77 Pac. 1058, where a passenger was thrown from a street car as it was rounding a curve, it was held not error to charge that the company would be liable for negligently failing to provide a guard or gate, or to refuse to instruct that it was under no obligation to provide guards because not required to do so by statute, where the failure to provide a guard or gate was not the only element of negligence complained of, but the accident was due also to the negligence in running an overcrowded car around a curve at a dangerous rate of speed while passengers were standing on the platforms. "It may not be negligent of railway companies," says the court, "to fail to provide railings or gates to prevent passengers from falling or being thrown from the cars, where they are run at the usual rate of speed upon straight or even tracks, where no such protections are usually required; but when an unusual or high rate of speed is maintained around curves or over rough and uneven roads, then ordinary diligence requires such safeguards, even if they are not required by positive statute."

In Gaffney v. Brooklyn City R. Co. 632 L.R.A.(N.S.)

The jerking of a train incident to the increase of its speed, after the speed has been slackened in crossing a bridge, was not negligence as to a passenger standing on the platform of a car, where there was at least standing room inside the car.

Louisville & N. R. Co. v. Morris, 23 Ky. L. Rep. 448, 62 S. W. 1012; White, Personal Injuries on Railroads, § 801; Goodwin v. Boston & M. R. Co. 84 Me. 203, 24 Atl. 816; Foley v. Boston & M. R. Co. 193 Mass. 332, 7 L.R.A.(N.S.) 1076, 79 N. E. 765; Worthington v. Central Vermont R. Co. 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590; Feldheim v. Brooklyn, Q. C. & Suburban R. Co. 122 App. Div. 883, 107 N. Y. Supp. 413; Paterson v. Philadelphia Rapid Transit Co. 218 Pa. 359, 12 L.R.A.(N.S.) 839, 67 Atl.

Misc. 1, 25 N. Y. Supp. 996, a company was liable where a passenger attempting to enter an open car on the wrong side, both guard chains being down, was struck by a car moving on a parallel track; the fact that the chains were down on the side next the other track being an invitation to passengers to enter the car on that side.

But in Bridges v. Jackson Electric R. Light & P. Co. 86 Miss. 584, 33 So. 788, 4 A. & E. Ann. Cas. 662, where a passenger was struck by a trolley post while standing on the car running board, the street railway company was not negligent in failing to maintain a guard rail on the side of the car nearest the trolley post, where the trolley posts were not dangerously near the track, and the danger therefrom was obvious; and the fact that the guard rail or bar, which plaintiff knew was ordinarily kept down along the side of the car next the posts, was up, did not relieve him of contributory negligence in exposing himself to obvious danger.

Although there may be no negligence in the failure of an electric street railway company to have gates to car platforms to guard passengers against accidents by preventing them alighting on the side next to a parallel track, yet when a particular company has provided such gates, failure to keep them closed may or may not be negligence in the given instance, and this is a question of fact for the jury. Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

Whether a street car company exercised the utmost care in the maintenance of a platform gate which broke, allowing a passenger to fall off the car, is a question for the jury. Stappers v. Interurban Street R. Co. 56 Misc. 337, 106 N. Y. Supp. 854.

And in Aston v. St. Louis Transit Co. 105 Mo. App. 226, 79 S. W. 999, a suit by a passenger for injuries caused by the giving way of a gate on the rear platform of a crowded street car, where he was standing, it was held that the happening of the accident created a presumption that the company was negligent in not having the gates securely fastened.

A street railway company was held guilty

616; *Walling v. Trinity & B. Valley R. Co.* 48 Tex. Civ. App. 35, 106 S. W. 417; *Harbison v. Metropolitan R. Co.* 9 App. D. C. 60; *McGinn v. New Orleans R. & Light Co.* 118 La. 811, 13 L.R.A.(N.S.) 601, 43 So. 450; *Philips v. St. Charles Street R. Co.* 106 La. 592, 31 So. 135; *Pitard v. New Orleans R. & Light Co.* 120 La. 932, 45 So. 943; *Sharp v. New Orleans City R. Co.* 111 La. 395, 100 Am. St. Rep. 488, 35 So. 614; *Kiefer v. Brooklyn Heights R. Co.* 111 App. Div. 404, 97 N. Y. Supp. 841; *Vogler v. Central Crosstown R. Co.* 83 App. Div. 101, 82 N. Y. Supp. 485; *Depew v. New York City R. Co.* 112 App. Div. 260, 98 N. Y. Supp. 276; *Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161; *South Covington & C. Street R. Co. v. Physioc* 124 Ky. 153, 92 S. W. 305; *Cottrell v. Pawtucket Street R. Co.* 27 R. I. 565, 65 Atl. 269; *Chicago G. W. R. Co. v. Mohaupt*, 18 L.R.A.(N.S.) 760, 89 C. C. A. 457, 162 Fed. 605; *Winters v. Baltimore & O. R. Co.* 163 Fed. 106.

Messrs. E. M. Stafford and H. W. Robinson, for appellee:

It is negligence to run a car into a curve at a speed of 18 or 20 miles an hour.

Nellis, *Street Railroad Law*, 180.

It is not negligence for a passenger to ride on the platform of a car.

Capital Traction Co. v. Brown, 29 App. D. C. 473, 12 L.R.A.(N.S.) 831, 10 A. & E. Ann. Cas. 813; *Spurlock v. Shreveport Traction Co.* 118 La. 1, 42 So. 575.

The carrier owes safe passage to the passengers, and should prove what fault, and whose, prevented the fulfilment of the contractual obligation.

Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766; *Spurlock v. Shreveport Traction Co.* 118 La. 1, 42 So. 575.

Breaux, Ch. J., delivered the opinion of the court:

This was an action for damages brought to recover the sum of \$15,000 for personal injuries. The case was tried by jury. Nine thousand dollars was the amount allowed

to plaintiff by the verdict and judgment. Defendant prosecutes this appeal.

On the 23d day of July, 1909, plaintiff was thrown from the front platform of one of defendant's cars, a few hundred feet before reaching the West End terminus of defendant's line, near the platform known as the "Jackson Brewing Box." Plaintiff, at the time of the accident, was a fireman in the employ of the New Orleans Fire Department, in whose service he had been for eighteen years. He was earning \$65 per month. His age was forty-four years. His health was good. On the day that he was hurt, he boarded the car about 1 p. m. at Basin and Canal streets. He was going to the lake to fish and enjoy a day's vacation. He had a hand basket and a package, which he placed on the platform where he stood. While on the platform, he held to a rod. Before he was thrown from the platform, he stooped down to take up his basket with his right hand, preparatory to his alighting from the car. It was then that he was thrown from the car. There is a curve in the road where plaintiff was thrown out of the car. The speed of the train was moderated a little on entering the curve, but not sufficient to prevent the jolting of the car. Thomas J. Reed, a witness (an armorer of the Naval Brigade), who was a passenger on the train, said that there is always a jolting when the car gets to the curve in question; passengers lean to the right as the West End train goes around the curve. He said that at the time the train was moving at the rate of about 18 miles an hour. The other witness for the plaintiff testified to about the same effect. The front gates of the car were open. The motorman, on request of plaintiff, was to stop at the Jackson Brewing Box, where plaintiff was to alight from the car. There were vacant seats in the car. The train consisted of two cars,—the motor and the trailer.

The contention of plaintiff is that when the train struck the curve there was a violent jolting, owing to the speed of the car, and it was then that he was thrown off.

of negligence, where the conductor saw that a gate on a car was so bent that it could not be bolted, and, as a result of neglecting to tie or secure it, it flew open and precipitated a passenger into the street. *Pendergast v. Union R. Co.* 10 App. Div. 207, 41 N. Y. Supp. 927.

And in an action for the death of a passenger riding on the front end of an interurban electric car, who was knocked off the step by a car passing in the opposite direction on a parallel track, the company was held negligent in running the car without closing the vestibule door next to the 32 L.R.A.(N.S.)

other track. *Peterson v. Elgin, A. & S. Traction Co.* 142 Ill. App. 34.

In *Cincinnati Traction Co. v. Leach*, 95 C. C. A. 47, 169 Fed. 549, the company was held bound to exercise the highest degree of care in the construction and fastenings of the gates on the rear platforms of its cars, and where a passenger was thrown off and injured by reason of the gate giving way, he was not chargeable with contributory negligence because he did not take the additional precaution to see and use a handhold.

J. D. C.

He suffered severe injury. His foot was badly crushed and amputation was necessary. He was carried to the Charity Hospital, where he remained four months. His leg was amputated the first time about 8 inches below the knee. The physician explained that it became necessary to perform a second operation, and to amputate the leg at about 4 inches below the knee. Plaintiff charges that it was negligence on the part of the defendant to leave the front gates of the car open. Plaintiff testified that after the amputation of his leg he had sought work, and had failed to find it, owing to the loss of his leg.

Defendant denies all liability, and charges that the injury suffered was through plaintiff's fault and negligence. The speed of the car was not sufficiently moderated while passing through the curve is the trend of the testimony for plaintiff. We are of opinion that there is no question but that, while running through a curve, those in charge of the car should be watchful and careful, in order, so far as possible, to protect the lives of the passengers. The care exercised should be commensurate with the situation. With reference to the jolting of the car, the defense urged that there were no jolts, and referred to the testimony of passengers inside of the car who did not feel jolt or jars. We have found that there is conflicting testimony upon the subject. But, be that as it may, passengers quietly seated in the car may not remember when testifying as witnesses in regard to jolts. Those on the outside were in a better position to see the jolt or feel it. Moreover, the fact is that plaintiff was thrown out. This fall is not accounted for on any other theory.

The position of the defendant is that the curve amounted to very little. The testimony is that years ago a curve was carved out of each side of the New Basin in order to enable schooners to pass. This curve on the east side of the canal has a shape of a half moon is the statement of one of the witnesses. In time, when a track was laid, this track was made to bend to the eastward in order to follow the curve. Some of the witnesses mention it as a curve of 45 degrees, and others, that it was a slight curve. We infer that there was enough of a curve to cause jolt or vibration when the car was running at a full speed, or near full speed. The testimony is that it was running at about 18 miles an hour through this curve. The motorman and the conductor knew that the plaintiff was standing on the platform. The former knew that he was standing behind him, and that he had asked him to

stop at the Jackson Brewing Box, and that he had assented. The conductor collected his fare from plaintiff while on the platform. Neither the motorman nor the conductor warned plaintiff of the least danger. These two employees testified that passengers frequently ride on the platform of this train, and that it is not considered at all dangerous to do so. The rule is that passengers may ordinarily stand on the platform of the car if there are no vacant seats. If there are vacant seats and a passenger is allowed to remain on the platform without warning or notice, it is not considered negligent on his part. There are decisions in other jurisdictions holding that a passenger may ride on the platform whether there are vacant seats or not.

The case before us for decision is a stronger case for the plaintiff for the reason that he was seen by the employees on the platform, and they gave him some sanction for riding thereon by collecting the fare from him, as before mentioned, and in assenting to let him off at the Jackson Brewing Box, as above stated, while he was standing on the front platform of the motor car, near the motoneer. The following decisions upon the subject are pertinent: *Spurlock v. Shreveport Traction Co.* 118 La. 1, 42 So. 575; *Capital Traction Co. v. Brown*, 29 App. D. C. 473, 12 L.R.A. (N.S.) 831, 10 A. & E. Ann. Cas. 813, 5 Street Ry. Rep. 97.

It is stated in defendant's brief that plaintiff crossed over from the right to the left of the platform; that he was thereby negligent, and it was then that he lost his balance and fell over. This is a contested issue of fact. Plaintiff testified that he did not move from the right to the left; that he was on the side of the platform from which he was thrown, picking up his packages preparatory to stepping off the car, when the jolt came and threw him out.

The open gates at the front platform give rise to another question for decision. Plaintiff was standing on the platform of the front (motor) car, where generally these gates are kept closed while on the way. The only defense at this point is that defendant's railroad should not be judged as if it were a city railroad. To this we can only say that this road is at least interurban, if not entirely urban, and a street road. The train was moved by electricity from the city to West End, through grounds that are densely settled, except vacant spots here and there, of which it may be said *rures in urbe*, for they all form part of the city of New Orleans. The gates should have been closed. There was as much necessity for closing them as there is for closing the gates of a

city car in front where the motorman guides the car. Interurban and strictly street cars are subject to the same regulation. *Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161. Defendant's cars are as much city railroads as they are interurban. One of the employees testified in regard to the open gate: "Yes, sir; there are gates on the motor car." But he said further that these gates are seldom used, unless the car runs over the Canal Belt. Why should they be seldom used except on the Canal Belt is an inquiry that is not answered by the testimony. There is evidently as much use for shutting these gates on the way to West End as anywhere else. Now, since the passengers were permitted to ride in front on the motorman's platform, it devolved upon the motorman to be careful and see that the gates were closed while the train was running and until the moment when the passengers are about to alight. Defendant cites several decisions of courts of other jurisdictions, decided in favor of defendant, in which it appeared that plaintiff had knowledge of the situation. Plaintiff was riding on the platform in view of the motorman and conductor, doubtless, without apprehending that there would be less control than the exigencies of the occasion required, or that there would be jolt or vibration. It is true that when plaintiff boarded the car at Canal he saw the gates open at the front platform. He would not have been heard by the motorman to object to the open gates at that time. There was no necessity for his assuming that they would not be closed if the motorman saw the necessity of closing them at or near the curve before mentioned. The duty of closing the gates was with the motorman. Defendant charges that it was extremely negligent for plaintiff to go near the open gate and stoop down just as the car was about to enter the curve. We understand that he stooped down to pick up his basket, as before mentioned, preparatory to stepping off. Even if he was a little hasty in picking up these effects some little distance before reaching the Jackson Brewing Box, it does not appear that he was negligent, for he testifies, and he was not contradicted, that while doing this he held onto the bar in front of the car; that is, he held to the bar with one hand and stooped to pick up his lunch basket with the other. In this one act, we have not found that there was negligence.

We have considered all the points, and have arrived at the conclusion that, as relates to negligence, the verdict should be affirmed.

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Quantum of Damages.

That is the only remaining question. The defendant's contention is that the jury having allowed \$9,000, a sum in excess of that allowed for injuries many times severer, it should be reduced. It cites a number of decisions in support of its contention on this point, to wit: *Bourg v. Brownell-Drews Lumber Co.* 120 La. 1009, 124 Am. St. Rep. 448, 45 So. 972; *Roff v. Summit Lumber Co.* 119 La. 571, 44 So. 302, and *Yates v. Southwestern Brush Electric Light & P. Co.* 40 La. Ann. 467, 4 So. 250. In these cases, the damages allowed were reduced on appeal. Defendant cites the case of *Conway v. New Orleans City & Lake R. Co.* 51 La. Ann. 146, 24 So. 780. In that case, the damages were reduced from \$8,500 to \$6,500. Plaintiff in the last cited case was an old man. He also lost a leg. In none of these cases are the facts entirely similar. Damages are controlled, as to the amount, by the facts of each case. Although there should be some similarity, there is no necessity for its being absolutely similar in every instance.

For reasons assigned, the judgment is affirmed.

Provosty, J., dissents.

Petition for rehearing denied January 3, 1911.

INDIANA SUPREME COURT.

JAMES TOUHEY, Appt.,

v.

CITY OF DECATUR.

(— Ind. —, 93 N. E. 540.)

Municipal corporation — negligent injury — notice — constitutional rights.

1. No constitutional right of one injured by a defect in a city street is impaired by a statutory requirement that before he can maintain an action against the municipality

Note. — Physical or mental incapacity as an excuse for failure to give notice of injury required as a condition of municipal liability.

There is considerable conflict in the decisions upon this question. In some statutes provision is made for failure to give notice because of physical or mental disabilities resulting from the accident, and under such statutes it becomes merely a question of fact as to whether the excuse given was sufficient.

Under statutes.

In Massachusetts the statute requires notice within thirty days "unless from physio-

for the injury, he must have given it notice of the time, place, cause, and nature of the injury.

Same — incompetency of plaintiff.

2. That one injured by a defect in a city street is rendered mentally and physically incompetent by the injury does not excuse his failure to give the notice to the city which the statute makes a prerequisite to the maintenance of an action against it.

Same — newspaper notice.

3. Notice to city officers of an accident on its streets through reading a newspaper description of it does not comply with a statutory requirement that before action can be brought against the city to hold it liable for the injuries written notice must be given to it of the time, place, cause, and nature of the injury.

al or mental incapacity it is impossible for the person injured to give such notice, in which case he may give notice within ten days after such incapacity is removed." Under this statute it was held in *Mitchell v. Worcester*, 129 Mass. 525, that failure to give notice was not excused where plaintiff was not so physically or mentally incapacitated as to be unable to give notice himself or through another.

In *McNulty v. Cambridge*, 130 Mass. 275, it was held that the fact that plaintiff was unable to leave his bed during the period required, and did not know how to write, was insufficient to show that it was impossible, within the statute, to give the notice earlier.

In *Lyons v. Cambridge*, 132 Mass. 534, where, after an injury resulting in a broken limb, plaintiff was taken to her home, one of her daughters assisting her, and while there she told her husband, who went to see the place where the injury occurred, and plaintiff was then taken to the hospital, but was of clear mind, and was visited by members of her family during the thirty-day period, it was held that she was not excused from giving the notice.

In *Welch v. Gardner*, 133 Mass. 529, it was held that where the evidence of incapacity is conflicting, the question is for the jury.

In *May v. Boston*, 150 Mass. 517, 23 N. E. 220, it was held that the burden of proof that plaintiff was physically incapacitated from giving the required notice was not sustained by proof of the fact that she was confined to her bed; nor was mental incapacity established by testimony that her head troubled her, and at times she was dizzy and her mind visionary, and at time delirious at night, and appeared worse after opiates were given her under a physician's directions.

In *Saunders v. Boston*, 167 Mass. 595, 46 N. E. 98, it was held that there was insufficient evidence to show inability to give notice, where the injury was a severe sprain of the ankle, causing severe pain, and making it impossible for plaintiff to step on the foot for two or three weeks, but she

Same — waiver by officers — validity.

4. Municipal authorities cannot waive the notice required by statute to be given in case of injury on a city street before action can be brought against the city to hold it liable therefor.

(January 6, 1911.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Adams County sustaining a demurrer to the complaint in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Amos P. Beatty and David E. Smith, for appellant:

A complaint showing injuries from neg-

was able to tell her husband of the injury on the same day, and her physician on his first visit, and she sent to a lawyer within a week or ten days after the accident.

But in *Barclay v. Boston*, 167 Mass. 596, 46 N. E. 113 (a second appeal of which is reported in 173 Mass. 310, 53 N. E. 822), it was held that incapacity might fairly be inferred where deceased fell, injuring her hip and her head, and was taken to a hospital, and her relatives were unable to locate her for ten days, and no reason appeared for her failing to communicate with them if she had been able, and it was shown that she became delirious within ten days after the injury, and remained delirious and unable to transact business until her death.

And in *Stoliker v. Boston*, 204 Mass. 522, 90 N. E. 927, it was held that incapacity to give notice was sufficiently shown by evidence that plaintiff immediately became unconscious, and ever since has been of unsound mind and without any recollection of the accident; and it was further held that his rights were not affected by inaction on the part of his father or other relatives or friends other than a duly appointed guardian.

In *Ray v. St. Paul*, 44 Minn. 340, 46 N. W. 675, under a statute requiring notice in thirty days unless the injured party was "bereft of reason," it was held that the fact that plaintiff's leg was broken by a compound fracture, causing much suffering, to relieve which opiates were administered as needed for more than thirty days, but that his mind was not affected except by the pain, and he did not suffer from delirium was insufficient to show that plaintiff was bereft of reason or mentally incapacitated from attending to business, so as to exempt him from giving the notice.

Under a similar statute in *Gonyeau v. Milton*, 48 Vt. 172, it was held that if a person injured loses consciousness temporarily, and then recovers his consciousness and continues so one week, he will not be excused; but if, after the primary effects of the injury have passed, the mind cannot perform its functions, not because

ligence in keeping streets and sidewalks in a reasonably safe condition, and freedom from negligence on the part of the person injured, is sufficient.

Goshen v. Alford, 154 Ind. 58, 55 N. E. 27; Huntington v. Breen, 77 Ind. 29.

Persons who are injured by reason of the defects in streets, and who are free from fault, may recover for such injuries, although the negligence of some third person may have contributed to such injury.

Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452.

Cities are bound to use active diligence to discover defects in a street, and if a defect which caused an injury had existed for such a length of time that the city or its officers might have obtained knowledge of it by the exercise of reasonable care and diligence, notice will be implied.

of mere pain or sickness, but because its functions are disordered, deranged, or abated so that he cannot transact such business as pertains to the giving of notice, he is bereft of his reason so as to be excused from giving any notice, though this condition does not continue for the full time within which notice could be given.

In Morrison v. Toronto, 12 Ont. L. Rep. 333, where the statute makes reasonable excuse sufficient, it was held that where plaintiff was so disabled as to make him incapable of giving notice on his own initiative, spontaneously and unaided by any direction or instruction as to notice, and was physically unable to serve such notice himself, he would be excused.

And in O'Connor v. Hamilton, 8 Ont. L. Rep. 391, it was held that there was a reasonable excuse for failure to give the notice, where plaintiff was taken immediately to a hospital, where he was confined for more than the statutory period, his only arm was broken, his hip and leg bruised, his shoulder swollen, and his arm was set twice within a few days. But this case was reversed on appeal in 10 Ont. L. Rep. 536, the court saying that plaintiff was under no disability except ignorance of the law, which would not excuse the omission.

In the absence of statute.

In Webster v. Beaver Dam, 84 Fed. 280, it was held that plaintiff was excused from service of notice within fifteen days, where she was rendered physically incapable of giving such notice within the time, and gave it as soon as she was able to attend to it.

In Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843, it was held that where the injured party dies after having lived beyond the period of notice without having given it, his administrator may nevertheless sue under a statute giving the personal representative a right of action if the deceased "might have maintained an action had he 32 L.R.A. (N.S.)

Ft. Wayne v. Patterson, 3 Ind. App. 34, 29 N. E. 167; Monticello v. Kennard, 7 Ind. App. 135, 34 N. E. 454; Columbia City v. Langohr, 20 Ind. App. 395, 50 N. E. 831.

Incapacity for transacting business is a sufficient excuse for noncompliance with an ordinance of the city requiring claims for damages to be presented within thirty days.

Ehrhardt v. Seattle, 33 Wash. 664, 74 Pac. 827; 20 Am. & Eng. Enc. Law, 2d ed. p. 1234.

Defendant can waive the notice if it chooses to do so.

Russell v. New York, 1 Daly, 263.

Messrs. Lewis C. DeVoss and Clark J. Lutz, for appellee:

It is not an act of negligence on the part of the city to allow owners of prop-

lived," as this refers to his right of action on the merits of the case,

In Hastings v. Foxworthy, 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955, it is held that the fact that plaintiff was physically and mentally incapacitated from giving notice within the required time does not extend the time for the statutory period after the removal of the disability, but only for a reasonable time.

But in Schmidt v. Fremont, 70 Neb. 577, 97 N. W. 830, it was held that incapacity was no excuse; and this case was followed by Ellis v. Kearney, 80 Neb. 51, 113 N. W. 803, holding that unconsciousness was no excuse; and by McCollum v. South Omaha, 84 Neb. 413, 121 N. W. 438, holding that plaintiff was not excused because the accident deprived him of consciousness for more than the statutory period.

In Forsyth v. Oswego, 191 N. Y. 441, 123 Am. St. Rep. 605, 84 N. E. 392, reversing 114 App. Div. 616, 99 N. Y. Supp. 1022, it was held that physical and mental incapacity to prepare and present the claim or give directions for its preparation and presentation during the entire time will entitle the party to a reasonable additional time, and the question of incapacity is for the jury.

In Green v. Port Jervis, 55 App. Div. 58, 66 N. Y. Supp. 1042, where notice was required in forty-eight hours, but was not served until five days after the injury, which was as soon as plaintiff was physically and mentally able to do so, it was held that this was a substantial compliance.

In Barry v. Port Jervis, 64 App. Div. 268, 72 N. Y. Supp. 104, where the notice was not given until thirty days after the injury, instead of within forty-eight hours, as required, and the reason given for the delay was that the serious effects of the injury did not develop until several days after the injury, and when the same did develop, plaintiff was in a critical physical condition, and was unable to draft and serve the notice, and did not know, and

erty to have openings in sidewalks for private use.

Lafayette v. Blood, 40 Ind. 62; *Ft. Wayne v. DeWitt*, 47 Ind. 391; *Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882.

Cities must have actual or implied notice of defects in order to be held liable.

Ft. Wayne v. DeWitt, 47 Ind. 391; *Huntington v. Breen*, 77 Ind. 29; *Huntington v. Burke*, 12 Ind. App. 133, 39 N. E. 170.

The statute requiring notice to cities of injuries is mandatory.

May v. Boston, 150 Mass. 517, 23 N. E. 220; *Barclay v. Boston*, 167 Mass. 596, 46 N. E. 113; *Saunders v. Boston*, 167 Mass. 595, 46 N. E. 98; *Welsh v. Franklin*, 70 N. H. 491, 48 Atl. 1102; *Walden v. Jamestown*, 178 N. Y. 213, 70 N. E. 466; *Green v. Port Jervis*, 55 App. Div. 58, 66 N. Y. Supp. 1042; *Williams v. Port Chester*, 183

N. Y. 550, 76 N. E. 1116; *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830; *Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98; *Forsyth v. Oswego*, 191 N. Y. 441, 123 Am. St. Rep. 605, 84 N. E. 392; *Winter v. Niagara Falls*, 190 N. Y. 108, 123 Am. St. Rep. 540, 82 N. E. 1101, 13 A. & E. Ann. Cas. 486; *Hay v. Baraboo*, 127 Wis. 1, 3 L.R.A. (N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654.

Monks, J., delivered the opinion of the court:

Appellant brought this action on August 23, 1909, for injuries sustained on February 19, 1909, by falling through an opening in a sidewalk from which the grate or cover had been removed by a third party. The complaint was in two paragraphs. A demurrer for want of facts was sustained to

does not yet know, that the cause of action has accrued to him, the court took the broad ground that the plaintiff had the constitutional right to sue for the injury, and the requirement of notice within forty-eight hours was void, as denying him due process of law.

In *Walden v. Jamestown*, 79 App. Div. 433, 80 N. Y. Supp. 65, 12 N. Y. Anno. Cas. 313, affirmed in 178 N. Y. 213, 70 N. E. 466, where notice was required to be given within forty-eight hours, but was not received for three days, during which time plaintiff was incapable, by reason of the injuries received, of transacting any business whatever with reference to the notice, it was held that the statute was fully complied with, the court saying: "It cannot be said with any show of reason that the legislature intended by this statute to deprive claimants of all right of action in cases where the injuries received were of a serious nature, and wherein, from the serious nature of the injuries, there was the stronger reason for holding the city liable for negligence with reference to its streets and sidewalks, and especially when the inability to serve the notice grows out of the very act of negligence for which the right of recovery is given."

In *Williams v. Port Chester*, 72 App. Div. 505, 76 N. Y. Supp. 631, which was an appeal on demurrer, it was held that a requirement of notice within thirty days was unconstitutional as to one who was incapacitated from giving notice within that time by the injuries received, in that it denied plaintiff the rights guaranteed by the Constitution, and did not constitute that due process of law demanded by both state and Federal Constitutions. And this proposition was reaffirmed on appeal from a trial on the merits of the case in 97 App. Div. 84, 89 N. Y. Supp. 671, which was affirmed without opinion in 183 N. Y. 550, 76 N. E. 1116.

Hungerford v. Waverly, 125 App. Div. 311, 109 N. Y. Supp. 438, reversing 56 32 L.R.A. (N.S.)

Misc. 186, 107 N. Y. Supp. 291, recognizes the inability of the injured party to comply with the requirement for notice as an excuse, but finds the evidence insufficient to show such inability as would amount to an excuse.

In *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, it was held that physical or mental incapacity resulting from the injury would be an excuse from giving the required notice, the court saying: "It cannot be questioned that if, by reason of the injury, the mind of the injured person is so affected that it cannot act intelligently, it would be a good excuse for not presenting the claim within the time, and it might be that there would be such physical agony and pain as would equally prevent the doing of any business whatever by the plaintiff. We think the general rule is that it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person to procure the notice to be served, and if there is an actual incapacity, it makes very little difference in reason whether the incapacity is mental or physical."

In *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827, it was held that an allegation that plaintiff was disabled from attending to or transacting any business during the statutory period was not subject to demurrer on the ground that it did not allege sufficient excuse for failure to give notice within the statutory period; but on a second appeal (reported in 40 Wash. 221, 82 Pac. 296) from a judgment for plaintiff on the merits, it was held that a showing that plaintiff suffered great pain a portion of the period, and may have suffered some pain all of the time, but that he was not disabled from transacting all business, but, on the contrary, gave instructions as to the care of his team, and was able to go to his doctor's office, several blocks distant,—was insufficient to excuse the omission.

R. L. S.

each paragraph. Judgment was rendered on demurrer against appellant.

At the time of the injury sued for there was in force the following statute: "That no action in damages for injuries to person or property resulting from any defect in the condition of any street, alley, highway, or bridge shall be maintained against any city or town of this state, unless written notice containing a brief general description of the time, place, cause, and nature of such injury shall, within sixty days thereafter, or, if such defect consists of ice or snow, or both, within thirty days thereafter, be given to the clerk or mayor or members of the board of trustees of such city or town." Burns's Anno. Stat. 1908, § 8962.

It is not alleged in either paragraph of the complaint that appellant gave or caused to be given the written notice required by said section. As an excuse for the failure to give said notice it is alleged in each paragraph "that, by reason of said injuries so received as aforesaid, this plaintiff was for more than sixty days thereafter rendered physically and mentally unable to give written notice containing a brief general description of the time, place, cause, and nature of such injuries, or to cause the same to be given to the clerk, mayor, or members of the common council of this defendant, but that said clerk, mayor, and members of the common council of this defendant did have notice of the time, place, cause, and nature of the plaintiff's injuries within thirty days from the date the same occurred, as a full and detailed account of the same was published in the Decatur Daily Democrat and Daily Times,—two daily newspapers of general circulation published within the corporate limits of the defendant city,—and that said accounts were read by all the above-named officials of the defendant."

It is insisted by appellant: (1) "That when the person injured was under such mental and physical incapacity as to make it impossible to give or procure such notice to be given, within the time provided in said § 8962, that the failure to give said notice is excused." (2) "That said provision for notice is for the benefit of the city or town; that they may waive it; and that unless they take advantage of the failure to give notice by answer, they have expressly waived such notice." (3) "That § 8962, supra, is in violation of the 14th Amendment to the Constitution of the United States and § 23, art. 1, of the Constitution of the state of Indiana."

The construction and repair of highways is a state function, and they may be constructed and kept in repair by the state,

or under state authority, by municipal subdivisions of the state within whose limits they may be needed. *Lowe v. White County*, 156 Ind. 183, 59 N. E. 466; *State ex rel. Hendricks v. Marion County*, 170 Ind. 595, 610, 811, 85 N. E. 513.

The liability of cities and towns for injuries resulting from defects in the streets, alleys, highways, and bridges is implied from the provisions of the statutes which impose the duty upon such municipalities to keep the streets, alleys, highways, and bridges in repair, and give them ample power to provide the means necessary to make such repairs. As said liability rests exclusively upon said statutes, it is competent for the legislature to limit or remove it entirely. The claim being a statutory one, it is clear that said § 8962, supra, providing the conditions upon which an action can be maintained, is not in violation of the 14th Amendment to the Constitution of the United States or § 23, art. 1, of the Constitution of this state. This is true, because a duty imposed by the legislature upon cities or towns, or a liability against them created by the legislature, may be qualified, limited, or removed by that body. No one complaining of the omission to perform such duty can successfully object to the qualifications and limitations imposed by the legislature.

Under § 8962, supra, no action can be maintained for an injury "resulting from any defect in the condition of any street, alley, highway, or bridge" unless the written notice required thereby is given as therein provided. The provisions of said section are mandatory, and the giving of said notice is a condition precedent to a right of action. Facts showing the giving of the notice required by said section must therefore be alleged in the complaint or the same will be insufficient on demurrer. These propositions are sustained by the following authorities: *Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98; *Forbes v. Suffield*, 81 Conn. 274, 70 Atl. 1023; *Bulkley v. Norwich & W. R. Co.* 81 Conn. 284, 287, 129 Am. St. Rep. 212, 70 Atl. 1021; *Hoyle v. Putnam*, 46 Conn. 56, 61; *Fields v. Hartford & W. Horse R. Co.* 54 Conn. 9, 11, 4 Atl. 105; *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42; *Breen v. Cornwall*, 73 Conn. 309, 47 Atl. 322; *Trost v. Casselton*, 8 N. D. 534, 538, 539, 79 N. W. 1071; *Underhill v. Washington*, 46 Vt. 771; *Jacobs v. St. Joseph*, 127 Mo. App. 669, 106 S. W. 1072; *Hastings v. Foxworthy*, 45 Neb. 676, 34 L.R.A. 321, 350, 63 N. W. 955; *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830; *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273, and cases cited; *Ellis v. Kearney*, 80 Neb. 51, 113 N. W. 803; *McCollum v. South Omaha*, 84 Neb. 413, 121

N. W. 438; *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; *Gay v. Cambridge*, 128 Mass. 387; *Kenady v. Lawrence*, 128 Mass. 318; *Saunders v. Boston*, 167 Mass. 595, 46 N. E. 98; *May v. Boston*, 150 Mass. 517, 23 N. E. 220; *Shea v. Lowell*, 132 Mass. 187; *Huntington v. Calais*, 105 Me. 144, 73 Atl. 829; *Greenleaf v. Norridgewock*, 82 Me. 64, 19 Atl. 91; *Low v. Windham*, 75 Me. 113; *Moulter v. Grand Rapids*, 155 Mich. 165, 118 N. W. 919, and cases cited; *Erford v. Peoria*, 229 Ill. 546, 553, 82 N. E. 374; *Lucas v. Pontiac*, 142 Ill. App. 470, and cases cited; *Taylor v. Peck*, 29 R. I. 481, 72 Atl. 645; *Hay v. Baraboo*, 127 Wis. 1, 3 L.R.A. (N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553, and cases cited; *Sowle v. Tomah*, 81 Wis. 353, 51 N. W. 571, and cases cited; *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280; *Sollenbarger v. Lineville*, 141 Iowa, 203, 119 N. W. 618, 18 A. & E. Ann. Cas. 991; and cases cited; *Forsyth v. Oswego*, 123 Am. St. Rep. 605, 608, 609, and note, 191 N. Y. 441, 445, 84 N. E. 392; *Purdy v. New York*, 193 N. Y. 524, 86 N. E. 560; *Winter v. Niagara Falls*, 190 N. Y. 198, 204, 205, 125 Am. St. Rep. 540, 543, 545, 82 N. E. 1101, 13 A. & E. Ann. Cas. 486; *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 490, 41 S. W. 704; *Williams v. Galveston*, 41 Tex. Civ. App. 63, 90 S. W. 505; 28 Cyc. Law & Proc. pp. 1447-1449; 15 Am. & Eng. Enc. Law, pp. 483-487; 3 Abbott, Mun. Corp. §§ 994, 1061, 1063; *Elliott, Roads & Streets*, 2d ed. §§ 642, 643; 1 Shearm. & Redf. Neg. 5th ed. § 254.

It is well settled that when anyone seeks the benefit of a statute, or to enforce a statutory right or liability, he must by allegation and proof bring himself clearly within its provisions. *Windfall City v. State* (Ind.) 92 N. E. 57, 58, and cases cited; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 96, 102 Am. St. Rep. 185, 193, 69 N. E. 669, and cases cited.

The fact that the city officers named in said § 8962, *supra*, had notice of the time, place, and cause and nature of appellant's injuries within thirty days, or within the sixty days given by said section, from a full and detailed account of the same, published in two daily newspapers of general circulation, published within the limits of said city, as alleged in each paragraph of the complaint, did not dispense with the necessity of giving the notice in writing required by said section. Appellant's right to maintain an action must be determined from the sufficiency of his notice, and not by the fact that the appellee obtained, from

other sources, full knowledge of the time, place, cause, and nature of his injury. *Crocker v. Hartford*, 66 Conn. 387, 391, 34 Atl. 98 and cases cited; *Gardner v. New London*, 63 Conn. 267, 273, 28 Atl. 42; *Kenady v. Lawrence*, 128 Mass. 318; *De Vore v. Auburn*, 64 App. Div. 84, 71 N. Y. Supp. 749; *Sowle v. Tomah*, 81 Wis. 353, 51 N. W. 571; *McKeague v. Green Bay*, 106 Wis. 577, 82 N. W. 708; *Trost v. Casselton*, 8 N. D. 534, 539, 79 N. W. 1071; *Huntington v. Calais*, 105 Me. 144, 73 Atl. 829; *Underhill v. Washington*, 46 Vt. 771; 28 Cyc. Law & Proc. pp. 1453-1458; 15 Am. & Eng. Enc. Law, pp. 484-487.

It has been held that the notice required by said section cannot be waived by the city or town. *Batchelder v. White*, 28 R. I. 466, 68 Atl. 320; *Starling v. Bedford*, 94 Iowa, 194, 62 N. W. 674; *Veazie v. Rockland*, 68 Me. 511; *Forsyth v. Oswego*, 123 Am. St. Rep. 605, 608, 609, and note, 191 N. Y. 441, 446, 84 N. E. 392; *Purdy v. New York*, 193 N. Y. 521, 86 N. E. 560; *Winter v. Niagara Falls*, 123 Am. St. Rep. 540, 543, 545, and note (190 N. Y. 198, 204, 205, 82 N. E. 1101, 13 A. & E. Ann. Cas. 486); 28 Cyc. Law & Proc. pp. 1452, 1453.

It follows from what we have said and the authorities cited that the court did not err in sustaining the demurrer to each paragraph of the complaint.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES W. RICE

v.

EBEN S. DRAPER, Governor.

(207 Mass. 577, 93 N. E. 821.)

Mandamus — to governor — ministerial act.

Mandamus will not lie to compel the governor of a state to pay over money which has been placed in his hands by the Federal government to be paid to officers and men who served under the Federal government in a war.

(January 9, 1911.)

Note. — Mandamus to governor.

This question is exhaustively treated in the note to *State ex rel. Irvine v. Brooks*, 6 L.R.A. (N.S.) 750. Since the preparation of that note, a Federal court, following the courts of Missouri, refused in *Huidekoper v. Hadley*, — L.R.A. (N.S.) —, 100 C. C. A. 395, 177 Fed. 1, to issue a writ of mandamus against the governor of that state while serving as a member of the state board of equalization, upon the ground that

R EPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of mandamus to compel the governor of the state to pay to petitioner a certain sum out of money placed in his hands by the Federal government, alleged to be due petitioner for services rendered during the war with Spain. Petition dismissed.

The facts are stated in the opinion.

Mr. Henry T. Richardson, for petitioner:

Mandamus lies to enforce a ministerial duty of chief executives and similar officers of the administrative branch of the government.

Dudley v. James, 83 Fed. 345; United States ex rel. White v. Bayard, 5 Mackey, 428; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; United States ex rel. Edwards v. Root, 22 App. D. C. 419; United States ex rel. International Contracting Co. v. La-

mont, 155 U. S. 303, 39 L. ed. 100, 15 Sup. Ct. Rep. 87; Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; United States ex rel. Redfield v. Windom, 8 Mackey, 54; Roberts v. Consaul, 24 App. D. C. 551; Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; Payne v. United States, 20 App. D. C. 581; United States ex rel. Romero v. Cortelyou, 26 App. D. C. 298; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; United States ex rel. West v. Hitchcock, 19 App. D. C. 333; Ex parte Pickett, 24 Ala. 91; State ex rel. Loomis v. Moffitt, 5 Ohio, 358; 6 Am. & Eng. Enc. Law, pp. 1013 et seq.

Messrs. Dana Malone, Attorney General, and Frederic B. Greenhalge, for respondent:

Mandamus will not lie to compel the performance of any duty by the executive in his official capacity, even where perform-

he was performing an executive duty, in no different sense than when performing any ministerial act devolving on him as chief executive, though it granted the relief as to other members of the board.

And in *Oklahoma City v. Haskell*, — Okla. —, 112 Pac. 992, it was held, without discussion, that the courts of the state were without jurisdiction to control the governor by mandamus in the exercise of his executive functions, following *State ex rel. Atty. Gen. v. Houston*, — Okla. —, 113 Pac. 190, which was prohibition by the state, on the relation of the attorney general against the governor and other state officers, in which the general rule was declared to be that the state courts might not control the governor of the state in the exercise of a ministerial duty.

In *McFall v. State Bd. of Edu.* 101 Tex. 572, 110 S. W. 739, under a statute which provided that the supreme court might issue writs of mandamus against any officer except the governor, it was held that a writ could not issue against the state board of education, of which the governor was a member.

On the other hand, in *Cooke v. Iverson*, 108 Minn. 388, — L.R.A. (N.S.) —, 122 N. W. 251, which is not strictly in point here, since an injunction was sought against a state auditor, *Chamberlain v. Sibley*, 4 Minn. 309, Gil. 228, sufficiently reviewed in the note above referred to, was quoted with approval to the effect that the supreme court would not undertake to compel the governor of the state to perform any duty devolving upon him as the chief executive, and properly pertaining to such office, but that, when some official act not necessarily pertaining to the duties of the executive of the state, and which might be performed as well by one officer as another, was directed by law to be done, then any person who clearly showed himself to be entitled to its performance, and who had no other

adequate remedy, might have a writ of mandamus in that regard, even though the law might have designated the chief executive of the state to perform the duty.

And in *State ex rel. White v. Dickerson*, — Nev. —, 113 Pac. 105, a writ of mandamus issued to compel the governor of the state to perform a ministerial act imposed by the legislature in clear and positive terms which contained no qualification or condition, and left no discretion or judgment vested in that officer.

In *Brown v. Ansel*, 82 S. C. 141, 63 S. E. 449, a writ of mandamus was refused against the governor to require him to order an election on the question of an annexation of a portion of one county to another. The court said: "Even if the governor is subject to our writ of mandamus, a question noticed, but not decided, in *State ex rel. Rawlinson v. Ansel*, 76 S. C. 406, 57 S. E. 185, 11 A. & E. Ann. Cas. 613, it appears from the petition that the act sought to be compelled is not a plain ministerial duty, but involves the exercise of discretion, and is therefore not compellable by mandamus."

In *Haley v. Cochran*, 31 Ky. L. Rep. 505, 102 S. W. 852, which was a petition by the members of a company of the state guard to secure a writ of mandamus against the adjutant general and the governor to compel them to certify and approve their pay rolls, in order to pay them for their services during the time they were on active duty, the petition as to the governor was dismissed upon the ground that he could only approve pay rolls when they were certified by the adjutant general. The court said: "When the pay rolls are certified by the adjutant general in obedience to the judgment, we have no doubt that they will be approved by the governor; and this is all that need be said upon this question at this time."

J. A. C.

ance of such duty may be accomplished by an act which is purely ministerial.

Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; State ex rel. Bisbee v. Drew, 17 Fla. 67; State ex rel. Low v. Towns, 8 Ga. 360; People ex rel. Bacon v. Cullom, 100 Ill. 472; People ex rel. Harless v. Yates, 40 Ill. 126; People ex rel. Keyes v. Dubois, 33 Ill. 9; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; State ex rel. Lockwood v. Kirkwood, 14 Iowa, 102; Hovey v. State, 127 Ind. 588, 11 L.R.A. 703, 22 Am. St. Rep. 663, 27 N. E. 175; State ex rel. Oliver v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Re Dennett, 32 Me. 508, 54 Am. Dec. 602; People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; State ex rel. Robb v. Stone, 120 Mo. 423, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; State, Gledhill, Prosecutor, v. The Governor, 25 N. J. L. 331; People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; Com. ex rel. Swartz v. Wickersham, 66 Pa. 134; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; Bates v. Taylor, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266; Teat v. McGaughey, 85 Tex. 478, 22 S. W. 302; Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317.

Knowlton, Ch. J., delivered the opinion of the court:

Under the act of Congress of March 3, 1899 (act March 3, 1899, chap. 445, 30 Stat. at L. 1356), which is amendatory of "An Act to Reimburse the Governors of States and Territories for Expenses Incurred by Them in Aiding the United States to Raise and Organize and Supply and Equip the Volunteer Army of the United States in the Existing War with Spain," approved July 8, 1898, a sum of money was paid to Curtis Guild, Jr., then governor of Massachusetts, to be paid to officers and men, referred to in the act, who served in the war with Spain. This money passed into the hands of his successor, the present governor, and is now subject to his control. By the terms of the act such money, under the circumstances that existed in this state, was to "be paid by the states and territories direct to the officers and men," and none of it was to "be covered into the treasury of the state or territory." The petitioner claims a part of the money under assignments from thirty-two soldiers, the validity of which is questioned under § 3477 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 2320, and he has brought this petition for a writ

of mandamus to compel the respondent to pay it over.

It is plain that the money came into the hands of the respondent in his official capacity as governor of the commonwealth, and that his only relations to it arose under the act of Congress which dealt with the governors as the executive representatives of the states, and, in states where no payments had been made to the men for the services for which the money was awarded, the act sought to impose upon the governors an official duty to pay the money to the men who were entitled to receive it. This duty having been accepted by Governor Guild, and afterwards having been transferred to his successor, the respondent, and having also been accepted by him, the action which the petitioner seeks to compel is in no sense personal, but is strictly official. The most important question in the case is whether a writ of mandamus should be issued against the governor of the commonwealth, to compel the performance of an official duty.

This question has been considered in many cases in other states, and the decisions are far from uniform. It is well established that a writ of mandamus will not be issued to compel the doing of a particular act that involves the exercise of judgment or discretion by a public officer. People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; State ex rel. Whiteman v. Chase, 5 Ohio St. 528. But, ordinarily, a public officer may be compelled to take some action, so far as to exercise his judgment and discretion in determining whether he ought to do or refrain from doing that which the petitioner desires of him, in the performance of an alleged public duty.

The governor of this commonwealth, under our Constitution, is the "supreme executive magistrate." He is the commander in chief of the military and naval forces of the state. In our Constitution the division of the government into three departments, each independent of the other, is provided for in language picturesque and emphatic, "to the end that it may be a government of laws, and not of men." Declaration of Rights, art. 30. In other states whose Constitutions recognize a similar division of the government, it is generally, if not universally, held that, in the performance of his political duties as the highest executive officer, the governor is not subject to supervision or direction by the courts. But in some jurisdictions there are decisions that, in the performance of strictly ministerial duties which might have been imposed upon some other

officer, the governor may be compelled to act by a writ of mandamus. See *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162; *Magruder v. Swann*, 25 Md. 173; *Chumasero v. Potts*, 2 Mont. 242; *Cotten v. Ellis*, 52 N. C. (7 Jones, L.) 545; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 15 L.R.A. 369, 31 Am. St. Rep. 284, 28 Pac. 1125; *Chamberlain v. Sibley*, 4 Minn. 309, Gil. 228; *State ex rel. White-man v. Chase*, 5 Ohio St. 528. But the weight of authority, furnished by decisions in a larger number of states, and supported, as we think, by stronger reasons, is in favor of the proposition that governors of states are not amenable to the courts for their conduct in the performance of any part of their official duties. *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *State ex rel. Bisbee v. Drew*, 17 Fla. 67; *State ex rel. Low v. Towns*, 8 Ga. 360; *People ex rel. Bacon v. Callon*, 100 Ill. 472; *People ex rel. Billings v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *Hovey v. State*, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175; *State ex rel. Oliver v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *Re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *People ex rel. Sutherland v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 70; *State ex rel. Robb v. Stone*, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; *State, Gledhill, Prosecutor, v. The Governor*, 25 N. J. L. 331; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Bates v. Taylor*, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266; *Teat v. McGaughey*, 85 Tex. 478, 22 S. W. 302; *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317. The subject is discussed learnedly by Mr. Justice Cooley in *People ex rel. Sutherland v. The Governor*, 29 Mich. 320-323, 18 Am. Rep. 89, where he says: "What is claimed is that, where the act is purely ministerial and the right of the citizen to have it performed is absolute, the governor, no more than any other officer, is above the laws, and the obligation of the courts on a proper application to require him to obey the laws is the same that exists in any other case where an official ministerial duty is disregarded. . . . There is no very clear and palpable line of distinction between those duties of the governor which are political and those which are to be considered ministerial merely, and if we should undertake to draw one, and to declare that in all cases falling on one side of the line the governor was subject to judicial process, 32 L.R.A. (N.S.)

and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation. . . . The apportionment of power, authority, and duty to the governor is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and, consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

Similar doctrine is stated in other cases cited above. We think it would be an unfortunate rule of law that would require this court, at the request of a petitioner, to scrutinize the official conduct of the governor, in order to determine whether certain of his acts or omissions were in matters merely ministerial, or in the exercise of executive functions which properly pertained to his office. An order under a writ of mandamus against the governor, if he should refuse to obey it, might present the strange spectacle of a direction by the court to the executive forces of the government, to coerce and punish the chief executive officer of the state, who commands and controls the military forces that are ultimately relied upon for the maintenance of law and order. It seems better to hold that, for whatever he does officially, the governor shall answer only to his own conscience, to the people who elected him, and, in case of the possible commission of a high crime or misdemeanor, to a court of impeachment. For these reasons we are of opinion that the petition should be dismissed.

In the view we have taken of the case, we cannot determine judicially which of the parties is right in his contention as to the validity of the assignments under which the petitioner claims.

Petition dismissed.

WISCONSIN SUPREME COURT.

MARTIN BRINILSON, Admr., etc., of
Douglas Brinilson, Deceased, Resp't.,
v.

CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY, Appt.

(144 Wis. 614, 129 N. W. 664.)

**Negligence — unsafe property — li-
cense.**

1. A railroad company cannot avoid liability for injury to a boy falling into its hot-water pit on the theory that he was a trespasser, where the pit was located under a plank walk or pathway which covered the top of a breakwater which it had constructed to protect its property from the waters of a lake, where to its knowledge boys were accustomed to resort to the walk to play, and it was used by the public as a footpath for walking along the edge of the lake.

Same — pitfall — liability.

2. A railroad company is liable to a mere licensee who is injured by falling into a steam pit which it maintains under a wooden pathway which the public is accustomed to use, where it permits a hole to remain in the covering, through which users are likely to fall, which is obscured from general observation by the steam emerging through the cracks.

Same — failure to discover defect.

3. A railroad company is negligent in failing for two or three months to discover a hole in the covering of a steam pit which it maintains under a plank walk which the public is accustomed to use as licensees, through which a person using the walk would be likely to fall, to his death.

(January 31, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. **Affirmed.**

Statement by Siebecker, J.:

The plaintiff's intestate, a boy of the age of five and one-half years, on February 22, 1906, fell into a steam and hot-water pit, constructed by the defendant in a breakwater which it maintained to protect its property along the shore of Lake Michigan,

Note. — As to duty to member of public on private way used by public generally, see notes to *Stevens v. Nichols*, 15 L.R.A. 459, and *Bowler v. Pacific Mills*, 21 L.R.A. (N.S.) 976.

As to duty of owner of premises to protect licensee against hidden danger, see note to *Watson v. Manitou & P. P. R. Co.* 17 L.R.A. (N.S.) 916.

As to duty of owner of land which li-

in the city of Milwaukee. The boy was so badly scalded by the steam and hot water discharged into this pit from the round-house of the defendant near by that he died on March 5, 1906. The pit into which the boy fell was in the center of a crib in the breakwater, was about 3 feet in diameter at the bottom, possibly 5 feet in diameter at the top, and 6 or 7 feet deep. In the previous October the defendant had removed the stone from the crib so as to form the pit above described, and had laid an underground conduit from its round-house to the center of the pit. The pit was covered by planks which were a part of the planking covering the breakwater. The child fell into the pit through an opening about a foot wide, and from 6 to 7 feet long, made by the removal of part of a plank of that size in the breakwater covering. The boy and an older brother were walking over part of the breakwater and into the railroad yards, where they looked for tin plates and some colored glass thrown from the dining cars of the defendant. The complaint alleges that the breakwater was made a pleasant promenade by being covered with planking, that no obstructions were so placed as to prevent its use by the public, and that the people were not excluded from walking upon it. It is alleged that the death of the boy was due to the negligence of the defendant in permitting a dangerous hole to exist in the covering of the pit in the manner stated, and damages are asked for the death of the boy, thus caused, and for the pain and suffering endured by him in consequence of his injuries during his lifetime.

The evidence tends to show that the defendant's agents and servants knew that the public were using the breakwater and the adjacent grounds for walking, fishing, and swimming, but that notices of "No thoroughfare" were posted to warn people off of the tracks, and that people, boys particularly, were expelled from the tracks. The breakwater extends north from Polk street. The evidence as to whether or not a fence extending east from a building belonging to the defendant along the north line of Polk street extended over the breakwater at the time of the accident is in conflict. There was evidence that the hole

licensees are accustomed to cross to guard against injuries in consequence of changes in conditions, see note to *Habina v. Twin City General Electric Co.* 13 L.R.A. (N.S.) 1126.

As to duty to trespasser with respect to excavations maintained on uninclosed land near highway, see notes to *Lepnick v. Gaddis*, 26 L.R.A. 686, and *Johnson v. Paducah Laundry Co.* 5 L.R.A. (N.S.) 733.

in the planking on the breakwater had existed for some weeks before and up to the time of the accident, and that it was a dangerous trap to persons walking on the breakwater. Various witnesses testified that they had seen the hole in the covering of the breakwater two or three months before the accident, a month or two before the accident, two weeks before it, and also on the day before the accident. There was evidence tending to show that this opening was difficult to see because of the steam arising from the hole and from the cracks between the other planks, and because of the conditions surrounding it. The jury found that the defendant was negligent and that it caused the injury, and awarded damages. This is an appeal from the judgment on the verdict in plaintiff's favor.

Mr. William G. Wheeler, for appellant:

The property line of the defendant extended to the low-water mark of the water of the lake, and it had the exclusive right of access thereto.

Prieve v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Delaplane v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Mendota Club v. Anderson*, 101 Wis. 480, 78 N. W. 185; *McCarthy v. Murphy*, 119 Wis. 159, 100 Am. St. Rep. 876, 96 N. W. 531; *Boorman v. Sunnucks*, 42 Wis. 233; *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661.

No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there or use them solely for their own convenience or pleasure.

Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. 656; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

Messrs. N. L. Baker and W. J. Zimmers, for respondent:

Small children attracted to the premises of another which naturally induce them to go onto such premises are considered invited, and the owner is charged with the same duty of care respecting them as is due to any invitee.

1 Thomp. Neg. § 1030; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703; *Ambroz v. Cedar Rapids Electric Light & P. Co.* 131 Iowa, 336, 108 N. W. 540; *Kansas R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *Osage City v. Larkin*, 40 Kan. 200, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; *Penso v. McCormick*, 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 25 N. E. 156; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

Where the property owner permits the public generally to use a certain way over his premises, it cannot be said that one who uses such way is a mere licensee, to whom the owner owes no duty of care.

Davis v. Chicago & N. W. R. Co. 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 400; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L.R.A. 203, 58 N. W. 79; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 528, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491; *Brezee v. Powers*, 80 Mich. 172, 45 N. W. 130; *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. 656; *Thayer v. Jarvis*, 44 Wis. 388.

A landowner is liable for permitting dangers to exist unguarded where persons are in the habit of coming, if he knows that they are liable to be injured thereby, even if they are trespassers.

Ambroz v. Cedar Rapids Electric Light & P. Co. 131 Iowa, 336, 108 N. W. 540; *Penso v. McCormick*, 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 25 N. E. 156; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Gwynn v. Duffield*, 66 Iowa, 708, 55 Am. Rep. 286, 24 N. W. 523; *Jacksonville Southeastern R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Redington v. Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432.

Stiebeck v. J., delivered the opinion of the court:

The appellant avers that the place where the boy was injured is its property. This the respondent denies, and asserts that the place of injury is located on the bed of Lake Michigan, and hence not within the boundaries of the appellant's private grounds. In the view we take of the case, this question need not necessarily be considered in determining the issues raised, and we therefore do not decide this controversy between the parties.

It is undisputed that the appellant maintained a breakwater at the place designated, to protect its grounds from the action of the waters of the lake; that it had

filled with earth the area between the breakwater and the dry land; and that it used and occupied this area for railroad purposes. As appears in the above statement of facts, the appellant had covered the surface of the breakwater with planking which formed a firm and even walk or pathway along and above the waters of the lake, which was used by the public as a footpath to pass and repass over these grounds and for walking along the edge of the lake. Boys had made a practice of so using it and as a place for boating fishing, and swimming. The evidence fully justified the jury in finding that appellant's agents and servants knew that the premises were being so used. It appears that there was a fence along the south line of appellant's grounds abutting on Polk street, but the evidence is in conflict as to whether or not the fence extended onto the breakwater, and the jury may well have found that this end of the breakwater was unobstructed and open, so that people could pass without interference in going to and from the street onto the railroad grounds and that an open passageway over the breakwater was thus afforded them. In the light of such facts and circumstances, it cannot be said that persons who passed onto the breakwater and adjacent grounds were there under such forbidding circumstances as to make them trespassers. It seems reasonably clear that people customarily used this place as a footpath, and that boys especially used it as a place for the purposes of boating and swimming. These uses of the premises must be held to have been within the knowledge of the railroad's agents and servants, and that an implied permission existed which justified persons in so using the breakwater and adjacent grounds. Under these circumstances, the persons so passing over this place on these premises cannot be considered trespassers. They must be considered as having entered onto the premises with the implied permission of the railroad company for the customary purposes. The license to so use the premises implies permission to so use them, and the railroad company cannot now be heard to charge that such use constitutes a trespass. Under these circumstances, persons making such customary use of the premises are licensees. The evidence sustains the claim that the decedent at the time of injury was using this place in the customary way, namely, as a footpath in passing over the breakwater, and his relation to the railroad company was that of a licensee. See *Hupfer v. National Distilling Co.* 114 Wis. 279, 90 N. W. 191; *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. 656; 32 L.R.A. (N.S.)

Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. With this relation existing between the appellant and the decedent, the legal duty devolving on the company is as recognized and declared in the *Muench Case*, that a licensee must be deemed to take the premises as he finds them, "and the licensor owes him no duty, save to refrain from acts of active negligence rendering the premises dangerous." The case of *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223, is not at variance with this rule. The facts of that case show that the danger complained of was one connected with an unfenced natural pond on a private lot, but so remote from the street and sidewalk as not to make their use dangerous; nor was it shown that the owner had done anything to this pond to create a pitfall or snare liable to injure persons going onto the lot. In the instant case the facts are different, in that the alleged dangerous condition was created by the company, and the question is whether or not, in view of the fact that the company knew or ought to have known that both adults and children were resorting to and using the place for travel and amusement, the omission to keep the pit covered created a danger likely to cause injury to persons so using the premises with ordinary care. That the opening or hole in the cover of the steam pit, as described in the evidence, was dangerous, seems self-evident from its very nature and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was obscured by the steam rising therefrom through this hole and the cracks between the planks covering the pit. This condition of the place made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them.

It is contended that it is not shown that the company was negligent in permitting this hole to exist, because it had no notice or knowledge thereof prior to the day of the accident. The evidence discloses that a hole had been observed by various persons two or three months, one month, two weeks, and on the day before the accident. These evidentiary facts furnish a sufficient basis for the conclusion of the jury that the railroad company was guilty of a want of ordinary care in failing to discover the hole in the plank covering over the steam pit, and in neglecting to repair it before the time of the accident.

It is probable that the decedent had not observed the hole. His conduct in this respect must be viewed in the light of his

age and the surrounding conditions, and of the danger; and, when so considered, it cannot be held as matter of law to show that he was guilty of contributory negligence in producing the injuries complained of. Cases illustrating the principles and grounds of liability under the circumstances disclosed here are: *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703; *Penso v. McCormick*, 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 25 N. E. 156; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. We find no reversible error in the record. Judgment affirmed.

MICHIGAN SUPREME COURT.

ELBERT V. INGERSOLL, Admr., etc., of
Elmer Quigley, Deceased, Plff. in Err.,
v.

DETROIT & MACKINAC RAILWAY COM-
PANY.

(163 Mich. 268, 128 N. W. 227.)

Damages — statutory allowance — retroactive law.

1. No recovery can be had for the suffering of one whose death was caused by another's negligence, where such damages were not allowed by the statute in force when the injury was caused and the death

Note.— *Action for death by or on behalf of statutory beneficiary as affected by desertion or nonsupport by deceased.*

The question of the effect of separation or nonsupport upon the right of the spouses to maintain a statutory action for the death of their child is not within the scope of this note. And cases in which the question considered is merely as to what probable benefit the beneficiary would have derived from the deceased had he lived, which do involve the question of nonsupport, are not within the scope of this note.

The decisions are agreed that the surviving widow is not precluded from maintaining a statutory action for negligently causing her husband's death, because he had previously deserted her.

Thus, the fact that, shortly before the deceased met his death, he and his wife had separated, is held not to preclude the latter from recovering the statutory damages for his death. *Galveston, H. & S. A. R. Co. v. Murray*, — Tex. Civ. App. —, 99 S. W. 144; *Dunbar v. Charleston & W. C. R. Co.* 186 Fed. 175.

And the wife was allowed to recover a small sum for the death of her husband, in *International & G. N. R. Co. v. Jones*, — Tex. Civ. App. —, 60 S. W. 978, although he had separated from her and was living 32 L.R.A. (N.S.)

occurred, although a change in the statute before action brought provides for them.

Same — death — statutory liability to furnish support.

2. The legal liability of a father and husband to contribute to the support of his wife and minor child may be the basis of assessing damages against one who has negligently caused his death, although he had deserted the wife and child, and they did not know his whereabouts and were being supported by the wife's father.

(November 11, 1910.)

ERROR to the Circuit Court for Ogemaw County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Mr. De Vere Hall for plaintiff in error.
Messrs. James McNamara and Charles R. Henry for defendant in error.

Stone, J., delivered the opinion of the court:

The declaration with the rule to plead in this cause was filed January 12, 1909, and set forth in due form actionable negligence on the part of the defendant resulting in the injury to and death of deceased, and due care on his part, claiming damages in the sum of \$20,000 to himself in consequence of such injuries, from his loss

on the charity of relatives, and although it appeared that he was not able to earn enough to support himself, but at times had earned something.

And the fact that the wife had consulted counsel as to her right to obtain a divorce will not affect her right to recover for the death of her husband through the negligence of another. *Abel v. Northampton Traction Co.* 212 Pa. 329, 61 Atl. 915.

Under a statute providing that, in case of death through negligence, a right of action shall accrue to the widow of the person killed, his lineal heirs, etc., the deceased's widow may recover, although she has separated from her husband and lived in adultery. *Cole v. Mayne*, 122 Fed. 836.

And the same result was reached in *Stimpson v. Wood*, 59 L. T. N. S. 218, 59 L. J. Q. B. N. S. 484, 36 Week. Rep. 734, 52 J. P. 822, under a statute providing for an action by the wife for such injury as the jury found had resulted from the husband's death, although the wife was living in adultery. It appeared in this case that the husband had at times given his wife small sums of money which, however, were insufficient for her support.

But in *Orendorf v. New York C. & H. R. R. Co.* 119 App. Div. 638, 104 N. Y. Supp. 222, where a statute awarded only such a sum as was deemed "to be a fair and just compensation for the pecuniary

of earnings, and the pain and suffering that he endured during his lifetime. It also claimed damages in a similar amount for pecuniary injury sustained by the widow and child as next of kin, by reason of being deprived of means of support and contributions that deceased would have made to them had he lived. After service the defendant appeared and pleaded the general issue. At the trial the case was disposed of by the court upon the opening statement of plaintiff's counsel of what he proposed to prove. That statement was, in substance, that the suit was brought by plaintiff as administrator of the estate of William Quigley, deceased, one who was employed by the defendant as brakeman on its line of road extending from Gooder, in Ogemaw county, north into Oscoda county; that on November 6, 1906, after dark, he was acting as brakeman on the front end of a train being pushed southerly from Oscoda county into Gooder, and it is the claim of plaintiff that this injury arose through the negligence of defendant, as set forth in the declaration herein, and that, as a result of such injuries, William Quigley died on November 24, 1906, at Rose City, in Ogemaw county. Here counsel for plaintiff made a statement offering to show the death of said William Quigley as a result of such injuries, the appointment of plaintiff as his administrator, the several acts of negligence set forth in the declara-

tion causing the injury to and death of deceased, and his want of contributory negligence, and then passed to the subject of damages. He offered to show that at the time of his injury Mr. Quigley was of good health and about thirty years of age, married to the young girl referred to in the declaration when she was about sixteen years of age, at Two Harbors, near Duluth, in the state of Minnesota; that this marriage was a forced one, brought about because deceased had seduced the girl, and was arrested and confined, and then lawfully married under the laws of that state; that later he had deserted and abandoned her; that there was one child as the result of such marriage, being the one referred to in the declaration; that the widow and child are both still living at Milwaukee, Wisconsin; and that she had no means of support other than deceased would either voluntarily contribute, or that which could be forced from him under the law, other than such as her father and her family may contribute. At the time deceased was so injured and died, Mrs. Quigley did not know where he was, and he had never contributed anything either to her support or that of the child; but the marriage was a lawful one, and was so treated and regarded, and she is the lawful widow, and the child is the lawful child of such marriage.

Plaintiff's first contention is that, based

injuries resulting from the decedent's death, to the person or persons for whose benefit the action is brought," in an action by the widow of deceased, it was held competent to show that she had not lived with the deceased for a number of years, and was at the time of his death living in open adultery with another man.

Where the statutory action is instituted for the benefit of the deceased's children, it is also held that the fact that he had deserted his children and failed to support them would not defeat their right to recover for his death, resulting from another's negligence.

Thus, it was held in *Gulf, C. & S. F. R. Co. v. Anderson*, — Tex. Civ. App. —, 126 S. W. 928, that it was the legal duty of a father to support his child during minority, and that, although he had failed to do so and declared that he never would, a recovery might nevertheless be had by the child, where he was deprived of his right to support by the negligence of another which resulted in the father's death.

And the same result was reached in *Beaumont Traction Co. v. Dilworth*, — Tex. Civ. App. —, 94 S. W. 353, where the father had abandoned his children.

So, the children of deceased are not precluded from recovering in such actions, although a divorce has been granted in which the custody of the children was decreed to 32 L.R.A. (N.S.)

the wife, and although it appeared that the father had not contributed to their support for ten years. *Taylor v. San Antonio Gas & Electric Co.* — Tex. Civ. App. —, 93 S. W. 674. The court said: "It follows, from the foregoing decisions, that a minor has the legal right to damages for the death of his father, independent of whether the father had contributed anything to his support or not, and it follows that proof that the children of Morris Scott had been placed in the custody of their mother by the court that granted the divorce, and that the father had never contributed anything to the maintenance and support of the children, did not constitute any reason for depriving them of the damages accruing to them by his death. The reason for this ruling is that the child is by law entitled to a support from his father, and that he is deprived of that right by the death of the father. The latter might have afterwards changed his course of conduct towards his children, or he might have acquired property and have been compelled by the courts to contribute to their support. The wife has the right to recover for the loss of the husband, and the minor child for the death of the father, without proof that he has contributed anything to their support. They have a right to the support, and no one can negligently deprive them of that right, through the

on that lawful marriage relation, such widow and child are entitled to have damages assessed with reference to his death, for the reason that the law would compel him to contribute to their support, to her during her life, and the child during its minority, and that by his death she and such child lost this resource which the law gives them, whether it was a voluntary or involuntary contribution; that contributions are of two characters, one that which the law compels by reason of either the common law or some statutory declaration arising out of the relationship of the parties, and another which exists by voluntary support given by the deceased to some other next of kin, that the widow and child belong to the first of these; and the fact that no contributions have been made in the past does not deprive them of the right to have damages arising from the death of deceased now assessed; that, as to the second, where the law does not supply forced contributions, it would be necessary to show some act of the deceased, either of contributions in the past, or some situation, which would warrant reasonable expectation of contributions in the future, before damages could be assessed. But in this case, and in so far as this branch of the claim of damages is concerned, the plaintiff stands squarely on the legal ground that both the statute and common law of Minnesota, where the marriage took

place, of Wisconsin, where the widow and child resided at the time of the death of plaintiff's intestate, and of Michigan, where the death took place, compel him to support his wife and child, and this furnishes a basis on which damages may be assessed.

Passing to the second ground of right of recovery, as stated, the injury took place on November 6, 1906, and plaintiff will show by the proofs that deceased was an intense sufferer from that time until the time of his death, November 24th following. This fact will be disclosed by the testimony of the nurse who was in attendance during twelve of the intervening days and at the time of his death; and on the right to assess damages which accrued to deceased by reason of such injury between said days, plaintiff will show that there was in force in this state at the time of this injury and death the survival act, being § 10,117, 3 Comp. Laws, and the limited liability act, being act No. 89, Pub. acts 1905. That under the survival act deceased had a right of action for the eighteen days' time that he lost between his injury and death, and, in addition to such right, he had a right under the survival act to recover for the pain and suffering that he endured during that time, and that the jury should consider and determine what would be reasonable compensation for such loss of time, plus the pain and suffering so endured.

death of the one from whom such support is legally due, without becoming liable for damages."

As to the effect of decree awarding custody of children to mother, upon father's liability for their support, see note to *Spencer v. Spencer*, 2 L.R.A.(N.S.) 851.

And the same result was reached in *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, 102 S. W. 608.

But adult children to whose support their father contributed nothing, and from whom they received no benefits, cannot recover for his death through the negligence of another. *Missouri, K. & T. R. Co. v. James*, — Tex. Civ. App. —, 120 S. W. 269.

The fact of separation or nonsupport, however, may be taken into consideration in determining the damages to which the beneficiaries are entitled.

Thus, it was held in *Creamer v. Moran Bros. Co.* 41 Wash. 636, 84 Pac. 592, that a verdict for \$13,500 awarded in an action brought by a widow and three children for the death of the husband and father was excessive, where it appeared that the deceased was forty-eight years old, was earning \$3.50 per day, and that he had once abandoned his family for a time, and had again left his home sometime prior to the accident, and his wife did not know of his whereabouts, and did not learn of the accident until several days thereafter.
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And where it appeared that deceased who was sixty years old, and earned about \$40 per month, left a widow about his age, who for some time had not been living with him, but lived in a house of her own, and so far as appeared did not receive anything from him, and also left four children, all of whom were over twenty years of age, and who had received no fixed or regular allowance from their father, a verdict of \$5,000 for his death was held excessive. *Chicago, R. I. & P. R. Co. v. Downey*, 96 Ill. App. 398.

So, in a statutory action by deceased's administrator for the benefit of the widow and son, where it appeared that the deceased was not living with his wife, and that it was unknown whether the latter was living or not, and it further appeared that the deceased had suffered a stroke of paralysis and was unable to earn his own living, a judgment for a little more than nominal damages only could be sustained. *Kroll v. Chicago, B. & Q. R. Co.* 150 Ill. App. 438.

But in *St. Louis, I. M. & S. R. Co. v. McCain*, 67 Ark. 377, 55 S. W. 165, where it appeared that the deceased was divorced, a verdict of \$2,500 on account of the loss suffered by his children was held not excessive, where he frequently sent money in aid of their support.
J. T. W.

In this statement is excluded all right of action for any prospective damage which would accrue during the probable life of deceased, by reason of his death on November 24, 1906, planting plaintiff's right squarely upon the survival act, which gave deceased during his life the right to recover for the two elements of lost time, pain and suffering, which latter will be shown were large and substantial in amount, and which counsel described in detail. With reference to the effect of act No. 89, Pub. acts 1905, it was the claim of counsel that it affected the third element of prospective damages only, and that, as to this, it was to be measured by the contributions that would probably thereafter be made, the same as under the death act.

At the close of said opening statement, counsel for defendant moved the court to direct a verdict for defendant, for the reason that the opening statement of counsel for plaintiff contained no basis upon which the jury could assess damages. Defendant's motion was granted, and verdict and judgment were directed and entered for defendant. The plaintiff has brought error, and by proper assignments of error two questions are presented: (1) Did the court err in refusing to permit the jury to assess damages in favor of plaintiff under the survival act (§ 10,117, 3 Comp. Laws) for the time lost after the injury and before the death of deceased, and for the pain and suffering then endured by him? (2) Did the court err in refusing to permit the jury to assess damages in favor of the plaintiff under act No. 89, Pub. acts 1905, for contributions, voluntary or forced, that would probably have been made by deceased in favor of the widow during her probable life, and the child during its minority, for the probable life of deceased, and in directing a verdict? We shall consider these questions in the order named.

1. It will be borne in mind that the plaintiff's intestate was injured November 6, 1906, and died November 24, 1906, while act No. 89, Pub. acts 1905 was in force. No action was brought by deceased, and this action was begun by the administrator January 12, 1909. We have no doubt that act No. 89 aforesaid fixes absolutely the measure of damages to be recovered in case of liability. We are of opinion that this question is answered against the contention of plaintiff by the case of *Norblad v. Minneapolis, St. P. & S. Ste. M. R. Co.* 156 Mich. 697, 118 N. W. 595. That was a well-considered case. There was a motion for rehearing, which delayed its publication in the report. In the meantime *Walker v. Lansing & Suburban Traction Co.* 156 32 L.R.A. (N.S.)

Mich. 514, 121 N. W. 271, was decided, and the *Norblad* Case cited. We must adhere to the doctrine announced in these cases, and hold that the circuit judge decided correctly upon this question.

2. This brings us to the consideration of a more difficult question. The plaintiff claims that even under act No. 89 aforesaid, the court erred in its refusal to let the jury determine what pecuniary loss the widow and child sustained by reason of the death of the husband of the one, and the father of the other. The circumstances of the case are peculiar. It appears that the marriage was lawful, that the child was born as a result of such marriage, that at the time the deceased was injured and died the wife did not know where he was, and that he had never contributed anything to her support nor that of the child. The plaintiff contends that contributions of a husband and father may be voluntary, or they may be forced; that the law would compel decedent to contribute to the widow during her life, and to the child during its minority; that by death she and the child lost this resource which the law gives, whether it was a voluntary, or an involuntary, contribution; that the common and statute law of Minnesota, where the marriage took place, of Wisconsin, where the widow and child resided at the time of the death, and of this state, where the death took place, would compel the decedent to support his wife and child; and that this furnishes a basis on which damages may be assessed by the jury, just as the court could assess damages or fix liability against decedent, had he been arraigned before it for a failure to contribute to their support. The defendant urges that no basis for damages was furnished in the opening statement of counsel; that the wife and child had no reason to expect the husband and father to contribute to their support; that damages must be proved by the circumstances, by capacity to earn, and by disposition to contribute pecuniarily to the aid.

The question, under the circumstances here presented, appears to be a new one in this state. In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, Chief Justice Cooley said: "The damages recoverable in a case of this nature are . . . to be assessed with reference 'to the pecuniary injuries resulting from such death.' . . . They have no regard . . . to any moral obligation which may have rested upon the deceased to supply their wants. If the moral obligation to support near relatives were to be the criterion, we might take their poverty into account as bearing upon the extent of this obligation; but as

this may or may not have been recognized, and, if recognized, may have been imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received, or was likely to receive, from the death. What the family would lose by the death would be what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime." Should it be said in this case, as a matter of law, that the wife and child had no reasonable expectation of receiving any aid from decedent in his lifetime? To sustain the position of the circuit judge would require us to so hold.

It is urged by defendant that there was no basis for assessing damages. Had decedent been proceeded against to compel him to support his wife and child, the same difficulty would have been encountered; and yet we think the court would have had no difficulty, after learning all of the facts, to fix a reasonable basis from which to determine the amount. Had this man been killed by a negligent act, an hour after his marriage, and before he had ever contributed a cent to the support of his wife, would it be contended that she had not suffered pecuniary loss thereby? It would seem not. What would be the basis of assessing damages in such a case? We think that they would be determined by showing the circumstances and by evidence of the probabilities, under proper rules, as in suits brought by parents to recover damages in case of the negligent death of a young child, who had never earned a dollar. *Rajnowski v. Detroit*, B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 847. In this case it appears that the husband had abandoned his wife through no fault of hers.

Similar questions have been before the courts of other states. In 6 Thompson's Commentaries on the Law of Negligence, at § 7054, the rule is stated as follows: "The widow is not prevented from maintaining an action for the death of her husband by negligence, by the fact that she is living in separation from him, unless she has forfeited the right to support from him by leading an abandoned life. Nor will a child be prevented from recovering for the death of his father by the fact that the father had lived away from him for many years, and had not contributed anything to the support of his wife or child,"—citing many of the following cases.

In the case of *Ft. Worth & D. C. R. Co. v. Floyd*, — Tex. Civ. App. —, 21 S. W. 544, it appears that James H. Floyd and the plaintiff were married at New Albany, Indiana, on the 25th day of February, 1887, having met for the first time on the pre-

ceding day. A separation soon followed. Early on the morning of April 6th of the succeeding year the husband was killed in a railroad collision at Alvord, Texas. About one month thereafter the surviving wife (this plaintiff) was found to be an inmate of a house of prostitution. She brought this suit for the benefit of herself and the mother of deceased for damages on account of the alleged negligent killing. The court held that the wife had forfeited her right to support from her husband, and that the evidence failed to show any reason on her part to expect that he would ever again have contributed towards her support, had he not been killed. It was held that here the wife had trampled every claim to marital obligation under foot, and that, while there might be a case of such misconduct on the part of her husband as would preclude this defense, no such case was presented in the record. This case seems to have turned upon the fact of the misconduct of the wife, whereby she forfeited all right to expect aid from her husband.

Gulf, C. & S. F. R. Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538. This was an action for damages for wrongfully causing the death of a brakeman, William Delaney, and the verdict allowed \$5,000 to the widow of the deceased, and a like amount to a son by a former divorced wife, which son was ten years old at the time of his father's death, and not shown to have ever received any support from the father. The second wife and this child joined as plaintiffs. The court says: "Deceased was earning \$80 per month at the time of his death, was thirty-one years old, and was strong, healthy, temperate, and industrious. [He had been divorced from his first wife, the mother of his only son.] No children were born of the second marriage. To allow the son \$5,000 as actual damages upon such a showing [that the son had never received anything from his father] seems to us like allowing a large sum of money where nothing would probably have been received had the deceased lived, and we hesitate to approve so large a verdict merely for the loss of the abstract right of the son to claim a support from his father; but we are unable to distinguish the case from that of *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182, 46 S. W. 922. . . . The case in this respect was thus stated in the opinion: [One] 'Culpepper, before his marriage with appellee, had been divorced from his first wife, the mother of Chris and Maud, by a decree which gave to him the custody of Chris, but made no provision as to Maud. At the time of the father's death Chris

was twelve years' and Maud ten years of age. Maud remained with her mother, who is still living. The evidence showed that Culpepper devoted his earnings to his wife and son, and there was no proof that he contributed to the support of his daughter.

... 'We are also of the opinion that Maud Culpepper was entitled to recovery, since she had the legal right to a support from her father, of which she was deprived by his death,'—citing many Texas cases.

Houston & T. C. R. Co. v. Bryant, 31 Tex. Civ. App. 483, 72 S. W. 885. This is an action for damages alleged to have arisen upon the death of Will Bryant, instituted by his parents and his widow, Lila Bryant. The appellant requested the following charge: "If, from the evidence, you believe that the plaintiff, Lila Bryant, widow of Will Bryant, voluntarily abandoned her husband with the fixed purpose of never returning to him, and wholly repudiated the relation of wife to Will Bryant, and had determined not to receive any benefits or aid from him had he lived, then his death under such circumstances inflicted no injury upon her; and, consequently, though you may believe Will Bryant's death was the result of negligence on the part of defendant, no recovery can be had by her." The court held that this charge was properly refused; that it was a clear invasion of the right of the jury to pass upon the facts and determine whether the wife was damaged by the death of her husband.

Under the circumstances of this case, should not the question of what, if any, sum might the widow and child be reasonably expected to receive from the deceased, have been submitted to the jury? Can it be said as matter of law that the wife would never learn the whereabouts of her husband, and proceed against him for support?

De Garcia v. San Antonio & A. P. R. Co. — Tex. Civ. App. —, 77 S. W. 275, was a suit to recover damages for the death of plaintiff's husband, and to set aside a judgment. The plaintiff, after setting up her cause of action against the company on account of the death of her husband, Alcario Garcia, alleged that he had left surviving him by a former marriage two minor children, naming them, and that they had, therefore, in the same court, through their next friend, instituted suit for damages and recovered a judgment. Fraud and collusion were charged against the minors and the defendant to defeat the claim of the widow. It appeared that several years prior to his death Alcario Garcia was married to the plaintiff, Josephine. In a former suit it had been found that the plain-

tiff widow had not, for more than two years prior to the death of the husband, received any pecuniary aid from him, and was not receiving any pecuniary aid from him at the time of his death, and would not have received any pecuniary aid from him had he lived. This court held that it was incumbent upon the children to act in good faith with those joined with them in the suit; that the wife, so long as she had not acted in any way to forfeit it, was entitled to support at the hands of her husband; and that a party wrongfully killing him cannot deprive her of damages by a plea that the husband had not been fulfilling the duties he owed his wife.

In *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297, a judgment of \$5,000 was awarded in favor of the wife for the death of her husband. The defendant asked the court to charge the jury that if the husband had left his wife and had no further communication with her, and the jury believed from the evidence that he had abandoned her for good, and at the time of his death she had no reasonable expectation of deriving any aid or advantage from the continuance of his life, then she would be entitled to but nominal damages. In holding that the defendant was not entitled to such request, the court said: "Henry Spicker [the husband] may have left his wife for a year or more before his death, and after leaving her may have had no further communication with her, and may have intended never to return to her, or contribute to her support; yet, so long as the marital relation existed, without reference to the will of the husband, the wife not being shown to have forfeited her right thereto by her own wrong, she was entitled to a decent support in accordance with their station in life from her husband. The marital relation created this right, and it would have continued to exist so long as the relationship continued; and so without reference to the will of the husband. There is no legal presumption that such relation would ever have been dissolved prior to the time when one of the parties thereto in the ordinary course of events would have died. The wrong of the appellant terminated the relationship, by causing the death of the husband prior to the time when, in the ordinary course of events, he would have died, and thereby deprived the wife of that pecuniary support and benefit which the law would have entitled her to from her husband so long as they remained husband and wife."

Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201. This was an action brought in the name of the state, as plain-

tiff, for the use of the widow and child of John W. Chambers, who was killed by what is alleged to have been the wrongful act, neglect, and fault of the defendant corporation. There was a verdict for the plaintiff and judgment thereon, from which the defendant has appealed. The court says: "The appellant's sixth prayer contained a proposition which we think is not sustained either by reason or authority. It asks the court for instruction that if they find that the decedent had been separated from his family for a period of about twelve years immediately preceding his death, and that he had contributed nothing to the support of his wife or infant child during that period, then the plaintiff was only entitled to nominal damages. In this we do not concur. The marital relation still continued to exist between the parties at the time of the death of the husband; and, whilst they had not for the period stated lived together as man and wife, her legal rights had suffered no change or impairment. It is very clear from the testimony in the record that the wife had not by her own wrong forfeited her right to a decent support from her husband in accordance with her station in life. The marital relation created this right, and it continued to exist in law to the death of the husband; and this, too, without reference to the will or wishes of the husband." See also note to *Eichorn v. New Orleans & C. R. Light & P. Co.* 3 A. & E. Ann. Cas. 103.

It is the claim of the plaintiff that the question here is analogous to the one presented to this court in *Clinton v. Laning*, 61 Mich. 355, 28 N. W. 125, where a father brought action against the sellers of liquors to recover damages for loss by being compelled to support an adult son given to drink, who became intoxicated at defendant's tavern and sustained injury. It was there held that contributions, whether voluntary or forced, may be included as an element of damages.

We are of opinion that the second question should be answered in favor of the plaintiff, and that the circuit judge should have permitted the case to go to the jury, under the proposed evidence, to determine as to the liability of defendant; and, if any was found, to assess damages, if any, for the contributions, voluntary or forced, that would probably have been made by deceased in favor of the widow during her probable life, if not exceeding the probable life of decedent, and for the child during its minority.

For the error pointed out, the judgment is reversed, and a new trial granted.
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MINNESOTA SUPREME COURT.

CARRIE M. LA PAUL et al., Appts.,

v.

FRANK HEYWOOD, Resp't.

(— Minn. —, 129 N. W. 763.)

Tax — tenant's property.

1. Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord.

Same — procedure — improvements.

2. In assessing any tract or lot of real property, the value of all structures and improvements thereon must be determined separately; but, for the purpose of taxation, the structures and improvements are considered a part of the realty, and are assessed as such.

Landlord — taxes paid on tenant's property — recovery.

3. Where no provision is made for the payment of taxes in a lease of real estate, and the lease provides that the structures or improvements put upon the lot by the lessee are removable, and the landlord is compelled to pay the entire amount of the taxes to save the property from being sold at tax sale, an action may be maintained by him against the tenant for the recovery of that portion of the tax levied upon the improvements.

(February 3, 1911.)

Headnotes by LEWIS, J.

Note. — Who is liable for taxes on improvements removable by tenant at end of term.

Although it is stated in the opinion and repeated in the first syllabus by the court, that the improvements are taxable to the tenant, and not to the landlord, the question was not as to the party to whom they should be taxed, but whether the burden of the tax must ultimately rest on the landlord or tenant; and that is the question involved in cases cited in the note. These cases hold that, as between landlord and tenant, the burden of taxes upon improvements removable by the tenant must fall on the latter.

If the tenant, by the erection of buildings which, by the terms of the lease, continue his property, and which he is authorized to remove, or for which he is entitled to be compensated by the landlord, enhances the taxes, the taxes upon the improvements, as between the landlord and tenant, must be paid by the latter. *Leach v. Goode*, 19 Mo. 501.

Lessees under a lease of coal land containing a covenant on their part to pay all taxes upon improvements are bound to pay the increased amount of taxes assessed upon the land by reason of its increased value in consequence of the erection upon it of

A PPEAL by plaintiffs from an order of the District Court for Hennepin County sustaining a demurrer to the complaint in an action brought to recover certain taxes upon improvements made by defendant as lessee, which were alleged to have been paid by plaintiffs to prevent the property being sold at a tax sale. Reversed.

The facts are stated in the opinion.

Mr. T. J. Stevenson, for appellants:

Where a lease is silent as to the payment of taxes, the tenant is bound to pay taxes on improvements owned by him and located on the demised premises.

Jones, Land. & T. 1906, ed. § 412, p. 457; 2 Wood, Land. & T. 1888, ed. p. 967; 2 Underhill, Land. & T. 1900, ed. pp. 1006-1008; 1 Tiffany, Land. & T. 1910, ed. § 141; 1 Taylor, Land. & T. 1904, ed. p. 426, § 341; 24 Cyc. Law & Proc. p. 1075; Leach v.

Goode, 19 Mo. 501; Watson v. Home, 7 Barn. & C. 235, 1 Moody & R. 191, 6 L. J. K. B. 73, 31 Revised Rep. 200, East Tennessee, V. & G. R. Co. v. Morristown, — Tenn. —, 35 S. W. 771; State ex rel. Ziegenheim v. Mission Free School, 162 Mo. 332, 62 S. W. 998; Phinney v. Foster, 189 Mass. 182, 75 N. E. 103; Parker v. Redfield, 10 Conn. 490; People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98, 47 N. E. 46; Joslyn v. Spellman, 9 Ohio Dec. Reprint, 258; People ex rel. Muller v. Board of Assessors, 93 N. Y. 308.

Mr. Arthur M. Higgins for respondent.

Lewis, J., delivered the opinion of the court:

Appellant was the lessor of a certain lot, and brought this action to recover certain taxes upon the improvements made by

houses, coal breakers, etc., by them. Heckscher v. Sheaffer, 17 W. N. C. 323.

If the right of removal of a building is reserved to the lessee in a lease, he will be regarded as an owner of real estate for the purpose of taxation. People ex rel. Van Nest v. Tax & A. Comrs. 80 N. Y. 573.

Where the landlord of a slate quarry is assessed for taxes on the land and pays them, and the tenant is assessed for taxes on the quarry and machinery, the machinery having been placed upon the land by the tenant, the tenant cannot deduct the amount of the taxes paid under the assessment on the quarry and machinery from the royalties due the landlord as rent. Flory v. Heller, 1 Monaghan (Pa.) 478.

Where a lessee covenants to pay taxes and assessments of every kind levied or assessed or to be levied or assessed upon the property leased, he is bound by such covenant to pay the taxes on said property and the buildings he may erect thereon. West Virginia C. & P. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

In Yeo v. Leman, 2 Strange, 1191, it is held that the tenant is not entitled to deduct land tax upon the improved value in an account with his landlord.

And in Joslyn v. Spellman, 9 Ohio Dec. Reprint, 258, 12 Ohio L. J. 7, it is held that so much of the taxes as are on account of improvements put upon a lot by a lessee are chargeable to him under a perpetual lease, although without a covenant by the lessee to pay the taxes.

And under a covenant in a building lease by the tenant to pay all the taxes except the land tax, the landlord is only to pay the old land tax, and not the additional land tax occasioned by the improvement of the estate. Hyde v. Hill, 3 T. R. 377.

So, under a lease whereby a lessor covenanted to pay all taxes chargeable on the premises or on the yearly rent thereby reserved, and the lessee covenanted to pay all fresh taxes which should thereafter be charged upon the premises, the lessor should pay such taxes as were chargeable 32 L.R.A. (N.S.)

on the premises at the time of making the lease, and the lessee should pay all fresh taxes and all such additions to the taxes formerly chargeable as were occasioned by the improved value of the premises. Watson v. Atkins, 3 Barn. & Ald. 647.

A lessee under a lease of certain buildings at the yearly rent of £60, whereby the lessee was to pay all rates, assessments, etc., except the sewers' rate, land tax on landlord's property, or income tax, having, by building on the land, increased its ratable value to £300 per annum, was entitled to deduct only the sewers' rate and land tax upon the original rent, and not in respect of the improved value. Smith v. Humble, 15 C. B. 321, 3 C. L. R. 225.

So, a lessor covenanting to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground, during the continuance of the term, is liable to pay the taxes in proportion to the rent reserved, and not to the improved value, where the lessee, by building on the land, increased the annual value of the premises. Watson v. Home, 7 Barn. & C. 285, 1 Moody & R. 191, 6 L. J. K. B. 73, 31 Revised Rep. 200.

Where landlords leased a piece of land with dwelling house and buildings built thereon for the term of ninety-nine years, at a ground rent of £1, 7s. per annum, clear of all deductions except, *inter alia*, land tax, which the landlords covenanted to pay, the premises being assessed for the purpose of land tax at the annual value of £32, and the land tax charged thereon at 2d. on the pound being 5s. 4d., the annual value of the premises not having been increased since the granting of the lease, it was held, on authority of Watson v. Home and Smith v. Humble, *supra*, that the landlords were bound to pay, and the lessee was entitled to deduct, when paying ground rent, only that part of the land tax which was proportionate to the ground rent. Mansfield v. Relf [1907] 1 K. B. 71, 77 L. J. K. D. N. S. 145, 71 J. P. 556, 97 L. T. N. S. 745, 24 Times L. R. 79.

respondent as lessee, which amount appellant claims to have paid in order to prevent the property from being sold for taxes. The complaint states that the lot

was leased for a period of ten years, with the privilege of renewal for another ten years; that by the terms of the lease respondent was obligated to erect on the lot,

Under a covenant by a tenant for the payment of £80 yearly rent, all taxes thereon being to him allowed, and also for the payment of all further or additional rates on the premises or on any additional buildings or improvements made by him; and the covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of £80, except such further or additional taxes as may be assessed on the demised premises,—the tenant is bound to pay all increase of the old as well as any new rates beyond the proportion at which the premises were rated at the time of the deed, which was £20 in respect of the £80 rent. *Graham v. Wade*, 16 East, 29.

Buildings erected by the lessee under provision of laws giving him the right to remove them are personal property, taxable to the lessee. *East Tennessee, V. & G. R. Co. v. Morristown*, — Tenn. —, 35 S. W. 771.

Where the lessee of land exempt from taxation because belonging to a charitable institution owns the houses and other improvements thereon, the lease providing that they shall not become a part of the realty but shall be and remain the personal property of said lessee, he is liable for taxes on said improvements under an assessment of the entire property to the lessor. *State ex rel. Ziegenheim v. Mission Free School*, 162 Mo. 332, 62 S. W. 998.

In *Philadelphia, W. & B. R. Co. v. Appeal Tax Ct.* 50 Md. 397, it was held that improvements placed upon two lots of ground leased from a city by a railroad company were subject to separate assessment, and being placed upon the demised premises by the lessee for his own use and benefit were properly assessed to the lessee at their full assessable value. "If this were a case," said the court, "between landlord and tenant, where the question was made as to the amount of taxes for which the tenant should be allowed as against the rent claimed, the lease being silent, or requiring the landlord to pay the taxes, without special reference to improvements, the tenant could claim only in respect to the property as he leased it, and not for all the taxes paid upon its enhanced value by reason of large improvements placed thereon by himself, and for his own exclusive use and benefit."

Under a lease of premises from a benevolent society whose real and personal property were exempt from taxation except for local improvements, the lessor having the privilege at the expiration of any term to resume possession upon paying the lessees the appraised value of the buildings erected by them upon the premises, buildings erected by the lessees in pursuance of their covenant were not exempted from taxation, and were properly assessed to them as real estate. *L.R.A. (N.S.)*

tate. People ex rel. Muller v. Board of Assessors, 93 N. Y. 308.

In *Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802, it is held that a bridge erected by the lessee upon piers exempt from taxation as public property is taxable to the lessee.

Right of landlord to pay taxes and recover same from tenant.

Where the lessor was compelled to pay the whole tax, including an increase by reason of the tenant's erection of buildings for the use of an amusement enterprise, and which, by the terms of the lease, were removable by the tenant at the end of the term, the lessor was entitled to recover from the lessee the tax chargeable against the buildings, notwithstanding a covenant to "save the lessee harmless from all taxes, assessments, ad betterments levied upon said premises, until the termination of this lease." *Phinney v. Foster*, 189 Mass. 182, 75 N. E. 103.

So, where lessors, in order to discharge a lien for taxes against premises, pay the whole tax, including that upon improvements which lessee should pay, they are entitled to reimbursement for the amount paid by reason of such improvements, out of lessee's estate. *Perrin & S. Printing Co. v. Cook Hotel & Excursion Co.* 118 Mo. App. 44, 93 S. W. 337.

And when a tenant under a lease silent as to the payment of taxes refuses to pay the taxes upon the improvements owned by him, which, by the terms of the lease, are removable at the end of the term, and the landlord is compelled by law to pay the same to save his own property from sale, an action may be maintained against the tenant for the recovery of the money so paid. *LA PAUL v. HETWOOD*.

So, where taxes were assessed upon the ground and buildings together, and the lessor was obliged to pay the whole sum assessed in order to discharge his property, he was entitled to set off against the lessee such proportion of the amount thus paid as the value of the improvements bore to the whole value of the property as improved. *Leach v. Goode*, 19 Mo. 501.

A landlord, under a covenant in a lease to pay the land tax, is bound to pay the land tax in proportion to the quantum of rent only. *Whitfield v. Brandwood*, 2 Starke, 440, 20 Revised Rep. 712.

So, where a lessee erected a house upon land exempt from taxation, leased from an ecclesiastical society, he is bound to pay taxes on the house, since, by the terms of the agreement between lessor and lessee, the house was no part of the land, there being an ownership in the one distinct from that in the other. *Parker v. Redfield*, 10 Conn. 490.

J. D. C.

at his own expense, a two-story building, which he was at liberty to remove at the termination of the lease; that in pursuance of the agreement a building was erected at a cost of \$30,000, which was separately valued and assessed for the taxes of 1906, 1907, and 1908, but the land and improvements were taxed together as one property; that respondent refused to pay the taxes upon the improvements for the years above mentioned; and that in order to prevent the property from being sold for taxes, the appellant was compelled to pay and did pay the entire tax, amounting to \$565.40. The complaint also contained an allegation that the respondent had agreed to pay all taxes above a certain valuation, and had refused to do so. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, and appellant appealed from an order sustaining the demurrer.

Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. 1 *Tiffany, Land. & T.* (1910) § 141; *Jones, Land. & T.* (1906) § 412; 2 *Underhill, Land. & T.* (1909) pp. 1006-1008; 1 *Taylor, Land. & T.* (1904) p. 426, § 341; *Phinney v. Foster*, 189 Mass. 182, 75 N. E. 103; 24 *Cyc. Law & Proc.* p. 1075. There is no provision of law by which the owner of land can pay the taxes, without at the same time paying the taxes upon all improvements located on the land. Under the law of Minnesota all buildings and improvements are, for the purpose of taxation, considered a part of the real estate, and must be assessed as such. *Rev. Laws 1905*, § 796. The assessor is required to view the premises, and to determine the true and full value of each tract or lot, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description. Section 808. But in assessing any tract or lot of real property, the value of the land, exclusive of structures and improvements, shall be determined, and also the value of all structures and improvements thereon, and the aggregate value of the property, including all structures and improvements. Section 810. Of course, taxes assessed upon real property are a perpetual lien thereon, and all structures thereon. Section 975.

It necessarily follows, from these provisions and rules of law, that when a tenant under such a lease refuses to pay the taxes upon the improvements owned by him, and the landlord is compelled by law to pay the same to save his own property from sale, an action may be maintained against the

tenant for the recovery of the money so paid. Our statute specifically provides for such an action. *Rev. Laws 1905*, § 984. The essential facts to constitute such a cause of action are stated in the complaint. The lease makes no mention of the payment of taxes. The lessee placed improvements upon the lot to the value of \$30,000, which, by the terms of the lease, were removable by him at the expiration of his term. The amount of the taxes for certain years on such improvement is stated with sufficient clearness. The lessee refused to pay his portion of the taxes, and the lessor paid them in connection with his own, in order to save the property from being sold.

It is only proper to state that the learned trial court appears to have sustained the demurrer upon the ground that the agreement to pay the taxes, as pleaded, was invalid, and the attention of the court was not called to the statute and rule of law upon which we hold the complaint sufficient.

Reversed.

Jaggard, J., took no part.

VIRGINIA SUPREME COURT OF APPEALS.

N. A. TERRELL, Plff. in Err.,
v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

(110 Va. 340, 66 S. E. 55.)

Nuisance — railroad yard — liability.

The maintenance by a railroad company of a yard for the storing, blowing out, cleaning, and firing of engines is done in its private, and not its public, capacity, so that it will be liable in damages if it maintains it in such manner as to constitute a nuisance to neighboring property.

(November 18, 1909.)

Note. — Liability of railroad for creating nuisance.

The early cases upon this question are covered in the notes to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579, and the note accompanying *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A. (N.S.) 49.

The position taken in the latter note, against the doctrine that legislative authority for the performance of acts which necessarily create a private nuisance will relieve a corporation responsible for those acts from responsibility, finds strong support in an opinion by Chief Justice Whitfield in *Alabama & V. R. Co. v. King*, 22 L.R.A. (N.S.) 603, quoting extensively the conclusions of that note. Most of the cases cited in the present note apparently pro-

FRROR to the Corporation Court for Charlottesville to review a judgment sustaining a demurrer to the declaration in an action brought to recover damages for injuries to plaintiff's property alleged to have been caused by the alleged unlawful use of defendant's premises. Reversed.

The facts are stated in the opinion.

Messrs. Micaiah Woods and Dabney & Fowler, for plaintiff in error:

The injury resulted from acts done in a private capacity, and therefore the railroad company is liable.

Townsend v. Norfolk R. & Light Co. 105 Va. 22, 4 L.R.A. (N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 A. & E. Ann. Cas. 558; Pollock, Torts, p. 158.

Messrs. D. H. Leake, Walter Leake,

and Henry Taylor, Jr., for defendant in error:

Whatever has to be done by a railroad company in order to enable it to discharge its duty to run trains, that it cannot procure another to do for it, and which must be done on or in close proximity to its main line, is an act done in the discharge of its public duty, rather than in its private capacity; and when done without negligence upon land selected for the purpose, in a reasonable exercise of its discretion, though the doing of the act creates damage, it is *damnum absque injuria*, for which there can be no recovery.

Richmond, F. & P. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl.

ceeded upon the assumption that a railroad company is responsible like an individual for the creation of a nuisance, even if it is a necessary incident to the operation of the road, and turn upon the question whether a private nuisance has in fact been established.

Damage from operation of road.

Damages for diminution in the market value of property not taken, by smoke, noise, dirt, and cinders arising from the proper, ordinary, and lawful operation of a railroad seeking a right of way, may be allowed the owner, under provisions of a Constitution that the legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, and of a statute that damages shall be awarded which result from the injuries to the property of any person from the construction and operation of the works. Tidewater R. Co. v. Shartzer, 107 Va. 562, 17 L.R.A. (N.S.) 1053, 59 S. E. 407.

The authority derived by a company from its charter to operate a railroad does not absolve it from liability for injuries to abutting property because of the operation of the road in such a manner as to constitute a private nuisance. Alabama & V. R. Co. v. King, 93 Miss. 379, 22 L.R.A. (N.S.) 603, 47 So. 857.

And the fact that a railroad was constructed under legislative authority, at a time when the Constitution made it liable to pay only for property taken in the exercise of eminent domain, does not render a requirement that its owner pay for injuries to property through the operation of the road in such a manner as to constitute a private nuisance a taking of its property without due process of law. Ibid.

So, legislative authority to operate a railway and light company will not exempt such company from liability for injury to adjoining property from noise, smoke, soot, cinders, and vibration caused by the careful operation of its power plant, where the Constitution provides for compensation in case

private property is injured for public use. King v. Vicksburg R. & Light Co. 88 Miss. 456, 6 L.R.A. (N.S.) 1036, 117 Am. St. Rep. 749, 42 So. 204.

And an abutting property owner may, regardless of defective construction or negligent operation, recover damages caused by the operation of trains on the street in front of his property, where his house is shaken thereby, and the occupants disturbed by the noises, and the house is liable to be set on fire by the sparks from the passing engines. Trinity & B. Valley R. Co. v. Jobe, — Tex. Civ. App. —, 126 S. W. 32.

So, a railroad company is guilty of a nuisance if it runs its trains across a much-used street in a town, wilfully, habitually, and for an unreasonable length of time, at such an unreasonable and unsafe rate of speed as to endanger the lives and safety of persons using the crossing, without giving the customary and usual warning signals. Cincinnati, N. O. & T. P. R. Co. v. Com. 126 Ky. 712, 17 L.R.A. (N.S.) 561, 104 S. W. 771.

But where such road gives the customary statutory signals and maintains a watchman at the crossing from 6 A. M. to 6 P. M., it thereby relieves itself from the charge of committing a nuisance in so operating its trains. Ibid.

And recovery for damages to property by smoke and vibration from a railroad was allowed in Baltimore Belt R. Co. v. Settler, 105 Md. 264, 65 Atl. 752. The questions there discussed, however, were as to evidence and damages.

But the fact that the operation of trains is accompanied by noise, smoke, and the jarring of the near-by property is not sufficient to show a negligent operation of the railroad, since such results necessarily follow from the operation of heavy trains and engines. Kilcoyn v. Chicago, St. L. & N. O. R. Co. — Ky. —, 132 S. W. 438.

And it was held in Danville & I. H. R. Co. v. Tidrick, 137 Ill. App. 553, in an action on the case, that a railroad was not liable to a property owner for injuries resulting from the construction and operation of its road, although it was alleged that his view was

164; *Fisher v. Seaboard Air Line R. Co.* 102 Va. 363, 46 S. E. 381, 1 A. & E. Ann. Cas. 622; *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591; *Ridge v. Pennsylvania R. Co.* 58 N. J. Eq. 172, 43 Atl. 275; *Ewing v. Alabama & V. R. Co.* 68 Miss. 551, 9 So. 295; *Protzman v. Indianapolis & C. R. Co.* 9 Ind. 467, 68 Am. Dec. 650; *Lawrence v. Morgan's L. & T. R. & S. S. Co.* 39 La. Ann. 427, 4 Am. St. Rep. 265, 2 So. 69; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456; *Dolan v. Chicago, M. & St. P. R. Co.* 118 Wis. 362, 95 N. W. 385;

Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; *Eldridge v. Smith*, 34 Vt. 484; *Lewis, Em. Dom.* 1888 ed. § 170.

Where the legislature contemplates the doing of the act which occasions the injury, and the thing is done without negligence, the railroad company cannot be liable therefor.

London B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45, 55 L. J. Ch. N. S. 354, 54 L. T. N. S. 250, 34 Week. Rep. 657, 50 J. P. 388, 22 Eng. Rul. Cas. 80.

Cardwell, J., delivered the opinion of the court:

The plaintiff in error brought an action of trespass on the case against the Chesapeake & Ohio Railway Company, and

obstructed and cars and engines were allowed to stand in front of his premises, making loud and unusual noises, jarring his premises, and throwing dust, cinders, and gases, etc., thereon, the damage being of a character suffered by the public generally, and not a special damage to his property.

And a complaint which charges as a nuisance the running and shifting of cars on Sunday, near a church, but which does not specify wherein the railroad is violating the statute against operating trains, etc., on Sunday, does not show an actionable wrong. *Taylor v. Seaboard Air Line R. Co.* 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

And where plaintiff's predecessor in title had recovered the usual abutting owner's judgment for damages resulting from the construction of an elevated railroad, and the only easements of the plaintiff were those of "light, air, and access," the mere increase in the number and speed of trains passing the property does not constitute a ground for an injunction to prevent such increase. *Wolf v. Manhattan R. Co.* 51 Misc. 426, 101 N. Y. Supp. 493.

So, a railroad may, if necessary to meet the demands of its enlarged growth, cover its right of way with tracks, and, in the absence of negligence, operate trains upon them, without incurring in that respect additional liability either to the owner of land condemned or to others; and it is therefore immaterial that the road has become a part of a system of roads. *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 318, 55 S. E. 205.

And an injunction will not be granted at the instance of a property owner against a company formed to supply electric power to trolley and elevated roads in a large city, where it has complied with all of the municipal ordinances, and uses the best appliances and materials, and exercises great care; but the owners will be left to other remedies, since the public rights overbalance the private injury. *Raymond v. Transit Development Co.* 65 Misc. 70, affirmed in 134 App. Div. 981, 119 N. Y. Supp. 655.

And an electric railroad company will not 32 L.R.A. (N.S.)

be enjoined from operating its road, as a nuisance, until it adopts devices to remedy the difficulty, where it appears that the high current of electricity used interferes with a telegraph and signal system used by a steam road near the first company's line, it not appearing that the electric railroad was guilty of any negligence. *Lake Shore & M. S. R. Co. v. Chicago, L. S. & S. B. R. Co.* — Ind. App. —, 92 N. E. 989. The court said: "It is true legislative authorization to take and use property does not extend to deprive, without redress, an adjoining owner of the legitimate uses and rights in his property; nor does it permit one neighbor to set up such a condition upon his premises as will exclude a subsequent owner on adjoining land from its proper and lawful uses. It is not denied that appellee was conducting with care and skill upon its own premises a quasi public enterprise by virtue of legislative authority, nor that it had not adopted, or was not maintaining in good repair, such appliances as are generally recognized as the best and most approved for the business in which it was engaged, nor was it charged with any unwarrantable, unreasonable, or unlawful acts or use of its property. As we see this case, the controlling principle in many respects is analogous to the principle which protects a steam railroad from the charge of maintaining a nuisance, preferred by an adjoining owner because of the annoyance, discomfort, or injury caused by the noise, vibration, dust, and smoke from its passing trains, and sparks and coals of fire emitted from its engines and thrown upon the premises of such adjoining owner, which would amount to an actionable nuisance were it not that the operation of the railroad had legislative sanction."

And an injunction will not be granted against the operation of a railroad in a street near a hotel, in such a way as to constitute a nuisance on account of the noise, vibration, etc., by reason of which the patronage of the hotel is interfered with, since an action at law is an adequate remedy. *Galveston, H. & S. A. R. Co. v. DeGroff*, 102 Tex. 433, 21 L.R.A. (N.S.) 749, 118 S. W. 134.

the declaration states that he was seised and possessed of a certain lot of land with a dwelling house thereon, known as No. 923 East Market street, in the city of Charlottesville, on the north side of said street, which lot fronts about 60 feet on said street and runs back in a northerly direction between parallel lines about 200 feet; that the Chesapeake & Ohio Railway Company, a corporation organized under the laws of the state of Virginia, was possessed of a certain lot of land lying on the south side of East Market street in said city, and directly opposite the plaintiff's premises; that on a part of its said lot, some time prior to the year 1903, the defendant had erected a building known as a "roundhouse," but a large part of the

defendant's lot in front of plaintiff's premises was, prior to the year 1905, used for the purpose of receiving, storing, and delivering car and locomotive supplies and materials; that it became and was the duty of the defendant so reasonably to use its said lot as not to injure or interfere with the possession, use, and enjoyment by the plaintiff of his said property, "yet the said defendant, not regarding its said duty in this behalf, but contriving, and wrongfully and unjustly intending, to injure and aggrieve the said plaintiff in the use and possession of his said property, heretofore, to wit, on the— day of —, 1905, laid on the said part of its said lot not occupied by the said roundhouse, and very near, to wit, 75 feet, from and in front of

And where it does not appear that a property owner will suffer any special injury other than the general public suffers by the construction and operation of a street railroad, it will not be enjoined as a nuisance. *Ayers v. Citizens' R. Co.* 83 Neb. 26, 118 N. W. 1066.

But where a property owner sustains a special and peculiar injury, differing in kind from that to which others in common with him are exposed, he may recover from a railroad for damage resulting from the operation of a coal chute. *Barksdale v. Charleston & W. C. R. Co.* 83 S. C. 287, 64 S. E. 1013.

Roundhouses and yards.

The facts in *Chesapeake & O. R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59, are identical with those in *TERRELL v. CHESAPEAKE & O. R. Co.*, and a recovery was there allowed, the court stating that the law announced in *TERRELL v. CHESAPEAKE & O. R. Co.* was controlling.

The noises attendant upon the careful and prudent operation of a railroad switch yard, which affect alike all within hearing distance thereof, cannot be regarded as a private nuisance to a religious society whose services are disturbed and interrupted thereby. *Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co.* — Utah, —, 23 L.R.A. (N.S.) 860, 103 Pac. 243.

And the maintenance of a temporary roundhouse and railroad yard while extensive improvements on a railroad are being made does not constitute a nuisance to adjoining property, where the work is being pushed with reasonable speed and energy; and this is true although the annoyance will continue for several years, such time not being disproportionate to the magnitude of the work. *Herrlich v. New York C. & H. R. R. Co.* 126 N. Y. Supp. 311.

And annoyances and injuries resulting from a railroad yard which has been operated twenty years, so that a prescriptive right exists, are *damnum absque injuria*, and the increase of the burden upon neighboring property caused by increased traffic does not change the rule. *Ibid.* 32 L.R.A. (N.S.)

Where a property owner is over 1,000 feet distant from a roundhouse, and over 100 feet above its level, and the roundhouse is the principal source of annoyance complained of in respect to a railroad yard, no injunction will be granted. *Ibid.*

Terminals, stations, etc.

The injuries and inconveniences to those who live near a railroad terminal, from noises of locomotives, shifting of cars, etc., which result from the necessary and proper use of the railroad, are not actionable nuisances, but are the necessary concomitants of defendant's franchise. *Taylor v. Seaboard Air Line R. Co.* 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129.

And the mere establishment and proper use of a freight and passenger station across the street from a church do not constitute an actionable nuisance, and the trustees cannot maintain an action for permanent damage suffered. *Ibid.*

And where suit is brought by trustees of a church against a railroad company, for damages sustained by reason of the improper use of a terminal station located near the church and manse, they cannot recover for physical suffering by the pastor, his family, or the members of the corporation. *Ibid.*

And a decree enjoining a railroad from enlarging its freight depot, upon a finding by the jury that it would be a public nuisance, was modified in *Hickory v. Southern R. Co.* 143 N. C. 451, 55 S. E. 840, so that the railroad was allowed to make the desired enlargement, providing it guarded persons crossing its tracks by erecting and maintaining gates, etc.

But the use of railroad terminals needlessly located so near to private property as to constitute a nuisance, the injury from which cannot be adequately compensated in money, may be enjoined where the absolute power to select the location has not been conferred on such railroad. *Rainey v. Red River, T. & S. R. Co.* 99 Tex. 276, 3 L.R.A. (N.S.) 500, 122 Am. St. Rep. 622, 89 S. W. 768, 90 S. W. 1096, 13 A. & E. Ann. Cas. 580.

the said plaintiff's property, a number of short railroad tracks, to wit, seven, in a segment or semicircle, which said tracks have been used by the said defendant for the purpose of standing, storing, and keeping of such of its locomotives as were not in immediate use on divers days and times from the above date to the commencement of this suit;" that "here numbers of locomotives were kept by said defendant, and cleaned, fired, steamed, and repaired, without any roundhouse or other structure inclosing or covering the same, and without smokestacks of sufficient height to carry the steam, smoke, dust, ashes, cinders, and odors above the said plaintiff's property;" that "from the engines so placed, hostled, tended, and handled, there were daily, and

many times during the day and night, the ringing of bells, the blowing of whistles, the prolonged and deafening roar of steam when boilers were blown off to be washed, and the noise of blowers at work raising steam, and vast clouds of smoke, soot, dust, cinders, and ashes poured from the smokestacks of the said locomotives over, upon, into, and through and about the said plaintiff's dwelling and premises, and when the doors and windows of the said dwelling were open for light and air, smoke, cinders, soot, ashes, and dust were discharged from said locomotives, and blown in and through said doors and windows, settling upon the occupants of the house and upon the furniture and furnishings, soiling clothes, bedding, curtains, food, and other

And a corporation organized under legislative authority for the generation of electricity for public service is not acting in its public capacity in locating its power house, so as to be absolved from liability for injuring neighboring property by the smoke, noise, and escaping electricity incident to its business. *Townsend v. Norfolk R. & Light Co.* 105 Va. 22, 4 L.R.A. (N.S.) 87, 116 Am. St. Rep. 842, 52 S. E. 970, 8 A. & E. Ann. Cas. 558.

Use of spur or side track.

A property owner may recover from a railroad for a nuisance where it shoves cars on a spur track, which is not at a freight depot, adjacent to such owner's property, frequently leaves theatrical cars there to be unloaded and loaded, and leaves its engines on such track during the night, so that the escaping steam, ringing of bells, and sounding of whistles unnecessarily at early hours in the morning, and the noise of employees during the night and early in the morning, and the loud puffing, unnecessary scattering of cinders, etc., and screeches of wheels on the curve, breaks the plaintiff's rest and scatters dirt and gases unnecessarily over his property. *Staton v. Atlantic Coast Line R. Co.* 153 N. C. 432, 69 S. E. 413.

And it is an actionable nuisance for a railroad to maintain a coal and wood yard on a lot adjoining a dwelling house, and to construct a spur track on the lot, a part of such track being a trestle or coal chute pointing directly at the windows of the dwelling, and extending within about 5 feet of the fence of the owner, and within 20 odd feet of his sleeping apartment; it appearing that the defendant had negligently used such track. *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 300, 55 S. E. 198.

But the use of a side track as a hostelry for the engines of a short branch line is not unreasonable; nor is the keeping of such engines on these tracks nights and Sundays, to be cleaned, fired, and steamed, without any roundhouse, or a failure to provide smoke stacks for locomotives of sufficient

size to carry the smoke and dust above the neighboring property, unreasonable or negligent, so as to give the owner of such property a right of action. *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 318, 55 S. E. 205.

And the annoyance from such engines through the ringing of bells, blowing of whistles, smoke, cinders, etc., which are necessary to their operation, will not render the railroad liable to the property owners. *Ibid.*

And where the use of a switch is reasonable, a railroad is not liable to a property owner for annoyance and personal inconvenience from noise, cinders, etc., resulting from such use. *Houston & T. C. R. Co. v. Barr*, 44 Tex. Civ. App. 571, 99 S. W. 437.

Damage from stock pens and oil.

It is a nuisance for a railroad adjoining a residential section of a city, to allow stock trains to remain stalled there, with the noises, odors, etc., incident thereto, during all hours of the night and day, and also to permit unnecessary whistling and bell ringing; and an injunction will be granted in such a case. *Colgate v. New York C. & H. R. R. Co.* 51 Misc. 505, 100 N. Y. Supp. 650, modified on other grounds in 122 App. Div. 908, 107 N. Y. Supp. 1123. The court said: "A railroad corporation is not exempt from the obligation to so use its property as not to unnecessarily and unreasonably injure its neighbors. Doubtless many inconveniences necessarily result from proximity to a steam railroad, and, as to these, the adjoining owner has no redress. But railroad corporations are bound, as well as private owners, to have regard for existing conditions, the locality of the railroad, the inconveniences arising to their neighbors from their operation; and there is nothing in the charter of a railroad company absolving it from the duty to exercise care, and, when practicable, to minimize these inconveniences, so as to avoid unnecessary injury to those dwelling along the route. By appropriate rules and regulations for the government of its employees, and the en-

articles therein, and accompanied by foul and offensive odors which tainted and corrupted the atmosphere, and rendered the dwelling and premises unhealthy and unfit for habitation, and also covered the shade trees in front of said dwelling with soot and dust, and blackened and destroyed them and the flowers and other vegetation on and about said premises, and by means of the said smoke, dust, and soot discharged as aforesaid on and about the said plaintiff's premises, the fences thereon and the front of his said dwelling have been blackened and rendered most dirty, disreputable, and unsightly in appearance. And by reason of the aforesaid unreasonable, wrongful, and unjust use by the said defendant of its said premises, the said

plaintiff has been and is greatly damaged in the use and possession of his said property, and the marketable and rental value of the same has greatly depreciated by means of the committing of the grievances as aforesaid by the said defendant, to the damage of the said plaintiff \$1,500."

The defendant demurred to the declaration, in which demurrer the plaintiff joined; the grounds of demurrer being that no negligence on defendant's part is alleged, and that, independent of negligence, the defendant is not liable.

Upon the hearing of the cause upon the demurrer, the corporation court of Charlottesville sustained the demurrer, and to that judgment this writ of error was awarded.

forcement of these rules, by observation of the character of the surrounding locality, and by having in mind the rights of others, and devoting some attention to these matters, a great deal of the unnecessary and unreasonable injuries sometimes attendant on railroad operation can be avoided, to the mutual benefit of the parties. . . . The necessities for expediting the movement of passenger trains, the prior right of the great through expresses to a clear way, their importance to the community, all may be conceded; but these considerations, to my mind, are no answer to the plaintiffs' case, and to the practically undisputed evidence. It is not for the court to suggest or point out methods; but it is clear that, whether by rearranging the schedules of these live-stock trains, or holding them up at more sparsely-settled localities, or by the acquiring of additional track facilities, some change should be made by which the plaintiffs shall be relieved of the undue burden put upon them."

And if property has depreciated in value by reason of the erection of stock pens near it by a railroad, the owner is entitled to recover, although property generally in the town, including his, has increased in value since the erection of such pens. *Gulf, C. & S. F. R. Co. v. Blue*, 46 Tex. Civ. App. 239, 102 S. W. 128.

And a railroad through whose carelessness and negligence oil is allowed to escape and flow into a ravine near a residence, causing disagreeable odors, so that the use of the house is interfered with, and the occupants are caused discomfort and annoyance, is liable for the damage caused. *Houston & T. C. R. Co. v. Crook*, — Tex. Civ. App. —, 120 S. W. 594.

Causing overflow, accumulation, or pollution of water.

Property owners are entitled to recover damages for the depreciation in value of their property arising from the overflow of their lots, caused by the roadbed and track of a railroad, and also for damage resulting 32 L.R.A. (N.S.)

from noise, smoke, and cinders, etc.; and the fact that the road was constructed with the highest degree of care, and that its trains were carefully and skilfully handled, constitutes no defense. *Schier v. Cane Belt R. Co.* 45 Tex. Civ. App. 295, 100 S. W. 360.

And a recovery may be had for damage resulting from the reconstruction of a railroad's roadbed in such a way as to obstruct the natural flow of water courses, causing the water to overflow an abutting owner's land. The question directly discussed in this case was as to the proper measure of damages. *Southern R. Co. v. Poetker*, — Ind. App. —, 91 N. E. 610.

And under a statute providing that "in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof," a railroad is liable where it fails, in constructing a switch, to provide a sufficient escape for surface water, and a property owner is thereby injured. *Houston & T. C. R. Co. v. Barr*, 44 Tex. Civ. App. 571, 99 S. W. 437.

And where a statute provides that any person who destroys any work constructed, in pursuance of any law, for the drainage of lands, and makes such person liable for the persons injured, a railroad which, in violation of such law, destroys a drain lawfully constructed, is liable to the owner of lands injured thereby. *Kelsay v. Chicago, C. & L. R. Co.* 41 Ind. App. 128, 81 N. E. 522.

So, where one is in possession of land upon which there are springs, and a railroad pumps a part of the water in such a negligent manner as to fill up a part of the springs, and to cut off the water supply, so that the plaintiffs are deprived of its use, it is liable to him for the injury caused. *Louisville & N. R. Co. v. Higginbotham*, 153 Ala. 334, 44 So. 872.

The construction by a railroad of a turntable and water tank within 40 feet of property, the value of which is thereby depreciated by reason of smoke, cinders, and stagnant pools of water, gives the owner of such property a right of action. *Missouri*,

That the defendant is a public service corporation is not questioned, and it is also conceded that the declaration sets out a nuisance, but the claim is that it is not an actionable nuisance. Therefore the sole question for determination is whether the nuisance was committed by the defendant in its private capacity, or as incidental to its public function of running trains for the carrying of passengers and freight.

The declaration, it may be said, is in all of its essential features identical with that considered by this court in *Townsend v. Norfolk R. & Light Co.* 105 Va. 22, 4 L.R.A. (N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 A. & E. Ann. Cas. 558, and the plaintiff urges that that case controls the decision in this; while the defendant, with

equal earnestness, claims that it is controlled by the earlier case of *Fisher v. Seaboard Air Line R. Co.* 102 Va. 363, 46 S. E. 381, 1 A. & E. Ann. Cas. 622.

In the earlier of these cases, Fisher sued to recover damages for a nuisance caused by "running trains and locomotives over and upon" defendant's track and trestle; while in this case the declaration alleges that defendant used its lot in front of and adjacent to its roundhouse for the purpose of "standing, storing, and keeping such of its engines as were not in use," and "cleaning, firing, steaming, and repairing" same, and that "from the engines so placed, hostled, tended, and handled," the nuisance complained of resulted.

In the *Townsend Case*, as in this, neg-

K. & T. R. Co. v. Perry, 46 Tex. Civ. App. 374, 102 S. W. 1169.

And recovery may be had without reference to the degree of care exercised by the defendant company, if the maintenance of the structures complained of amount to a nuisance. *Ibid.*

And the fact that the jury, in an action for damages resulting from the maintenance by a railroad of a tank near the plaintiff's property, failed to find in the latter's favor on the issue of personal annoyance and inconvenience, does not prevent a finding that his property has depreciated in value. *Texas & P. R. Co. v. Edrington*, 46 Tex. Civ. App. 388, 102 S. W. 1171.

But a railroad which is the successor of another company is not liable for a nuisance created by the latter in constructing its road in such a way as to cause stagnant surface water to accumulate in narrow pits, but it is liable for the continuance of such nuisance after receiving notice of it. *Graves v. St. Louis, M. & S. E. R. Co.* 133 Mo. App. 91, 112 S. W. 736.

And no cause for enjoining a nuisance is shown where the only injury alleged is that a culvert which had been constructed by defendant's lessor some ten years before had twice caused the overflow of plaintiff's property, resulting in damage to a certain amount, there being no suggestion as to the defendant's solvency. *Central R. Co. v. Americus Constr. Co.* 133 Ga. 392, 65 S. E. 855.

A railroad that buries a heifer killed by its train on its own land is not liable for the pollution of a neighbor's spring, unless the circumstances are such that it should, as a person of reasonable prudence, have anticipated that such a result would follow; and whether one who buries a heifer within 70 feet of a spring of an adjacent owner, at a point where the natural underground drainage is toward the spring, uses due care must be submitted to the jury. *Long v. Louisville & N. R. Co.* 128 Ky. 26, 13 L.R.A. (N.S.) 1065, 107 S. W. 203, 16 A. & E. Ann. Cas. 673.

Where it is largely a matter of speculation (N.S.)

tion as to whether typhoid fever was caused in a property owner's family from drinking filthy water flowing onto his land and into his well from barrow pits dug by a railroad in building an embankment, no recovery for such injury can be had. *Gulf, C. & S. F. R. Co. v. Craft*, — Tex. Civ. App. —, 102 S. W. 170.

Miscellaneous.

A railroad which maintained a large quantity of dynamite in a shed near a highway and its track, without notice to the public, is not liable for injuries to one who, without right, uses the shed as a target for gun practice, since the railroad is not bound to foresee that it would be so used. *McGhee v. Norfolk & S. R. Co.* 147 N. C. 142, 24 L.R.A. (N.S.) 119, 60 S. E. 912.

So, a preliminary injunction will not be granted against a railroad having full power to construct a drawbridge over a navigable stream, it not being seriously contended that the proposed bridge would altogether obstruct navigation, or that the most approved methods had not been adopted in its construction. *Pedrick v. Raleigh & P. S. R. Co.* 143 N. C. 485, 10 L.R.A. (N.S.) 554, 55 S. E. 877.

And where it is not shown that the plaintiff in an action for injury to property by reason of the maintenance and operation of a stone quarry is the owner of any property adjacent to the alleged nuisance, no recovery can be had. *McManus v. Southern R. Co.* 150 N. C. 655, 64 S. E. 766.

So, a railroad company is not liable to the owner of a passageway, for obstructing such way with its trains, if it is not negligent. *Louisville & N. R. Co. v. Scomp*, 124 Ky. 330, 98 S. W. 1024.

And blasting rock so that they fall into a stream which is the proposed site of a pier which plaintiff was to erect for the defendant, thereby enhancing the cost of the foundation, is not a nuisance. *McCalla v. Louisville & N. R. Co.* 163 Ala. 107, 50 So. 971.

A delay of nineteen years in seeking an in-

ligence was not charged, but in both, facts constituting the nuisance are duly alleged, and in the Townsend Case the operation of a power house for generating electricity to run an electric railway was the *modus injuriæ*, and this court, though conceding that the electric railway was a public service corporation with the power of eminent domain, held that it had no legislative authority to operate its power house to the injury of the plaintiff, Townsend, on the ground that such operation was not incidental to its public function of running cars; the opinion saying: "It is true that an electric railway cannot be operated without a power house. It is true that an engine house is a necessary adjunct to a steam railway; but they are incidents to the operation of the road with which the public has no concern."

It cannot be maintained that the storing, blowing out, cleaning, and firing of engines on an open yard is more incidental to the public function of carrying passengers than a roundhouse for the sheltering of engines, or a power house for the generation of electrical power. The one is not, when considered on a demurrer to a declaration or to a plea setting up such a defense, any more incidental to the performance of the public function of the carrier than the other. The true distinction between a public and a private function, when exercised by a public service corporation, is so lucidly and exhaustively drawn in the Townsend Case that little need be added to what is there said. As a preface to the discussion of the question in that case the opinion says: "A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and, if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

Authorities are cited with approval as follows: "A railway company is authorized to acquire land within specified lim-

its, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building work shops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house." Pollock, Torts, 2d ed. p. 158.

"A common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the parties. The private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is the private business of the company." *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 592.

"But, over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use." *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 61 L.R.A. 192, 72 S. W. 957, citing *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537.

With respect to the Fifth Baptist Church Case, the learned counsel for the railway company in this case make the point that, while the opinion in that case used the expression, "a railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity; there is nothing in the case with regard to the public and private capacity of a railroad, the decision being rested emphatically upon the proposition that, in selecting the place for its roundhouse, the railroad had made an unreasonable choice,—a claim that is not made in the case at bar." This view of that case, however, was not taken by this court in the Townsend Case, nor in the large number of cases in which it has been cited with approval. It is not necessary to

junction against the operation of a railroad in a street in such a way as to constitute a nuisance to abutting property owners will deprive a complainant of the right to that relief, although the injury of which complaint is made is of recent origin, especially where the stoppage of the road would result in inconvenience to the public. *Galveston, H. & S. A. R. Co. v. DeGroff*, 102 32 L.R.A. (N.S.)

Tex. 433, 21 L.R.A. (N.S.) 749, 118 S. W. 134.

But the construction by an elevated railroad of part of a structure beyond the limits of the franchise granted is a public nuisance which the court may, at the instance of a private person, require the company to move. *Bremer v. Manhattan R. Co.* 191 N. Y. 333, 84 N. E. 59. J. T. W.

the liability of a public service corporation for a nuisance caused by an unlawful use of a power house, or of a site selected, and used as a roundhouse, that the corporation had made an unreasonable selection, but the question in this, as in the Townsend Case, is: Was the corporation acting in its private capacity, as distinguished from its public function, when operating the nuisance complained of? In the Townsend Case the corporation was held to be acting in its private capacity as distinguished from its public function when so operating its power house as to cause a nuisance damaging to adjacent property owners, and the effort to distinguish that case from this is in vain.

It is very true that it is necessary for a public service corporation having the franchise to construct and operate a railway line for the carrying of passengers and freight, to fire up and clean its engines for the purpose of performing its public functions; and it is equally true that it is necessary for a street railway to have and operate a power house for the generation of its transportation power, but the one in selecting and operating its power house, as well as the other in selecting a site for its roundhouse and making use thereof, is, as the great weight of the authorities conclusively shows, to be held as acting in its private capacity, and not in the performance of its public function, and is liable, as a rule, for a nuisance resulting therefrom, even though the nuisance is not negligently caused. See report of the Townsend Case, with authorities, 4 L.R.A. (N.S.) 87.

In answer to the argument of the learned counsel for the railway company in this case, that the view just stated is in conflict with the decision in the Fisher Case, and that this case is controlled by that case, and not the Townsend Case, we deem it only necessary to refer to the exhaustive opinion of Keith, P., in the last-named case, upon a petition for a rehearing, where the authorities are reviewed at greater length than in the original opinion; the result being a denial of the prayer for a rehearing.

It is finally argued on behalf of the railway company in this case: "If the appellee is to be made to pay damages in this case, and this principle is established as the law in Virginia, then it is difficult to perceive how, where, and when a railroad company in this state may establish a permanent terminal yard on which it may do its business necessary to the 'hostling' of its engines. If said principle is once established, the running of trains upon the roads in this state will become difficult,—at best,

a most expensive matter,—and possibly may be prevented entirely."

Similar suggestions as to the consequences of adhering to the rule of law established by the authorities, applicable to cases of this character, were made in the Townsend Case, to which the opinion replied as follows: "It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say, with the great Lord Mansfield, *Fiat justitia, ruat cælum.*"

We have not deemed it necessary to consider the argument of the learned counsel for the plaintiff, that, even if the nuisance complained of were done in the exercise of a public function, the demurrer to the declaration should be overruled, under § 58, art. 4, of the present Constitution (Code 1904, p. ccxx ii.), since the injury from the engines, as alleged in the declaration, was done after the adoption of the Constitution, in 1902, when there was added to the provision of the former Constitution, with respect to the taking of private property for public use, the provision that damage to property, even for a public use, shall be compensated for. The purport and effect of this change in the Constitution, which we do not think is necessary to be considered again here, was fully considered and determined in *Tidewater R. Co. v. Shartzer*, 107 Va. 562, 17 L.R.A. (N.S.) 1053, 59 S. E. 407, and we shall be content with a mere reference to the opinion in that case.

The decision of the Townsend Case, which is conclusive of this upon the demurrer to the declaration, was based upon the principle that a nuisance is unlawful; and, though an injury results from a lawful act done without negligence, the injury is *damnum absque injuria*, yet, however carefully one may maintain a nuisance, he is liable for the resulting injury to others. See also *Wood on Nuisances*, pp. 709, 1277, where the rule is clearly stated and discussed.

The principles of law applicable to such

a case are also clearly and forcibly stated in 29 Cyc. Law & Proc. pp. 1198, 1199, as follows: "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury. So, in an action for a nuisance consisting of smoke entering plaintiff's house from defendant's chimneys, it is no defense that the chimneys are as high as the city regulations for chimneys require, if, in fact, they are not high enough to keep the smoke out. It is a condition always implied by law that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons, and so the fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance. Thus, the fact that a railroad is constructed and operated under statutory authority does not deprive neighboring property owners of their remedy for annoyances and injuries not necessarily incident to the operation of the road in the vicinity. Neither can defendant's possession of the right of eminent domain legalize a nuisance, but, until defendant has exercised such power, and by the authority thereof acquired plaintiff's property, defendant's illegal acts resulting in the substantial impairment or destruction of the property constitute an actionable nuisance."

See also *Rosenheimer v. Standard Gas-light Co.* 36 App. Div. 1, 55 N. Y. Supp. 192; *Ganster v. Metropolitan Electric Co.* 214 Pa. 628, 64 Atl. 91.

We are of opinion that the judgment of the Corporation Court sustaining the demurrer to the declaration in this case is erroneous. Therefore it will be reversed, the demurrer overruled, and the case remanded to be further proceeded with in accordance with the views herein expressed.

OHIO SUPREME COURT.

SEEDS GRAIN & HAY COMPANY, Plff.
in Err.,

v.

H. M. CONGER.

(— Ohio St. —, 93 N. E. 892.)

Accord and satisfaction — payment of less than due.

1. Where there is a bona fide dispute 32 L.R.A. (N.S.)

over an unliquidated demand, and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative. He must accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely; or, if he has received the amount by check in a letter, he must return it.

Same — acceptance of check — notification of balance.

2. Where, in such case, the creditor retains a check which was sent upon the condition that it shall be in full satisfaction of the debt claimed to be due, and receives the money thereon, and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an accord and satisfaction.

(December 20, 1910.)

RROR to the Circuit Court for Champaign County to review a judgment affirming a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover a certain amount and interest upon a contract for sale and delivery of oats by the defendant to plaintiff. Affirmed.

Statement by Davis, J.:

The plaintiff in error commenced this action in the court of common pleas of Champaign county to recover \$700 and interest upon a contract for sale and delivery of oats by the defendant. The defendant in error contracted with the plaintiff in error to sell and deliver to it 10,000 bushels of oats during the month of August, 1907, at 37 cents per bushel. On the 17th day of August defendant called plaintiff over the telephone, and notified it that he could not comply with the contract, and desired to settle. There is conflict in the testimony

Headnotes by the COURT.

Note. — The effect of the acceptance of a remittance of part of an unliquidated or disputed claim, accompanied with a statement that it is "in full," as assent to its receipt in full payment, is discussed in notes to *Canadian Fish Co. v. McShane*, 14 L.R.A. (N.S.) 443, and *Barham v. Bank of Delight*, 27 L.R.A. (N.S.) 439.

As to effect of payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole, see notes to *Fuller v. Kemp*, 20 L.R.A. 785; *Melroy v. Kemmerer*, 11 L.R.A. (N.S.) 1018; and *Ex parte Zeigler*, 21 L.R.A. (N.S.) 1005.

as to the substance of this conversation; the defendant insisting that there was a settlement on the basis of 40 cents a bushel, and the plaintiff denying this. Upon the same day, August 17th, the defendant sent the plaintiff a check for \$300, indorsing thereon the following words: "Settlement in full August account," and accompanied it with a letter in which he stated that it was according to their telephone talk of that day, and was "settlement in full for the 10,000 bushels oats sold you May 29, 1907, for August shipment." Plaintiff on the same evening answered as follows: "Note telephone conversation with you this morning with reference to your sale of 10,000 bushels No. 3 white oats to us subject to Eastern weights and inspection, and your wish to settle that trade at 40 cents track your place, our bid of last night. This we can't consent to do now, for the reason we find ourselves short a few cars of oats, and have nothing with which we can replace this at the present time, but would be glad to buy the oats for you just as quickly as we get enough to replace the amount you sold us. We will not charge you anything for making the purchase, only the price we are obliged to pay for the oats. It seems to us, however, that you can get the matter closed up more advantageously if you hustle around and buy the oats at Mechanicsburg and ship them on the contract. If you want us to buy them in, while we are short ourselves, we will give you the first ten cars of oats we can buy subject to the same conditions on which your sale was made." Plaintiff received the check, drew the money on it, and kept it, but at the same time wrote a letter to the defendant, of the date of August 19th, acknowledging the receipt of the check for \$300 and stating, "which amount we place to your credit. In our conversation of Saturday we did not mean to close up that transaction, as we wrote you on Saturday evening. We have bought about 6,000 or 7,000 bushels of oats to-day at 41 to 42 cents, and are bidding 42 cents to-night, and just as soon as we get a sufficient amount to cover your 10,000 bushels, will advise you about the cost of them, and I think you will want to adjust the matter as we wrote you on Saturday evening." It does not appear on the record that there was any open account existing between the plaintiff and defendant, other than the \$300 item. The defendant made no answer to the plaintiff's letter of August 19th.

At the conclusion of the plaintiff's testimony, a motion was made by defendant's counsel to withdraw the case from the jury and direct a verdict for the defendant, which the court then declined to do, but, at the

conclusion of all the evidence, the motion was renewed and the court sustained it, upon the ground that, under the facts above stated, the plaintiff was not entitled to recover, and that the transaction shown by the check and letters became an accord and satisfaction upon the plaintiff accepting the money. Upon petition in error the circuit court affirmed the judgment of the court of common pleas, and this proceeding in error is prosecuted to reverse the judgment of both the lower courts.

Mr. Lemuel D. Lilly, for plaintiff in error:

The payment was not accepted by Seeds as a satisfaction, and upon the receipt of the letter so stating, it was Conger's duty to insist upon the condition if he expected to hold him to it.

Fuller v. Kemp, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034; Gassett v. Andover, 21 Vt. 342; Pottlitzer v. Wesson, 8 Ind. App. 472, 35 N. E. 1030; Curran v. Rummell, 118 Mass. 482; Cooley v. Kinney, 119 Mich. 377, 78 N. W. 332; Laroe v. Sugar Loaf Dairy Co. 180 N. Y. 367, 73 N. E. 61; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986.

Messrs. Thomas B. Ware and Louis D. Johnson, for defendant in error:

In all cases of unliquidated demands, one who takes money offered on condition thereby accepts the condition, and, in the absence of fraud or other excuse, he is bound by his act.

Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 365, 44 L. ed. 1105, 20 Sup. Ct. Rep. 924; De Arnaud v. United States, 151 U. S. 483, 38 L. ed. 244, 17 Sup. Ct. Rep. 374; Curran v. Rummell, 118 Mass. 482; Cooley v. Kinney, 119 Mich. 377, 78 N. W. 332; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Hussey v. Crase, — Tenn. —, 53 S. W. 986; Komp v. Raymond, 42 App. Div. 32, 58 N. Y. Supp. 909; Brown-Ketcham Iron Works v. Hazen, 24 Ohio C. C. 681; Fuller v. Kemp, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034.

Davis, J., delivered the opinion of the court:

In the application of the law of accord and satisfaction, a distinction between liquidated and unliquidated demands is universally recognized. Where there is a bona fide dispute over an unliquidated demand, and the debtor tenders an amount less than the amount in dispute, upon an express condition that, if accepted, it shall be in full of the disputed claim, the creditor must accept it upon the condition unless the condition be waived, otherwise he must refuse it; or, if he has received the amount ten-

dered, he must return it. 1 Enc. L. & P. 626-628. He cannot accept the tender in such case and recover the balance which he claims, because he is presumed to have accepted it upon the express condition on which it was offered.

Generally, however, the law is applied differently in cases of liquidated and undisputed claims, the reason being, as sometimes stated, that the payor pays no more than he is clearly bound in law to pay, and there is therefore no consideration for a release of the remainder of the obligation. But even in such a case it has been held that, when the parties agreed, in settlement of a bona fide dispute between them, that the lesser sum shall be received in satisfaction of the greater, it will be regarded as an accord and satisfaction (*San Juan v. St. John's Gas Co.* 195 U. S. 510, 49 L. ed. 299, 25 Sup. Ct. Rep. 108), especially if the agreement has been fully executed (*Dreyfus Co. v. Roberts*, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. Rep. 67, 87 N. W. 641, 5 A. & E. Ann. Cas. 521).

Keeping in mind the foregoing principles, it is easy to distinguish from the case in hand all of the cases cited by counsel for plaintiff in error. Indeed, some of them are distinctly against him, notably *Fuller v. Kemp*, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034; and *Eamer Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986. In the latter case it was said that "ordinarily the retention of a check inclosed in a letter which refers to the amount as the balance due on accounts between the parties will not be held to be an accord and satisfaction, so as to bar an action for the balance due. . . . It is only in cases where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered, by an acceptance and retention of the check,"—citing in support of the last sentence *Fuller v. Kemp*, supra, and *Nassoï v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715.

Another case relied upon for the plaintiff in error is *Gassett v. Andover*, 21 Vt. 342. There the debtor tendered a sum of money in full for all legal claims which the creditor had against him upon account. The creditor received the money, protesting that it was not sufficient, but said that he would take it and pass it to the debtor's credit on the account. The debtor expressed no dissent. It was held that the acceptance of the tender did not bar the creditor's right to recover such sum as might be found due him on the account. It 32 L.R.A. (N.S.)

is entirely clear that the supreme court of Vermont did not regard this judgment as inconsistent with its former judgment in another case, reported in the same volume (*McDaniels v. Lapham*, 21 Vt. 222), in which it was held that "the doctrine that the receiving a part of a debt due under an agreement that the same shall be in full satisfaction is no bar to an action to recover the balance does not apply to any cases except where the plaintiff's claim is for a fixed and liquidated amount, or where the sum due could be ascertained by mere arithmetical calculation. But when a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and attaches to his offer the condition that the same, if taken at all, must be received in full, or in satisfaction, of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction; even though the party, at the time of receiving the money, declare that he will not receive it in that manner, but only in part satisfaction of his debt so far as it will extend."

In this case there is a dispute which grew out of the inability of the defendant to fulfil his contract to deliver 10,000 bushels of oats during the month of August at 37 cents a bushel. The defendant sought to limit his liability by securing a settlement at the highest market price on August 17th; and he insists that he succeeded in doing so, and paid the amount agreed upon, although the plaintiff attempted to recede from the settlement, and sought to hold him on the original contract. The plaintiff denies all of this, except the payment of the money. Here was a real controversy, which yet exists, over the amount of the defendant's liability. It was a dispute over a demand which was yet contingent and the amount of which was not yet determined. We have at present no concern as to the merits of this contention. It is enough for our present purpose that it plainly appears that there was such a difference between these parties, and that the defendant sent to the plaintiff his check, indorsed on the face of it, "Settlement in full August account," and accompanied it with a letter saying, "Enclosed find my check for \$300, which, according to our talk over the 'phone to-day, is settlement in full for the 10,000 bushels oats sold you May 29, 1907, for August shipment." There was no other claim or account between them, and this plainly expressed condition of payment was never withdrawn; for mere silence by the debtor under the circumstances of this case

does not amount to a withdrawal of the condition, nor a waiver of it. The plaintiff had only one alternative,—to accept the check as payment in full, or to return it. He kept it and drew the money on it, knowing the condition imposed, and thereby completed the transaction as an accord and satisfaction.

The judgment of the court below is affirmed.

Summers, Ch. J., and Crew, Spear, Shauck, and Price, JJ., concur.

WISCONSIN SUPREME COURT.

JULIUS KLUETER, Respt.,

v.

JOSEPH SCHLITZ BREWING COMPANY,
Apt.

(143 Wis. 347, 128 N. W. 43.)

Parol evidence — written contract — application to subject.

1. Oral testimony is not admissible to contradict or vary a written contract, but, nevertheless, is admissible to apply the contract to the subject with which it deals, and to show facts and circumstances characterizing its making, where—by reason of

Headnotes by MARSHALL, J.

Note. — Admissibility of evidence of conversation expressly referred to in written contract.

The admissibility of evidence of an "agreement" expressly referred to is not included within the scope of this note.

A perusal of the leading and dissenting opinions in *KLUETER v. JOSEPH SCHLITZ BREWING Co.* will suggest to the reader that the enunciation of general principles upon the bearing of extrinsic evidence on written instruments is of little assistance to the practitioner in the present state of the law on the subject.

But however varied the application of the general principles, it is to be remembered that the tendency is to admit the evidence.

While there are a number of cases which refer to an "agreement" or other extrinsic matters, there are few where the writing expressly refers to a "conversation."

In *Wolff v. Wells, F. & Co.* 52 C. C. A. 626, 115 Fed. 32, the contract provided as follows: "Referring to the conversation of the writer, Mr. Baker, had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German-Portland cement for use in the new Wells-Fargo Building, now in course of construction. We will name you a price for what you may require, on about 5,000 barrels, more or less, of two dollars and fifty-six cents (\$2.56) per barrel, delivered at the 32 L.R.A. (N.S.)

ambiguity either in the language or the writing itself, or therein when applied to the subject with which it deals—that is reasonably required to enable the court to read the writing in the light of such characterization, and thus discover what the parties intended to express therein.

Contract — construction — intent.

2. A written contract is to be held to mean what the parties thereto intended it should, if such meaning can be found by aid of rules for construction, within the reasonable scope of its language.

Same — when open to construction.

3. The language of a written contract is not open to construction unless its meaning is ambiguous, and then, by the aid of such rules, it must speak for itself, the words, however, not being extended beyond their reasonable scope, in the light of the characterizing circumstances, in order to effect an intention not fairly expressed therein.

Extrinsic evidence — written contract — obscure when applied to subject.

4. When the language of a written contract is plain, it is not open to construction; but though plain, viewed exclusively, if not plain when applied, by the aid of oral evidence or otherwise, to the subject with which it deals, extrinsic evidence showing the circumstances characterizing the making of the contract is permissible for the purpose of clearing up the obscurity.

Same — construction of contract.

5. The rule as to construction of contracts, that "where the meaning is plain

building site, Second and Mission streets, in quantities to be designated by you." The building required 2,925 barrels of cement besides the 5,000 delivered by the seller on the contract, and it was held that there was no error in permitting the buyer to show that in the conversation referred to in the contract, the seller had endeavored to ascertain how much cement would be required for the building, and the buyer declined to give any definite assurance on the point.

Where the contract provided, "referring to the matter of the dredging which you desire to have done near your coke ovens in the First pool, Monongahela river, as shown to our Mr. Smoot by your Mr. Williams, we beg to make you the following proposition: . . . This includes . . . all labor and expense in connection with this work, which we understand is to be done in accordance with government specifications;" it was claimed that at the conversation referred to by the phrase "as shown to our Mr. Smoot by your Mr. Williams," it was proposed to induce the government to alter its specifications; and it was held that evidence of the conversation was properly admitted from which it appeared that the change to be asked of the government, and to which it assented, did not touch the matter in controversy between the parties. *Jones & L. Steel Co. v. Monongahela & W. Dredging Co.* 80 C. C. A. 186, 150 Fed. 298, affirming 144 Fed. 312.

In *Ruggles v. Swanwick*, 6 Minn. 526,

and leads to no absurd consequences, there can be no reason for refusing to admit the meaning which the words naturally present," suggests the propriety of extrinsic evidence to apply the contract to the subject with which it deals, and if manifest unreasonableness thus appears, the propriety of evidence of the circumstances characterizing the making of the writing, to aid in clearing up the obscurity.

Same — to apply contract to subject — ambiguity — explanation.

6. Extrinsic evidence is not admissible for the direct purpose of creating ambiguity in the language of a written contract which is plain, viewed exclusively, but that does not militate against the rule that extrinsic evidence is proper to apply a contract, plain in its literal sense, to the subject with

which it deals, and if the effect is to disclose ambiguity, like evidence to show the circumstances characterizing the making of the contract.

Same — ambiguity — words uncertain when applied.

7. From the foregoing the rule results that ambiguity in a written contract calling for construction may arise as well from words plain in themselves, but uncertain when applied to the subject-matter of the contract, as from words which are uncertain in their literal sense.

Same — conflict of rules as to admissibility.

8. The rule that contracts which are plain are not open to construction, and the one that evidence of conversations between parties respecting the contract, prior to and

Gil. 365, where only a brief synopsis of the writings are given, but where it seems they referred to a "settlement," the court said: "Where there is a direct reference in a writing to a verbal agreement, the latter may be proved, even though the effect of it be to add material terms and conditions to the writing."

In *Work v. Beach*, 59 Hun, 625, 37 N. Y. S. R. 547, 13 N. Y. Supp. 678, affirmed in 129 N. Y. 651, 29 N. E. 1028 (a case not strictly within the scope of this note), one of the writings between the parties stated: "When this is done . . . I will then write a letter to you, stating my obligation to pay this sum when I can do so, in accordance with our agreement on Saturday last;" it was held that evidence of a conversation on the Saturday referred to was properly admitted to show what the agreement was. It would appear from the report that any agreement between the parties on the day referred to was in the course of conversation.

In *Sieberts v. Spangler*, 140 Iowa, 236, 118 N. W. 292, it appeared that the defendant had executed to the plaintiff the following writing: "I hereby agree to pay F. L. Sieberts \$175 to assist me in managing the football team of the State University of Iowa during the football season of 1903, in case I am elected and accept the general management of the athletics of the State University of Iowa. The work of assisting to be along the line of our talk this evening. If, in case F. L. Sieberts is elected coach of any team of the University, one half of that salary is to be applied upon this agreement. [Signed] H. E. Spangler." In an action to recover for agreed services, the court, after stating that it was incorrect to say that the action was upon the writing, said: "The most that can be said is that the contract pleaded by plaintiff embraces and includes certain written terms, but these terms expressly recognize the existence of certain other oral stipulations or understandings not embodied therein, and it was entirely competent for plaintiff to prove them. The authorities cited by defendant to the effect that, where the consideration is clearly expressed in a

written contract, it cannot be varied by parol testimony, are not in point. In this case the services to be rendered are not stated in the writing, but reference is had to a conversation or talk had between the parties prior to the making of the paper. This reference made it proper for the court to admit parol testimony as to the matter and substance of such conversation."

The conversation referred to may be the real contract, and the writing a mere reference to it. Thus, in *Leary v. Moore*, 48 Misc. 551, 96 N. Y. Supp. 266, a buyer of lumber claimed that in a letter referring to a verbal contract, he had inadvertently named the price as \$23.50 per thousand feet instead of \$22.50 for that amount; and it was held error to exclude evidence of a conversation referred to in the letter, on the ground that the contract was a verbal one, made in the conversation, and the letter was not the contract, the court saying, *inter alia*: "In the case under examination, it is certain that some kind of an oral agreement for the sale of the lumber, at a stated price, was arrived at between the parties on February 5th. In his letter of February 6th, defendant writes: 'Referring to our conversation yesterday in Davison's, I understand you to say that you would furnish me the yellow pine timber . . . for the sum of \$23.50 per M. ft.' In a letter from plaintiff's intestate to the defendant, dated February 7th, the writer said: 'I wrote my mill man South on the 5th, saying I had the order at \$23.50, as he has copy of the schedule you gave me last fall;' and, on March 25th, plaintiff's intestate wrote to defendant: 'Within one hour after I accepted your verbal offer of \$23.50 per M. ft. for timber to build your dry dock on February 5th. . . .' It seems to be quite clear, therefore, that an order was given and accepted on February 5th, the day prior to the date upon which was written the letter which the court below treated as the contract between the parties. Even read by itself, if there had been no other evidence of a prior contract, the letter of February 6th appears, upon its face, to be nothing more than a letter of confirmation." B. B. B.

inclusive of the making thereof, are not admissible to explain it, and the one that extrinsic evidence is not proper to vary or contradict a written contract, all harmonize with the rule that where a contract, though plain in its literal sense, is uncertain when applied by oral evidence or otherwise to the subject with which it deals, such evidence is proper to show the circumstances characterizing the making of the contract, in aid of its construction, which latter rule is a logical deduction from the basic one that "where a contract is plain and leads to no absurd consequences, it must speak for itself," and otherwise it may speak in the light of the circumstances under which it was made.

Same — conversation referred to in writing.

9. Where a conversation had at the time of making a written contract relates to some condition with reference to which it was made, and such conversation is referred to in the writing, without specifying such condition, so as to make it a part of the contract, then evidence of such conversation to the extent of showing such condition is within the rule that extrinsic evidence characterizing the making of a contract is admissible in aid of construing it, in harmony with the rule that evidence of mere conversations between parties in making a written contract, inclusive of the final closing of it, is not admissible to explain it.

Same — to give effect to ambiguous contract.

10. The rule that when a contract is ambiguous, viewed in the light of the subject-matter with which it deals, though plain in its literal sense, it may, by aid of extrinsic evidence showing the circumstances characterizing its making, be read very differently from its literal sense, so long as the reasonable scope of its words be not exceeded, if necessary to give effect to the purpose expressed and intended, does not involve any modification of the contract, but "has relation to the application of the language used to the subject within the contemplation of the parties, as represented by the situation then existing and the surrounding circumstances, which it may be assumed they then had in view."

(Barnes, J., dissents.)

(October 4, 1910.)

APPPEAL by defendant from a judgment of the Circuit Court for Dane County in plaintiff's favor in an action brought to recover the purchase price of certain property alleged to have been sold and delivered. Affirmed.

Statement by Marshall, J.:

Action to recover on contract a balance claimed to be due on a sale of ice.

The complaint is to this effect: Plaintiff

contracted to sell defendant ice at 30 cents per ton, delivered on cars on the Chicago & Northwestern Railway at Madison, Wisconsin, and then shipped as directed by defendant and at its expense. Pursuant to such contract, in March, 1909, plaintiff delivered ice free on board on such road, which was in due course received by defendant at destinations as ordered by it, whereby it became indebted to plaintiff in the sum of \$696.43, which became due April 1, 1909, but has not been paid. Judgment was demanded accordingly.

Defendant thus counterclaimed: Defendant's agent, Campbell, under only special authority to secure prices on ice at Madison, Wisconsin, to be shipped to points in Illinois, informed his principal that it could obtain ice of plaintiff, free on board cars at such point, for 30 cents per ton. Thereupon, and on March 2, 1909, it gave plaintiff an order in writing to ship specified quantities of ice to specified places over the Illinois Central Railroad. Pursuant thereto plaintiff sent defendant the quantities of ice ordered, but over the Chicago & Northwestern Railway, rendering it necessary for defendant to pay for freight charges \$418.98 in excess of what it would have cost to ship the ice over the Illinois Central, as directed. Such road reached Madison, so the ice could have been shipped as ordered. Plaintiff at no time before accepting the order made any complaint as regards shipping specifications.

Indebtedness to the amount of \$277.45 was admitted and judgment tendered therefor.

Plaintiff replied that he informed defendant's agent, Campbell, he would furnish ice at 30 cents per ton, loaded on cars on the track of the Chicago & Northwestern Railway Company; that the latter could make his own agreement with the agent of that company; that they visited such agent, at which time Campbell did make such arrangement, and then contracted in defendant's behalf for ice to be loaded on the Chicago & Northwestern Railway Company's track at Madison; that in March thereafter plaintiff received from Campbell orders for the ice in question, which was loaded and shipped out as per the understanding with him.

There was evidence tending to show these to be the facts: Campbell had a conversation with plaintiff, as claimed in the reply. He was informed that ice would have to be loaded on the Northwestern track and shipped out under agreement with the agent of that road. The Northwestern track, not the Illinois Central track, reached the point for loading. Cars of the Illinois Central Company could have

been, without extra charge, placed at such loading point and delivered over the Northwestern track to the Illinois Central Railroad Company at Madison, but such method of handling the ice was not as satisfactory to plaintiff as shipping out over the Northwestern to the regular junction point with the Illinois Central Railroad, as was done. After Campbell had been informed of the price for ice to be shipped in that way, he, in defendant's name, gave a written order, pursuant to which the shipments in question were made, which order, so far as relates to this case, is as follows: "Klueter Ice Company, Madison. As per your conversation with Mr. Campbell to supply ice at the rate of thirty cents per ton (30), we herewith send you the following orders to be shipped at once;" then followed specifications of the amounts to be shipped to specified points, followed by the words "via Ill. Cent. R. R.," the whole concluding with language not material to the controversy, and signed, "Yours truly, Jos. Schlitz Brew. Co., Campbell."

Evidence was permitted tending to establish that the term "As per your conversation," etc., referred to the fact of Campbell having been informed, in a conversation with plaintiff that the price for the ice was made on condition of its being shipped out over the Northwestern Railway; that shipments would necessarily start on the Northwestern Road, as only the Northwestern Company had a track reaching the loading place,—such facts being claimed to be material on the question of the meaning of the term "via Ill. Cent. R. R." Evidence of the sort indicated and other evidence as to the meaning of such term was permitted under objection, defendant claiming that the order was unambiguous, plainly requiring shipments over the Illinois Central Road, and plaintiff claiming that it was ambiguous, viewed in the light of the circumstances under which it was made, and that such circumstances showed that shipment over the Northwestern Road, so far as practicable, and then by way of the Illinois Central Road, was contemplated. The case was submitted to the jury, resulting in the following special verdict: (1) Plaintiff stated to Campbell, in substance, before or at the time the contract was made, that all ice would have to be forwarded out of Madison over the Chicago & Northwestern Railway. (2) Campbell gave the order for the ice with that understanding. (3) He had apparent authority to make the contract. (4) The words of the order did not call for shipment of ice out of Madison, Wisconsin, on the Illinois Central Railroad to points of destination.

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Judgment was rendered on the verdict in accordance with the prayer of the complaint, and defendant appealed.

Messrs. Aylward, Davies, Olbrich, & Hill, for appellant:

A contract cannot be partly in parol and partly in writing, because the written agreement excludes any previous oral agreement when there is neither fraud nor mistake in the transaction and furnishes the most reliable evidence of what was intended by the parties.

Whiting v. Gould, 2 Wis. 552; 9 Enc. Ev. pp. 321, 325; Hubbard v. Marshall, 60 Wis. 325, 6 N. W. 497; Loree v. Webster, Mfg. Co. 134 Wis. 173, 114 N. W. 449; Smith v. Vose & Sons Piano Co. 194 Mass. 193, 9 L.R.A.(N.S.) 966, 120 Am. St. Rep. 539, 80 N. E. 527; Hei v. Heller, 53 Wis. 415, 10 N. W. 620; Vogt v. Schienebeck, 122 Wis. 498, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814.

Every essential element to a valid contract was contained in the written order and the written acceptance.

Hodson v. Carter, 3 Pinney (Wis.) 212; Metzel v. State, 16 Wis. 348; McFarland v. Boston & L. R. Corp. 115 Mass. 63; Corbett v. Joannes, 125 Wis. 385, 104 N. W. 69; Midland Linseed Co. v. Remington Drug Co. 127 Wis. 242, 106 N. W. 115.

Where a contract is reduced to writing which purports to contain the whole contract, and it is not apparent from the writing itself that anything is left out, to be supplied by extrinsic evidence, parol evidence to vary, contradict, add to, or detract from its terms is not admissible.

Hei v. Heller, 53 Wis. 418, 10 N. W. 620; Hooker v. Hyde, 61 Wis. 204, 21 N. W. 52; Cliver v. Heil, 95 Wis. 364, 70 N. W. 346; Beers v. North Milwaukee Town Site Co. No. 2, 93 Wis. 572, 67 N. W. 936; Case v. Phoenix Bridge Co. 134 N. Y. 78, 31 N. E. 254.

If the meaning in law of the contract of the parties can be fairly gathered with a certainty satisfying the judicial mind, the courts will consult the writing alone, and reject parol evidence as an aid in construing it.

Harmon v. Thompson, 119 Ky. 528, 84 S. W. 569; Blythe v. Gibbons, 141 Ind. 332, 35 N. E. 557; Johnson v. Pugh, 110 Wis. 167, 85 N. W. 641.

Even if the terms of the written contract changed the shipping directions previously agreed upon, or contained terms inconsistent with the alleged oral agreement, the rule of law is that the oral agreement is superseded and rescinded by the written agreement, which must be re-

garded as the sole contract between the parties.

Housekeeper Pub. Co. v. Swift, 38 C. C. A. 187, 97 Fed. 290; Tuggles v. Callison, 143 Mo. 527, 45 S. W. 291; McDonough v. Kane, 75 Ind. 181; Scruggs v. Cotterill, 67 App. Div. 583, 73 N. Y. Supp. 882; Cochecho Bank v. Berry, 52 Me. 293.

The route is one of the terms of the written contract, just as much as the quantity of ice, or the price of the same.

Hurd v. Whitsett, 4 Colo. 84.

The terms "via the Illinois Central," or "via the Chicago & Alton," have a fixed and definite meaning among freight agents and shippers, and parol evidence of prior conversations is inadmissible to explain their meaning.

Cooper v. Cleghorn, 50 Wis. 113, 6 N. W. 491; Murphey v. Weil, 92 Wis. 467, 66 N. W. 532; Vogt v. Schienebeck, 122 Wis. 498, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814; Denver & R. G. R. Co. v. DeWitt, 1 Colo. App. 419, 29 Pac. 524.

Messrs. Bashford & Welton, for respondent:

Where there is a direct reference in the writing to a verbal agreement, such agreement may be proved by parol evidence, even though the effect be to add material terms and conditions to the writing.

9 Enc. Ev. p. 353; Ruggles v. Swanwick, 6 Minn. 526. Gil. 365; 2 Phillips, Ev. Cowen & Hill's Notes, 519; Commissioners v. McCalmont, 3 Penr. & W. 122; Couch v. Meeker, 2 Conn. 305, 7 Am. Dec. 274; Work v. Beach, 129 N. Y. 651, 29 N. E. 1028.

Where a writing does not purport to state the whole contract, parol evidence is admissible to establish the terms omitted.

Gilbert v. Stockman, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924; Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054; Agnew v. Baldwin, 136 Wis. 263, 116 N. W. 641; Jones, Ev. 445.

The word "via," as used in the letter, is ambiguous and subject to explanation by parol evidence.

Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812; Ganson v. Madigan, 15 Wis. 144, 82 Am. Dec. 659; Prentiss v. Brewer, 17 Wis. 635, 86 Am. Dec. 730; Rockwell v. Mutual L. Ins. Co. 21 Wis. 548; 2 Jones, Ev. §§ 444-446.

While it is not permissible to offer extrinsic evidence to vary the terms of a written contract, it is permissible, in case of ambiguity, to introduce evidence to ascertain the subject-matter with reference to which parties proceeded to negotiate and contract, and their situation and surrounding circumstances, so that the court

may stand in substantially the same light in reading the words of the contract as did the parties when adopting those words.

Excelsior Wrapper Co. v. Messenger, 116 Wis. 553, 93 N. W. 459; Nash v. Towne, 5 Wall. 689, 18 L. ed. 527; Sigerson v. Cushing, 14 Wis. 527; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1; Brittingham & H. Lumber Co. v. Manson, 108 Wis. 221, 84 N. W. 183; Rib River Lumber Co. v. Ogilvie, 113 Wis. 482, 89 N. W. 483; Jung Brewing Co. v. Konrad, 137 Wis. 107, 118 N. W. 548; Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841.

Evidence to enable the court to say what the parties to a contract intended to express by the language adopted in making it is permissible, and is often absolutely essential to show the real nature of the agreement.

Sigerson v. Cushing, 14 Wis. 527; Lyman v. Babcock, 40 Wis. 503; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1; Nash v. Towne, 5 Wall. 689, 18 L. ed. 527; Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; Wells v. Alexandre, 130 N. Y. 642, 15 L.R.A. 218, 29 N. E. 142; Cooper v. Lansing Wheel Co. 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; Loree v. Webster Mfg. Co. 134 Wis. 173, 114 N. W. 449.

Marshall, J., delivered the opinion of the court:

The first error assigned is that the contract was in writing; therefore parol evidence thereof was improperly admitted.

It may well be admitted, for the purposes of this case, that the contract was in writing. The trial court, as we understand the record, so held, and admitted evidence to aid in construing the language used in the paper.

It is argued at considerable length that the agreement is unambiguous, looking at the words thereof only, and that there is no room for operation of rules for construction. It seems to be thought that, unless ambiguity can be discovered in the language of the paper, looking at that only, it must, regardless of circumstances, be taken in its literal sense as expressing what the parties agreed to. There is no such rule, though it may be there is room for one to be misled in respect to the matter as he reads the numerous discussions found in the books on the subject, unless he carefully notes differences in situations treated.

The very familiar rule is often stated and applied, that oral testimony is not admissible to contradict or vary a written contract. It is perfectly consistent with that other rule, likewise often stated and applied, that oral testimony is admissible

for the purpose of applying the contract to the subject with which it deals, and, in case of ambiguity then appearing, to establish the facts and circumstances under which the agreement was made, in order that the language thereof may be read in the light of the environment at the time the parties chose such language to express their intention.

It is said that when the language of a contract is plain, it is not open to construction. That is true in the general sense, but, unless viewed broadly, it does not convey accurately the full scope of the field where rules for construction are applicable. The words of a contract, in themselves, may be plain, yet, when applied to the situation with which it deals, not plain, the literal sense leading to such unreasonableness as to suggest that the parties probably did not so intend. In so applying the contract, oral testimony is generally necessary and permissible to the end that the full scope of the situation dealt with may be observed. As to when the language of a contract, in its literal sense, is to be taken as expressing the intention of the parties, is correctly indicated by Vattel's rule which has been often cited by this and other courts: "When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present." Note the language,— "when the meaning is evident." The meaning is not evident when, if looking at the subject-matter, it is so unreasonable as to appear unlikely that the parties so intended. To enable one to read the contract in the light of the subject-matter and the effects and consequences, obviously evidence of facts and circumstances, not mere conversations, leading up to and concurrent with the making of the contract, is often necessary. One of the elementary rules found in 1 Greenl. Ev. 15th ed. § 286, and often cited by this and other courts, covers this subject. It is phrased thus:

"As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also

a just foundation for giving the instrument an interpretation when considered relatively, different from that which it would receive if considered in the abstract."

In view of the elementary rule stated, this court has said many times—and in perfect harmony with the idea that contracts which are plain are not open to construction, and in harmony with the idea that parol evidence is not admissible to contradict or vary a written contract, and in like harmony with the idea that mere conversations between parties respecting the contract, leading up to and inclusive of the making thereof, are not admissible either to vary or explain it (*Steele v. Schrickner*, 55 Wis. 134–143, 12 N. W. 396)—ambiguity calling for construction may as well appear from language clear in itself, but leading to some absurd result when applied literally to the situation with which it deals, as from uncertainty of meaning upon its face. *Corbett v. Joannes*, 125 Wis. 370, 104 N. W. 69. When it is said,—where there is ambiguity in a contract, either in its literal sense, or when it is applied to the subject thereof, evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law, as in *Johnson v. Pugh*, 110 Wis. 167–170, 85 N. W. 641, and, in effect, in many other cases decided by this court, and in *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527, *Merriam v. United States*, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536, and many of the Federal cases, and likewise in the books quite generally—we see only the logical application of the rule that "when a contract is plain and leads to no absurd consequences, it must speak for itself; but when otherwise, it may speak in the light of the circumstances under which it was made." Evidence of such circumstances is in no sense, under such rule, received to contradict or vary the contract, but rather to enable the court to say what the language of the agreement means according to the intention of the parties. In that respect such language cannot be twisted out of its ordinary meaning to the extent of going beyond the reasonable scope of the words. The meaning, in the ultimate, must be found in the language the parties used. To that extent their intention can be effectuated however much the literal or plain, ordinary sense of the words may be departed from.

True, the distinction sometimes is so shadowy between application of the rule

that "oral conversations had between the parties to a written contract" before and at the time of the making thereof "cannot be received as explanatory of the writing," and the rule that the contract may be applied to its subject-matter by oral evidence, as in *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1, and many other cases, and any ambiguity thus disclosed explained by resort to such evidence of the facts and circumstances characterizing the making of the agreement, that one is liable, at least, without careful analysis, to think there is a conflict, as in case of some term having been used in the contract, reasonably susceptible of either of two meanings, and proof was held proper to show—by what the parties said when the agreement was made—that they attributed thereto a particular meaning. *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Weber v. Illing*, 66 Wis. 79, 27 N. W. 834; *Wenger v. Marty*, 135 Wis. 408, 116 N. W. 7; *Burton v. Douglass*, 141 Wis. 110, 123 N. W. 631, 18 A. & E. Ann. Cas. 734. But in each instance the fact that the parties contracted with reference to the particular meaning was treated as a circumstance, within the rule that the circumstances characterizing the making of a contract may be shown to aid in construing it, that other rule being fully appreciated, that mere verbal communications respecting a contract, had at the time of or prior to the making thereof, are no such characterizing circumstances of such making as to render proof thereof proper for purposes of construction. It is believed that the ideas in mind in the numerous cases which might be referred to, making, in one view, seemingly two lines, as suggested in *Burton v. Douglass*, 141 Wis. 110, 123 N. W. 631, 18 A. & E. Ann. Cas. 734, substantially all harmonize.

The subject treated was reviewed at some length by this court in *Boden v. Maher*, 105 Wis. 539, 81 N. W. 661, and, thinking to minimize seeming difficulties in the application of rules for construction, the court said:

"Parol evidence to vary the terms of a written contract is one thing; such evidence to enable the court to say what the parties to a contract intended to express by the language adopted in making it is quite another thing. The former is not permissible. . . . The latter is permissible, and is often absolutely essential to show the real nature of the agreement. . . . Both rules are elementary and do not conflict in the slightest degree with each other. One prevents a written contract from being varied by parol evidence either in regard to what was said at the time it was

made or prior thereto; the other aids in determining what the contract is when its language, either in its literal sense or as applied to the facts, is obscure. The one is a rule to preserve the contract as expressed in writing; the other is a rule of construction to determine what the contract, as expressed, is, it being kept in mind that the mutual intention of the parties, so far as the same can be ascertained, governs within the reasonable meaning of the language they chose to express it; and that rules of construction to discover it are not to be resorted to unless there is some ambiguity to be cleared up. A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction often leads to error."

We might well add to the foregoing, as a conclusion evolved from the logic of *Vattel's* rule, so often referred to, and the general application of it: Since a contract may be uncertain in the words themselves when applied to the subject-matter thereof, though not otherwise uncertain, parol evidence to aid in making such application is proper. Such evidence for that direct purpose is one thing, while evidence merely to create ambiguity is quite another. The former is admissible; the latter is not. That does not militate against the rule that if the legitimate effect of the application is to disclose ambiguity, it opens the door for construction, including in aid thereof, introduction of evidence of the circumstances characterizing the contract and in view of which it was made. Thus it is said: Courts may ignore the literal sense of words where there is no uncertainty of expression (in the words by themselves) to clear up obscurities and avoid absurd consequences. *State v. Chicago & N. W. R. Co.* 128 Wis. 449, 108 N. W. 594. It is only where the words are "plain, both in themselves and when applied to the subject with which they deal," that they "must be taken according to their ordinary import," no other meaning being added thereto or taken therefrom. *Huber v. Martin*, 127 Wis. 412-429, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 A. & E. Ann. Cas. 400. Otherwise, "the contract may be read very different from its literal sense" "so long as its reasonable scope is not departed from, if necessary to give effect to what the minds of the parties really met upon. That does not involve any modification of the contract," but, as said in *Zimmer v. Settle*, 124 N. Y. 37-42, 21 Am. St. Rep. 638, 26 N. E. 341 "has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situation then

existing and the surrounding circumstances, which it may be assumed they then had in view."

Applying the foregoing to the contract in question, ambiguity is readily observed. The language, "to be shipped at once to," etc., "via Ill. Cent. R. R.," by itself would indicate that shipments from the seller's loading point to the named destination were contemplated. But the situation dealt with by the writing, as disclosed by legitimate evidence, is that the Illinois Central Railroad did not reach the loading place at all, so the transit, necessarily, had to commence on the Chicago & Northwestern Railway, which, only, reached such loading place. Again, though not indicated in the statement of facts, the calls for shipments to various points "via Ill. Cent. R. R." were associated with calls for shipments "via Wabash R. R." and shipments "via A. T. S. F. R. R.," neither of which roads reached anywhere near the contemplated loading place, showing quite clearly that "via" any particular road, where such road did not reach the loading point, was not used in the literal sense. That situation could only be made to appear by evidence *aliunde* the writing. When disclosed, ambiguity in the contract appeared at once. So it became necessary to learn the meaning of the language in view of the situation.

If there were nothing suggesting ambiguity but the circumstance mentioned, "via Ill. Cent. R. R." might mean by way of that railroad so far as practicable, and otherwise by way of the only road reaching the loading point, to wit: the Northwestern Road. But the obscure words refer back to and are characterized by the opening words of the writing, "As per your conversation with Mr. Campbell to supply ice at the rate of 30 cents per ton," etc., "we herewith send you the following orders," etc. On the face the term "as per your conversation," etc., might refer to the mere price for the ice, suggesting that the whole conversation was embodied in the writing, or quite as well refer to stated conditions in the conversation upon which ice would be furnished at 30 cents per ton, not incorporated in the writing. In that there is ambiguity solvable only by proof of what the conversation in fact related to, and if to conditions of the price being as stated, further proof of such condition. In that sense the subject-matter of the conversation is a characterizing fact or circumstance, and the stipulated condition likewise. Such facts or circumstances being a part of the environment in which the parties acted were subjects of proof by parol evidence, within the rule above stated,

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and consistent with the other rule that parol evidence of conversations between parties respecting the contract, had at the time of the making thereof, are not admissible. When such conversations result in some matter of fact with reference to which the contract is made, either as evidenced in the writing, as in this case, or by the use of some term of double meaning pursuant to an agreement as to the particular one in mind, as in *Burton v. Douglass*, 141 Wis. 110, 123 N. W. 631, 18 A. & E. Ann. Cas. 734; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659, and similar cases, then, necessarily, evidence to prove the conversation as a fact is permissible, not to show the meaning of the contract directly, and not at all to vary or contradict, but to establish the fact or circumstance in the light of which the contract was made. Here the parties, in the writing itself, made the conversation referred to and the condition, as the jury in effect found, upon which the ice would be furnished at 30 cents per ton, circumstances necessarily referable to in order to determine what meaning the language of the writing was intended by both parties to express.

It follows that errors assigned on the admission of evidence to prove the conversation referred to in the writing must be overruled. The evidence tended to show that, in such conversation the price of 30 cents per ton was made on condition of the ice being forwarded out of Madison over the Chicago & Northwestern Railway, and that reference to such conversation was made to thereby make such condition a part of the contract, which it might well do without contradicting the term "via Ill. Cent. R. R.," or enlarging it beyond its reasonable scope and that of similar terms several times used in the paper.

The disputed questions of fact involved in construing the contract being found in respondent's favor, upon evidence which was competent, as we have seen, the conclusion which resulted in the judgment followed necessarily.

The treatment of this case has been quite general, since substantially all appellant's complaints turn on whether the contract is ambiguous, and whether ambiguity in an agreement calling for construction can be legitimately disclosed by applying the writing by aid of evidence *aliunde* to the situation with which it deals, when, looking at the particular vital words themselves, there is no ambiguity, and whether a conversation had prior to, or at the time of making, the writing, may be so referred to therein as to make stipulations and conditions thereby made and in the light of which the writing was drawn fall within the field of

circumstances provable in aid of construction. We have been constrained, in the light of familiar principles, to resolve such propositions in respondent's favor.

The judgment is affirmed.

Barnes, J., dissenting (Filed October 22, 1910):

I desire to record my views on some matters treated in the opinion of the court without indulging in any lengthy statement of the reasons therefor.

1. I think there was no ambiguity in the writing in so far as it related to the shipments involved in this suit. The Illinois Central Railroad extended from Madison to the points at which the ice was to be delivered. The plaintiff was directed to ship the ice from Madison to these points "via" that line of road. Manifestly he did not do so, but, instead, relied on the construction placed on the writing by the agent of a rival line of road. The mere fact that the word "via" was not advisedly used in connection with the shipment of other cars does not furnish a sufficient warrant for the conclusion that it was inadvisedly used in connection with the shipments in question.

2. If the writing stated definitely, as I think it did, that the shipments should be made over the Illinois Central from the point of origin to that of destination, the fact that it referred to a prior oral conversation would not admit of parol evidence to show a prior agreement was made to the effect that the shipment should be made in some other way. Where the subject of the oral conversation is definitely covered in the subsequent written agreement, reference to the fact that a verbal talk was had does not take the writing out of the rule, and permit one of the parties to testify to an entirely different contract. Nearly all contracts are the result of verbal negotiations, and reference thereto is immaterial so long as it is apparent that it was not the intention of the parties that some part of the agreement should rest in parol.

3. It is said in the opinion: "To enable one to read the contract in the light of the subject-matter and the effects and consequences, obviously evidence of facts and circumstances, not mere conversations, leading up to and concurrent with the making of the contract, is often necessary." If by this statement it is intended to state as a rule of law that prior conversations are not admissible to explain an ambiguity in a contract, I disagree with the proposition. The contrary rule was established in *Ganson v. Madigan*, 15 Wis. 145, 82 Am. Dec. 659, which was approved by this court in *Burton v. Douglass*, 141 Wis. 110, 116, 123 32 L.R.A. (N.S.)

N. W. 631, 18 A. & E. Ann. Cas. 734, wherein a number of other cases approving of the rule in *Ganson v. Madigan* are approved. If the court means that such conversations cannot be shown to import ambiguity into an otherwise unambiguous contract, I agree entirely with what is said.

4. The mere fact that a contract may appear unreasonable to this court in view of the things that have transpired since it was made, or even in view of the situation of the parties when it was made, is not in itself a sufficient reason for holding the contract to be ambiguous. People have the privilege to, and as a matter of fact do, frequently make foolish contracts.

5. The integrity of written contracts should be preserved. Writings embodying the agreements of parties and signed by them seldom lie. Living witnesses often do, particularly when it is to their interest to do so. It is charitable to say that perhaps frequently they are only mistaken.

6. I think it is unfortunate to extend the rule of *Johnson v. Pugh*, 110 Wis. 167, 170, 85 N. W. 641, and many other cases, as to when parol evidence is admissible to vary or even to explain a written contract, and, if I have a correct conception of what is decided in this case, many things are said which are not in harmony with that case.

7. Where a contract does not express the true agreement of parties, resort may be had to a court of equity to reform it in an appropriate proceeding brought for that purpose. I think the orderly proceeding of going into such a court for such a purpose should be continued, instead of attempting reformation by importing ambiguity into a contract because it may appear unreasonable or even ridiculous, and then interpreting the contract as meaning something different from what its words plainly imply.

WISCONSIN SUPREME COURT.

EDMUND FLANNAGAN, Resp't.,

v.

C. H. BUXTON et al., Appts.

(— Wis. —, 129 N. W. 642.)

Municipal corporations — hiring detective — authority.

Power to employ private detectives to ascertain whether or not the criminal laws

Note. — Power of municipality to employ private detectives.

It will be noticed that this note is confined to the authority of municipalities to employ private detectives, and it does not

have been violated in a village is not conferred by charter authority to establish ordinances for the government and maintenance of good order of the village, the suppression of crime, and to appoint policemen and prescribe their duties.

(January 31, 1911.)

APPEAL by defendants from an order of the Circuit Court for La Crosse County overruling a demurrer to the complaint in an action brought to recover certain village funds alleged to have been unlawfully appropriated and expended. **Affirmed.**

Statement by Siebecker, J.:

The plaintiff, a resident elector, property owner, and taxpayer of the village of Readstown, brings this action to recover the sum of \$95. It is alleged that certain of the defendants, under claim that they acted as officers of the village, instructed the defendant village treasurer to draw expense warrants on the village treasury, that the president and treasurer did draw them, and that the village treasurer paid them out of the village funds. The expense warrants were drawn for detective work in favor of Walter Garder, an agent of the defendant the American Detective Service Company. It is alleged that the resolution of the board of trustees authorizing the employment of the defendant the American Detective Service Company stated that it was "to investigate and report upon violations of the laws in said village of Readstown." It is alleged that these payments were made without authority in the law,

and that they were unlawful. Plaintiff demands recovery in behalf of the village for the amount so paid out of the village funds, and for his costs and disbursements.

Mr. C. W. Graves, for appellants:

A village board may lawfully employ a nonofficial detective to investigate and secure evidence as to violations of the village ordinances.

28 Cyc. Law & Proc. p. 687; 20 Am. & Eng. Enc. Law, 2d ed. pp. 1229, 1230; Kendall v. Frey, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851; LeFeber v. West Allis, 119 Wis. 608, 100 Am. St. Rep. 913, 97 N. W. 203; White v. Decatur, 119 Ala. 476, 23 So. 999; Chicago v. Williams, 80 Ill. App. 33; Frank v. St. Louis, 145 Mo. 600, 47 S. W. 508; Torrent v. Muskegon, 47 Mich. 115, 41 Am. Rep. 715, 10 N. W. 132; Wells v. Atlanta, 43 Ga. 67; Findley v. Pittsburgh, 82 Pa. 351.

Mr. C. J. Smith for respondent.

Siebecker, J., delivered the opinion of the court:

The contention of the defendants is that the funds of the village were properly applied to a village debt which had been rightfully incurred in the execution of corporate functions in administering the government of the village. Section 893 of the Statutes of 1898 grants villages the power to establish ordinances and by-laws for the government and maintenance of

cover the question of their power to employ and maintain a public detective force.

A search has disclosed but one case which has previously considered the question annotated.

In *Sargent v. Bristol*, 2 Haskell, 112, Fed. Cas. No. 12,363, where a statute authorized the appointment of an agent by a town for the purpose of commencing and prosecuting suits in the town's behalf as well as to defend those commenced against it, it was held that the agent appointed might employ a detective to ascertain what persons composed a mob which had destroyed property for which the town was held liable. The court said: "It will be observed his authority is not restricted to the defense of the town in suits instituted against the town, but he may and should commence and prosecute in the town's behalf all such actions as he shall judge proper for the protection of the town; and whatever steps he may deem judicious and reasonable for him to adopt, relative to such claims and prior to any suit, we think by implication he is authorized to pursue, although by so doing some expenses may be incurred for which the town will be chargeable. His authority is like that of any other agent to 32 L.R.A. (N.S.)

whom is intrusted by his principal the care and protection of his legal rights in his absence; and it must be held broad enough to accomplish the object intended. Such an agent may not only employ an attorney to commence the suit for his principal if he shall deem it expedient so to do, but any preliminary proceedings he may deem requisite and proper, he may first initiate in order to ascertain whether a cause of action exists and against whom the suit should be brought; and to this end, he may employ a detective in behalf of the town in a case like that now presented for our determination. Such authority we hold is ample from the very purpose and nature of the agency. The rights of the principal in many cases could not be ascertained and understood without such assistance; it is the duty, most certainly, of a party to make due inquiries and satisfy himself that he has good reasons for instituting his suit before he commences the same, and any agent he may employ to act in his behalf in the matter is bound to exercise the same prudence and discretion and make all proper investigations before he involves his principal in a suit at law." J. T. W.

good order of the village, the prevention of crime, and the suppression of vice and immorality, and authorizes the village board "to appoint policemen, night watchmen, and superintendent of police, and prescribe their duties. . . ." No express grant of power is conferred authorizing these village boards to employ private detectives for the purpose of conducting an investigation to ascertain whether the criminal laws have been violated within the village. It is argued that though such power is not expressly conferred, it is an incident to the corporate functions which impose on the village officers the duty of employing the measures necessary to maintain security and good order, and to enforce the law by the prosecution and punishment of offenders.

The policy of the state is that municipal corporations are to exercise only such powers as are clearly embraced within the legislative grant or those derived therefrom by necessary implication, and to this end municipal grants of power are construed so as to confine the corporate authorities to the employment of such means and measures as are necessary to effectually execute the powers conferred. Upon this subject, this court in *Butler v. Milwaukee*, 15 Wis. 493, declared: "Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted. . . . Implications spring from the necessities of some power actually conferred, and not from notions of what would be convenient or expedient under particular circumstances." See also *State, Davis, Prosecutor, v. Cherry*, 53 N. J. L. 173, 20 Atl. 825; *McQuillin, Mun. Ord.* §§ 53 et seq.; 28 Cyc. Law & Proc. p. 262, § (d), *Implied Powers, Municipal Corporations*. Applying these principles of construction to the instant case, can it be said that the powers conferred and the duties imposed on the village officers authorize the employment of detectives to conduct an investigation to ascertain whether the laws have been or are being violated within the village? The legislature has conferred authority on village boards to appoint officers for policing the village. This express grant provides a means for carrying into effect its general police authority to secure peace and good order in the village and the enforcement of the criminal law.

In the judgment of the legislature this provided a proper and adequate means to execute these corporate functions in the state of affairs that is generally and ordinarily expected to exist in these communities, and negatives any implication of authority to employ other and private agencies to discharge these corporate functions. Should an extraordinary and unusual state of affairs arise respecting the violation of criminal law, which of necessity called for special and extraordinary means on the part of the village authorities to discharge these corporate functions, an implication of authority might arise for the employment of means and measures, in addition to those expressly conferred, which would be commensurate to meet the necessities of such an occasion. But no such occasion is presented under the allegations of the complaint. We are of opinion that the trial court properly held that under the facts as alleged, the village officers acted without authority in authorizing the employment of a private detective to investigate and report upon violations of the law in the village, and in applying village funds in payment of such service.

The order appealed from is affirmed.

UTAH SUPREME COURT.

D. A. SMYTH, Respt.,

v.

T. U. BUTTERS et al., County Commissioners, Appts.

(— Utah, —, 112 Pac. 809.)

Intoxicating liquor — meeting conditions of license — right to enforce issuance.

1. The mere meeting, by an applicant for a license to sell intoxicating liquors, of the conditions on which the legislature has authorized the granting of a license, does not entitle him to compel its issuance, where authority to issue licenses is conferred on certain officers, who are expressly empowered, in their discretion, to refuse an application for good cause.

Same — constitutional right to sell.

2. Refusal to permit one to engage in the business of selling intoxicating liquors deprives him of no constitutional right.

Note. — For power of court by mandamus to control decision of licensing officers as to fitness of applicant for license to sell intoxicating liquors, see note to *Darby v. Pence*, 27 L.R.A. (N.S.) 1195.

As to discretion of local authorities respecting number of licenses, see note to *Brown v. Jugenheimer*, 18 L.R.A. (N.S.) 386.

As to discrimination between different localities, see note to *State ex rel. Gibson v. Richardson*, 8 L.R.A. (N.S.) 362.

As to character and extent of relief by mandamus against an officer vested with discretion, who has rendered a decision upon a ground not within his discretion, see note to *French v. Jones*, 7 L.R.A. (N.S.) 525.

Mandamus — to compel issuance of license — discretion.

3. Mandamus will not lie to compel the issuance of a license to sell intoxicating liquors by officers who are vested with discretionary powers in the matter, if they have rejected an application after examination, consideration, and inquiry.

Same — violation of law — right to refuse.

4. Officers having authority to refuse for good cause to issue a license to sell intoxicating liquors may refuse a license to one who is shown to have repeatedly violated the statute by selling on Sunday and permitting gambling to be carried on on the premises.

Intoxicating liquor — rejection of license — power to award rehearing.

5. The court cannot, upon a petition for a writ of mandamus to compel the issuance of a license to sell intoxicating liquors, which the officials had refused after hearing, remand the case to them, for a rehearing of the facts as to whether or not the applicant was entitled to a license.

(September 17, 1910.)

APPEAL by defendants from a judgment of the District Court for Morgan County in plaintiff's favor in a mandamus proceeding to compel defendants to issue to plaintiff a license to sell intoxicating liquor. Reversed.

The facts are stated in the opinion.

Messrs. Nathan J. Harris and Albert R. Barnes, for appellants:

Mandamus will not lie to compel the issuance of a license to sell intoxicating liquors by officers vested with discretionary powers.

State ex rel. Kyger v. Holt County Ct. Justices, 39 Mo. 521; Ex parte Whittington, 34 Ark. 395; Batters v. Dunning, 49 Conn. 479; Stanley v. Monnet, 34 Kan. 708, 9 Pac. 755; Crotty v. People, 3 Ill. App. 405; Dunbar v. Frazer, 78 Ala. 538; Ramagnano v. Crook, 85 Ala. 229, 3 So. 845; St. Clair County v. People, 85 Ill. 396; Civic Federation v. Salt Lake County, 22 Utah, 6, 61 Pac. 222.

Mr. A. G. Horn, for respondent:

While the board of county commissioners have vested discretion as to certain matters pertaining to the regulation of the liquor business, they do not have entire control thereof.

Logan City v. Buck, 3 Utah, 301, 2 Pac. 706; Portland v. Schmidt, 13 Or. 17, 6 Pac. 221; Ex parte Reynolds, 87 Ala. 138, 6 So. 335; Ex parte Anniston, 90 Ala. 516, 7 So. 779; Territory v. McPherson, 6 Dak. 27, 50 N. W. 351; Werner v. Washington, 2 Hayw. & H. 175, Fed. Cas. No. 17,416a; Ex parte Florence, 78 Ala. 419; Hill v. Decatur, 22 Ga. 203; Pekin v. Smelzel, 21 32 L.R.A.(N.S.)

Ill. 464, 74 Am. Dec. 105; Strauss v. Pontiac, 40 Ill. 301; State, Rossell, Prosecutor, v. Garon, 50 N. J. L. 358, 13 Atl. 26; State v. Brittain, 89 N. C. 574, 4 Am. Crim. Rep. 458; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90.

If a liquor license is refused simply because the bodies in whom the law places the right to grant licenses are opposed to the liquor traffic, mandamus will lie.

23 Cyc. Law & Proc. pp. 135, 136.

Straup, Ch. J., delivered the opinion of the court:

The plaintiff applied to the district court for a writ of mandate to compel the defendants, the county commissioners of Morgan county, to grant him a license to sell intoxicating liquors at retail at Devil's Slide, in Morgan county. It is alleged in the complaint that on and prior to the 1st day of March, 1909, the plaintiff was engaged in such business at such place, pursuant to a license theretofore issued to him by the defendants, and that on the day last named he applied to them for a license to there continue the business, but that they refused to grant it. It is further alleged that the plaintiff signed and filed a petition for a license with the county clerk of Morgan county, as provided by law, and that he also presented a bond signed by himself and by two good and sufficient sureties in the sum of \$1,000, and conditioned, as by the statute provided, that he would keep an orderly and well-regulated house, and would not allow gambling with cards, dice, or other device or implements, and that he would pay all damages, fines, and forfeitures which might be adjudged against him under the provisions relating to intoxicating liquors. It is further alleged that the application "was acted upon by said defendants on March 1, 1909, in due and regular meeting of said board of county commissioners, and by them then and there refused and not granted," and that "such refusal was not based upon any defect in the application nor upon any other reason, except that said board was opposed to the granting of any liquor license in said county, and refused said application upon said ground and no other ground." Upon such verified complaint the plaintiff prayed that the defendants be required to issue him a license to sell intoxicating liquors at Devil's Slide, or show cause why they should not do so; and the district court issued an alternative writ of mandate commanding the defendants, as the county commissioners of Morgan county, to grant the license to plaintiff as prayed for, or show cause why they did not do so.

The defendants filed a motion to quash the writ, and a demurrer to the complaint for want of facts. The motion and the demurrer were overruled. The defendants then filed an answer in which they averred that a large majority of the residents and taxpayers of Morgan county was opposed to the granting of licenses for the sale of intoxicating liquors at any place within the boundaries of the county, outside of the limits of incorporated cities, and that a large percentage of the residents and taxpayers of that county had theretofore filed with the county commissioners written protests against the granting of any such licenses; that it was against the interests of Morgan county, and of the residents and taxpayers thereof, to permit the sale of intoxicating liquors at any place within the boundaries of the county, outside the limits of incorporated cities; that a majority of the residents and taxpayers of the precinct in which the plaintiff desired permission to sell intoxicating liquors was opposed to the granting of a license to sell intoxicating liquors at retail therein; and that, in the opinion of the defendants, the permitting of such sales in such precinct was against the best interests of the precinct, and of the residents and taxpayers thereof. It is further alleged by them that, during the time the plaintiff was engaged in the business of selling intoxicating liquors at Devil's Slide, prior to the 1st day of March, 1909, under a license theretofore issued to him by the board of county commissioners, the plaintiff, in the conduct of such business, knowingly and repeatedly violated the laws of the state, "and, more particularly, that the plaintiff permitted intoxicating liquors to be sold and disposed of on the premises on the first day of the week, commonly called 'Sunday,' and that, at divers times during said period, he permitted upon said premises gambling by means of cards, slot machines, and other devices," contrary to law; that the defendants believed if a license were issued to the plaintiff, as applied for by him, he would continue, in the conduct of such business upon his premises, to violate such laws, and that, in the opinion of the defendants, no license should be granted him to sell intoxicating liquors at such place. Upon the filing of such answer, the plaintiff moved for a judgment upon the pleadings. After argument and submission, the court took the motion under advisement, and subsequently ordered and adjudged "that said motion be, and the same is hereby, granted." Thereupon the court, without evidence or any further proceedings, made findings of facts, finding all the allegations of the complaint to be true, 32 L.R.A. (N.S.)

and upon such findings ordered and adjudged that "a peremptory writ of mandamus issue to the defendants," commanding them "immediately, after the receipt of this writ, to proceed to consider whether or not the plaintiff has complied with the provisions of law relating to the granting of liquor licenses, whether or not he is a suitable person to whom a liquor license for the sale of intoxicating liquors at retail at the place petitioned for should be granted, and whether or not, for any other reason applicable to the granting of this particular license, the said license, in the exercise of their discretion, should or should not be granted, other than the general objection to granting any license at all for the sale of intoxicating liquors at retail in said county; and said defendants are further directed not to refuse to issue the said license to the said plaintiff upon the ground that they are opposed to the granting of any liquor license in said county."

From such judgments the defendants have prosecuted this appeal. The principal errors assigned relate to the rulings overruling the demurrer and the motion to quash, and granting judgments on the pleadings and so-called findings. They involve the question whether the determination of the commissioners in refusing to grant the plaintiff a license on his application can be controlled by mandamus, and, if so, whether the judgments entered by the lower court on the pleadings and findings were justified. The nature and object of a writ of mandamus have often been stated. "It is a command," said the court in the case of *Johnson's License*, 165 Pa. 315, 31 Atl. 203, "to some official or other officer to proceed to the discharge of some official duty. When that duty is deliberative or depends upon the exercise of official discretion, the purpose of the writ is to quicken the action of the officer, and require him to proceed to hear, to deliberate, to exercise his discretion. It does not lie to revise the decision of any person clothed with judicial, deliberative, or discretionary powers. . . . If a judge declines to hear, or delays a hearing unreasonably, a mandamus is the appropriate remedy. It commands him to proceed to a hearing and decision; but it is not a substitute for an appeal, and it does not bring up for review the soundness of the discretion used or the correctness of the conclusion reached. . . . This rule is applicable to petitions for licenses to sell [intoxicating liquors] at wholesale as well as . . . at retail."

In a recent case the Maryland court (*Gross v. Baltimore*, 111 Md. 543, 75 Atl. 346) concisely stated the rule that "the

essential question to be determined in all such cases is whether the nature of the duty is imperative or discretionary. If it be the former, the writ will be granted or not according to the merits of the case; but if it be the latter, the writ will not be granted at all." And to that effect is our statute (Comp. Laws 1907, § 3641), which provides that the writ may issue to any inferior tribunal, board, etc., "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board," etc. To entitle the respondent to the writ, it therefore is incumbent upon him to show that the granting of a license to him to sell intoxicating liquors at retail at Devil's Slide, the particular place named in his petition, was, under the facts alleged, specifically enjoined by law upon the defendants as a duty resulting from their office as county commissioners, or that their refusal unlawfully precluded him from the enjoyment of a right to which he was entitled.

Section 1242, Comp. Laws 1907, relating to intoxicating liquors, is as follows: "No person shall manufacture, sell, barter, deal out, or otherwise dispose of, any spirituous, vinous, malt, or other intoxicating liquors, without first obtaining from the board of county commissioners of the county, or city council of the city, or board of trustees of the town, in which he intends to do business, a license therefor, as hereinafter provided."

By § 1243 it is provided that "the boards of county commissioners in their respective counties, and the city councils in their respective cities, and the boards of trustees in their respective towns, are hereby authorized to grant licenses, as contemplated in § 1242, to any person over the age of twenty-one years, upon an application being made for such license by petition signed by the applicant and filed with the county clerk, city recorder, or town clerk, as the case may be. Said petition must state definitely the particular place at which any of the liquors named in § 1242 are intended to be manufactured, sold, bartered, dealt out, or otherwise disposed of, and whether the applicant intends to carry on a retail or wholesale business."

It is further provided by that section that, before a license is granted, the applicant shall execute a bond with two or more sureties in a sum not less than \$500, and not more than \$1,000, to be fixed and approved by the board of county commis-

sioners, etc., and conditioned, as in that section provided, that during the continuance of his license he will not allow gambling with cards, dice, or other device or implements, that he will keep an orderly and well-regulated house, and that he will pay all damages, fines, and forfeitures which may be adjudged against him under the provisions of the title relating to intoxicating liquors.

By § 1244 the county commissioners, etc., are given the power to determine the amount of the license, which shall not be less than \$400 for a period of one year, and the time for which it is granted, which shall not be for a longer period than one year nor less than three months. And by § 1245 it is further provided that "any application for such license may be refused for good cause, in the discretion of the board of trustees of the town, the city council of the city, or board of county commissioners" of the county, etc.

It is in effect contended by respondent that when an application for a license in conformity with the statute is made, and the applicant shows himself to possess the qualifications requisite for the issuing of a license under the statute, it then becomes the imperative duty of the commissioners to grant the license, and that they cannot lawfully, in the exercise of any other discretion, refuse it. And he is required to take such a position, else the complaint does not show a plain legal duty resting upon the commissioners to grant the license.

We do not think that under the statute the commissioners are bound to issue a license to everyone applying for it, though the application be made in conformity with the statute, and the applicant found to possess all the qualifications requisite for the issuance of a license. And such is the effect of the holding in the case of *Perry v. Salt Lake City*, 7 Utah, 143, 11 L.R.A. 446, 25 Pac. 739, 998. In that case the granting of a license upon an application made in conformity with the requirements of the statute and the ordinances of the city was refused by the council without assigning any reason therefor. Upon an application for a writ of mandamus to compel the council to issue a license to the applicant, the writ was denied on the ground that the granting or refusing of a license was within the discretion of the council. The then powers conferred upon the council, and the ordinances of the city relating to the issuing of such licenses, were, as appears in the statement of the case, similar to those conferred upon the county commissioners, and the present statutes, heretofore referred to, with the exception that

the latter in express terms confer upon the commissioners a discretion to refuse the granting of a license. In that case, Mr. Justice Zane, in delivering the prevailing opinion, and in holding that the council had conferred upon it "a wide discretion" in the matter, said: "It is apparent from the act under consideration that the intention of the legislature in conferring on the council the power to regulate the sale of liquor was to enable that body to protect society from the evils attending it. The benefit of the dealer was not the chief end; therefore the duty of the council with respect to him must depend largely on the good of the neighborhood."

He further approvingly referred to the cases of *Muller v. Buncombe County*, 89 N. C. 172, and *State ex rel. Kyger v. Holt County Ct. Justices*, 39 Mo. 521, where it was held that even though the application for a liquor license was made in conformity with the requirements of the statute, and the party applying possessed all the required qualifications for the issuance of a license under the statute, still the commissioners and the county court, upon whom was conferred the power to grant liquor licenses, could, in the exercise of their discretion, refuse to grant it. In those cases the statute conferred no wider discretion upon those authorized to grant licenses than is conferred by our statute upon the board of county commissioners. If, upon an application for a license made in conformity with the statute, and the applicant shown to possess all the qualifications requisite for the issuing of a license, the county commissioners have no discretion to refuse the granting of the license, then, upon application, might the commissioners be obliged to grant a license to sell intoxicating liquors at every settlement or neighborhood or crossroad in the county; and not only one or a half a dozen at each place, but as many more as there were persons showing themselves so qualified and applying for a license. The legislature undoubtedly vested the county commissioners with the power of passing upon applications for permission to sell intoxicating liquors. In passing upon such question they may not only consider whether the applicant is twenty-one years or more of age, whether his application is in due form, and whether his proposed bond is good and sufficient, but also whether the person applying for the license is a proper person to be intrusted with the conduct of such business, whether the place proposed to engage in the business is suitable, whether the demands of the public require such accommodations at such place, and they may also

take into consideration many other questions involving the safety, peace, good order, morals, and public good of the neighborhood or community in which it is proposed to engage in the business.

That there are certain dangers and evils attending the business of selling intoxicating liquors is generally conceded and recognized. Mr. Justice Field in the case of *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, said: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose." And, as we have seen, by our statute a wide discretionary power is conferred upon the board of county commissioners in passing upon applications for licenses to sell intoxicating liquors within their territorial jurisdiction. When an application for a license is made to them, it unquestionably is their duty to consider it, to make proper inquiry concerning it, and, upon the responsibility of their official oath, to reach a determination. But the duty of the commissioners in the premises to grant licenses is not imperative and mandatory. It is discretionary.

In *State ex rel. Zeglin v. Carver County*, 60 Minn. 510, 62 N. W. 1135, the court said: "Whether a license to sell intoxicating liquors shall be granted or refused rests in the discretion of the board of county commissioners, in the exercise of which they act judicially, and not ministerially, and therefore their action cannot be controlled or reviewed by mandamus." And in *State ex rel. Howie v. Northfield*, 94 Minn. 84, 101 N. W. 1064, that court again said: "The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number

of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action."

In *Stanley v. Monnet*, 34 Kan. 708, 9 Pac. 756, the court said: "We think the motion to quash must be sustained. The probate judge is vested by the statute with discretionary power in granting permits [to sell intoxicating liquors by druggists], and the duty to do so is not peremptory and absolute. It is not claimed that the probate judge refused to receive or consider the application presented. He has heard the application, and determined not to grant the same. He refuses to give his reasons therefor, but that is immaterial; he has acted."

In *Ramagnano v. Crook*, 85 Ala. 226, 3 So. 845, the court said: "In *Dunbar v. Frazer*, 78 Ala. 538, it was held that the judge of probate, in granting or refusing a license to retail spirituous liquors, under the act of February 17, 1885, acts in a quasi judicial capacity, whether the application is or is not contested, and that his action cannot be reviewed or controlled by mandamus. A mandamus will be issued to compel a judicial officer to act when it is his duty, and he refuses, but not to direct him how to act. In the present case, the judge of probate acted; and the sufficiency of the reasons for his action cannot be reviewed by mandamus, though they may be erroneous." These views are also supported by the following cases: *Ex parte Whittington*, 34 Ark. 394; *State ex rel. Brown v. Stiff*, 104 Mo. App. 685, 78 S. W. 675; *Devin v. Belt*, 70 Md. 352, 17 Atl. 375; *Eve v. Simon*, 78 Ga. 120; *Malmo's Appeal*, 72 Conn. 1, 43 Atl. 485; *Batters v. Dunning*, 49 Conn. 479; *State ex rel. Kelley v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *Swift v. People*, 63 Ill. App. 453; *Barnes v. Wilson County*, 135 N. C. 27, 47 S. E. 737; *Armstrong v. Murphy*, 65 App. Div. 123, 72 N. Y. Supp. 473; *Burke v. Collins*, 18 S. D. 190, 99 N. W. 1112.

It is not averred here that the commissioners refused to examine or consider or act upon the application. To the contrary, it is averred in the complaint that the application "was acted upon by said defendants in due and regular meeting of said board of county commissioners, and by them refused, and not granted." These cases, to a large extent, proceed upon the theory that the retail traffic of intoxicating liquors is one which confessedly requires to be kept in prudent hands, and that where the legislature conferred the power upon authorities to regulate, restrict, and control the traffic, and the power, in passing upon applications, to grant or refuse licenses in their discretion, undefined and

unprescribed by the legislature, the responsibility for the proper conduct of such business rests with such authorities; and in the language of the court in *Ex parte Whittington*, supra, if they do not act with a view to the public interests, the legislature may take away their power and discretion, or the people may elect more satisfactory officers upon whom such power and discretion has been conferred; and in the language of the Federal court in the case *Re Hoover* (D. C.) 30 Fed. 51, that the state may authorize the sale of spirituous liquors on such terms, by such persons, and at such places, as it thinks proper, "and if it may do this directly, may it not delegate to others the exercise of the power? It has simply delegated a portion of its sovereignty to the county commissioners of Chatham county. The commissioners, in the exercises of that sovereignty, refuse a license to the petitioner. The discretion must rest somewhere. The state might have exercised it. It intrusts its discretion to the board of county commissioners, and, as I have said, by the terms of the grant this discretion is final, and not reviewable. This power is inseparable from the sovereignty of the state."

We are not unmindful of rulings made that even though a licensing board may be vested with a discretion in the matter of granting licenses, it cannot act arbitrarily or capriciously in refusing to issue a license, and that where it is made to appear that an applicant is entitled to a license upon a compliance with the statutory requirements, and the action of the board is of such a character, issuance of the license may be compelled by mandamus (*Joyce, Intoxicating Liquors*, § 271), and the allegations contained in the complaint that the refusal of the defendants to grant plaintiff a license was not based "upon any defect in said application, nor upon any other reason, except that the board was opposed to the granting of any liquor license in said county." Even though it be conceded that the discretion conferred upon the commissioners cannot be exercised arbitrarily or capriciously, and that the allegation referred to is sufficient to show the discretion to have been exercised in such manner, still, before the respondent is in a position to complain, it is essential for him to show by proper averments that a plain legal duty rested upon the commissioners to grant a license to him. In this connection we must not lose sight of the action of the court invoked by plaintiff. It was not that the commissioners had refused to examine or consider or act upon his petition, or that their determination was the outcome or result of no or an im-

proper examination or consideration, but that they, in a due and regular meeting of the board, had acted on it, and refused to grant the plaintiff a license upon insufficient reasons; and hence the action of the court was invoked to compel the commissioners to issue a license to him, or show cause why they should not do so. If, upon the filing of a petition for a license in conformity with the statute, and a showing that the applicant possessed all the qualifications requisite for the issuing of a license, a plain legal duty was imposed upon the commissioners to issue a license, and they arbitrarily or capriciously refused to do so, then mandamus might well lie to compel the issuance of it. But the statute does not impose a duty upon the commissioners to issue a license upon such conditions or findings, or upon conditions set forth in the allegations of the complaint, that the plaintiff had filed a petition or application with the county clerk for a license in which the place proposed to sell intoxicating liquors at retail was designated, and had presented a proper bond with good and sufficient sureties. And we may again say, as was said by the court in *Barnes v. Wilson County*, supra: "The judgment of the court is based entirely upon the theory that, after finding that the applicant is a fit person and that the building is suitable, and the other recited facts, the commissioners have no discretion left in the matter. This is an error, for the statute expressly provides that even when those facts are found, the commissioners may grant license, and not that they must do so." Our statute merely authorized the county commissioners to grant licenses to sell intoxicating liquors. It does not in express terms require or command them to do so. The use of the word "authorized" in such a statute is permissive, not mandatory.

In construing a statute "authorizing and empowering" the mayor to grant theatrical licenses, the New York court in the case of *People ex rel. Worth v. Grant*, 58 Hun, 455, 12 N. Y. Supp. 879, observed: "The rule undoubtedly is that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted upon, though the statute conferring it be only permissive in its terms. . . . But why, it may be asked, should this construction be given to the act under consideration? What public interest demands that the mayor should be required under all circumstances to accept the fee and grant the license? It seems to me that it is quite the other way. The public good clearly requires that the permissive words

in question should be read in their natural and ordinary sense." Such ruling was later approved by the same court in the case of *Armstrong v. Murphy*, supra.

Even though it may be said that under the statute a duty is implied to license someone, yet there is nothing in the statute which can properly be construed as imposing a legal duty to license any particular person. And certainly no duty is imposed upon the commissioners to grant a license within the range of their power to all who may apply and show qualifications requisite for the issuing of a license. It may again be observed, as was said by the court in the case of *Barnes v. Wilson County*, supra, that "while their discretion is not an arbitrary one, this is far from proving that the courts can, by the writ of mandamus, coerce the commissioners into exercising that discretion in favor of any particular person or in any particular way. If the case of *Atty. Gen. ex rel. Gillaspie v. Guilford County Justices*, 27 N. C. (5 Ired. L.) 315, decides anything, it certainly decides that a mandamus will not be issued for the purpose of compelling the body invested with the discretion of granting or refusing a license, to issue a license to a person whose application has been rejected by them. In that case the justices refused the application upon the single ground that their power to do so was absolute. No stronger case for a mandamus, if one can issue in any case, could have been presented, and yet the court adjudged that 'because this is not a case for a mandamus, the judgment of the court must be reversed, and the motion for a peremptory mandamus is refused.'"

The legislature saw fit not to prescribe the conditions upon which the commissioners were required to grant liquor licenses. Should the courts, by mandamus, compel or coerce them to do so upon certain assumed or existing conditions, they would but do what the legislature itself saw fit not to do. No one has an unqualified or inherent right to carry on the business of selling intoxicating liquors at retail, nor a vested right to do so which he may ask to be enforced; nor can it be said that it concerns or promotes the public interests for anyone to exercise it. *Ex parte Whittington and Malmo's Appeal*, supra. And, as said by the court in the case of *State ex rel. Brown v. Stiff*, supra: "The business of selling liquor is not a right, and cannot be likened to the ordinary callings of life; that it is a mere privilege to be granted or withheld at the exclusive discretion of the body empowered to license." The refusal of a license to plaintiff, therefore, did not unlawfully preclude him from the enjoyment of a right to which he was entitled.

As already observed, when an application is made to the county commissioners for a license, they may not refuse to examine or consider it, or, without examination or consideration, arbitrarily or capriciously reject it. When the application is properly made in conformity with the statute, it is their legal duty to examine and consider it, to make proper inquiry concerning it, and to reach a decision or determination as the result or outcome of such examination, consideration, and inquiry. When they have done that, they have discharged their official duty, so far as the courts have any power to control them in the premises. If, as the result of such a determination, they reach a conclusion to grant or refuse a license to an applicant, they are not answerable to the courts for their conduct and discharge of duty, but to the people, who conferred the power upon them to regulate and control the liquor traffic, and clothed them with the discretion to grant or refuse liquor licenses. It is only upon averments and proof that they arbitrarily and capriciously disapproved and rejected an application without examination, consideration, and inquiry, that the courts may interfere and then not to direct them how to act or to decide the matter, or to compel or coerce them to issue or refuse a license to any particular person upon certain assumed or existing conditions.

We are of the opinion that under the statute, and upon the facts alleged in the complaint, it is not made to appear that a plain legal duty was imposed upon the commissioners to issue a license to the plaintiff upon his application, or that their refusal to do so unlawfully precluded him from enjoying a right to which he was entitled; and therefore the court erred in overruling the demurrer.

For additional reasons we are also of the opinion that the court erred in rendering judgment on the pleadings and findings. The plaintiff contends that he was entitled to a judgment on the pleadings, on the ground that the defendants had failed to specifically deny the allegation in the complaint that the license was refused plaintiff for the reason that they were opposed to the granting of any license to sell intoxicating liquors in the county. Here, again, the relief sought by plaintiff by his complaint must be kept in mind. It was to compel the defendants to issue a license to him to sell intoxicating liquors at retail at a particular place, Devil's Slide, or show cause why they should not do so. In response to the alternative writ to grant a license to the plaintiff for such purpose, or show cause, the defendants, among other things, in their verified answer, alleged that the plaintiff in the con-

duct of such business at such place, and in pursuance of a license theretofore issued to him, knowingly and repeatedly permitted intoxicating liquors to be sold and disposed of on Sunday, and there upon his premises where such business was conducted knowingly and repeatedly permitted gambling to be carried on by means of cards, slot machines, and other devices, in violation of law, and that, if another license were issued to him, he would continue to carry on the business with such violations of the law. The undoubted effect of such averments was that the plaintiff was not a suitable person to be intrusted with the conduct of the business, and unquestionably was a showing of good cause why the court should not by mandamus direct a license to be issued to him. The plaintiff, by his motion for judgment on the pleadings, at least for the purposes of the motion, admitted the truth of the facts thus averred by the defendants. The only judgment which the court could have rendered for the plaintiff, on the motion, was to direct the defendants to issue a license to him in accordance with the allegations and prayer of the complaint. But confessedly such a judgment could not properly have been rendered by the court in the face of the averments contained in the verified answer. Such averments did not controvert only a part of the cause of action alleged in the complaint, but constituted a complete defense.

The court in effect made two inconsistent orders, or rendered two inconsistent judgments. First, the court, after being "sufficiently advised," made an order granting plaintiff's motion for judgment on the pleadings, which indirectly, and, were it not for the subsequent order or judgment of the court, directly, required and commanded the defendants to issue a license to the plaintiff as prayed for in his complaint, and which was a ruling that the cause or causes averred in their answer, why they had not done so, were no cause. Then the court, without evidence or further proceedings, made findings of facts, that the allegations of the complaint were true, and, upon such findings, made an order, or rendered a judgment, remanding the case back to the defendants, in effect, to proceed and determine whether the verified answer filed by them was true or not, and "whether the plaintiff has complied with the provisions of law relating to the granting of liquor licenses, whether or not he is a suitable person to whom a liquor license for the sale of intoxicating liquors at retail at the place petitioned for should be granted, and whether or not, for any other reason applicable to the granting of this particular liquor license, the said license, in the exercise of their discretion, should or should

not be granted," and admonished and directed them that they must not refuse to grant the license on the ground that they were opposed to the granting of licenses to sell intoxicating liquors in the county. Such a judgment was not responsive to, nor in accordance with, the pleadings. As before observed, the complaint does not proceed upon the theory that the defendants had refused to consider or examine the application, or to act, or to proceed to a decision or determination, but upon the theory that the plaintiff, upon the filing of his petition with the county clerk for a license in conformity with the statute, and the presentation of a proper bond as required by the statute, was entitled to a license, and that a plain legal duty was imposed upon the defendants to grant it, and that their refusal to do so was based upon insufficient reasons or invalid grounds, and hence the action of the court was invoked, by mandamus, to command and compel the defendants, not to hear and determine whether the plaintiff was entitled to a license, but to issue one to him.

We are of the opinion that the judgment of the court below ought to be reversed, and the case remanded to the District Court, with directions to dismiss the action. It is so ordered. Cost to appellants.

Frick and McCarty, JJ., concur.

OKLAHOMA SUPREME COURT.

CARL L. MOFFITT et al., Pliffs. in Err.,
v.

I. D. GARRETT.

(23 Okla. 398, 100 Pac. 533.)

Attachment — discharge — bond — liability of obligor.

An obligor on a bond to discharge an attachment, under the provisions of § 4404, Wilson's Rev. & Anno. Stat. (Okla.) 1903, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment.

(March 9, 1909.)

ERROR to the Probate Court for Oklahoma County to review a judgment in

Headnote by WILLIAMS, J.
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plaintiff's favor in an action brought to recover on a bond given to discharge an attachment. Affirmed.

Statement by Williams, J.:

On the 28th day of July A. D. 1906, the defendant in error, as plaintiff, instituted his action in the probate court of Oklahoma county, territory of Oklahoma, against the plaintiffs in error, C. L. Moffitt and L. R. Moffitt, as defendants, to recover the sum of \$102.50, alleged to be due on an award of arbitrators between the said I. D. Garrett and C. L. Moffitt, and on the same day filed proper affidavit for attachment against both of said defendants, and writ of attachment was issued and levied on a

Note. — Right of obligor in bond for release of attached property to attack attachment.

- I. Introduction, 401.
- II. Where bond conditioned "to pay judgment," 402.
- III. In action on bond where attachment discharged, 403.
- IV. Attack in principal case where attachment discharged, 404.
- V. Rule where bond does not discharge attachment, 406.
- VI. Rule as to replevy bonds, 406.
- VII. Rule where attachment proceedings are void, 407.
- VIII. Right to attack in independent suit, 408.
- IX. Rule under statutes governing right to raise objections, 409.
- X. Miscellaneous, 409.

This note does not cover the right of the obligors to defend an action on the bond on the ground of the irregularity or invalidity of the judgment entered in the original proceeding.

I. Introduction.

The following general rules may be laid down concerning the right of obligors in bonds for the release of attachments to attack the attachment: Where the bond contains a provision by which the obligors undertake to pay the judgment recovered in the attachment suit, they are held to be precluded by their undertaking from attacking the validity of the attachment proceedings in an action on the bond. And even where the bond contains no express provision to pay the judgment, but has the effect of discharging and releasing the attachment, it is held in actions on the bonds that the obligors are precluded from attacking the validity of the attachment. But it has been held in some cases that the defendant can attack the attachment in the principal case, although the bond has the effect of discharging and releasing the attachment. And where the bond given does not have the effect of discharging the attachment, the defendant has been allowed to attack the

certain stock of goods. After said levy had been made, the defendant Carl L. Moffitt, with L. A. Fightmaster as surety, executed the following bond:

Territory of Oklahoma, }
County of Oklahoma. } ss.
In the Probate, Court in and for Said
County and Territory.
I. D. Garrett, Plaintiff.
v.
C. L. Moffitt et al., Defendants. }

Undertaking to Discharge Attachment.

Know all men by these presents, that we, the undersigned, are held and firmly bound unto I. D. Garrett, the plaintiff in the

validity of the attachment. Where it appears that the attachment proceedings are void, an exception to the general rules precluding an attack on the validity of the attachment is recognized, and it is held that the validity of the attachment may be attacked, both by the defendant and his sureties.

II. Where bond conditioned "to pay judgment."

Where the obligors in a bond given for the release of attached property expressly undertake to pay the judgment recovered, they are held to be estopped, in an action on the bond after judgment has been recovered in the principal action, from attacking the validity of the attachment.

Thus, in *McMillan v. Dana*, 18 Cal. 339, where the obligors in a bond for the release of an attachment undertook to pay the judgment recovered, it was held in an action on the bond that they could not attack the attachment and show that the property was not subject to attachment. The court said: "The recitals are conclusive of the facts stated. They show a consideration for the promise, and the obligation of the parties upon that consideration. In the present instance, the defendants promise, in consideration of the release of the property from the attachment, that in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. The complaint avers that this property was released by order of the judge, and the order of release is set out. The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking, therefore, is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not was wholly immaterial. The plaintiff in attachment, after the giving of the undertaking and the order of the judge, had no further claim on it. Nor does it matter whether the property was subject to attachment or not." 32 L.R.A. (N.S.)

above-entitled action, in the penal sum of two hundred and five dollars (\$205), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally by these presents. The condition of the above obligation is such that whereas the above-named plaintiff, I. D. Garrett, did on the 28th day of July, 1906, begin the above-entitled action against the above-named defendants, C. L. Moffitt and L. R. Moffitt, to recover the sum of one hundred two and 50/100 dollars (\$102.50), and caused an attachment to be issued and levied upon the property of said defendants, and this bond is given for the purpose of hav-

That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit."

In other cases containing like provisions, the obligors have been held estopped to show that no property was levied upon by virtue of the attachment. *Bailey v. Aetna Indemnity Co.* 5 Cal. App. 740, 91 Pac. 416; *Dackich v. Barich*, 37 Mont. 490, 97 Pac. 931; *Coleman v. Bean*, 1 Abb. App. Dec. 394;

—or that the property was not subject to attachment. *Lott v. Porter*, — Ark. —, 133 S. W. 180; *Mayfield v. Creamer*, 39 Ark. 460; *Pierce v. Whiting*, 63 Cal. 538; *Klippel v. Oppenstein*, 8 Colo. App. 187, 45 Pac. 224; *Taylor v. Taylor*, 3 Bush, 118; *Hazlerigg v. Donaldson*, 2 Met. (Ky.) 445; *Com. v. Litvitz*, 14 Pa. Super. Ct. 278; *Sanger v. Hibbard*, 2 Ind. Terr. 547, 53 S. W. 330;

—or that the affidavit upon which the attachment was made was defective. *Ferguson v. Glidewell*, 48 Ark. 195, 2 S. W. 711; *Bromly v. Vinson*, 9 Ky. L. Rep. 401; *Thompson v. Arnett*, 23 Ky. L. Rep. 1082, 64 S. W. 735; *Bowers v. Beck*, 2 Nev. 139; *Inman v. Stratton*, 4 Bush, 445; *Huff v. Hutchinson*, 14 How. 586, 14 L. ed. 553; *Bildersee v. Aden*, 62 Barb. 175; *Franklin v. Pendleton*, 3 Sandf. 572, affirmed on other ground in 7 N. Y. 508;

—or that the attachment proceedings were not legally conducted. *Dunn v. Crocker*, 22 Ind. 324; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004; *Delany v. Brett*, 4 Robt. 712; *Onderdonk v. Voorhis*, 2 Robt. 24; *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 308, 18 Pac. 841;

—or that the writ of attachment did not appear to be under the seal of the court, or that there was no authority for making an amended return. *New Haven Lumber Co. v. Raymond*, 76 Iowa, 225, 40 N. W. 820;

—or that the attachment was invalid because issued in a suit *ex delicto*. *Billingley v. Harris*, 79 Wis. 103, 48 N. W. 108;

ing said attachment discharged, now therefore, if the said defendants shall perform the judgment of the court in the above-entitled action, and shall well and truly pay the amount of any judgment that shall be rendered against them in said action, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands this 30th day of July, A. D. 1906.

Carl L. Moffitt.

Mrs. L. A. Fightmaster.

Taken and approved this 30th day of July, A. D. 1906.

W. P. Harper,

Probate Judge.

That after the approval of said bond,

—or that no valid levy was made. *Eisenbud v. Gellert*, 26 Misc. 367, 55 N. Y. Supp. 952;

—or that the officer issuing the attachment was without jurisdiction. *Cruyt v. Phillips*, 16 How. Pr. 120;

—or to deny the nonresidence of the defendant. *Haggart v. Morgan*, 5 N. Y. 428, 55 Am. Dec. 350;

—or to deny the issuing of the warrant. *Higgins v. Healy*, 15 Jones & S. 207, affirmed in 89 N. Y. 636.

And the same result was reached in *Fusz v. Trager*, 39 La. Ann. 202, 1 So. 535, and *Love v. Voorhies*, 13 La. Ann. 549, where the ground of attack does not appear.

And it has been held that obligors who undertake in a bond for the discharge of an attachment to perform the judgment of the court are liable in an action thereon, although the court in the principal action on motion dissolved and set aside the attachment for irregularities. *Wyman v. Hallock*, 4 S. D. 469, 57 N. W. 197.

And the sureties on a bond given for the release of an attachment, and conditioned to pay the judgment recovered, are not discharged by an order vacating the attachment, where it is not declared void by the order, and it does not appear that it was void for want of jurisdiction. *Bildersee v. Aden*, 8 Abb. Pr. N. S. 171.

So it was held in *Blanchard v. Anderson*, — Okla. —, 113 Pac. 717, that where the execution of a bond conditioned to perform the judgment was admitted in an action thereon, the obligors were estopped from denying the recitals therein, the estoppel under consideration in that case being as to the value of the attached property.

And the rule is the same as to a third person having possession of property who executes a release bond to satisfy the judgment recovered. *Wright v. Oakley*, 16 La. Ann. 125.

And a receipt for the release of attached property, which expressly agreed that the goods belonged to the defendant, and undertaking to deliver the goods on demand or pay the judgment recovered, precludes the receptors, in an action thereon, from showing

that part of the goods did not belong to the defendant, and that others were not attachable. *Bacon v. Daniels*, 116 Mass. 474; *Dewey v. Field*, 4 Met. 381, 38 Am. Dec. 376.

But where the attachment in a suit for goods sold was valid against any of the defendant's property, the giving of a bond to pay any judgment rendered does not amount to a ratification of an unauthorized purchase of the goods by another, who, it was claimed in the attachment suit, had acted as the defendant's agent in purchasing the property sued for. *Woods v. Robertson*, 31 Mich. 64.

See also *Murphy v. Montandon*, under subdivision on "Rule where attachment proceedings are void. *Lehman v. Berdin* and *Wolf v. Cook*, under subdivision "Attack in principal case where attachment discharged."

III. In action on bond where attachment discharged.

Where a forthcoming or redelivery bond has the effect of discharging the attachment and releasing the property, although the obligors do not undertake to pay the judgment, it is generally held in an action on the bond after judgment, that the obligors cannot attack the validity of the attachment.

Thus, they are precluded in such actions from showing that the defendant did not have an actionable interest in the property. *Gray v. MacLean*, 17 Ill. 404; *Sponenbarger v. Lemert*, 23 Kan. 55; *Haxtum v. Sizer*, 23 Kan. 310; *McCormack v. Henderson*, 10 Ky. L. Rep. 541; *Morgan v. Furst*, 4 Mart. (N.S.) 116, 16 Am. Dec. 166; *Beal v. Alexander*, 1 Rob. (La.) 277; *Dorr v. Clark*, 7 Mich. 310; *Cooper v. Davis Mill Co.* 48 Neb. 420, 67 N. W. 178; *Johnston v. Oliver*, 51 Ohio St. 6, 36 N. E. 458;

—that no levy was made. *Smith v. Fargo*, 57 Cal. 157; *Birdsall v. Wheeler*, 58 Conn. 429, 20 Atl. 607; *Crisman v. Matthews*, 2 Ill. 148, 26 Am. Dec. 417; *Frost v. White*, 14 La. Ann. 136; *Price v. Kennedy*, 16 La. Ann. 78;

A. D. 1906, said plaintiff, I. D. Garrett, instituted his action in said court against said defendant Carl L. Moffitt, and his surety, L. A. Fightmaster, on said bond. On the 28th day of June, A. D. 1907, the cause came on for hearing before the court without a jury, at which time said findings were made, and also judgment was rendered against both of the defendants, Carl L. Moffitt and L. A. Fightmaster, for the amount of said judgment, \$102.50, and the costs and interest. The record recites that the court finds that prior to the beginning of said action, and the levying of said attachment ancillary thereto, the defendant C. L. Moffitt had sold the goods thus levied on to the said L. R. Moffitt, and at the time of said levy and the execution of said discharging bond they were the property of the said L. R. Moffitt. And, further, as conclusions of law, that the defendant L. A. Fightmaster, surety on said bond, was es-

topped to show that the allegations in said attachment affidavit were not true, or that the ownership of the property, at the time of the levying of the attachment and the giving of said bond, was in the said L. R. Moffitt. Motion for a new trial was made in due time, and an appeal prosecuted by petition in error to the supreme court of the territory of Oklahoma, and, by virtue of the provisions of the enabling act and the schedule to the Constitution, is now properly before this court for review.

Mr. John L. Jenkins for plaintiffs in error.

Mr. J. L. Brown for defendant in error.

Williams, J., delivered the opinion of the court:

Section 4404 (chapter 66, art. 11, § 206), Wilson's Rev. & Anno. Stat. 1903, provides: "If the defendant, or other person on his

—that the property supposed to be levied upon was fictitious. *Mead v. Figh*, 4 Ala. 279, 37 Am. Dec. 742;

—that the officer's levy was invalid. *Scanlan v. O'Brien*, 21 Minn. 434;

—or from setting up the nonappraisal of the property before attachment. *Woodward v. Adams*, 9 Iowa, 474;

—or attacking the constitutionality of the act under which the attachment was made. *Vose v. Cockcroft*, 44 N. Y. 415.

And in the following cases where the specific ground of attack is not clear, it was held that obligors on such bonds could not, in actions on the bonds, attack the regularity of the attachment proceedings after judgment in the attachment suit. *McCloskey v. Wingfield*, 32 La. Ann. 38; *Kirkland v. Boyle*, 7 La. Ann. 369; *Goodman v. Allen*, 11 La. Ann. 246.

And sureties cannot deny that an order for the release of the goods was made, where they were in fact released, and the redelivery bond recites that it was given pursuant to an order of the court requiring the release. *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804.

So, the obligors on a bond executed in consideration of a release of the attached property cannot defend an action on the bond on the ground that, after the court ordered the attachment discharged and the property released, the sheriff refused to deliver the property. *Gardner v. Donnelly*, 86 Cal. 367, 24 Pac. 1072.

And obligors on a bond given to release attached goods, and stating that the attachment was commenced in due form of law, cannot defend an action on the bond by showing that the affidavit of attachment was defective, where the defendant in attachment failed to raise the point before judgment was entered. *Goebel v. Stevenson*, 35 Mich. 172.

So, a partner who gives a receipt for the return of partnership property attached as 32 L.R.A. (N.S.)

the property of another partner cannot defend a suit on the receipt by showing that the partner against whom it was issued did not own it, and this fact will not avoid a judgment on the receipt. *Staples v. Fillmore*, 43 Conn. 510.

But in *Bauer v. Antoine*, 22 La. Ann. 145, it was held that the surety on a release bond might show after judgment had been rendered, and in an action on the bond, that the property attached did not belong to the defendant.

IV. Attack in principal case where attachment discharged.

In some cases where the giving of a bond containing no undertaking to pay the judgment has the effect of discharging and releasing the attached property, it is held that the fact that such a bond had been executed does not preclude the defendant from attacking the attachment in the case in which the attachment issued.

Thus, the execution of bonds releasing the attachment will not preclude the defendant in the principal action from showing that the plaintiff had not given the necessary attachment bond. *Delano v. Kennedy*, 5 Ark. 457;

—or from contesting the sufficiency of the affidavits for attachment, although the bond was conditioned to pay the judgment. *Lehman v. Berdin*, 5 Dill. 340, Fed. Cas. No. 8,215;

—or that the property was subject to attachment notwithstanding he undertook to perform the judgment. *Ross v. Miller Merchant Tailoring Co.* 7 Ohio C. C. 51, 3 Ohio C. D. 658;

—or that defendant was not a nonresident. *Egan v. Lumsden*, 2 Disney (Ohio) 168.

And in the following cases, where the ground of attack does not appear, he was held not to be precluded from attacking the

behalf, at any time before judgment, causes an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee in such action, for any property of the defendant in his hands." The bond upon which the action was brought in the lower court was made by virtue of said section, and the sole question involved in this record is whether or not the undertakers on such bond are bound to perform the judgment of the court, by paying such judgment, regardless of whether or not the attachment was rightfully brought, or the

property seized belonged to the defendant in the attachment writ. Section 52 of the justices' act (Kan. Gen. Stat. 1868, p. 787, chap. 81) is exactly the same as § 4404, supra. In the case of *Endress v. Ent*, 18 Kan. 239, Mr. Chief Justice Horton, in delivering the opinion of the court, said: "It is insisted by the defendants that the undertaking was intended as a forthcoming bond, as described in § 33 of the justices' act (Gen. Stat. 1868, p. 782), and they cite the action of the justice in overruling the motion of Ent to discharge the attachment. The bond is very dissimilar from the undertaking required by § 33, and cannot by us be construed into an undertaking that the property attached in this action, or its appraised value in money, should be forthcoming to answer the judgment of the court. The constable did not take the bond in question, and no appraisal was had. It was approved by the justice, and filed

attachment in the principal case by executing such a bond: *Saxton v. Plymire*, 3 Ohio C. C. 209; *Dienelt v. Aronia Fabric Co.* 2 Pa. Co. Ct. 206.

And the giving of special bail in vacation for the purpose of having attached property discharged is not a waiver of the defendant's objections as to the sufficiency of the affidavit for attachment (*Carson v. The Talma*, 3 Ind. 194; *Blaney v. Findley*, 2 Blackf. 338); or of the failure to file a bond in a foreign attachment (*Root v. Monroe*, 5 Blackf. 594).

So, a release bond undertaking to pay such sums as might be found to be a lien upon attached logs does not waive the right to object to defects in service in the case. *Reynolds v. Marquette Circuit Judge*, 125 Mich. 445, 84 N. W. 628.

It has been held in Louisiana that the mere execution of a bond for the release of attached property will not, before the joinder of issues, debar the defendant from attacking the validity of the attachment in the principal suit. *Myers v. Perry*, 1 La. Ann. 372; *Brinegar v. Griffin*, 2 La. Ann. 154; *Avet v. Albo*, 21 La. Ann. 349; *Pailhes v. Roux*, 14 La. 83.

But by a joinder of issues in the main action, the right to attack the attachment is lost. *Myers v. Perry*, 1 La. Ann. 372.

And in some cases where the bond given discharged and released the property, it has been held that the defendant or his sureties could not attack the attachment. Thus it has been held that they could not show that the property attacked was held under another levy. *Fenner v. Boutte*, 72 Miss. 271, 16 So. 259;

—or that no grounds for an attachment existed. *Hill v. Harding*, 93 Ill. 77;

—or that property was not subject to attachment. *Morrison v. Alphin*, 23 Ark. 136; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752;

—or that no attachment was made. 32 L.R.A. (N.S.)

Easton v. Driscoll, 18 R. I. 318, 27 Atl. 445.

And it has been held that sureties on a release bond are estopped from asserting in the principal action any claims to or privilege on the property, where it has been released from the jurisdiction of the court. *Wallace v. Burnham*, 28 La. Ann. 791.

And in *Wolf v. Cook*, 40 Fed. 432, it was held that the giving of a bond conditioned to pay the judgment, whereby an attached vessel was released, waived the objection that the property was not subject to attachment.

And in *J. I. Case Threshing Mach. Co. v. Merrill*, 68 Iowa, 540, 27 N. W. 742, the insufficiency of the officer's return to show a levy was held to be waived by an intervener by consenting that the property should remain in the officer's possession, and the execution of a delivery bond for the release of the property.

And it was held in *Barry v. Foyles*, 1 Pet. 311, 7 L. ed. 157, that after the giving of special bail and a discharge of the attachment, no reference to a variance between the manner in which the account sued on was filed in the attachment and in the declaration on which the case was tried could be made.

And an intervener who, as agent of the defendant, signed a bond reciting the seizure of property given, which was thereupon released, is estopped from proving that there was no seizure of the property, and he cannot, after the attachment is dissolved, intervene in the suit and set up a claim against the property. *McRae v. Austin*, 9 La. Ann. 360.

And a third person in whose hands property is attached is estopped, by executing a forthcoming conditioned bond to return the property or its value to answer the judgment, from setting up in the principal action that the property belonged to him, and was not the property of the defendant,

ner v. Donnelly, 86 Cal. 367, 24 Pac. 1072; Bunneman v. Wagner, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 841; Fox v. Mackenzie, 1 N. D. 298, 47 N. W. 386; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816. It is the theory of a great many of the adjudicated cases, under such statutory provisions, that the bond becomes an unconditional contract or promise to pay whatever judgment may be rendered against the defendant upon the merits of the case, and does not depend upon the regularity of the attachment branch of the case; that the consideration for the promise to pay the judgment is the immediate release of the attached property; that the giving of the bond effects the immediate discharge of the attachment and the release of the property, and the bond then becomes security for any judgment that shall be rendered against the defendant. The following authorities appear to support the contrary rule, to wit: Lehman v. Berdin, 5 Dill.

340, Fed. Cas. No. 8,215; Bates v. Killian, 17 S. C. 553; Love v. Voorhies, 13 La. Ann. 549. But the overwhelming weight appears to be in favor of the rule that where, under a statute similar to § 4404, supra, a party causes a bond to be executed in order to have discharged from attachment property levied on under such writ, providing that the defendant shall perform the judgment of the court, where an affidavit and bond have been executed for the issuance of such writ, after judgment has been rendered against the defendant in such action, the obligors in the bond are precluded and estopped from traversing the truth of the allegations of the affidavit, or setting up that the defendant in the attachment was not the owner of the property levied on.

The judgment of the lower court is affirmed.

All the Justices concur.

on the bond, may set up the invalidity of the attachment. Cadwell v. Colgate, 7 Barb. 253.

And where no affidavit or bond for attachment is filed nor order for attachment issued, a bond conditioned to perform the judgment in the suit is unauthorized, and a judgment against the surety is void, as is also a stay bond given by him. Williams v. Skipwith, 34 Ark. 529.

And the obligors of a bond given for the release of logs attached under color of a lien, and undertaking to pay the amount of any judgment recovered, are not bound by it where the attachment was void. Shevlin v. Whelen, 41 Wis. 88.

And sureties on a replevy bond given for the release of attached property may defend upon the ground that the affidavit in the attachment was insufficient, where such defect renders the attachment void, and this is true although a motion by defendant to dismiss the attachment on this ground had been denied. Neal v. Gordon, 60 Ga. 112.

And where a statute provides that no attachment shall issue against national banks before final judgment, the sureties on a bond given on mesne process, conditioned to pay the judgment, are not bound, since the taking of the property was unlawful and the acceptance of the bond was also unlawful. Pacific Nat. Bank v. Mixer, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718.

VIII. Right to attack in independent suit.

The giving of an under-~~standing~~ for the release of attached property by the defendant in an action on attachment is sustained. Min. 32

Fed. 724. The court said: "While the surety on a bond for the release of an attachment may not, after giving such a bond and securing the release of the attachment, have the attachment dissolved because of a mere irregularity in the attachment proceedings, he may nevertheless show that the attachment proceedings were void. There is no principle of waiver or law of estoppel in this case, or in any of these cases, that deprives the defendant in the attachment suit of his right of action against the plaintiff and the sureties on the attachment bond to recover damages sustained while the attachment is in force, and this we believe to be the law upon the subject." To the same effect is Alexander v. Jacoby, 23 Ohio St. 358.

And the owner of goods in the possession of another does not, by becoming surety on the latter's bond to release them from attachment, waive his right to assert his ownership in an action by him for damages resulting from the loss of possession, his ownership not having been passed upon in the trial of the original suit. Redwitz v. Waggaman, 33 La. Ann. 26.

So, a surety on a bond for the release of property may attack the validity of the attachment in an action by him against his principal for indemnity. Edwards v. Prather, 22 La. Ann. 334.

It has been held, however, that a third person in whose hands property of defendant in attachment proceedings is attached is estopped by procuring another to give a forthcoming bond, and receiving the property, from denying, in an action against the sheriff for its value, where it has been returned to the latter and sold by him, that the property belonged to the defendant. Alf v. Hahn, 28 Kan. 588.

And it was held in Peterson v. Woollen, Kan. 770, 30 Am. St. Rep. 327, 30 Pac. that a surety on a redelivery bond was

the court of appeals of Maryland, under a similar bond, held to like effect. Also, in *Austin v. Burgett*, 10 Iowa, 302. *Inman v. Strattan*, 4 Bush. 445, and *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445, the courts have held to the same effect. New York, Illinois, Wisconsin, Missouri, Michigan, Minnesota, Texas, Arkansas, Washington, Rhode Island, California, Oregon, North Dakota, and South Dakota have, or have had, statutes containing substantially the same provisions as are contained in §§ 4374 and 4404, *supra*. The courts in these states have held that the execution of a bond under and in accordance with these statutes estops the defendant from controverting the attachment, and renders the obligors in the bond absolutely liable for

the amount of any judgment the plaintiff recovers in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out. *Haggart v. Morgan*, 5 N. Y. 428, 55 Am. Dec. 350; *Coleman v. Bean*, 3 Keyes, 94; *Delany v. Brett*, 4 Robt. 712; *Bildersee v. Aden*, 62 Barb. 175; *Dierolf v. Winterfield*, 24 Wis. 143; *Payne v. Snell*, 3 Mo. 409; *Paddock v. Matthews*, 3 Mich. 18; *Kennedy v. Morrison*, 31 Tex. 220; *Ferguson v. Glidewell*, 48 Ark. 195, 2 S. W. 711; *People ex rel. Swan v. Cameron*, 7 Ill. 468; *Hill v. Harding*, 93 Ill. 77; *Sanger v. Hibbard*, 2 Ind. Terr. 547, 53 S. W. 331; *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776; *Brady v. Onfroy*, 37 Wash. 482, 79 Pac. 1004; *Easton v. Ormsby*, 18 R. I. 309, 27 Atl. 216; *Gard-*

in the case must prove this. *Swift v. Tatter*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842.

Where, in a replevy bond given for the forthcoming of property, the defendant in the attachment suit waives the right of exemption, his sureties cannot defend an action on the bond on the ground that their principal had filed his claim for exemption as to the property in question. *Reynolds v. Williams*, 152 Ala. 488, 44 So. 406.

And the obligors on a replevy bond given for attached property, conditioned to pay the amount found due on final hearing, are estopped in an action on the bond to show that defendant did not own the property, where a statute provides that if a party receives property on the strength of such bond, he and his sureties are estopped to deny the validity of the bond or the legality of the proceedings under which the property was obtained. *Stephens v. Greene County Iron Co.* 11 Heisk. 71.

And a third person to an attachment suit, who has replevied the property attached, cannot, after judgment on the attachment, and after demand of the property on the replevy bond, interpose a claim to the property without first having surrendered it to the sheriff, according to the condition of his bond. *Braley v. Clark*, 22 Ala. 361.

See also cases involving replevin bonds under subdivision "Rule where attachment proceedings are void."

VII. Rule where attachment proceedings are void.

Where the attachment proceedings are void, the obligors are held not to be precluded by the giving of a bond for the release of the attachment from attacking the attachment.

Thus, a defective affidavit which renders an attachment void may be taken advantage of by a motion in the principal case, although a replevy bond has been issued. *Bruce v. Conyers*, 54 Ga. 678. The court said: "Ordinarily, a replevy bond will dissolve an attachment, but where there is no 32 L.R.A. (N.S.)

valid attachment, and the defect is not amendable, there is nothing to dissolve. A void thing cannot be made the less void by calling it dissolved." To the same effect is *Camp v. Cahn*, 53 Ga. 558.

So, where an attachment is ordered on the oath of a third party who has no knowledge of the claim, the process is improperly issued, and the defendant does not waive his right to object thereto by executing a bond for the release of the attachment. *Baker v. Hunt*, 1 Mart. (La.) 194.

And where the property attached does not belong to the defendant, and the court therefore has no jurisdiction, his sureties in an action on the bond may set up that he did not own it, although, by the terms of the bond, they undertook to satisfy any judgment recovered. *Quine v. Mayes*, 2 Rob. (La.) 510.

In *Murphy v. Montandon*, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851, it was held that sureties on a bond to pay such judgment as was recovered might, in an action on the bond, show that the affidavit made to secure the attachment was false, and did not comply with the conditions required by the statute. The court said: "The defendants Montandon and Cramer were not parties to the original suit, and could not appear therein, and move for a dissolution of the attachment. They have had no day in court. An attachment issued upon a false or fatally defective affidavit stands in the same position as an attachment issued without any affidavit; and can it be successfully contended that a bond executed to release property from the lien of an attachment issued without affidavit, and therefore without any jurisdiction, is supported by a valuable consideration? If the defendants in this suit cannot go back of the naked bond, then they cannot show that their obligation is without any consideration,—a position, it seems to us, contrary to the plainest principles of justice."

And where a bond conditioned to pay the debt found due was void because of an insufficient affidavit to give jurisdiction in the attachment, the obligors, in an action

ner v. Donnelly, 86 Cal. 367, 24 Pac. 1072; Bunneman v. Wagner, 16 Or. 433, 8 Am. St. Rep. 308, 18 Pac. 841; Fox v. Mackenzie, 1 N. D. 298, 47 N. W. 386; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816. It is the theory of a great many of the adjudicated cases, under such statutory provisions, that the bond becomes an unconditional contract or promise to pay whatever judgment may be rendered against the defendant upon the merits of the case, and does not depend upon the regularity of the attachment branch of the case; that the consideration for the promise to pay the judgment is the immediate release of the attached property; that the giving of the bond effects the immediate discharge of the attachment and the release of the property, and the bond then becomes security for any judgment that shall be rendered against the defendant. The following authorities appear to support the contrary rule, to wit: Lehman v. Berdin, 5 Dill.

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And where no affidavit or bond for attachment is filed nor order for attachment issued, a bond conditioned to perform the judgment in the suit is unauthorized, and a judgment against the surety is void, as is also a stay bond given by him. Williams v. Skipwith, 34 Ark. 529.

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And sureties on a replevy bond given for the release of attached property may defend upon the ground that the affidavit in the attachment was insufficient, where such defect renders the attachment void, and this is true although a motion by defendant to dismiss the attachment on this ground had been denied. Neal v. Gordon, 60 Ga. 112.

And where a statute provides that no attachment shall issue against national banks before final judgment, the sureties on a bond given on meane process, conditioned to pay the judgment, are not bound, since the taking of the property was unlawful and the acceptance of the bond was also unlawful. Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718.

VIII. Right to attack in independent suit.

The giving of an undertaking for the release of attached property does not preclude the defendant from maintaining an action on the attachment bond for damage sustained by the attachment. Anvil Gold Min. Co. v. Hoxsie, 60 C. C. A. 492, 125 32 L.R.A. (N.S.)

Fed. 724. The court said: "While the surety on a bond for the release of an attachment may not, after giving such a bond and securing the release of the attachment, have the attachment dissolved because of a mere irregularity in the attachment proceedings, he may nevertheless show that the attachment proceedings were void. There is no principle of waiver or law of estoppel in this case, or in any of these cases, that deprives the defendant in the attachment suit of his right of action against the plaintiff and the sureties on the attachment bond to recover damages sustained while the attachment is in force, and this we believe to be the law upon the subject." To the same effect is Alexander v. Jacoby, 23 Ohio St. 358.

And the owner of goods in the possession of another does not, by becoming surety on the latter's bond to release them from attachment, waive his right to assert his ownership in an action by him for damages resulting from the loss of possession, his ownership not having been passed upon in the trial of the original suit. Redwitz v. Waggaman, 33 La. Ann. 26.

So, a surety on a bond for the release of property may attack the validity of the attachment in an action by him against his principal for indemnity. Edwards v. Prather, 22 La. Ann. 334.

It has been held, however, that a third person in whose hands property of defendant in attachment proceedings is attached is estopped by procuring another to give a forthcoming bond, and receiving the property, from denying, in an action against the sheriff for its value, where it has been returned to the latter and sold by him, that the property belonged to the defendant. Wolf v. Hahn, 28 Kan. 588.

And it was held in Peterson v. Woollen, 48 Kan. 770, 30 Am. St. Rep. 327, 30 Pac. 128, that a surety on a redelivery bond was

estopped in an action of replevin from asserting title to the property.

IX. Rule under statutes governing right to raise objections.

The giving of a bond for the release of attached property will not preclude the defendant from attacking the validity of the attachment because of insufficient affidavit or ground for attachment, under a statute providing that in all cases the defendant may move to discharge the attachment as in the case of other provisional remedies. *Bates v. Killian*, 17 S. C. 553.

And under such a provision, a defendant may vacate an attachment because of irregular affidavits, on motion made after judgment was entered, although he had given the undertaking required by statute for the discharge of the attachment. *Rowles v. Hoare*, 61 Barb. 266.

And the giving of an undertaking releasing property from attachment does not waive the defendant's right to object to the regularity of the affidavit of attachment, where a section of the statute provides that the defendant may, before or after the release of the property, apply for a discharge of the attachment on the ground of irregularity. *Glidden v. Whittier*, 46 Fed. 437.

And where a statute gives a right to apply for a discharge of an attachment because it was irregularly issued, the right is not lost by giving a bond for the release of the property. *Winters v. Pearson*, 72 Cal. 553, 14 Pac. 304.

And under an act giving the defendant the right to put in issue the truth of the affidavit upon which an attachment is made, the defendant is not precluded from showing in the action that such affidavit is false, by the giving of a bond to dissolve the attachment. *Ward v. Carlton*, 26 Ark. 662.

And a claimant of property which is levied upon as the property of a third person is not precluded by the execution of a forthcoming bond from presenting his claim to the property, or disputing the validity of the attachment, as provided for by another section. *Schwein v. Sims*, 2 Met. (Ky.) 209; *Halbert v. McCullock*, 3 Met. (Ky.) 456, 79 Am. Dec. 556.

But if he fails to prefer his claim according to the last section, he cannot, in an action on the bond, claim that the property was not subject to attachment, where another section provides that, upon a failure to pursue his claim, the fact that the property was not subject to attachment shall be no defense in an action on the bond. *Miller v. Desha*, 3 Bush, 212.

So, the obligors on a bond given to release an attachment against a nonresident, and conditioned to pay the amount found due, cannot contest the fact of nonresidence in an action on the bond, where the statute provides for another manner of raising this point. *Haggart v. Morgan*, 4 Sandf. 198.

And it has been held where statutes provided two modes for the release of attached property, one by motion and the other by

giving an undertaking to pay the judgment, that the giving of the undertaking destroyed the writ of attachment, so that it could not thereafter be dissolved under the other section because of irregularity in the attachment. *Paddock v. Matthews*, 3 Mich. 18; *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776; *Fox v. Mackenzie*, 1 N. D. 298, 47 N. W. 386; *Dierolf v. Winterfield*, 24 Wis. 143; *Correy v. Lake, Deady*, 469, Fed. Cas. No. 3,253.

And where a defendant has the option of trying the regularity of the attachment or giving a bond for its immediate release, the giving of the bond waives his right to maintain an action on the attachment bond. *Gutter v. Joiner*, 56 Wash. 202, 105 Pac. 457.

And where a defendant proceeds under the section authorizing an actual discharge of the attachment, instead of the section merely authorizing a release of the property, and gives a bond conditioned on the payment of the judgment recovered, he cannot, on motion, attack the validity of the attachment. *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

X. Miscellaneous.

A surety on a bond executed for the delivery of property, who signed upon the officer's representation that the property had been attached, and who was not present when the supposed levy was made, is not liable thereon. *Connell v. Scott*, 5 Baxt. 595.

And a surety on a forthcoming bond is not estopped by the fact of his suretyship from asserting a right acquired by him under the foreclosure of a prior lien. *Kelley v. Sitlington*, 54 Mo. App. 168.

In *Blatchley v. Adair*, 5 Iowa, 545, it was held that the giving of a bond for the release and delivery of property attached raised a presumption that the property was the defendant's, and the requirements of pleading were held not satisfied by an averment that it was not his, since the pleadings should aver in whom the property is.

Where sureties in an attachment bond undertake to redeliver the property attached, it is no defense that the property was subject to a mortgage, and had all been taken to satisfy that, since they might have paid off the mortgage and produced the property. *Farr v. Scott*, 50 Ill. 490.

J. T. W.

PENNSYLVANIA SUPREME COURT.

GEORGE GRESS and Wife, Appts.,
v.

PHILADELPHIA & READING RAILWAY
COMPANY.

(228 Pa. 482, 77 Atl. 810.)

Negligence — crossing railroad track — child.

1. A girl within ten days of being four-

teen years old, who is strong, capable beyond her years, and fully acquainted with the *locus in quo*, is negligent as matter of law in passing under closed safety gates at a railroad crossing, and attempting to cross the tracks when a clear view cannot be secured of them; and the railroad company is therefore not liable in case she is killed or injured in the attempt by a passing train.

Same — imputed — custodian of child.

2. Parents who commit a child of tender years to the custody of their older child are affected by the latter's negligence so that, in case the former is killed through negligence to which the latter contributes, the parent cannot hold the other negligent party liable for the death.

(Mestrezat, Elkin, and Moschzisker, JJ., dissent.)

(July 1, 1910.)

Note. — Imputing negligence of custodian of child non sui juris to parent in action by latter, or by administrator, for death or injury of child.

The question under annotation is to be distinguished from the question whether contributory negligence of a parent or custodian of a child will prevent recovery by the child for negligent injury. That question is discussed in notes to Chicago City R. Co. v. Wilcox, 21 L.R.A. 76, and Neff v. Cameron, 18 L.R.A. (N.S.) 320.

Again, the question under annotation is to be distinguished from the question which frequently arises on the same state of facts, whether the parent of the child was guilty of contributory negligence in intrusting the custody of the child to another person. A convenient illustration of the distinction is afforded by Ehrmann v. Nassau Electric R. Co. 23 App. Div. 21, 48 N. Y. Supp. 379, where the court, after holding that the parents were not guilty of contributory negligence, as a matter of law, in intrusting the custody of the child to an older child, said in effect that the question whether the negligence of the older child was imputable to the parent was not before the court, since the trial court charged that, if the death of the younger child was due to the negligence of the older child, there could be no recovery.

Logically, the question whether the negligence of the custodian of the child is imputable to the parent does not arise, unless it is held, or assumed for the purposes of the point, that the negligence of the parent himself would have precluded recovery, or at least have reduced the amount thereof in the proportion of his interest as a beneficiary. That question, however, is not within the scope of this note, but is treated in the note to Vinnette v. Northern P. R. Co. 18 L.R.A. (N.S.) 328. The question here considered is simply whether the negligence of the custodian of the child is imputable to the parent with the same effect upon the 32 L.R.A. (N.S.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Lebanon County entered upon a verdict directed for defendant in an action brought to recover damages for the death of plaintiffs' children, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Walter C. Graeff for appellants.

Messrs. Jefferson Snyder and Charles H. Killinger, for appellee:

Julia Gress was guilty of contributory negligence, as she had sufficient knowledge and experience to understand the danger at this crossing and to avoid it.

Parker v. Washington Electric Street R. Co. 207 Pa. 441, 56 Atl. 1001; Nagle v. Allegheny Valley R. Co. 88 Pa. 38, 32 Am. Rep. 413; McCool v. Lucas Coal Co. 150 Pa. 638, 24 Atl. 350; Smith v. Hestonville,

action as if the negligence had been the personal negligence of the parent.

The note is confined to cases which have expressly passed upon the point, and does not include the cases which have assumed that the negligence of the custodian, if established, would preclude recovery.

In a few cases instructions of the trial court covering the point annotated have been passed upon on appeal without discussing the point. Such cases are not of special value. See O'Flaherty v. Union R. Co. 45 Mo. 70, 100 Am. Dec. 343; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Tecker v. Seattle, R. & S. R. Co. — Wash. —, 111 Pac. 791.

In denying the right of a father to recover for an injury to his child, because of the contributory negligence of an older sister having her in charge, the court said in Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670: "Both parties to the transaction were represented by agents,—the railroad company by its brakeman and engineer, and the father of the girl by the elder sister who had her in charge,—and both were responsible for the acts or omissions of their respective agents. What a party does by his agent he does himself, and the case stands no otherwise than it would have stood had the father himself been present, taking charge of the child."

The negligence of a grandmother in whose charge was a girl seven years old, in allowing her to go upon a railroad track to pick coal, where she was struck by a locomotive, was held to be chargeable to the child's father in an action by him to recover damages. Pratt Coal & I. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555.

The gross negligence of the custodian in taking a child eleven years old upon a dangerous railroad trestle is in law imputable to the father in an action by the father for the son's death. Atlanta & C. Air Line R. Co. v. Gravitt, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550.

But the custodian of a child cannot prop-

M. & F. Pass. R. Co. 92 Pa. 450, 37 Am. Rep. 705; Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; Payne v. Chicago & A. R. Co. 136 Mo. 562, 38 S. W. 308.

The contributory negligence of Julia Gress is imputed to her parents in the action brought by them to recover damages for the death of their minor son, killed while in her custody.

Pittsburg, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421; North Pennsylvania R. Co. v. Mahoney, 57 Pa. 187; Glassey v. Hestonville, M. & F. Pass. R. Co. 57 Pa. 174; Smith v. O'Connor, 48 Pa. 218, 86 Am. Dec. 582; Pennsylvania Co. v. James, 81 Pa. 194; Johnson v. Reading City Pass. R. Co. 160 Pa. 647, 40 Am. St. Rep. 752, 28 Atl. 1001; Faust v. Philadelphia & R. R. Co. 191 Pa. 420, 43 Atl. 329; Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670;

erly be regarded as likewise the representative or agent of the child's mother, when, by express statute, the father is vested with the control of his minor child, and the mother is not accountable for the conduct of a custodian chosen by the father, so as to defeat a recovery by her. *Ibid.*

As shown in the note to *Vinnette v. Northern P. R. Co.* 18 L.R.A.(N.S.) 328, there is some conflict of authority upon the question whether the negligence of the parent himself will preclude an action by him as administrator, for the death of a child. Of course, in those jurisdictions in which that question is answered in the negative, the distinctive question under annotation cannot properly arise; but in those jurisdictions holding that the negligence of the parent will bar an action by him in a representative capacity, practically the same question, as to imputing negligence of the custodian to the parent, arises that is presented when the action is by the parent in his own behalf for injury to the child. And so, in those jurisdictions, it is generally held that the negligence of the custodian is imputable to the parent, and prevents recovery by him as administrator, just as his own negligence would have done.

Thus, recovery for the death of his child was denied the father as administrator, in *Chicago & N. W. R. Co. v. Schumilowsky*, 8 Ill. App. 613, because the accident was the result of the negligence of the child's uncle, in whose charge it had been left, in allowing it to stray away.

The negligence of the driver of a wagon to whom had been intrusted the care of a boy nine years old, in crossing a railroad track in front of an approaching train, was imputed to the father of the boy, in an action against the railroad by the administrator to recover for the boy's death, in *Toledo, W. & W. R. Co. v. Miller*, 76 Ill. 278.

Lake Erie & W. R. Co. v. Pike, 31 Ill. App. 90, was an action based upon a very 32 L.R.A.(N.S.)

Atlanta & C. Air-Line R. Co. v. Gravitt, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550.

Stewart, J., delivered the opinion of the court:

The action was brought by the plaintiffs to recover damages for the loss of two of their children, a girl and a boy, who were killed while attempting to pass over the tracks, five in number, of the defendant company, at a public crossing in Lebanon, by a passing train. The girl was fourteen years old, lacking ten days. The boy was about six. The accident occurred at mid-day, while the children were on their way home from school in company with many others. When they approached the crossing, they found the gate down, arresting their further progress. While standing there a box car was shunted from the east,

similar state of circumstances, and the court applied the same rule.

The negligence of a girl twelve years of age, while acting in the capacity of nurse to a child of three and one half years, resulting in the child's death from an accident, was held imputable to the father in an action by him as administrator of the child's estate, in *Schlenk v. Central Pass. R. Co.* 15 Ky. L. Rep. 409, 23 S. W. 589.

The negligence of a child's custodian contributing to an accident to the child is imputable to the father in an action by him as administrator, when he is the sole beneficiary of the action. *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 18, 28 L.R.A. 486, 49 Am. St. Rep. 909, 31 S. W. 163.

It will be observed that the cases just cited arose in jurisdictions which, while repudiating the doctrine that imputes the negligence of the parent or custodian to the child, hold that the negligence of the parent himself will preclude a recovery by him as administrator.

The results in *Williams v. Gardiner*, 58 Hun, 508, 12 N. Y. Supp. 612, holding that the negligence of an elder daughter in charge of a child four years old was imputable to the father, and prevented a recovery by him as administrator, and in *Paige v. New York C. & H. R. R. Co.* 111 App. Div. 828, 98 N. Y. Supp. 183, holding that the contributory negligence of the grandmother of a child nineteen months old barred a recovery for the child's death, in an action by the father as administrator,—may probably be accounted for by the New York doctrine, which imputes the negligence of the parent or custodian to the child himself, so as to prevent a recovery by him in case he survives the injury, the inability of the child to have recovered in the event he had survived his injuries being, of course, in itself, fatal to a recovery for his death.

The case of *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71, is opposed to the

which, while it did not entirely clear the crossing at the point where it rested, left unobstructed so much of the crossing as was directly in front of the point where the children stood, but concealed from their view the tracks beyond that on which it rested to the west. This being the situation the children, with a view of crossing over, passed under the gate. They ran across the first track, the girl leading the boy, directly in the rear of the shunted car, which was at rest on the second track, and without stopping continued over the next track beyond, still running, and then entered upon the third track, when the boy fell. While his sister was helping him to his feet, both children were struck by a train coming from the west. The negligence alleged was failure to give proper signal of the approach of the train, and undue rate of speed. The trial judge directed a verdict for the defendant on the ground of contributory negligence.

This is the only feature of the case that

majority doctrine on the question under annotation. The court in that case took the view that when parents cannot give their personal supervision to the child, and they place it in charge of a proper person and he acts negligently, such negligence cannot be imputed to the parents. The court said: "If the rule denying relief to a party who has been negligent arose out of consideration for the defendant, this question must be answered in the affirmative, for if the injury to the deceased was contributed to by others than the defendant, the result as to defendant is the same whether this contributory negligence arose from the acts of the parents or from another to whose custody the parents had intrusted the child. But as we have already seen, this rule has its primary foundation upon grounds of public policy, and is not intended especially for the benefit of the defendant. When, therefore, the parents, who are primarily intrusted with the protection and care of their infant children, and who are entitled to the pecuniary compensation which the law allows for a wrongful act resulting in their death, exercise reasonable and ordinary care, the public interests are subserved, and there is no good reason why the negligence of the person in charge of the child should be imputed to the parent, and through the parent to the child itself." In that case the child died as a result of the injuries, and the action was by the parent as administrator. As shown in the note in 18 L.R.A. (N.S.) 331, it was subsequently held in Iowa (*Wymore v. Mahaska County*, 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264), that even the personal negligence of the parents will not preclude recovery by an administrator in an action for the death of the child, even if they are the sole beneficiaries. Had that view been adopted before the *Walters Case* came be- 32 L.R.A. (N.S.)

calls for present consideration. Of course, for an accident occurring under such circumstances to an adult, there would be no liability on the part of the railroad company. Contributory negligence would defeat recovery in such case. Is it sufficient here? The action is by the parents. If both these children were lacking in capacity to understand and appreciate the danger to which they would necessarily be exposed in attempting to cross over the tracks of a railroad under such conditions as were here present, then clearly the parents were negligent of their duty in allowing them to thus expose themselves. Either they should have restrained them, or put them in the care of one who would. No one knew quite so well as they the capacity of the children to avoid danger. The only inference to be derived from the testimony of the father is that he had confidence in the ability of the older one, the girl, and that he intrusted to her care the safety of the younger. Upon no other theory could his

fore the court, it would not have been necessary in that case to consider the question as to imputing negligence of the custodian to the parent, since, of course, if the personal negligence of the parent would not preclude a recovery by him as administrator, the negligence of the custodian could not have that effect, at least upon the theory that his negligence was chargeable to the parent. The *Walters Case*, however, was decided before the *Wymore Case*, and rests on reasoning that would be applicable in an action by the parent in his own behalf for injuries to the child, or to an action by the parent as administrator for the death of the child, assuming that the Iowa court had adopted the view that prevails in most jurisdictions, that the negligence of the parent himself will preclude recovery for the child's death in an action by him as administrator.

The question whether the negligence of one parent will affect the right to recover for the death of a child in an action by, or for the benefit of, the other parent, is treated in connection with the note to *Vinnette v. Northern P. R. Co.* 18 L.R.A. (N.S.) 328, and it is not necessary to repeat the cases in this note.

The decision in *Taylor, B. & H. R. Co. v. Warner*, — Tex. Civ. App. —, 60 S. W. 442, holding that the contributory negligence of the uncle, who was driving at the time of the accident, would not preclude recovery by the parent for the death of the child, was upon the ground that the latter was in the custody of the father, who was also in the vehicle, and not in the custody of the uncle. The implication seems to have been that if the parent had not accompanied the child, the uncle's negligence would have prevented a recovery by the parent.

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conduct with respect to the younger child be excused or extenuated. To suffer a child of such tender years unattended to attempt a crossing such as this four times daily could only be characterized as extreme negligence. The girl had been attending this same school for some five or six years, during all this time crossing these tracks four times daily. The father had repeatedly instructed her as to the care which she should observe in crossing over. She was a bright, intelligent girl, over 5 feet in height, well and strong, accustomed to housework, and capable beyond her years, as the evidence clearly establishes. When asked whether she performed services about the house, the father answered, "Yes, sir; everything in the house that could be done." He then indicated, scrubbing, washing, helping at cooking. He further said she was well built and strong, milked cows, helped to cook, washed, and scrubbed. This testimony of the father derives added significance from the fact that his business was that of a landlord. John Ross, a witness called by plaintiffs, testified that he had seen her do all kinds of household work; that she was intelligent enough to look out for accidents from railroad trains, and to know what safety gates were used for. When asked the direct question whether he had put the boy in charge of the girl, the father's reply was, "Well, they were together. They always were together." Again when asked: "But you never trusted the boy alone over that railroad? You trusted him to go with his sister?" He replied: "They always went together." The testimony above referred to as to the capacity of the girl showed that the father had at least some reason to believe in her ability to take care of her younger brother; and while he does not say that he intrusted the boy to her care, it admits of no other conclusion than that he did. From the evidence in the case several conclusions are unavoidable. First. If it would have been negligence in an adult to attempt to cross over the tracks under the conditions we have here, it was negligence in the girl to make the attempt. The legal presumption of her incapacity to appreciate and avoid injury had reached that point in the diminishing scale when it was almost a negligible quantity. She was within ten days of being fourteen years old, when the presumption would have been just the opposite. Against this feeblest presumption in her case is the testimony as to her years of experience in connection with the very danger which she here risked, and her unusual capacity in general affairs. "In clear cases, where the facts are settled and there can be no reason-

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able doubt as to the inferences to be drawn, the question may be determined by the court as matter of law." *Parker v. Washington Electric Street R. Co.* 207 Pa. 438, 56 Atl. 1001. Second. The only inference derivable being that the father had committed the younger child to the sister as a care taker, and, the accident having occurred through the contributing negligence of the sister, the latter's negligence must be imputed to the father, the action being for his benefit. The care taker was of his own selection. She stood towards her brother in *loco parentis* by the parent's own appointment, and for any loss which resulted to him from her negligence, no right of action could arise. It seems to be true that in our own state no express adjudication is to be found where this doctrine has been asserted and applied, and yet cases are not wanting where the doctrine is impliedly recognized. In *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187, it is said by Sharswood, J.: "If, however, this was an action by the father to recover damages for the death of the child, a very different question would be presented. It would most probably be held that it was negligence to suffer such an infant to be on the streets without a care taker, and he could not hold the defendant responsible, whether he had appointed a care taker who was negligent, or left the child to roam at large without one." *Kroesen v. New Castle Electric Street R. Co.* 198 Pa. 30, 47 Atl. 851, impliedly recognizes the rule. There can be no question as to the general rule. "Imputable contributory negligence which will bar the plaintiff from recovery, exists when the plaintiff, although not chargeable with personal negligence, has been, by the negligence of a person in privity with him, and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant. In cases of this character, if the negligence of the person exposing the plaintiff to injury is a proximate cause of the injury, the plaintiff cannot recover, because the contributory negligence of such person will be imputed to him." 7 Am. & Eng. Enc. Law, 2d ed. p. 445. The numerous cases cited in support of the text show how generally the rule obtains. It is supported by abundant reason, and we accept it as the law. It follows that the learned trial judge committed no error in declining to take off the nonsuit which he had directed.

The assignments of error are overruled, and the judgment affirmed.

Mestrezat, Elkin, and Moschzisker, JJ., dissenting:

In our opinion the question of the con-

tributary negligence of the child was for the jury, and not for the court. Therefore we dissent from the views expressed in the majority opinion.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON

v.

ALEX McDOWELL, Appt.

(— Wash. —, 112 Pac. 521.)

Jury — operation of Federal Constitution.

1. The guaranty in the 6th Amendment of the Federal Constitution of an impartial jury has no application to trials in a state court for violation of state laws.

Same — requiring taxpayers.

2. Requiring jurors in a criminal case to be taxpayers does not violate the constitutional provision that the right of trial by jury shall remain inviolate.

Evidence — similar attempts — admissibility.

3. Upon prosecution for an assault with attempt to commit sodomy, evidence is admissible of an attempt by accused to commit a similar act upon another person present at the time, immediately after making the attempt for which he is on trial.

Appeal — comment on evidence — remarks upon witness.

4. A remark of the trial judge, in overruling an objection that the questions asked a witness were leading, that he was only thirteen years old, very young, that such questions could be asked such witnesses, is not reversible error as an unconstitutional comment on the facts, where the testimony as to his age does not conflict.

Same — questions reviewable — party not appealing.

5. Whether or not a convict was given

Note. — Constitutionality of statute requiring jurors to be taxpayers.

Reece v. Knott, 3 Utah, 451, 24 Pac. 757, the only other case found directly involving the constitutionality of a statute requiring that jurors shall be taxpayers, takes the opposite view from that held in *STATE v. McDOWELL*. The ground upon which it is held in *Reece v. Knott*, that such a statute is unconstitutional, is that the framers of the Constitution used the word "jury" with reference to its signification at common law, and that the legislature cannot prescribe different qualifications. The court reasons that if such power be conceded, it might be exercised in such a way as practically to deny the right to a jury trial altogether, saying: "Where are we to draw the line if the power to prescribe a property qualification be conceded? Suppose 32 L.R.A. (N.S.)

too light a sentence cannot be reviewed on his appeal, at the instance of the state.

(January 3, 1911.)

A PPEAL by defendant from a judgment of the Superior Court for Kittitas County, convicting him of assault with attempt to commit sodomy. Affirmed.

The facts are stated in the opinion.

Messrs. William M. Thompson and Keith W. Dunlop, for appellant:

The court erred in permitting the prosecution to lead the witness, and in making the comments as to his age.

Hicks v. United States, 2 Okla. Crim. Rep. 626, 103 Pac. 873; *Looney v. People*, 81 Ill. App. 370; *State v. Walters*, 7 Wash. 250, 34 Pac. 938, 1098; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *State v. Hyde*, 20 Wash. 236, 55 Pac. 49; *State v. Crotts*, 22 Wash. 245; 60 Pac. 403, 13 Am. Crim. Rep. 647; *State v. Thield*, 36 Wash. 365, 78 Pac. 919; *State v. De Pasquale*, 39 Wash. 260, 81 Pac. 689; *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047; *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443; *Smarrt v. State*, 112 Tenn. 539, 80 S. W. 586; *Mumford v. State*, 45 Tex. Crim. Rep. 590, 78 S. W. 1063; *McIntosh v. State*, 140 Ala. 137, 37 So. 223; *Roberson v. State*, 40 Fla. 509, 24 So. 474; *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684; *O'Donnell v. People*, 110 Ill. App. 250; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842; *Wilson v. Territory*, 9 Okla. 331, 60 Pac. 12, 12 Am. Crim. Rep. 582; *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797; *Zysman v. State*, 42 Tex. Crim. Rep. 432, 60 S. W. 669; *State v. Staley*, 45 W. Va. 792, 32 S. E. 198; *Synon v. People*, 188 Ill. 609, 59 N. E. 508; *People v. Hill*, 37 App. Div. 327, 56 N. Y. Supp. 282; *Manning v. State*, 37 Tex. Crim. Rep. 180, 39 S. W. 118; *Chancey v. State*,

the legislature should say that before a man was eligible he should be worth \$10,000,—and certainly they have a right to exempt from taxation all property under this amount,—would it not operate, in a country where most of the people are poor, to the entire exclusion of the right of trial by jury? And no matter however oppressive this must seem, yet, if you concede to the legislature the power in the one case, you must grant it in the other."

In view of the fact, however, that a number of states impose such a qualification, and under it personal and property rights are constantly being adjudicated without objection to the constitutionality of the juries so constituted, the presumption would seem to be in favor of the correctness of the decision in *STATE v. McDOWELL*.

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50 Tex. Crim. Rep. 85, 96 S. W. 12; Briggs v. People, 219 Ill. 330, 76 N. E. 499; State v. Logan, 104 La. 362, 29 So. 110; Feinberg v. People, 174 Ill. 609, 51 N. E. 798; Campbell v. State, 111 Wis. 152, 86 N. W. 855.

Incorporating among the qualifications of a juror a condition that he must be a taxpayer is in violation of the right of one accused of crime, guaranteed by article 6 of Amendments to the United States Constitution, and paragraph 22 of article 1 of the state Constitution.

Reece v. Knott, 3 Utah, 451, 24 Pac. 757; State v. Glenn, 54 Md. 575; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Ross v. Irving, 14 Ill. 171; Stilwell v. Kellogg, 14 Wis. 462, 24 Cyc. Law & Proc. p. 102; Anderson v. Caldwell, 91 Ind. 454, 46 Am. Rep. 613; Frazee v. Beattie, 26 S. C. 348, 2 S. E. 125; State ex rel. West v. Cobb, — Okla. —, 24 L.R.A.(N.S.) 639, 104 Pac. 361; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Work v. State, 2 Ohio St. 297, 59 Am. Dec. 671; State ex rel. Jackson v. Kennie, 24 Mont. 45, 60 Pac. 589; Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066; State v. McClear, 11 Nev. 39; Lavey v. Doig, 25 Fla. 611, 6 So. 259; Wheeler v. Caldwell, 63 Kan. 776, 75 Pac. 1031; Vaughn v. Scade, 39 Mo. 600; State ex rel. Mullen v. Doherty, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; State v. Strasburg, — Wash. —, 110 Pac. 1020.

It was error to admit testimony of a witness as to an independent crime committed upon him.

Buell v. Aberdeen State Bank, 58 Wash. 407, 108 Pac. 951; State v. Oppenheimer, 41 Wash. 630, 84 Pac. 588; State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523; Dow v. Spenny, 29 Mo. 386.

Messrs. E. K. Brown and Austin Mires, for the State:

The Amendment to the United States Constitution has no reference to prosecutions in state courts for the violation of a state law.

8 Cyc. Law & Proc. p. 1091; 24 Cyc. Law & Proc. pp. 103-105; Cooley, Const. Lim. 5th ed. 26; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Supreme Justices v. Murray (Supreme Justices v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Kansas v. Bradley, 26 Fed. 289; Re King, 51 Fed. 434.

It is competent for the state, through its proper legislative agency, to impose such requirements as it sees fit as to the eli-

gibility of jurors, the manner and method of their selection, and their qualifications.

24 Cyc. Law & Proc. pp. 186, 187, 201-203; Dowdy v. Com. 9 Gratt. 727, 60 Am. Dec. 314; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; Saginaw v. Campau, 102 Mich. 594, 61 N. W. 65; People v. Meyer, 162 N. Y. 357, 56 N. E. 758; Beatty v. Com. 91 Ky. 313, 15 S. W. 856; Perry v. State, 9 Wis. 19; People v. Thompson, 34 Cal. 671; State v. Arnstein, 9 Kan. App. 697, 59 Pac. 602; Redford v. Spokane Street R. Co. 15 Wash. 419, 46 Pac. 650; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. Lattin, 19 Wash. 57, 52 Pac. 314.

In the allowance of leading questions and the answers thereto the trial court has a very wide discretion; and reversible error can be predicated thereon only where manifest abuse of such discretion is clearly shown, which is prejudicial to the constitutional rights of the defendant.

8 Enc. Ev. p. 155; State v. Watson, 81 Iowa, 380, 46 N. W. 868; State v. Cambron, 20 S. D. 282, 105 N. W. 241; State v. Elwood, 15 Wash. 453, 46 Pac. 727; State v. Surry, 23 Wash. 655, 63 Pac. 557; Mann v. State, 134 Ala. 1, 32 So. 704; State v. Stevens, 119 Iowa, 675, 94 N. W. 241; State v. Roland, 11 Idaho, 490, 83 Pac. 337; People v. Smith, 134 Cal. 453, 66 Pac. 669.

In proving a crime, all the *res gestæ* may always be shown, though it involve proof or evidence concerning the commission of another and independent crime by the defendant at the same time.

Wigmore, Ev. § 218; 11 Enc. Ev. 399-403; Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. Craemer, 12 Wash. 217, 40 Pac. 944; State v. Hyde, 22 Wash. 551, 61 Pac. 719; State v. Norris, 27 Wash. 453, 67 Pac. 983, 14 Am. Crim. Rep. 197; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Patchen, 37 Wash. 24, 70 Pac. 479; State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523.

Gose, J., delivered the opinion of the court:

The defendant was convicted of the crime of assault with intent to commit sodomy, and has appealed from the judgment entered upon the verdict.

The first question raised is that the requirement that a juror shall be a taxpayer (Laws 1909, p. 131) conflicts with the 6th article of Amendment to the Federal Constitution, which guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial

by an impartial jury. This Amendment has no reference to prosecutions in state courts for the violation of a state law. 8 Cyc. Law & Proc. p. 1091; Cooley, Const. Lim. p. 46; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494. In the Maxwell Case the accused was tried for a felony in the state of Utah, in the state court, before a jury composed of eight jurors, and convicted and sentenced to imprisonment. The Constitution of Utah provides that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors." Art. 1, § 10. It was contended, among other things, that the clause quoted violated the 6th Amendment of the Federal Constitution. The court said that the contention had merit if the Amendment was applicable to criminal prosecutions of citizens of the United States in state courts, that the Amendment was not applicable, and that "the states, so far as the Amendment is concerned, are left to regulate trials in their own courts in their own way." Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, and *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514, cited by the appellant, hold that the Amendment is operative in criminal prosecutions in the territories, and that the term "jury" means a jury of twelve persons.

It is also contended that the requirement that a juror shall be a taxpayer is violative of § 21 of article 1 of the state Constitution, which provides that "the right of trial by jury shall remain inviolate." A juror was not required to be a taxpayer under the laws of the territory when the Constitution was adopted. The precise point raised is that the legislature is powerless to prescribe any qualification for jury service in addition to that required at the time of the adoption of the Constitution. This contention, we think, is without merit. While we think the point was ruled adversely to appellant's contention in *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355, we will proceed to a consideration of the question as if it were not controlled by that case. In *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650, in considering another statute fixing the qualifications for jury service, this court said: "That the act requires that jurors shall be householders—a qualification not required by the old law—furnishes no sufficient reason in our judgment for holding that it is unconstitutional." The guaranty, says Johnston, Ch. J., in *Wheeler v. Caldwell*, 68 Kan. 776, 32 L.R.A. (N.S.)

75 Pac. 1031, means "that the right of trial by jury shall be and remain as ample and complete as it was at the time when the Constitution was adopted." In *Vaughn v. Scade*, 30 Mo. 600, it was held that the guaranty means a jury of twelve men, but that "the nonessentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters," are left to the wisdom of the lawmaking body, and that the guaranty is preserved "in retaining the substance of that form of trial as it was known and practised among those from whom we derived it." In *State v. Strasburg*, — Wash. —, 110 Pac. 1020, we said that the guaranty means something more than the "preservation of the mere forms of trial by jury." In *State v. McClear*, 11 Nev. 39, it was said: "We think that the term 'jury,' as it is used in the Constitution, means twelve competent men who are free from all the ties of consanguinity and all other relations that would tend to make them dependent on either party. It means twelve men who are not interested in the event of the suit, and who have no such bias or prejudice in favor of, or against, either party as would render them partial toward either party." And that the statute which took away the right of the state and the accused to challenge a juror for actual bias contravened the constitutional guaranty, in that the right of the parties to have the case tried by an impartial jury was of the essence and substance of the guaranty. We fully acquiesce in this view. In *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, it is said that the term "jury" has been variously defined as "twelve good men and true," "neighbors and equals," "peers" of the parties to the litigation. In *Stokes v. People*, 53 N. Y. 164, 18 Am. Rep. 492, it was held that "the mode of procuring and impaneling" the jury may be regulated by statute, but that the right of trial by an impartial jury must be preserved. In *People v. Harding*, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555, the court said that all the essential incidents of trial by jury as it existed at the time of the adoption of the Constitution are protected by the guaranty. In *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53, it was said that the three essential attributes of a jury trial are numbers, impartiality, and uniformity. In *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958, the principal question presented was whether a party was entitled to a jury trial in a quo warranto proceeding. Preliminary to giving a negative answer to that question, it was said that "the right of trial by jury

as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate." Elliott, J., speaking for the court in *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613, said that "matters of practice may always be changed and regulated by the legislature." In *Reece v. Knott*, 3 Utah, 451, 24 Pac. 757, cited by appellant, it is held that the statute of the territory of Utah, providing that only taxpayers shall be eligible to jury service, is violative of the 7th Amendment to the Federal Constitution. The court in that case says *arguendo* that, if the legislature may require the juror to be a taxpayer, it may say that, before he is eligible, he shall be worth \$10,000, and that, if the power to so fix the qualification is once conceded, it can be extended so as to become oppressive. We do not agree with either the conclusion or the reasoning of the court. We entertain no doubt that the standard of qualification for jury service might be so raised as to be subversive of the right of trial by jury. We think that the logic of the cases is that the right to a jury trial shall remain inviolate where the right existed when the Constitution was adopted; that the term "jury" signifies a body of twelve impartial men, peers of the parties; and that the guaranty is that these essential features cannot be taken away by the lawmaking power. This, we think, has been the construction from the beginning. The legislature, in harmony with this view, has from time to time changed the qualifications of jurors, but has always preserved the essential and fundamental features of the jury system as we had it when the Constitution was adopted. This, we think, satisfies the guaranty. See also 24 Cyc. Law & Proc. p. 187.

The testimony of the state shows that the act charged was committed in a barn between the hours of 10 and 11 o'clock P. M., and that three boys were present. One of the boys was permitted to testify that immediately after the crime charged had been committed, and at the same place, the defendant attempted to commit a similar indecent act upon him. The admission of the latter testimony is assigned as error. "Evidence of another and distinct crime is admissible if it was committed as part of the same transaction, and forms a part of the *res gestæ*." 12 Cyc. Law & Proc. p. 407. In *State v. Gainor*, 84 Iowa, 209, 50 N. W. 947, the defendant was prosecuted on a charge of murder in the first degree, and convicted of manslaughter. The witness testified that immediately after the shooting, the defendant pointed his pistol at another party. The court held that the evidence "was essentially a part of the *res*

gestæ," and competent. See also *Wigmore*, Ev. § 218; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Wilkerson v. State*, 31 Tex. Crim. Rep. 86, 19 S. W. 903; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523. In the *Wilkerson* Case the appellant was convicted of the murder of his wife. The state was permitted to prove that immediately after killing his wife, and within forty steps of her dead body, the defendant shot and killed another person. The court said that the evidence of the second killing was competent as *res gestæ*.

The appellant cites in support of this assignment *Buell v. Aberdeen State Bank*, 58 Wash. 407, 108 Pac. 951, and *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588. The objectionable evidence in these cases was not a part of the *res gestæ*. We think the second act was admissible as a concomitant part of the criminal act charged in the information.

During the examination of one of the state's witnesses, a boy thirteen years of age, objections were several times interposed on the ground that the questions were leading. In ruling upon the objections, the court remarked: "Oh, the boy is only thirteen years of age." "This is a very young witness, remember." "You can ask leading questions of a witness who is only thirteen years old." These remarks, it is said, are comments on the facts within the meaning of article 4, § 16, Const. We cannot accede to this view. The court was speaking to counsel, and had a right to assign a reason for his ruling. The boy had testified that he was only thirteen years of age, and there was no other testimony on that subject. In *State v. Gohl*, 46 Wash. 408, 90 Pac. 259, this court remarked upon the distinction between technical and prejudicial error. It said that the instructions "manifestly do comment on the facts, but erroneous instructions do not necessitate a reversal unless they tend in some manner to prejudice a party's cause before the jury," and that a party was not prejudiced by a mere statement of an uncontroverted fact. It was further said that the trial judges should scrupulously avoid such comment, but that appellate courts cannot reverse a judgment for error without prejudice. See also *State v. Belknap*, 44 Wash. 605, 87 Pac. 934. In *State v. Surry*, 23 Wash. 655, 63 Pac. 557, the court, speaking to the constitutional provision here invoked, said: "But we do not think it was intended by this provision to prevent the judges from giving counsel the reasons for their rulings upon questions presented dur-

ing the progress of a trial, or to prohibit them, in all cases, from stating, when necessary, the facts upon which they base their conclusions." *State v. Hyde*, 20 Wash. 236, 55 Pac. 49; *State v. Crotts*, 22 Wash. 245, 60 Pac. 403, 13 Am. Crim. Rep. 647; *State v. Thield*, 36 Wash. 365, 78 Pac. 919; *State v. De Pasquale*, 39 Wash. 260, 81 Pac. 689, and *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047, cited by the appellant, were decided upon facts so dissimilar that they are not in point. In *Hicks v. United States*, 2 Okla. Crim. Rep. 620, 103 Pac. 873, cited by the appellant, one Fred Warren was the only witness who connected the defendant with the crime charged. During his cross-examination, the trial judge interrupted counsel, and, among other things, said: "That boy is all right." At another time the judge said to the witness while still upon the witness stand: "After the trial is all over, I want to see you and your father in my room." The conduct of the judge was, of course, held to be error. Further comment on the case is unnecessary. There is no merit in the assignment that the evidence is insufficient to support the verdict. Two boys who were eyewitnesses to the crime testified positively to its commission. A discussion of the evidence would be neither profitable nor edifying. The state suggests that the appellant was sentenced under the wrong statute, and that he should have received a heavier sentence. That question cannot be reviewed on this appeal.

The judgment is affirmed.

Rudkin, Ch. J., and Fullerton, Park-
er, and Mount, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

PHILIP OSBORNE

v.

KANAWHA COUNTY COURT et al.

(— W. Va. —, 69 S. E. 470.)

Voter — convict who has served sentence.

A citizen who has been convicted of bribery in an election, and has undergone the punishment fixed by the judgment, is a qualified voter.

(Robinson, P., and Williams, J., dissent.)

(November 2, 1910.)

Headnote by BRANNON, J.
32 L.R.A.(N.S.)

APPPLICATION for a writ of mandamus to compel registration of petitioner as a voter. Writ awarded.

The facts are stated in the opinion.

Messrs. Littlepage, Cato, & Blesdoe for petitioner.

Messrs. Avis & Hardy for respondents.

Brannon, J., delivered the opinion of the court :

Philip Osborne was indicted for bribery in an election, and in 1909 pleaded guilty, and judgment was rendered against him for a fine and costs, which he has paid. Osborne, on the 31st day of October, 1910, appeared before the county court of Kanawha county and moved it to put his name as a voter upon the registration list of voters, and the court refused to do so. He asks this court for a mandamus to compel the county court to register him as a voter. The county court defends this application only on the ground of such conviction of Osborne of bribery in an election.

The Constitution, art. 4, § 1 (Code 1906, p. 7), reads as follows: "The male citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside; but no person who is a minor, or of unsound mind, or a pauper, or who is under conviction of treason, felony, or bribery in an election, or who

Note. — Restoration of right to vote by service of sentence upon conviction for crime.

Although a number of cases may be found in which the question of the efficacy of a pardon to restore the right to vote to a convict is considered, an extensive search for authority on the point involved in the title to this note has disclosed nothing but confirmation of the statement made in *OSBORNE v. KANAWHA COUNTY CT.*, to the effect that there is practically no other decision. Generally the constitutional provisions of the various states, touching the eligibility of voters, deprive them of the elective franchise when they have been convicted of crime, or upon conviction thereof, until such time as they may be pardoned or in some other way restored to their civil rights. Such provisions, it seems, leave little room for such a question as the effect of the service of the sentence upon the right to vote.

But in *OSBORNE v. KANAWHA COUNTY CT.*, the question arose under a Constitution peculiarly worded, as the court points out; the intention clearly being that one convicted of crime should be denied the right of suffrage only while under the ban of the punishment, and not when he had fully served the term.

As to the effect of suspension of sentence upon right to vote, see note to *People v. Fabian*, 18 L.R.A.(N.S.) 684. E. M. S.

has not been a resident of the state for one year, and of the county in which he offers to vote for sixty days, next preceding such offer, shall be permitted to vote while such disability continues; but no person in the military, naval, or marine service of the United States shall be deemed a resident of this state by reason of being stationed therein."

Is Osborne entitled to vote? Is he yet "under conviction" and disability? Or has that conviction lost its disfranchising force by payment of the penalty? Does the suffering of punishment fixed by the judgment remove the disability? The Constitution names several things as creating disability to vote, among them "conviction of treason, felony, or bribery in an election." These disabilities are not permanent, because the Constitution in letter says that disfranchisement shall last only "while such disability continues." While the sentence stands unexecuted the party is "under conviction;" he stands "under" it, it rests upon his head; but when he has suffered the penalty, he has paid the debt, the sentence has spent its force, and no longer hovers over him. Now, no one can deny that this disability from conviction of crime is one that is removable, since the words, "while such disability continues," apply to all the disabilities specified. It is said that it can only be removed by pardon. We cannot think so. The clause says that it may cease, and does not say that it can only cease by pardon. That word "under," in connection with the words, "while such disability continues," indicates that when the sentence has been executed, the party is no longer under conviction. Reflect that the party is a citizen, as the Constitution says, "All persons residing in this state, born or naturalized in the United States, and subject to the jurisdiction thereof, shall be citizens of this state." Article 2, § 3 (Code 1906, p. 48). This does not exclude convicts from citizenship, and we should not deprive one having that from the privilege of the citizen,—right to vote,—except by clear words of disfranchisement. He is under all burdens and duties of a citizen. He must obey the law, suffer punishment for offense, pay taxes, go to war, answer all demands of his state and government. He ought to have a voice and representation under principles of free government. True, he has once offended, but he has paid the penalty fixed by the law of his state. Reflect that the Constitution is broad in its grant of suffrage, declaring that "the male citizens of the state shall be entitled to vote." "All male citizens." This man is one. To exclude him the language must be clear. He comes in under the broad

grant, and to exclude him he must plainly, clearly, beyond doubt, come within the exception. It is wrong to debar of a great privilege except where there is no escape from it. Mere doubt, mere inference, guess, that having once sinned he is forever under ban and loss of high right, deemed essential for defense of his dearest interests, will not do. I suggest, with confidence of the force of the suggestion, that reference to the law which applies to suffrage in Virginia prior to the formation of West Virginia will fortify the position we take. The Constitution of 1830 said that "the right of suffrage shall not be exercised by any person of unsound mind, or who shall be a pauper, or a noncommissioned officer, soldier, seaman, or marine in the service of the United States, or by any person convicted of any infamous offense." Art. 3, § 14. This language would exclude from suffrage though the convict had suffered punishment. The Virginia Constitution of 1851 said that "no person shall have the right to vote who is of unsound mind, or a pauper, or a noncommissioned officer, soldier, seaman, or marine in the service of the United States, or who has been convicted of bribery in an election, or of any infamous offense." Art. 3, § 1. This would exclude from suffrage a convict though he had suffered punishment. It will be seen, too, that neither of those two Constitutions contained the words of our Constitution, "while such disability continues." The Constitution of 1851 governed in the territory of West Virginia until June 20, 1863, when the first Constitution of the new state became operative. It reads: "The white male citizens of the state shall be entitled to vote at all elections held within the election districts in which they respectively reside; but no person who is a minor, or of unsound mind, or a pauper, or who is under conviction of treason, felony, or bribery in an election, or who has not been a resident of the state for one year, and of the county in which he offers to vote for thirty days, next preceding such offer, shall be permitted to vote while such disability continues." Art. 3, § 1. Here is change. The Constitution abandoned the words of the Virginia Constitution, "who has been convicted," and substituted the words, "under conviction," and after specifying disability, including such conviction, inserted the words, "while such disability continues." So with the Constitution of 1872, now in force. This change tells of an intention. The Virginia Constitution disfranchised a convict during life, no matter that he had undergone the punishment. His disability continued. The intention of the new state Constitution was to abolish that

severe proscription, because it disused the words, "has been convicted," and put in the words, "under conviction" and "while such disability continues,"—words not in the Virginia Constitution. Elaborate search for authority from other states has been made without revealing any of much import. Our Constitution is said to be peculiar. We must take its words and apply a reasonable construction, one favoring the great privilege and right of the citizen, rather than disfranchisement and unforgiveness. In our day of advanced civilization government is more liberal, enduring penalties less favored, participation in free government more than formerly, disfranchisement more limited. As reflecting this spirit I may refer to our statute making a convict a competent witness, if he has been punished. This repeals the rigorous common-law rule which forever barred the convict as a witness. Most of our states have similar statutes. In England, in 1843, following this liberalizing tendency, a statute was enacted making the enduring punishment have the effect of pardon for conviction of crime not punishable with death. 1 Greenl. Ev. § 378a. In its text it is said that absolute exclusion as witnesses for crime cannot be defended, and is almost everywhere abolished. "In a few jurisdictions the old crudities remain."

As the word "disability" is used in our Constitution in the clause before us, it may not be without force to say that when our present Constitution was made we had—still have—a statute saying that the words "under disability," in a statute, include married women, minors, "and convicts while in the penitentiary."

So far as I have heard the opinion of the legal profession it accords with our holding, and I will remark, to show the construction which the executive department has given the clause, that in 1905 Attorney General Freer, in an opinion addressed to Governor White, held "as has been the uniform practice in this state, that a person who has served his full term of punishment, or been pardoned, is entitled to vote." He had given the same construction to Governor White in 1903. Attorney General Rucker, in 1899, gave the same construction in a communication to Governor Atkinson. My understanding is that those governors acted on that construction.

Mandamus awarded.

Robinson, P., and Williams, J., dissent.

32 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

AB WILLIAMS, Plff. in Err.

(— W. Va. —, 69 S. E. 474.)

Indictment — larceny — variance — false pretenses.

1. Under a count for simple larceny, it is admissible to prove that the property was obtained by false pretense, with intent to defraud.

Larceny — obtaining property in payment of debt.

2. One who obtains possession of property upon the pretense of buying it for cash, at an agreed price, for the purpose of the payment of a just debt then due by the owner, equal to, or greater in amount than, the price of the property, is not guilty of a statutory crime.

False pretenses — securing payment of debt.

3. The procuring of the payment of a just debt already due, by false pretenses, is not an indictable offense.

(November 1, 1910.)

Headnotes by WILLIAMS, J.,

Note. — *Purpose of applying property on debt as affecting larceny or substantive offense of obtaining property by false pretenses.*

The comparatively few cases on this point, while conflicting, are to some extent distinguishable in the extent to which their holdings go, and the weight of authority seem to be opposed to the decision in *STATE v. WILLIAMS*, that obtaining property upon the pretense of buying it for cash, with the real purpose of applying it on a debt, does not constitute the statutory crime of obtaining property by false pretenses. A distinction should be noted between a creditor's inducing one by false pretenses to pay a debt, knowing that he is paying it, in which case he may not be defrauded, although induced by false pretenses; and inducing him by false pretenses to part with property or money for some other purpose, with the secret intention on the part of the creditor of applying it on a debt, in which case it would seem that he is in fact defrauded of his property, by its fraudulent application to a purpose other than he contemplated.

As said in *Com. v. Leisy*, 1 Pa. Co. Ct. 50, a case very similar to *STATE v. WILLIAMS*, holding that one is guilty of obtaining goods under false pretenses, where, being unable to collect a debt, he agreed to buy a horse belonging to the debtor, secretly intending to apply the price of the horse upon his claim, but giving in payment a worthless check which he expressly

ERROR to the Circuit Court for Braxton County to review a judgment convicting defendant of larceny. Reversed.

The facts are stated in the opinion.

Messrs. Morrison & Rider and C. W. Flesher, for plaintiff in error:

The procuring of the payment of a just debt, already due, by false pretenses, does not make a person liable to such indictment.

State v. Hurst, 11 W. Va. 54, 3 Am. Crim. Rep. 100; State v. Edwards, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; 1 Bishop, New Crim. Law, § 438; Steward v. People, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056, 11 Am. Crim. Rep. 563; Com. v. Eichelberger, 119 Pa. 254, 4 Am. St. Rep. 642, 13 Atl. 422, 7 Am. Crim. Rep. 324.

stated was good: "Although a false representation by which a man may be cheated into the performance of a duty is not within the prohibition of the statute, yet, even in such case, it is necessary that this performance be the expressed object of the transaction: in which event he cannot be said to be cheated out of his property, since the result of the transaction is to apply his property to the payment of his debt, and, moreover, to bring this about with his own consent, obtained though that may be by false representations. In the case on trial, there was no consent on the part of the prosecutor to deliver his horse in payment of his debt, but his consent was given to a sale of the animal, and that alone. The undisclosed intention of the defendant to apply the horse to the payment of his claim is no defense, and need not be regarded. The defendant's testimony is substantially a confession of guilt, since he admits obtaining the property by representations which he knew to be then false, and since his intent in so doing was to cheat and defraud, as appears from his further admission that his expressed intention was to buy the horse, while his real and secret intention, and the one which he carried out, was to get the horse into his own possession, and apply the price in payment of his claim."

So, in *People v. Smith*, 5 Park, Crim. Rep. 490, it is held in a well-reasoned opinion, though not without dissent, that where one, by falsely representing that he is an agent for certain flour dealers, that certain flour ordered through him is about to be delivered, and that he has authority to collect therefor, obtains money from another, it is no defense to a prosecution for obtaining money by false pretenses, that the latter person was indebted to the former in an amount equal to or greater than the amount so obtained, and that the former intended to apply such money on said debt.

And in *Pruitt v. State*, — Ark. —, 11 S. W. 822, it is held that where one by false pretenses obtains from a corporation justly indebted to him in a certain sum, 32 L.R.A. (N.S.)

Mr. William G. Conley, Attorney General, for the State:

Upon an indictment charging larceny as at common law, proof that the money or other property was obtained by false pretense will sustain such indictment.

Leftwich v. Com. 20 Gratt. 719; Anable v. Com. 24 Gratt. 563; Dull v. Com. 25 Gratt. 981; State v. Halida, 28 W. Va. 499, 6 Am. Crim. Rep. 407.

Williams, J., delivered the opinion of the court:

Defendant was convicted in the circuit court of Braxton county on an indictment for the larceny of a cow worth \$27, the property of one J. F. Combs, and sentenced

two drafts aggregating in amount more than the amount so due him, he is guilty of obtaining by false pretenses the two drafts, and not merely the money difference between the amount of the drafts and the amount due him.

Where a solicitor by fraud and forgery obtains from the accountant of the court of chancery, for one whom he represents, an order for the payment of money, he is guilty of obtaining the order by false pretenses, with intent to defraud, although the person so represented is entitled to the money. *R. v. Parkinson*, 41 U. C. Q. B. 545.

Likewise, one who obtains county money by falsely and fraudulently representing to the county treasurer that a certain writing is a true and genuine order for its payment is guilty of obtaining money by false pretenses, although the amount obtained is for a debt justly due him from the county, where the county treasurer has no authority to pay a county indebtedness except upon order of the county commissioners, and defendant, whatever his motive may be, knows that he is not then entitled to such money because no such order has in fact ever been issued. *State v. Walton*, 114 N. C. 783, 18 S. E. 945.

And a state treasurer who, by falsely representing to the state debt board that the bonds from which certain coupons had been clipped had been redeemed, obtained the signatures of the members of that board to an order authorizing him, as treasurer, to issue state certificates of indebtedness in exchange for such coupons, which in fact were clipped from unredeemed bonds, and were therefore not exchangeable, is guilty, under a statute providing that "every person who . . . shall . . . by any . . . false pretenses obtain a signature of any person to any written instrument . . . shall be deemed guilty of larceny," although the coupons belonged to him or to some other person for whom he held them, and not to the state. *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102. After reviewing the authorities and stating other grounds for its holding, the court

to an indefinite term in the penitentiary, and brings error.

The proof shows that defendant got possession of the cow by going to Combs's house in the country, and representing to him that he was sent to buy her for one Holcomb, a butcher, whose agent defendant claimed to be, and to whom Combs had before that time talked of selling her. They agreed on a price of \$27.50, which defendant said would be satisfactory to Holcomb. Defendant then said he did not have any

money with him, and Combs consented to go with him to the town of Sutton to get it, and assisted defendant in leading the cow to town. When they arrived, defendant put the cow in the stable of one Frank Frame, and, instead of paying him the money, presented to Combs a judgment in favor of said Frame against Combs for \$50, which had been assigned to defendant. The judgment was subject to a credit of \$7, and admittedly just; but Combs refused to let the cow go in payment of it. He, however,

said: "But, aside from these reasons, we hold that it is against public policy, subversive of sound morals, and injurious to the best interests of the state,—a thing not to be tolerated,—that an officer of the state shall, in violation of express enactment, in violation of his trust, and by false pretenses, obtain and enjoy an advantage, the fruits of his deception, and not be liable to punishment, even though a different rule might prevail as to similar transactions between individuals."

Where a debt is unliquidated, the creditor cannot, without criminal liability, seek by false pretenses to obtain a larger amount than justly due. Thus, where a passenger on a railroad train receives substantial injuries in a collision, for which the railroad admits its liability, and where, for the purpose of defrauding the company, he knowingly makes a false statement of facts as to the extent and seriousness of his injuries, he is guilty of larceny in obtaining money by false pretenses, if the railroad, believing the false statement to be true and relying on it, pays him a sum in settlement of the injury, which he falsely represented that he had suffered, but which he did not in fact suffer, although he may have received no more than he was in fact entitled to for the injuries actually received. *Com. v. Burton*, 183 Mass. 461, 67 N. E. 419.

On the other hand, there are cases frequently cited to sustain the general proposition that obtaining property by false pretenses is no offense, if obtained by a creditor from his debtor with the intention of applying it on a debt due from the latter to the former, because the latter is not defrauded by being made to pay his debt. This may be true in the first class of cases, under the distinction above pointed out, where the debtor parts with his money or property for the express purpose of applying it on the debt, though induced by false pretenses to do so. Thus, in *People v. Thomas*, 3 Hill, 169, distinguished in *People v. Smith*, supra, it is held that the holder of a past-due negotiable note, who merely calls for and obtains payment thereof, falsely pretending that the note has either been lost or burned up, is not guilty of obtaining money by false pretenses, the prosecutor not being defrauded by such false pretenses.

And in *Com. v. Thompson*, 2 Clark (Pa.) 32 L.R.A. (N.S.)

33, distinguished in *Com. v. Leisy*, 1 Pa. Co. Ct. 50, a prosecution for obtaining money and goods by false pretenses, where a constable, by falsely representing that he had a warrant and by arresting the prosecutor, had obtained from the latter payment of a just judgment in favor of another person, the court said: "It is not pretended that he desired anything more than to induce Learned [prosecutor] to pay Bacon that which he owed him; it was simply to induce a debtor to pay an honest debt, to do that which it was his duty to do. It is very clear that by so doing, he could neither be cheated nor defrauded, and it is equally clear that no intent to defraud should even be implied, where the measure intended, if successful, would neither cheat nor defraud."

So, in *Com. v. Harkins*, 128 Mass. 79, holding, against a strong dissent, that one is not guilty of obtaining money by false pretenses, where he obtains by false pretenses the consent of a city to the entry of a judgment in his favor, and against the city, in a pending action on a fraudulent claim, the court said: "It is not alleged that, after the judgment was rendered, any false pretenses were used to obtain the money due upon it; and even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay."

And in *State v. Hurst*, 11 W. Va. 54, 3 Am. Crim. Rep. 100, holding that one is not guilty of obtaining money by false pretenses, who, by a false representation as to the amount due on a certain bond, induces another, under a binding promise to take up such bond, to so take it up at a supposed discount, paying therefor no more than is actually due thereon, the court said: "This proposition involves the question whether a person can be indicted for procuring money by false pretenses, who by false pretenses has induced another to pay him a debt already due." "The true question involved is, What is the proper construction of the 23d section of chapter 145 of the Code of West Virginia? Its language is: 'If a person obtain by any false pretenses from any person, with intent to defraud, money, etc., he shall be deemed guilty of larceny.'" "The question

proposed to defendant that, if he would pay him \$15 in cash, the balance of the value of the cow might be applied to the judgment; but defendant declined the proposition. Combs then brought an action of detinue, gave bond, and regained possession of the cow. Pending this action, a compromise was effected by Combs paying \$10 in discharge of the judgment, and dismissing the action of detinue.

On the foregoing state of facts, defendant was indicted for larceny, tried, and con-

victed. Do the facts sustain the indictment? If they prove that defendant obtained the cow by false pretense, with intent to defraud Combs, they do; otherwise, they do not.

It is well settled by adjudicated cases, both by this court and the supreme court of Virginia, that an indictment for larceny may be sustained by proof that the property alleged to have been stolen was in fact obtained by false pretense, with intent to defraud, because the statute (§ 23, chap. 145,

is whether the use of false pretenses to obtain a claim justly due is, within the true meaning of this criminal statute, a fraud. To so construe this statute would, in my judgment, consign to the penitentiary as thieves many persons who cannot be classed with common thieves, without breaking down all our ideas of distinctions in degrees of immorality. I think, therefore, that, within the true meaning of this statute, a man cannot be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him, though in making the collection he has used false pretenses. The authorities I have cited, though not entitled to much weight in themselves, sustain this view; and I have seen no authority which sustains the contrary view."

In *Re Cameron*, 44 Kan. 64, 21 Am. St. Rep. 262, 24 Pac. 90, holding that no crime or offense is committed where an agent, by means of false statements made to a third person, obtains property belonging to his principal, and to the immediate possession of which the latter is entitled, the court also said, *obiter*: "It is not an indictable offense under the statute for one to obtain by false statements payment of a debt already due, . . . because no injury is done."

In the second class of cases, where one is induced by false pretenses to part with property or money for some other purpose than application on a debt, the defendant having a secret intention of so applying it, the extent of the holdings seems to be that evidence of the indebtedness is admissible upon the question of defendant's intent; and this rule seems proper in any case, as there is no crime in the absence of criminal intent.

In the leading case of *R. v. Williams*, 7 Car. & P. 354, where the servant of a creditor, in order to secure to his master the means of paying himself a debt of which he had been unable to procure payment, went to the debtor's wife in her husband's absence, and, by falsely representing to her that his master had bought of her husband certain malt and had sent him to fetch it away, obtained from her such malt and carried it to his master, it was held that he was not guilty of obtaining it by false pretenses, if he did not intend to defraud the debtor, but only to put it in his

master's power to compel him to pay a just debt. The court said to the jury: "It is not sufficient that the prisoner knowingly stated that which was false and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud."

The decision in this case was disapproved in *People v. Smith*, 5 Park. Crim. Rep. 490, and in *R. v. Parkinson*, 41 U. C. Q. B. 545, the court saying in the latter case: "That seems to me to be rather doubtful law." But as the decision goes only to the extent of holding that defendant's intent to defraud is a question for the jury upon all the evidence, including evidence of his purpose to apply the money or property on his debt, the case, thus limited, seems correct upon principle.

So, in *Com. v. McDuffy*, 126 Mass. 467, it is held that where one employed to build a house and to pay all bills for material used, upon a settlement therefor, made false representations as to what went into the house as materials, whereby he received a certain sum of money, evidence that he in fact received no more than was actually due him for bills actually paid by him, and for his own services, is admissible on a prosecution for obtaining money by false pretenses, on the question of his intent; and it is a question for the jury upon all the facts and circumstances whether he "had an intent to defraud, and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations, and succeeded by means of such representations."

In *Wehmeyer v. Mulvihill*, — Mo. App. —, 130 S. W. 681, a civil action for false imprisonment, it is incidentally held that one having a claim against a merchant for a certain amount, which the merchant has agreed may be used for the purchase of goods, is not guilty of obtaining property by false pretenses, in going to the merchant's store and purchasing goods from a clerk, paying cash for the difference between the price and the amount of his credit, and requesting the goods to be sent C. O. D. as to the balance, and, after he has obtained possession of the goods from the delivery man, tendering a receipt for the amount for which he is entitled to credit, instead of cash. A. C. W.

Code 1906) says that a person who obtains the money or property of another by such means and with such intent shall be deemed guilty of larceny. *Leftwich v. Com.* 20 Gratt. 719; *Anable v. Com.* 24 Gratt. 563; *Dull v. Com.* 25 Gratt. 981; *State v. Halida*, 28 W. Va. 499, 6 Am. Crim. Rep. 407; *State v. Reece*, 27 W. Va. 375; *State v. Edwards*, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429. There can be no doubt that defendant obtained possession of the cow by means of false pretense; but the serious question is, Did he do it with intent to defraud Combs? His only purpose in deceiving was to induce Combs to pay a debt, greater in amount than the price of the cow. Combs could not have disputed the debt, because it had been reduced to judgment. He, in fact, admits it to be just. Can it be said that one is defrauded when he is simply deceived into paying a just debt, already due, against his will? This question arose in *State v. Hurst*, 11 W. Va. 54, 3 Am. Crim. Rep. 100, and it was there held not to be a crime. In a very carefully prepared opinion by that eminent jurist, Judge Green, in which the other judges concurred, in concluding the discussion of the phrase used in the statute, "with intent to defraud," at page 73, he says: "I think, therefore, that within the true meaning of this statute, a man cannot be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him, though, in making the collection, he has used false pretenses." In 2 Bishop's New Crim. Law, § 466, the author says: "One who by a false pretense procures another to pay him money already due does not commit this statutory crime, because no injury is done." The principles stated in the text are supported by the following decisions: *R. v. Williams*, 7 Car. & P. 354; *People v. Thomas*, 3 Hill, 169; *Com. v. McDuffy*, 126 Mass. 467; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *People v. Getchell*, 6 Mich. 496. In *Com. v. Henry*, 22 Pa. 253, the opinion, at page 256, refers approvingly to the case of *Com. v. Thompson* [2 Clark (Pa.) 33], reported in 3 Pa. Law Journal, 250, which we do not find in the library, in which it was held that a party who fraudulently represented that he had a warrant of arrest for a party, and thereby procured the payment of an honest debt, was not guilty of violating the statute. The court said: "A false representation by which a man may be cheated into performance of a duty is not within the statute."

While we do not wish to be understood as approving defendant's method of collection, or of justifying his conduct from a moral point of view, still, viewing his case 32 L.R.A. (N.S.)

from a purely legal standpoint, he has not committed a crime for which the law would punish him. There are many things which, the moral sense of every good citizen would readily suggest to him, are inconsistent with a good code of ethics, yet which are not made penal by our Code of laws. Although Combs was deceived into parting with possession of his cow against his will, the deceit was not with fraudulent intent.

The court erred in refusing to set aside the verdict, and the judgment of the lower court will be reversed, the verdict set aside, and the case remanded for a new trial.

SOUTH DAKOTA SUPREME COURT.

ELOISE CARDOZO GARCIA, Appt.,
v.

EMANUEL R. GARCIA, Respt.

(— S. D. —, 127 N. W. 586.)

Marriage — conflict of laws — annulment by courts where invalid.

The courts of one state cannot, at the suit of one of the parties, annul a marriage which was valid by the law of the state where it was contracted, on the ground that it is void under the laws of their state, and cohabitation between the parties made a penal offense, where, at the time the marriage was contracted, they were not citizens of the state where the suit is brought, so that the marriage was not a mere evasion of its laws.

(June 18, 1910.)

A PPEAL by plaintiff from an order of the Circuit Court for Lincoln County sustaining a demurrer to the complaint in an action brought to annul a marriage. Affirmed.

The facts are stated in the opinion.

Mr. Joseph Mitchell Donovan, for appellant:

There are two exceptions to the general rule that a marriage valid where solemnized is valid everywhere, viz.: Marriages which are declared contrary to the law of nature, as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either by express terms or by necessary implication.

Sturgis v. Sturgis, 51 Or. 10, 15 L.R.A. (N.S.) 1034, 131 Am. St. Rep. 724, 93 Pac.

Note. — The subject of conflict of laws as to marriage is covered in a note to *Hills v. State*, 57 L.R.A. 155, which is supplemented by notes in 11 L.R.A. (N.S.) 1082; 17 L.R.A. (N.S.) 800; 26 L.R.A. (N.S.) 179; and 28 L.R.A. (N.S.) 753.

696; Jackson v. Jackson, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; Georgia v. Tutty, 7 L.R.A. 50, 41 Fed. 758; Com. v. Graham, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706; Story, Conf. L. § 113a; Potter's Dwarrr. Stat. 96; Re Stull's Estate, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 904, 128 Am. St. Rep. 1085, 117 N. W. 787; Gabisso's Succession, 119 La. 704, 11 L.R.A. (N.S.) 1082, 121 Am. St. Rep. 5, 44 So. 438, 12 A. & E. Ann. Cas. 574; Re Lum Lin Ying, 59 Fed. 682; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Hills v. State, 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 836; State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 23 N. E. 747, 8 Am. Crim. Rep. 373; United States ex rel. Devine v. Rodgers, 109 Fed. 886; State v. Bell, 7 Baxt. 9, 32 Am. Rep. 549; Warrender v. Warrender, 9 Bligh N. R. 89, 2 Clark & E. 488; Caballero v. The Executor, 24 La. Ann. 575; Saul v. His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Dupre v. Boulevard, 10 La. Ann. 411; Taylor's Succession, 39 La. Ann. 829, 2 So. 581; Re Chace, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050; 19 Am. & Eng. Enc. Law, 2d ed. pp. 1211, 1212; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Campbell v. Crampton, 18 Blatchf. 150, 2 Fed. 417; Wharton, Conf. L. 2d ed. § 175; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; 1 Bishop, Marr. Div. & Sep. §§ 831, 832; Kinnier v. Kinnier, 45 N. Y. 544, 6 Am. Rep. 132; Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. Supp. 671; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; Hunt v. Hunt, 131 U. S. CLXV, and 24 L. ed. 1109; Haddock v. Haddock, 201 U. S. 579, 50 L. ed. 873, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1; Livingston v. Livingston, 173 N. Y. 380, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; Hawkins v. Hawkins, 193 N. Y. 418, 19 L.R.A. (N.S.) 468, 127 Am. St. Rep. 979, 86 N. E. 468, 15 A. & E. Ann. Cas. 371; Lyon v. Lyon, 230 Ill. 366, 13 L.R.A. (N.S.) 996, 82 N. E. 850, 12 A. & E. Ann. Cas. 25; 1 Wharton, Conf. L. 3d ed. 326, § 141a, p. 358, § 165b; Johnson v. Johnson, 57 Wash. 89, 26 L.R.A. (N.S.) 179, 106 Pac. 500; 26 Cyc. Law & Proc. p. 907; State v. Fenn, 47 Wash. 561, 17 L.R.A. (N.S.) 800, 92 Pac. 417; Martin v. Martin, 54 W. Va. 301, 46 S. E. 620, 1 A. & E. Ann. Cas. 612; 19 Am. & Eng. Enc. Law, 2d ed. p. 1212; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; 16 Am. & Eng. Enc. Law, 2d ed. p. 134.

A statute which expressly declares that marriages within prohibited degrees shall 32 L.R.A. (N.S.)

be void absolutely, without any degree of divorce or other legal process, renders a marriage contrary to its provisions void, and the same effect has been given to a statute making such a marriage a felony.

Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281; Hayes v. Rollins, 68 N. H. 191, 44 Atl. 176; McIlvain v. Scheibley, 109 Ky. 455, 59 S. W. 498; 26 Cyc. Law & Proc. p. 80, § 3.

A marriage absolutely void needs no judicial decree. Nevertheless, in cases of absolute nullity, the courts will make a decree on proper application and proofs, as well for the sake of the good order of society as for the quiet and relief of the injured party and the adjustment of property interests.

26 Cyc. Law & Proc. p. 80, § 3; Re Eichhoff, 101 Cal. 600, 36 Pac. 11; Drummond v. Irish, 52 Iowa, 41, 2 N. W. 622; Summerlin v. Livingston, 15 La. Ann. 519; Dare v. Dare, 52 N. J. Eq. 195, 27 Atl. 654; Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001; Mt. Holly v. Andover, 11 Vt. 226, 34 Am. Dec. 685; Gaines v. Relf, 12 How. 472, 13 L. ed. 1071; Patterson v. Gaines, 6 How. 550, 12 L. ed. 553; Rawdon v. Rawdon, 28 Ala. 565; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Johnson v. Kincade, 37 N. C. (2 Ired. Eq.) 470; Waymire v. Jetmore, 22 Ohio St. 271.

Mr. Herbert Abbott, for respondent:

Marriage being a universal right, and there being one law of marriage governing all nations alike, subject to mere local, and not extraterritorial, regulations of the state wherein it is celebrated, if, at any place where the parties may be, whether transiently or permanently, they enter into what by the law of the place is a marriage, they will be holden everywhere else throughout Christendom to be husband and wife.

1 Bishop, Marr. Div. & Sep. §§ 846, 847, 4343.

The state can only legislate upon matters in marriage and divorce affecting its own citizens; hence, the statute involved does not affect marriages entered into in other states where the marriage is valid, but simply prohibits the residents and citizens of the state of South Dakota from marriage.

Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960; Eaton v. Eaton, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 A. & E. Ann. Cas. 199; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; Medway v. Needham, 16 Mass. 157, 82 Am. Dec. 141.

A marriage valid where entered into is valid everywhere, even though the parties were within a prohibited degree of relationship.

Sutton v. Warren, 10 Met. 451; Stevenson v. Gray, 17 B. Mon. 193; Dannelli v. Dannelli, 4 Bush, 51; Campbell v. Crampton, 18 Blatchf. 150, 2 Fed. 417; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Martin v. Martin, 54 W. Va. 301, 46 S. E. 120, 1 A. & E. Ann. Cas. 612; Adkins v. Holmes, 2 Ind. 197; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Boylan v. Deinzer, 45 N. J. Eq. 485, 18 Atl. 119; Parker's Appeal, 44 Pa. 309; Walter's Appeal, 70 Pa. 392; Bowers v. Bowers, 10 Rich. Eq. 551, 73 Am. Dec. 99.

Corson, J., delivered the opinion of the court:

This is an appeal by the plaintiff from an order sustaining the demurrer to her complaint, and from a judgment entered thereon. The complaint is as follows: "That the plaintiff now is, and for a period of more than a year next and immediately preceding the commencement of this action has been, an actual and bona fide resident, in good faith, of the county of Lincoln and state of South Dakota, having during all of said time, and now, her sole, indefinite domicile herein, and that the plaintiff is a citizen of the state of South Dakota. That the plaintiff, whose name prior thereto was Eloise Cardozo, entered into a form of marriage with the defendant at Los Angeles, in the state of California, on the 3d day of April, 1901. That there are no children, issue of the marriage form between the plaintiff and the defendant. That at the date of said marriage form and now the plaintiff and the defendant were cousins of the whole blood, this plaintiff's father and the defendant's mother being brother and sister of the whole blood. That said marriage was and is incestuous and void under § 38, Civil Code of the state of South Dakota (Revised Code of South Dakota, 1903), and prohibited, criminal, and cohabitation thereunder criminal and prohibited, under § 350, Penal Code of the state of South Dakota. Rev. Code (S. D.) 1903, § 350. Wherefore, the plaintiff demands judgment herein, and prays: (a) That said form of marriage and said relationship be declared by decree of this court null and void and the same annulled and held for naught, and the parties released from all obligation, if any, arising therefrom or thereunder, and restored to the status of single persons. (b) For such other or further relief herein as may seem equitable and just." To this complaint the defendant interposed the following demurrer: "Now comes the defendant and demurs to the complaint of the plaintiff herein, and for grounds of demurrer says, first, that the court has no jurisdiction of the person

of the defendant, or the subject of the action herein; second, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, and five days given the plaintiff in which to amend her complaint. Plaintiff failing to amend the complaint, judgment was thereupon entered in favor of the defendant, in which "it is ordered and adjudged that the complaint of the plaintiff herein be, and the same is hereby, dismissed for want of jurisdiction of the parties and of the subject of the action, and for the further reason that the said complaint does not state facts sufficient to constitute a cause of action."

The assignments of errors are as follows: "(1) The court erred in not overruling the defendant's demurrer to the plaintiff's complaint. (2) That the court erred in sustaining the defendant's demurrer to the plaintiff's complaint. (3) That the court erred in rendering the judgment pronounced herein on the 3d day of March, 1910, dismissing the plaintiff's complaint for want of jurisdiction, and because said complaint does not state facts sufficient to constitute a cause of action."

The defendant was served with process in the state of New York, and appeared in the action generally by his attorney. It will be observed that the complaint alleges that the plaintiff has been a resident of Lincoln county in this state for a period of more than one year next preceding the commencement of this action; that she entered into a form of marriage with the defendant at Los Angeles, in the state of California, in 1901; that the plaintiff and the defendant were cousins of the whole blood, and that said marriage is incestuous and void under § 38, Civil Code of the state of South Dakota, and prohibited, criminal, and cohabitation thereunder criminal under § 350, Penal Code (S. D.). Section 38 of the Civil Code provides: "Marriages between . . . cousins of the half as well as of the whole blood are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate." Section 350, Penal Code, provides: "Persons who, being within the degrees of consanguinity within which marriages are, by the laws of the state, declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other, are punishable by imprisonment in the state prison not exceeding ten years." It will be observed by the complaint that it is not alleged therein that the contract of marriage was legal at the time it was solemnized in the state of California by the laws of that state, and that the law of California relating to the subject of marriage is not set out in

the complaint. But it is conceded by counsel for the respective parties that the marriage was valid at the time it was solemnized in the state of California under the laws of that state, and no question in the briefs of counsel is raised as to that point. We will therefore assume for the purposes of the decision in this case that the marriage between the parties was, at the time of its solemnization, valid and legal in the state of California.

It is contended by the appellant: (1) The rule that a marriage 'valid where entered into is valid everywhere' has never been applied to uphold a void or prohibited marriage. (2) A void and prohibited marriage has never been permitted to stand within the confines of the state prohibiting it, or making it a crime, because the domicile of the parties, or the marriage contract, was within a state or country permitting such unions. (3) Parties entering into a marriage contract that is prohibited in many states and countries do so with the knowledge that such union is legal only within the state or countries permitting such acts, and that, if they or one of them afterwards removes within a state or country prohibiting them, or making the cohabitation thereunder a crime, the contract and relationship are terminated by operation of law. . . . (7) Where an act or contract is prohibited by direct statute, the fact that such contract was entered into or commenced in a state permitting such act or contract could not give such act or contract any legal force or life in the prohibiting state, without setting at naught our own laws and public policy through a misconstruction of interstate comity."

It is contended, however, by the respondent: (1) That a marriage entered into between first cousins, both citizens and residents of the state of California, valid under the laws of that state, is valid within the state of South Dakota. (2) That § 38 of the Civil Code of this state, prohibiting the intermarriage of cousins, and declaring the same to be void and incestuous, applies only to marriages entered into within the state, or to its citizens when entered into in another state, to avoid the laws of their domicile. (3) That a complaint which fails to state that the plaintiff and defendant are both within the state, that the laws of the state of South Dakota are being violated, or that the marriage was void where entered into and consummated, fails to state sufficient facts to constitute a cause of action. It is further contended by the respondent that, it being conceded by the plaintiff and appellant that the marriage under consideration was valid at the time it was entered into by the law of the state 32 L.R.A. (N.S.)

of California, therefore no facts are stated which would entitle the plaintiff to maintain this action, for the reason that the law of this state has not provided for annulling the contract of marriage upon any such ground. Section 61 of the Civil Code provides that marriage may be annulled by an action in the circuit court to obtain a decree of nullity for any of the causes existing at the time of the marriage. Six grounds or causes are provided for, but the ground stated in the complaint in this action is not referred to in that section. The question, therefore, presented for our consideration, is, assuming that the marriage between the parties was valid and legal in the state of California, but would have been invalid, illegal, and void had it been contracted in this state, did the court err in holding that the complaint failed to state facts sufficient to authorize the court in this state to annul the marriage? We are of the opinion that the court committed no error in sustaining the demurrer, as the court was clearly without jurisdiction to annul the marriage so conceded to be legal and valid in the state of California, where it took place.

Mr. Bishop, in his work on Marriage, Divorce, and Separation (§ 843, vol. 1), says: "By the international law of marriage, which ought to govern the courts in the absence of any statute of their own forbidding, a marriage valid by the law of the country in which it is celebrated, though the parties are but transient persons, though it would be invalid entered into under the same formalities in the place of their domicile, and even though contracted in express evasion of their own law, is good everywhere. And this doctrine is specifically established in the tribunals of the common-law countries." That learned author further says:

"Sec. 857. Should there be, as occasionally it may happen, a country or state permitting marriages which, by the common voice of civilized nations, are vicious past toleration, such marriages, though solemnized under the protection of its laws, would not be within the protection of the law of nations, because lacking the general favor essential. Therefore they would be rejected by the tribunals of every other country in which they were not by its local laws approved.

"Sec. 858. To bring a case within this exception, something more must appear than that the marriage is contrary to the general law of the state in which the question arises. It must be contrary also to the common voice of Christendom. The familiar illustrations, perhaps the only ones of which a writer can speak with absolute

assurance, are polygamous marriages and those of excessively near consanguinity."

The learned author then proceeds to state the law as adopted by the supreme court of the state of Kentucky, as follows: "Sec. 846. Where a Kentucky statute prohibited intermarriages within a degree of consanguinity too remote to conflict with the law of nations, and a pair of Kentucky people, whom it rendered incompetent, went into Tennessee and there intermarried, no like provisions forbidding in Tennessee, the Kentucky court held it to be good in Kentucky; observing, by Marshall, Ch. J.: 'As the prohibitory law of Kentucky would have had no force in Tennessee, the marriage in the latter state must there have created the lawful relation or status of marriage, by which the parties were in law and in fact lawful husband and lawful wife to each other in the state of Tennessee, so soon as the marriage was performed, and continued to be, so long as they remained, and would have been so if at any time before an actual divorce they had returned to that state. And so, if immediately after the marriage they had gone through the other states, and even to Europe, intending all the time to return to Kentucky, they would have been lawful husband and wife in every place, at least in every country where the common law prevails, because it is a part of that law that, being lawful husband and wife at the place of marriage, they continue to be so wherever they may be.' Therefore, since matrimony was a part of the law of nations, this individual marriage could not be otherwise than good in Kentucky. A contrary decision rendering it void in Kentucky while valid in all the rest of the world would have taken Kentucky marriages out of the law of nations, and made them a mere domestic institution, peculiar to the one state." And the author states: "A like doctrine was shortly afterwards maintained in England."

The case of *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, is also a case directly in point. In that case the learned supreme court, speaking by Mr. Justice Parker, says: "By the law in force here when the marriage in question took place, that marriage could have had no legal effect, if it had been celebrated within this then province, because expressly prohibited by law. . . . But the marriage was solemnized in Rhode Island, where it was not unlawful. Now, it is a principle adopted for general convenience and security that a marriage which is good according to the laws of the country where it is entered into shall be valid in any other country. And this principle is considered so essential that, even when it appears that the parties went into another

state to evade the laws of their own country, the marriage in the foreign state shall nevertheless be valid in the country where the parties live. . . . The law now in force in this state not only prohibits the marriage of negroes and mulattoes with white persons, but expressly declares such marriages to be void. But they are only void if contracted within this state in violation of its laws. If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against if a contract of this solemn nature, valid in a neighboring state, could be dissolved at the will of either of the parties by stepping over the line of a state which might prohibit such marriages." *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Stevenson v. Gray*, 17 B. Mon. 193; *Campbell v. Crampton* (C. C.) 18 Blatchf. 150, 2 Fed. 417; *Dannelli v. Dannelli*, 4 Bush, 51.

The law as stated by Mr. Bishop and in the decisions from which we have quoted clearly establish the law applicable to this case. The marriage, therefore, being valid in the state where it was contracted, is to be regarded as valid in this state, and fully supports the decision of the court in sustaining the demurrer to the complaint in this action. As was well said by the supreme court of Massachusetts in the case of *Sutton v. Warren*, 10 Met. 451: "It is a well-settled principle in our law that marriages celebrated in other states or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this commonwealth, although the same might, by force of our laws, be held invalid if contracted here. This principle has been adopted as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life."

The contention of the appellant that the courts of this state have jurisdiction to declare a marriage contracted in the state of California, where the same was valid and legal, illegal and void, cannot, in our opinion, be sustained. The law of this state upon the subject of marriage cannot properly be held to apply to marriages contracted in other states, legal and valid where contracted, and where, as in this state, there is no provision in our Code authorizing our courts to declare such marriage legally contracted in another state void in this state. The consequences of declaring a marriage void *ab initio* and annulling the same are very serious. Its effect is to bastardize innocent

children, deprive them of their inheritance, and to make the parties whose marriage was legal and valid in the state where contracted criminally liable in this state, and subject to exceedingly severe penalties. The law of the state of California permitting first cousins to legally intermarry certainly does not come within the exceptions laid down by Mr. Bishop or referred to by the courts. Incestuous marriages, as spoken of by Bishop and referred to by the authorities as being an exception to the rule, embrace only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters, and does not embrace cousins. *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317. While it is competent for the lawmaking power of this state to declare a marriage between cousins as incestuous and void, such a law does not come within the exception referred to by Bishop, and by the authorities generally. Undoubtedly it was competent for the lawmaking power of this state to provide that marriages in other states or countries between cousins, and therefore incestuous and void under our Code, might be declared void by the courts of this state, but in the absence of any such provision, the courts of this state are clearly without authority under the general principles applicable to the law of marriages to annul a marriage legal and valid in a state where the same was contracted, and where the parties were domiciled. The learned counsel for the appellant has cited numerous authorities, some of which, upon first reading, would seem to support the contention of the appellant, but upon a careful examination will be found to be clearly distinguishable from the case at bar. Most of the cases cited by counsel for appellant appear to be cases where parties domiciled in the state have, for the purpose of avoiding the laws of their own state inhibiting the marriage, gone to another state or country, and there contracted the marriage, and subsequently returned to their own state. In such cases it seems to be held that marriages so contracted will be held invalid in the state where the parties are domiciled, though the decisions are conflicting upon that subject. The law, however, as laid down in the *Massachusetts*, *Kentucky*, and *New York*, cases, seems to be fully approved by the supreme court of North Carolina in *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678. in which the court held that a marriage between a negro man and a white woman in a state where they were bona fide domiciled, and according to the law of which the marriage was valid, would be recognized 32 L.R.A. (N.S.)

as valid in North Carolina notwithstanding that it would have been invalid if it had been solemnized in the latter state. We shall not attempt a review of the decisions cited by counsel for the appellant, as such a review would extend this opinion to an unreasonable length, and will conclude by calling attention to an exhaustive note to *Hills v. State* in 57 L.R.A. 155, in which the authorities bearing upon the question involved in this case are very fully and ably reviewed. In our opinion the rule as laid down by Bishop and supported by the supreme courts of Kentucky, Massachusetts, New York, and North Carolina clearly establishes the law that should be applied to cases arising under the provisions of our Code.

Finding no error in the record, the order and judgment of the Circuit Court are affirmed.

Whiting, P. J., concurring:

While I fully concur in my colleague's conclusion that the judgment and order appealed from should be affirmed, it seems to me best to express no opinion as to the criminal liability of parties who, though related within the degrees that would make their marriage, if contracted in this state, incestuous, yet, having entered into a valid marriage in another state, come into this state, and while within this state indulge in sexual intercourse. A determination of such question is in no manner called for upon this appeal.

Smith, J.:

I concur in the opinion of Judge Whiting.

McCoy, J.:

I concur in the views expressed by Justice Whiting.

ARKANSAS SUPREME COURT.

S. F. BOWSER & COMPANY, Appt.,
v.

F. K. MARKS et al.

(— Ark. —, 131 S. W. 334.)

Sale — second order — advance price — repudiation.

One who orders an article similar to one which he had previously purchased cannot

Note. — Necessity of meeting of minds as to price in contract for sale of personality.

Executed contract.

The authorities are in harmony upon the proposition that a purchaser who accepts property purchased under an executory contract silent as to the price is nevertheless

repudiate the transaction after the order is filled, and refuse to pay a reasonable price for it, because he intended that the price should be the same as the former one, while the price charged is higher, where no mention of the price was made in the negotiations.

(October 10, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Grant County in defendants' favor in an action brought to recover the purchase price of certain chattels alleged to have been sold undelivered. Reversed.

The facts are stated in the opinion.

Mr. W. D. Brouse, for appellant:

The acceptance of the order, from the moment it was mailed or communicated,

liable for its reasonable value, generally the market value, and cannot escape liability on the ground that the contract is invalid because silent as to the price of the article. Under such circumstances the law will imply a promise to pay the reasonable worth of the property received. *Wilkinson v. Williamson*, 76 Ala. 163; *Peerless Glass Co. v. Pacific Crockery & Tinware Co.* 121 Cal. 641, 54 Pac. 101; *Rice v. Western Fuse & Explosives Co.* 64 Ill. App. 603; *Griffin v. O'Neil*, 47 Kan. 116, 27 Pac. 826, rehearing in 48 Kan. 117, 29 Pac. 143; *Jenkins v. Richardson*, 6 J. J. Marsh. 441, 22 Am. Dec. 82; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 88 Mich. 15, 13 L.R.A. 770, 49 N. W. 901; *Paine Lumber Co. v. Betcher*, 34 Minn. 480, 26 N. W. 606; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 200; *Hill v. Hill*, 1 N. J. L. 261, 1 Am. Dec. 206; *Stout v. Caruthersville Hardware Co.* 131 Mo. App. 520, 110 S. W. 619; *Butler v. Moses*, 43 Ohio St. 166, 1 N. E. 316; *Lefurgy v. Stewart*, 52 N. Y. S. R. 931, 23 N. Y. Supp. 537; *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98.

In *Jenkins v. Richardson*, 6 J. J. Marsh, 441, 22 Am. Dec. 82, the court said that the modern doctrine of the law of sales dispensed with the technical and rigid rules of remoter times, in order to facilitate the procurement of justice; and it is no longer necessary that the price be agreed on for the article sold and delivered, in order that the value of the article may be recovered.

Where a purchaser of lumber ordered certain carloads to be shipped to a designated place at a price fixed by a price list, and also ordered other carloads to be shipped to other points without specifying anything as to the price, it will be presumed that it was the intention of the parties that all the lumber ordered was ordered with reference to the price list, and such prices will govern. *Paine Lumber Co. v. Betcher*, 34 Minn. 480, 26 N. W. 606.

In *Lefurgy v. Stewart*, 52 N. Y. S. R. 931, 23 N. Y. Supp. 537, the seller furnished the buyer with a price list of stone for

turned the offer into a binding promise, and was irrevocable.

Clark, Contr. 42.

Mr. Isaac McClellan, for appellees:

There was not a complete sale, as the minds of both parties did not come together and agree upon the goods, quality, quantity, and price.

Priest v. Hodges, 90 Ark. 131, 118 S. W. 253; 35 Cyc. Law & Proc. p. 62 and notes.

Defendants had a right to rescind the whole transaction, and place plaintiff as nearly as possible *in statu quo*, which they did when they notified it that they would not take the goods at the advanced price.

Fairbanks, M. & Co. v. Walker, 76 Kan. 903, 17 L.R.A.(N.S.) 558, 92 Pac. 1129; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec.

building material of different dimensions and different values; thereafter a contract was made for stone of the character of some of that mentioned in the price list, the same to be furnished at an agreed price; the purchaser later ordered stone not mentioned in this contract, but mentioned in the price list, no reference being made to this price list. As to the stone of the latter character, it was held that the price list would control, but as to stone of dimensions not included in the price list, the seller was entitled to recover the reasonable value. Affirmed without opinion in 140 N. Y. 661, 35 N. E. 893.

Where a purchaser of material ordered more of a similar kind, and was informed by the seller that the price had advanced, and also the advanced price, and he expressed a desire for the material, he cannot thereafter claim to settle therefor at the prices theretofore paid for the material. *Rice v. Western Fuse & Explosives Co.* 64 Ill. App. 603.

Where the contract is executory.

While the authorities are not in harmony on the question, by the weight of authority an order or contract for the purchase of personal property is lacking in an essential element, and is invalid, if the price to be paid is not expressly or impliedly incorporated therein, or some reasonably definite method for determining it agreed upon. Indeed, in most of the cases considering the matter, the doctrine is stated that the price must be expressly stated, or some method expressly agreed upon by which it may be determined, in order to constitute a valid executory contract of sale. The doctrine as stated finds support in the following cases, which also go to the extent of stating the rule to be that there must be an express agreement as to price, or some method by which it may be determined: *Harper v. Dougherty*, 2 Cranch, C. C. 284, Fed. Cas. No. 6,087; *Lewis v. Lofey*, 60 Ga. 559; *James v. Muir*, 33 Mich. 224; *Lambert v. Hays*, 136 App. Div. 574, 121

39; Davis v. Tarwater, 15 Ark. 286; Johnson v. Walker, 25 Ark. 196.

The vendor concealed facts, respecting the price from vendee, that he should have, under the circumstances, made known before the goods were shipped.

Merritt v. Robinson, 35 Ark. 483.

There was an admitted mistake, and vendees had a right to rescind, and return the goods.

Rutherford v. McDonnell, 66 Ark. 448, 51 S. W. 1060; Barton-Parker Mfg. Co. v. Taylor, 78 Ark. 586, 94 S. W. 713; American Standard Jewelry Co. v. Hill, 90 Ark. 78, 117 S. W. 781.

It was a case of shipping goods on approval as to price, expecting vendees to

pay the advanced price after the goods were received.

Gottlieb v. Rinaldo, 78 Ark. 123, 6 L.R.A. (N.S.) 273, 93 S. W. 750.

Frauenthal, J., delivered the opinion of the court:

This was an action instituted by the appellant to recover the purchase price of an oil tank and pump which it alleged it sold to the appellees. The appellant was located at Ft. Wayne, Indiana, and was engaged in the manufacture and sale of oil tanks and pumps and other wares, and the appellees were merchants located at Sheridan, Arkansas. On September 15, 1908, appellees made a written offer to purchase from ap-

N. Y. Supp. 80; Still v. Cannon, 13 Okla. 491, 75 Pac. 284; Wittkowsky v. Wasson, 71 N. C. 451; Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568; Bigley v. Risher, 63 Pa. 152, 13 Mor. Min. Rep. 176; Asebal v. Levy, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98.

It may be said, however, that the question did not arise in any of these cases in such a manner as to require the court to consider whether the agreement as to price might not, under some circumstances, be implied, although not referred to in the written agreement of sale, for example, from the course of dealing between the parties with reference to the sale of the same class of goods.

In Harper v. Dougherty, 2 Cranch, C. C. 284, Fed. Cas. No. 6,087, the court remarked that to constitute a valid sale of a chattel, so as to pass title to the property, there must be a price agreed upon and the property must be delivered.

And in considering the abstract question as to what constituted a complete sale of personalty, in Bigley v. Risher, 63 Pa. 152, 13 Mor. Min. Rep. 176, the court said that where there was no actual delivery or taking possession of the property by the purchaser, and no specification of the price, there was no sale. Similar language is to be found in Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568.

And in Wittkowsky v. Wasson, 71 N. C. 451, the court, on the same subject, said: "A sale is defined by Benjamin as 'a transfer of the absolute or general property in a thing for a price in money.' To the completion of this contract, as of all others, there must be the mutual assent of the parties to its terms. Such mutual assent cannot exist unless the terms are definite. The thing sold must be ascertained. Until the specific thing is agreed on, the agreement can only be executory. . . . And for a like reason, the price to be paid must also be certain, or some guide must be agreed on by which it can be found with certainty. There may be a sale for a reasonable price, in which case, if the party afterwards differ, the price must be made certain. . . . 32 L.R.A. (N.S.)

tain by the verdict of a jury. Or there may be a sale at a price to be afterwards fixed by valuers. In such case, if the valuers refuse to fix the price, the sale is considered incomplete, or else as rescinded by the refusal. If, indeed, the thing sold has been delivered to the vendee and consumed, so that the parties cannot be put in *statu quo*, the vendee is liable for a reasonable price."

And in Still v. Cannon, 13 Okla. 491, 75 Pac. 284, the court quoted from Hilliard on Sales, page 169, to the effect that "a price is one of the essential elements of the contract of sale. And the price must be certain, or capable of being made certain. If left to be fixed by the vendor or vendee, the sale is void."

In Stout v. Caruthersville Hardware Co. 131 Mo. App. 520, 110 S. W. 619, the court said that the agreement under consideration would have been treated as invalid as long as it remained executory, because indefinite as to price; yet as it was executed by the parties, the case must be disposed of with reference to that fact, and added: "When a sale transaction which is incomplete as a contract, in consequence of the price being left uncertain, is carried into execution by delivery of the article sold, the law treats the transaction as a sale for the reasonable value of the article, and this value can be recovered."

And in James v. Muir, 33 Mich. 224, in drawing the same distinction, the court said: "Where a contract is executory, and not executed, it is laid down by some authorities, if not generally, that unless the price is fixed distinctly according to some standard, either of amount or of market or of reasonableness, or some other method of ascertainment, the contract is incomplete, and the purchaser is not bound. Where goods are accepted, and nothing has been said about the price, a reasonable price has been recognized as correct."

This distinction is also made in Shealy v. Edwards, 73 Ala. 175, 49 Am. Rep. 43, wherein the court on this point said: "The rule as to price in executory contracts of sale is generally said to be that it must be

pellant an oil tank and pump by the following letter:

Sheridan, Ark., Sept. 15, 1908.

S. F. Bowser & Co.,
Ft. Wayne, Ind.

Gentlemen:—

Please ship me at once, one sixty-five Gal. oil tank & pump. I bought one of these tanks of you in 1906. Now I would like to have another one.

Yours truly,

F. K. Marks & Co.

Upon receipt of said letter on September 17, 1908, appellant wrote to appellees, accepting the order, and stating that it would make immediate shipment. Thereafter appellant promptly shipped the oil tank and

pump by delivering same to a common carrier, properly addressed to appellees; and also sent them bill of lading therefor and a statement showing that the price thereof was \$55. Thereupon appellees wrote to appellant that they had paid \$45 for the tank and pump of the same kind bought from it in 1906, and that they refused to pay \$55 for this last tank and pump. Some further correspondence passed between the parties relative to the price of the tank and pump, and the appellant refused to reduce the price from \$55. In the meanwhile the article had arrived at Sheridan, Arkansas, and remained with the common carrier during the correspondence. On November 21, 1908, appellees reshipped it to appellant, and notified it of that action. The appel-

certain, or capable of being made certain. Such is undoubtedly the settled doctrine, and although, in such case, if the agreement be that it is to be fixed by arbitration, the sale must be considered void if the arbitrators fail to agree, a different principal prevails where the contract of sale is complete and executed. In the latter class of contracts, where the seller, whether by actual delivery or other like unequivocal act, intentionally passes the property in specific goods to the purchaser, without fixing the price, the law leaves the price to be adjusted by the agreement of the parties, or, if they fail to agree, by the verdict of a jury. If such price is left open for future adjustment by consent, the property being delivered with the expressed intention to complete the sale, the price to be agreed on is implied to be one that is fair and reasonable, and this is always the rule of recovery on a *quantum meruit* or *quantum valdebat*. If there should or can be no mutual consent, the implication follows, as part of the original contract of sale, that a jury will adjust it, just as manifestly as in everyday sales and delivery of goods by merchants on open account, where the price is very often not adjusted for months afterwards."

An executory contract for the sale of goods which specifies no price at which they are to be sold, and furnishes no rule or criterion by which the price can be ascertained, is not sufficient to form the basis for an action for damages for its breach. *Lambert v. Hays*, 136 App. Div. 574, 121 N. Y. Supp. 80.

A memorandum for the sale of certain articles mentioned in an attached list does not satisfy the statute of frauds, where it does not contain a statement of the price agreed upon. *Goodman v. Griffiths*, 1 Hurlst. & N. 574, 26 L. J. Exch. N. S. 145, 5 Week. Rep. 309; and see to the same effect *Elmore v. Kingscote*, 5 Barn. & C. 583, 8 Dowl. & R. 343, 29 Revised Rep. 341; also *Acehal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98.

But if no price is agreed upon, a memorandum of sale is sufficient, under the statute 32 L.R.A. (N.S.)

ute of frauds, although it contains no reference to the price. *Hoadly v. McLaine*, 10 Bing. 482, 4 Moore & S. 340, 3 L. J. C. P. N. S. 162.

A few cases have held that under some circumstances a contract of sale may be valid, although silent as to price, the theory being that this element will be supplied by implication of law.

Thus, an order for goods specifying the articles to be furnished, and a promise to pay for the same, constitutes a valid contract, although the price is not stated, since it amounts to an agreement to pay what the articles are reasonably worth. Under such circumstances, when the seller accepts the order and consigns the goods in compliance therewith, the contract becomes obligatory upon the buyer, and he is bound for the reasonable value of the goods as ordered and sent. *Prenatt v. Runyon*, 12 Ind. 174.

In *Christie v. Burnett*, 10 Ont. Rep. 609, in holding that the title had passed from the seller to the buyer of goods delivered on board a steamer which was lost at sea, the doctrine was asserted that where no price is agreed upon for goods to be manufactured, the bargain is nevertheless sufficient, since the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price.

This is also the doctrine of *S. F. BOWSER & Co. v. MARKS*. It will be observed that this case cites *Hoadly v. McLaine*, 10 Bing. 482, 4 Moore & S. 340, 3 L. J. C. P. N. S. 162, in support of the doctrine, although the decision in that case, strictly speaking, was merely to the effect that where an executory contract is entered into for the manufacture of goods (a kind of contract to which the provisions of § 17 of the statute of frauds is in effect extended by 9 Geo. IV. chap. 14, § 7), without any agreement as to price, the memorandum of the contract required by the statute of frauds is sufficient without specification of price. As this was an action for the nonacceptance of a carriage built pursuant to order, the contract seems to have been regarded as an executory one, and the decision seems to

lant refused to accept the return of the property, and so notified appellees, and thereupon brought this suit for said \$55.

The appellant introduced testimony tending to prove that the cost of the material of which the tank and pump were manufactured in 1906 had advanced, and that \$55 was the current price at which it was sold in September, 1908. The case was tried by the court sitting as a jury, who, among others, made the following declarations of law:

"(4) Where the minds of both parties have not met as to price and terms, then there is no sale, and the plaintiffs cannot recover.

"(5) The oil pump and tank being shipped to the defendants by the plaintiffs with-

out any agreement as to price, and the price being increased since the defendants previously ordered the same kind of goods from the plaintiffs, and the defendants returned the goods to the plaintiffs within a reasonable time, refusing to accept them at the advanced price, then the plaintiffs cannot recover."

The court thereupon made a finding in favor of appellees, and rendered judgment in their favor.

The question involved in this case is whether or not the parties had entered into a contract for the bargain and sale of the pump and tank. The appellees contend that the contract was not entered into because the price of the article had not been agreed upon, and that, on this account, there was

proceed upon the assumption that, apart from the statute of frauds, an express agreement on the price would not be necessary, and that the omission would be supplied by implication of law that the purchaser was to pay the reasonable value of the goods ordered. Tindal, Ch. J., said: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." There is, however, no reference in the opinions in this case to the case of *Acebal v. Levy*, 10 Bing. 370, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98, decided about the same time. Tindal, Ch. J., in the latter case while conceding the inference that the law makes that the parties intended to sell and buy at a reasonable price where the contract is executed, said that it was questionable whether the same results applied to a case where the contract is executory only, and where the goods are still in possession or under the control of the seller. That question, however, was not decided, since the contract disclosed by the parol evidence was for the shipping price at the port of shipment, and the case was therefore held to come within the doctrine of *Elmore v. Kingscote*, 5 Barn. & C. 583, 8 Dowl. & R. 343, 29 Revised Rep. 341, that where the price is fixed by the contract, it must be stated in the memorandum in order to satisfy the statute of frauds. The failure in the *Hoadly Case* to allude to the doubt expressed in the *Acebal Case* suggests a possibility that, in the *Hoadly Case*, the court merely had in mind the question as to the sufficiency of the memorandum to comply with the statute of frauds, and not the question as to the essential ingredients of the contract, apart from the statute. In view, however, of the doctrine of *Elmore v. Kingscote*, supra, that when a special price is agreed upon, it must be stated in the memorandum in order to satisfy the statute, it is difficult to see how any practical effect can be given to the decision in the *Hoadly Case*, unless it

be assumed that the implication that the parties intended to contract for the reasonable value of the goods will take the place of the express agreement as to price as an essential ingredient of the contract, apart from the statute of frauds, unless possibly it may be that the court intended to make a distinction between a case arising under the 17th section of the statute of frauds and a case arising under 9 Geo. chap. 14, subdiv. 7, because of the use in the former of the word "price," and in the latter of the word "value." There is a suggestion of such a distinction in the opinion of Tindal, Ch. J. He, however, said that the question was whether the order involved was a sufficient note or memorandum within the 17th section of the statute of frauds.

Effect of mistake or misunderstanding as to price.

Where a contract of sale is entered into by the parties under a mutual mistake or misunderstanding as to the price to be paid, the contract will not be enforced where it is repudiated or rescinded on the ascertainment of the mistake prior to the delivery and acceptance of the property. *Wilkinson v. Williamson*, 76 Ala. 163; *Rovegno v. Defferari*, 40 Cal. 459; *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837; *Estey Organ Co. v. Lehman*, 132 Wis. 144, 11 L.R.A.(N.S.) 254, 122 Am. St. Rep. 951, 111 N. W. 1097; *Phillips v. Bistolli*, 2 Barn. & C. 511, 3 Dowl. & R. 822, 2 L. J. K. B. 116, 26 Revised Rep. 433.

The foregoing doctrine has been set forth both in cases where the price was stated in the contract, and where it was not; and while *S. F. Bowser & Co. v. Marks* reaches a contrary conclusion, it is to be noted that in that case the contract was silent as to price, and although it was clear that the purchaser ordered the articles in question with the intention of paying a price different from the price the seller intended to charge, the court nevertheless held that this fact could not affect the validity of the contract, since it was silent as to the price, and therefore the law implied a reasonable price was to be paid.

no mutual assent to one of the essential terms of the alleged contract. The price is one of the essential elements involved in the agreement to make a contract of sale, and there must be an agreement of the parties to the price, either express or implied, before there can be a completion of a sale. But it is not necessary that the price be expressly stipulated by the parties. If the parties have agreed to all the other elements of the sale, and have made no reference to the price, then the law will by implication fix the price, which will be what the article is then reasonably worth. A contract not only includes the things said or written, but also terms and matters which, though not actually expressed, are implied by law, and these are as binding as those terms actually written or spoken. In his work on Sales, Mr. Benjamin says: "If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at

what it is reasonably worth. In *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98, the court of common pleas, while deciding this to be the rule of law in cases of executed contracts, expressly declined to determine whether it was also applicable to executory agreements. But in the subsequent case of *Hoadly v. M'Laine*, 10 Bing. 482, 4 Moore & S. 340, 3 L. J. C. P. N. S. 162, the same court decided that in an executory contract where no price had been fixed, the vendor could recover in an action against the buyer for not accepting the goods, the reasonable value of them; and this is the unquestionable rule of law." Benjamin, Sales, 7th ed. § 85. See also 1 Mechem, Sales, § 207; Tiedeman, Sales, § 47; 35 Cyc. Law & Proc. p. 101; 24 Am. & Eng. Enc. Law p. 1036; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 88 Mich. 15, 13 L.R.A. 770, 49 N. W. 901. By their letter of September 15, 1908, the

In *Estey Organ Co. v. Lehman*, 132 Wis. 144, 11 L.R.A.(N.S.) 254, 122 Am. St. Rep. 951, 111 N. W. 1097, where the facts were very similar, in considering this question, the court said that where, owing to a misunderstanding as to the price, the minds of the parties never met upon the price before delivery, the contract is incomplete, and the doctrine that the law will imply that the parties intended a reasonable price, where no price is agreed upon, does not apply, and added: "Where no price is agreed upon, and there is a misunderstanding as to price, one party understanding it to be one sum and the other another, the doctrine invoked . . . cannot apply. There being a clear misunderstanding as to price, the contract of sale was not complete until the price was agreed upon; and the law could not imply a price contrary to the understanding of the parties."

In *Wilkinson v. Williamson*, 76 Ala. 163, the doctrine is asserted that "there can be no contract without a concurrence of the minds of the contracting parties, by which their mutual assent is given to some particular thing. This assent must be entire and adequate, comprehending unconditionally the whole, and not merely the part, of the proposition suggested as the basis of the contract. . . . This principle is, of course, just as applicable to sales of personal property as to contracts of any other nature. Unless all the terms of the proposed contract of sale, including the price when specified, are agreed to, the contract cannot be said to be complete. It is true that a contract of sale may be complete and executed without specifying the price of the article sold. This is the case where the price is either not stated, or is left open for future adjustment by consent, the property being delivered with the intention to complete the sale. If there is a failure to agree, a fair and reasonable price may be 32 L.R.A.(N.S.)

recovered on a *quantum valebat*, by verdict of a jury. . . . But where the intention of the vendor is to sell at a specified price, and the intention of the vendee is to buy at another and different price, which was specified by him at the time of delivery, and the minds of the contracting parties, through mutual misunderstanding, have failed to agree upon the same proposition as to price, there can manifestly be no legal contract of sale, because each has assented to a separate and distinct contract, and not to one and the same. It follows that, in cases of this character, either party may rescind upon the discovery of the mistake, by offering to return the price on the one hand, or the property on the other, within a reasonable time."

In *Rovegno v. Defferari*, 40 Cal. 459, where both purchaser and seller were mistaken as to purchase price of the seller's interest in a copartnership, and each was therefore assenting to a supposed contract which had no real existence, the court said that there was no valid agreement, notwithstanding the apparent assent of each.

And in *Phillips v. Bistolli*, 2 Barn. & C. 511, 3 Dowl. & R. 822, 2 L. J. K. B. 116, 26 Revised Rep. 433, the doctrine is asserted that a mistake by the purchaser as to the price he was to pay for certain articles is a valid objection to completing the contract, if raised before the property was delivered to and accepted by him.

So, in *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837, where the seller intended to place one price upon certain chattels, and the buyer understood him to place another, it was held that the minds of the parties never met upon the question of price to be paid for the articles, and therefore there was in fact no sale. The pretended purchase having been repudiated by the seller before the articles were in fact delivered to the buyer, and the earnest money ten-

appellees made an unconditional offer to purchase the oil tank and pump, and this offer was accepted by appellant. No price was fixed or mentioned, and the law read the price into the offer. The agreement then became mutual, and the contract of sale completed. And when, in pursuance of such contract, the appellant delivered the tank and pump to a common carrier in the usual course of business, properly addressed to appellees, the title to the property passed to them, and they became liable for the reasonable value thereof at the time of the acceptance of the offer to purchase.

It is urged by counsel for appellees that there was a mistake in the price made by the parties, and that, on this account, the contract was not assented to by both, and therefore was not effective. It is contended that the appellees understood the price to be \$45, and that appellant understood it to be \$55. It is true that the appellees may have entertained an unexpressed inten-

tion to pay only \$45 for the tank and pump. But an agreement is established by the words used, and the law imputes to the parties a meaning corresponding to those words. An unexpressed state of mind of one of the parties cannot affect the agreement as established by the words that are employed. In this case there was no dispute or disagreement about the price, and no misunderstanding by either party thereto. There was simply no reference made to the price. It cannot be said, therefore, that there was any mistake made as to the price. The fact that appellees had purchased the same kind of article at a certain price in 1906 could not determine the price thereof in 1908. If they had intended to make the offer of purchase at the price paid in 1906, they should have made an express stipulation in their offer to that effect. Failing to name any price, the law implies that they intended to pay for the oil tank and pump the price that it was reasonably worth; and

dered back to him, the buyer acquired no title to the property, and therefore could not maintain replevin for it.

In *Everson v. International Granite Co.* 65 Vt. 658, 27 Atl. 320, the doctrine is asserted that a misunderstanding or mistake by the seller as to the price of an article, where known by the buyer, precludes action on a contract of sale where executory, since the minds of the parties never met.

And the same rule has been asserted where the contract had been executed by the delivery of the property, and it has been held that replevin might be maintained by the seller to recover the property from the purchaser. This is the doctrine of *Rupley v. Daggett*, 74 Ill. 351, wherein, in so holding, the court said that where there is a mutual mistake in regard to the price of personalty, neither party is bound, since there has been no meeting of the minds of the contracting parties.

As a rule, however, where the property has been accepted by the purchaser, he will be held liable for its reasonable value, although the parties had not agreed as to price, or were laboring under a mistake with reference thereto. And although there is no meeting of the minds of the parties, because of a mutual misunderstanding as to the price, if the buyer has received and disposed of the articles purchased, he will be held liable for the value thereof on a *quantum valebat*. *Peerless Glass Co. v. Pacific Crockery & Tinware Co.* 121 Cal. 641, 54 Pac. 101.

And where the parties misunderstand each other as to price of an article, so that their minds never meet with reference thereto, but the buyer takes possession of the article, and keeps it so long that its return is not practicable, the seller is entitled to recover its fair and reasonable value. *West v. De Wezele*, 4 Fost. & F. 596.

So, where the owner of chattels by a 32 L.R.A. (N.S.)

mistake in figures places a wrong price thereon, and his offer to sell at that price is accepted by the buyer, who pays him therefor, and the property is delivered, the sale is completed and the title passes, even though the minds of the parties never met as to the price. *Griffin v. O'Neil*, 47 Kan. 116, 27 Pac. 826, on rehearing in 48 Kan. 117, 29 Pac. 143.

Where a contract is executed by the delivery of the property and its consumption by the purchaser, but the minds of the parties did not meet as to the price, owing to a misunderstanding and an ambiguity in the language used, the seller is entitled to recover of the purchaser for its value. *Butler v. Moses*, 43 Ohio St. 166, 1 N. E. 316.

So, a purchaser receiving goods knowing, or having reason to believe, that the seller has made a mistake in the price, is liable for the reasonable value of the goods. *Cunningham Mfg. Co. v. Rotograph Co.* 30 App. D. C. 524, 15 L.R.A. (N.S.) 308, 11 A. & E. Ann. Cas. 1147.

In *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. E. 40, where the seller of property, through the mistake of a stenographer, quoted a wrong price upon certain articles, and the buyer accepted the offer at the quoted price, but after the articles were shipped to him and before they had come into his actual possession, the seller discovered his mistake and informed the buyer thereof, telling him that if he took the articles it must be at a different price than the one which the seller in the first instance quoted. It was held that the buyer, by thereafter taking the property and disposing of it, rendered himself liable for the price which the seller had originally intended to place upon the property, and as to which he had informed the buyer. For similar cases, see note to *Estey Organ Co. v. Lehman*, 11 L.R.A. (N.S.) 254.

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as to such an article as this, that would be the current selling price thereof at the time the offer to purchase it was accepted.

The court therefore erred in its declarations of law.

The judgment is reversed, and the cause remanded for a new trial.

WISCONSIN SUPREME COURT.

SENTINEL COMPANY, Resp.,

v.

A. D. MEISELBACH MOTOR WAGON COMPANY, Appt.

(144 Wis. 224, 128 N. W. 861.)

Corporation — right to contract.

1. A corporation may bind itself by a contract from the time of filing its articles of incorporation, under statutes requiring them to be filed, and providing that no corporation shall, until such articles are left for record, have legal existence, and that no corporation shall transact business with any other than its members until a certain portion of its stock is subscribed and paid in, and depriving it of any right of action upon any obligation contracted in violation of the statute, but rendering its existing stockholders personally liable thereon.

Evidence — judicial notice — date.

2. The court takes judicial notice of the fact that publications of advertisements were on Sunday, in an action on *quantum meruit* to recover the value thereof, where the dates of publication appear and those dates fall on Sunday.

Sunday — advertisements — recovery for.

3. No recovery can be had on *quantum meruit* for the publication of advertisements in a Sunday paper, where the statute prohibits labor, business, or work on that day except only works of necessity or charity.

(December 6, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action brought to recover for services rendered on Sunday in publishing advertisements. Modified and affirmed.

Note. — As to stage in the proceedings when the corporation is deemed to be organized, see note to *Roosevelt v. Hamblin*, 18 L.R.A.(N.S.) 748.

As to validity of contract partially made on Sunday and perfected on a secular day, see note to *Jacobson v. Bentzler*, 4 L.R.A.(N.S.) 1151.

As to delivery on week day pursuant to contract made on Sunday, see note to *King v. Graef*, 20 L.R.A.(N.S.) 86.
32 L.R.A.(N.S.)

Statement by Kerwin, J.:

This action was brought on *quantum meruit* to recover upon two causes of action. The first cause of action was for advertising done for the defendant by the plaintiff between the 1st day of January and August, 1906, alleged to be reasonably worth \$248.67. An exhibit is attached to the complaint, showing the items and dates of publication. The second cause of action is based upon a claim for the manufacture and delivery to the defendant, at its special instance and request, by the Clark Engraving & Printing Company, a corporation, of engravings, plates, cuts, and drawings alleged to be reasonably worth \$60.10, which it is alleged the defendant agreed to pay for, and that the claim of said Clark Engraving & Printing Company was assigned to the plaintiff prior to the commencement of this action. The exhibit attached to the complaint under the first cause of action is as follows:

A. D. Meiselbach Motor Wagon Company,
In account with Sentinel Company, Dr.
1906.

| | | | |
|----------|----------------|-------|----------|
| May 13. | To advertising | | \$ 32 34 |
| " 20. | " " | | 40 18 |
| " 27. | " " | | 33 32 |
| " 28. | " " | | 57 |
| " 31. | " " | | 78 10 |
| June 30. | " " | | 64 16 |

\$248 67

The date of the last item, June 30th, was corrected on the trial without objection to read June 3d.

The complaint also alleges that the defendant is a corporation. The answer denies the corporate existence of the defendant, and denies generally the allegations of the complaint. It was, however, admitted on the trial that the Clark Engraving & Printing Company was a corporation at the times stated in the complaint, and that the work alleged to have been performed by the Clark Engraving Company was in fact performed, and the prices charged therefor reasonable. The material controverted issues upon the trial, briefly stated, were: (1) The incorporation of the defendant at the time in question, and its power to incur the obligation; (2) the authority of one Charles Rohde to bind the defendant, and whether said Rohde individually, or the defendant through him, authorized the advertisements published by the plaintiff and the work done by the Clark Engraving Company; (3) whether the defendant ever adopted the acts of Rohde in the matters in question; (4) the validity of the Sentinel Sunday advertising as a basis for legal lia-

bility against the defendant; and (5) the reasonable value of the Sentinel advertising.

The jury returned a general verdict in favor of the plaintiff upon both causes of action for the sum of \$308.77, with interest from the 30th day of June, 1906. The defendant moved that the verdict be set aside and for judgment dismissing the complaint with costs, and, in case of the denial of such motion, that the verdict be set aside and a new trial granted for several alleged reasons. Defendant's motions were denied, and judgment ordered for the plaintiff in accordance with the verdict, from which the defendant appealed.

Messrs. Perry, Morton, & Kroesing, for appellant:

The court takes judicial notice of the almanac.

1 Enc. Ev. p. 768, II.; Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 892; Wilson v. Van Leer, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; McIntosh v. Lee, 57 Iowa, 350, 10 N. W. 895.

Sunday advertising cannot be the basis of a legal liability against the defendant.

Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Cohn v. Heimbauch, 86 Wis. 176, 56 N. W. 638; Williams v. Lane, 87 Wis. 152, 58 N. W. 77; Howe v. Ballard, 113 Wis. 375, 89 N. W. 136; Julien v. Model Bldg. Loan & Invest. Asso. 116 Wis. 79, 61 L.R.A. 668, 92 N. W. 561; King v. Graef, 136 Wis. 548, 20 L.R.A.(N.S.) 86, 128 Am. St. Rep. 1101, 117 N. W. 1058; Stewart v. Thayer, 168 Mass. 519, 60 Am. St. Rep. 407, 47 N. E. 420.

A contract must have mutuality to be binding.

9 Cyc. Law & Proc. p. 327, h; Hodson v. Carter, 3 Pinney (Wis.) 212; Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110; Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982.

The corporation cannot enforce its contracts made before 50 per cent of its stock has been subscribed and 20 per cent paid in.

Anvil Min. Co. v. Sherman, 74 Wis. 226, 4 L.R.A. 232, 42 N. W. 226; J. A. Fay & E. Co. v. Brown, 96 Wis. 434, 71 N. W. 895; Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795; Tuttle v. George H. Tuttle Co. 101 Me. 287, 64 Atl. 496, 8 A. & E. Ann. Cas. 260; Penn Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; Wright v. St. Louis 32 L.R.A.(N.S.)

Sugar Co. 146 Mich. 555, 109 N. W. 1062; Ireland v. Globe Mill. & Reduction Co. 20 R. I. 190, 38 L.R.A. 299, 38 Atl. 116; Sullivan v. Detroit, Y. & A. R. Co. 135 Mich. 661, 65 L.R.A. 673, 186 Am. St. Rep. 403, 98 N. W. 756; Tryber v. Girard Creamery & Cold-Storage Co. 67 Kan. 489, 73 Pac. 83; Moore & H. Hardware Co. v. Towers Hardware Co. 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41.

A corporation has no power to bind itself where it is prohibited by statute, and such defense of *ultra vires* can in such case be urged by the corporation itself.

Koerts v. Grand Lodge, O. H. S. 119 Wis. 520, 97 N. W. 163; National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; Central Transp. Co. v. Pullman's Palace Car. Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 578.

Mr. J. V. Quarles, Jr., with Messrs. Quarles, Spence, & Quarles, for respondent:

A recovery can be had on a subsequent promise to pay for goods sold and delivered on Sunday.

Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; Williams v. Lane, 87 Wis. 158, 58 N. W. 77; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771.

There are many instances in the law in which one party to a contract may not enforce it, and yet be responsible thereon to the other party.

Badger Paper Co. v. Rose, 95 Wis. 145, 37 L.R.A. 162, 70 N. W. 302.

Kerwin, J., delivered the opinion of the court:

The first three propositions referred to in the statement of facts—namely, the power of the defendant to incur the obligation which is the basis of plaintiff's claim, the authority of Rohde to bind the defendant, and whether he in fact did so, and whether defendant adopted the acts of Rohde—may be considered together. The articles of incorporation of the defendant were filed with the register of deeds on May 8, 1906. They were signed by A. D. Meiselbach, B. R. Godfrey, and Chas. Rohde, incorporators. Section 1772, Stat. 1898, provides for the filing of the articles of incorporation, or a true copy thereof, with the secretary of state and register of deeds of the county in which the corporation is located, and further provides that "no corporation shall, until such articles be left for record, have legal existence." Section 1773, Stat., provides that, "until the directors or trustees shall be elected, the signers of the articles of organi-

zation shall have direction of the affairs of the corporation," and that "no such corporation shall transact business with any others than its members until at least one half of its capital stock shall have been duly subscribed and at least 20 per cent thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the signer or signers of the articles and the subscriber or subscribers for stock transacting such business, or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same."

Under our statutes the defendant became a corporation at the time of the filing of its articles with the register of deeds,—namely, May 8, 1906,—and was capable from that time to bind itself by contract, and the signers of the articles had lawful authority to manage its affairs. *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L.R.A. 162, 70 N. W. 302. There is evidence tending to show that, immediately after the articles of incorporation of the defendant were filed with the register of deeds, Chas. Rohde, one of the signers, assumed the management of the business and contracted the indebtedness in question on behalf of the corporation, and held himself out as acting for the corporation. There is also evidence that early in May, 1906, Rohde, with the knowledge and consent of the other signers of the articles, acted as secretary and manager of the sales department of the defendant at a salary of \$1,200 per year, made contracts for the defendant, and represented it in the management of the business. The jury in finding for the plaintiff necessarily found the facts in its favor, and, without further reciting the evidence, it is sufficient to say that there is ample evidence to support the verdict on the points of Rohde's authority to bind the defendant, and that he did in fact contract with the plaintiff and the Clark Engraving & Printing Company on defendant's behalf. All the services performed by the plaintiff and the Clark Engraving Company, and material furnished, were done, performed, and furnished for defendant after the filing of the articles of incorporation of the defendant, therefore after the defendant had existence as a corporation.

The only serious question on this appeal is the right of the plaintiff to recover for charges made for Sunday publications. It appears from the record that four of the items recovered for, namely: May 13th, \$32.34; May 20th, \$40.18; May 27th, \$33.32; and June 3d, \$64.10—were for Sunday pub-

lication, and the question arises whether the recovery for these items can be sustained. The main answer of respondent's counsel to the contention of appellant's counsel on this point is that the objection to these items as being Sunday publications was not sufficiently brought to the attention of the trial court; the only objection made to proof of these items being that the evidence was incompetent, irrelevant, and immaterial, while on the part of appellant it is contended that, the dates appearing, the court was bound to take judicial notice that such publications were on Sunday. The action being on *quantum meruit* to recover what the publication of the articles was reasonably worth, and the dates of publication appearing, we think the court was bound to take judicial notice of the Sunday publications, and that no recovery could be had therefor. *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; *Louisville & N. R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 So. 892; 1 Enc. Ev. p. 768. Moreover, it appears from the record that at least three of the Sunday publications were brought to the attention of the court as Sunday publications. The question is not free from difficulty. It is a matter of common knowledge that Sunday newspapers are published throughout the country, and that they contain in their columns much valuable advertising matter, and it seems like a harsh rule to hold that such publications made on Sunday cannot be recovered for, although perhaps much of the work in preparing the matter for publication is done on secular days. However, in the case before us we are not dealing with a situation of agreement made on a secular day for work to be done generally, nor a case of agreement made on Sunday for work afterwards done on a secular day and supported by a subsequent promise under the rule laid down in *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 158, 58 N. W. 77; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *King v. Graef*, 136 Wis. 548, 20 L.R.A. (N.S.) 80, 128 Am. St. Rep. 1101, 117 N. W. 1058; and *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787.

In the case at bar the respondent placed itself squarely upon the right to recover for what the services performed on Sunday were reasonably worth. Section 4595, Stat., prohibits "labor, business, or work except only works of necessity and charity," and no attempt was made by respondent to bring itself within the exception, if it were possible for it to do so. Under a similar statute in New York, a contract for the publication of an advertisement in

a newspaper printed Saturday night and issued Sunday was held void. *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302. This court has held to a strict rule against the enforcement of Sunday contracts. *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *Williams v. Lane*, 87 Wis. 153, 58 N. W. 77; *Howe v. Ballard*, 113 Wis. 375, 89 N. W. 136. In *Williams v. Lane*, supra, the last materials in a mechanics' lien case were furnished on Sunday, and, although actually used in the work, it was held that no recovery could be had therefor, since no subsequent promise was made to pay, and none could be implied. In *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095, it was held that, where a contract is void because executed on Sunday, acts of subsequent recognition do not constitute ratification of the original contract; such contract being absolutely void and incapable of ratification. In face of the statute and repeated decisions of this court, we see no escape from the conclusion that the plaintiff cannot recover for the Sunday items. If the rule of the statute be wrong, it is for the legislature, not the courts, to afford relief.

It is also insisted by appellant that there is an entire failure of proof on the item May 31, 1906, \$78.10. We cannot agree with counsel for appellant on this point. A prima facie case was made on the whole bill for advertising, namely, \$248.67, and no attempt was made to contradict it. The evidence was sufficient, especially in connection with the admissions made on the trial.

It is also urged by counsel for appellant that the reasonableness of the charge for advertising in plaintiff's paper was not proven. We think there was sufficient evidence to support the finding of the jury on this point.

Error is assigned respecting rulings on evidence, denying motions for nonsuit and directed verdict, refusal to charge as requested, in instructing the jury, and denial of motion for new trial. We do not regard these alleged errors of sufficient gravity to warrant treatment in the view we take of the case. It is sufficient to say that, with the exception of allowing recovery for the Sunday items, we find no prejudicial error in the record. It follows that the judgment of the court below must be modified in accordance with this opinion.

The judgment of the court below is modified by deducting therefrom \$170, the amount of the Sunday advertising, and, as so modified, is affirmed as of the date of the judgment.

32 L.R.A. (N.S.)

CALIFORNIA SUPREME COURT.

ITALIAN SWISS COLONY, Resp't.,
v.

ITALIAN VINEYARD COMPANY, Appt.

(158 Cal. 252, 110 Pac. 913.)

Tradenames — unfair competition — foreign words.

1. A manufacturer of wine who has put up his product under a name composed of the common Italian word "Tipo," signifying type, and another word signifying the kind of the wine, cannot enjoin, on the ground of unfair competition, the use of such word by another manufacturer, in connection with words signifying other kinds of wine, where the packages and labels are entirely different, although his wine has become known to the trade as Tipo White and Tipo Red, according to its color.

Trademark — foreign words.

2. The ordinary Italian word "Tipo," signifying type or kind, cannot be adopted as a trademark in connection with other words merely designating the type or kind.

(Angellotti, Henshaw, and Lorigan, JJ., dissent in part.)

(August 30, 1910.)

Note. — Descriptive word adopted from foreign language as subject of trademark.

It is intended to include herein only cases considering the right to protect a foreign word which is descriptive of the character or quality of the article. Cases discussing the question whether a particular word is descriptive of the character or quality of the article are excluded. This exclusion covers such cases as *Eastman Photographic Materials Co. v. Comptroller-General* [1898] A. C. 571, 87 L. J. Ch. N. S. 628, 79 L. T. N. S. 195, 25 Eng. Rul. Cas. 240, wherein the court passed upon the question whether the word "Solio" was capable of registration as a trademark in respect of photographic paper, where the contention was made that it was a foreign descriptive word, as it suggested the Latin word "Sol" meaning sun, and hence had reference to the processes of photography, the court holding that although the word "Solio" was an Italian word meaning the throne, and a Latin word in the ablative case with the same meaning. It was not descriptive in any sense which would make it intelligible in England, and hence it was entitled to registration as a fancy word; that merely because the letters S, O, L, taken from "Solio" may be understood to mean the sun, it was not sufficient to disentitle it to registration as a trademark.

Generally.

No person is entitled to be protected in the use as a trademark of a word or phrase descriptive of the article to which it is

APPEAL by defendant from an order of the Superior Court for Los Angeles County temporarily restraining the infringement of an alleged trademark. Reversed.

The facts are stated in the opinion.

Messrs. O'Melveny, Stevens, & Millikin and Frederick S. Lyon for appellant.

Messrs. Naphtaly & Friedenrich and Shankland & Chandler, for respondent:

A word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use like the adjectives of the language, yet there may be unfair competition in trade by an improper use of such word, mark, or symbol.

Paul, Trademarks, §§ 208, 211; Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed.

651; Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704.

While a descriptive geographical or personal name cannot constitute a technical trademark, yet where an article has come to be known by a descriptive word, one may not use that word to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known.

Williams v. Mitchell, 45 C. C. A. 265, 106 Fed. 168; Anheuser-Busch Brewing Asso. v. Piza, 23 Blatchf. 245, 24 Fed. 149; California Fruit Cannery Asso. v. Myer, 104 Fed. 82; El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 6 L.R.A. 823, 23 Am. St. Rep. 537, 7 So. 23; Gage-Downs Co. v. Featherbone Corset Co. 83 Fed. 213; Carls-

applied; and, by the great weight of authority, the fact that the word is a translation in English of a foreign word, properly descriptive of the article in the language of the country in which it is produced gives no greater right to its use as a trademark. Luyties v. Hollender, 30 Fed. 632; Dadirrian v. Yacubian, 72 Fed. 1010; Dadirrian v. Yacubian, 90 Fed. 812, affirmed in 39 C. C. A. 321, 98 Fed. 872; Selchow v. Chaffee & S. Mfg. Co. 132 Fed. 996; American Brewing Co. v. Bienville Brewery, 153 Fed. 616; Burke v. Cassin, 45 Cal. 407, 13 Am. Rep. 204; Bolander v. Peterson, 136 Ill. 215, 11 L.R.A. 350, 26 N. E. 603; Roncoroni v. Gross, 92 App. Div. 221, 86 N. Y. Supp. 1112; Philippart v. Whiteley [1908] 2 Ch. Div. 274, 77 L. J. Ch. N. S. 650, 99 L. T. N. S. 291, 24 Times L. R. 707; Re Farbenfabriken [1894] 1 Ch. Div. 645, 63 L. J. Ch. N. S. 257, 7 Reports, 439, 70 L. T. N. S. 186, 42 Week. Rep. 488.

In Dadirrian v. Yacubian, 72 Fed. 1010, the court said: "A word is a combination of articulate sounds by which men communicate with each other. To say that the Armenian characters whereby the sound 'Matzoon' is indicated are unknown to a person who does not know them is a proposition which carries with it no information. The impulses by which a word extends itself from the usage of one people to that of another, the laws of comparative philology by which a transliteration—when the elemental sounds of one language are signified by written signs unknown in the other—is explained and held to be accurate, and the arrangement of English letters which reproduce the word, are subject to the exclusive dominion of no man. In the vocabulary of a person unacquainted with the letters or characters in which any language is written, but who knows the article here in question, made from sterilized and fermented milk, as 'Matzoon,' that word has a place. By such person such word will be spontaneously used as a means of communication. A word must exist in speech before it can be signified in letters or characters. I am not able to see how the legal aspects of the case would be different if the name 32 L.R.A. (N.S.)

'Matzoon' were written in the same characters in Armenian as in English. A declaration by these defendants, whether written or spoken, that the article made and offered for sale by them is Matzoon, is true, equally with the like written or spoken declaration by complainant as to the article made and offered for sale by him. Let it be assumed that these defendants are taking advantage of a popularity and knowledge of 'Matzoon' on the part of the trading public which Dr. Dadirrian has been the chief instrument in bringing about; how, in view of their labels, and of the facts shown on this hearing, can it be fairly declared that they are trying to pass off or sell their product as having been manufactured by him? The strong contention is that Dr. Dadirrian introduced into this country a product which was unknown here, and by a name which was equally unknown, and that, since the name has become identified here with the article as made by him, his property in the name should be recognized. But, as already said, the product was in fact old, as was also the name. The ignorance of people in this country touching it, its uses and its name, cannot be treated as property, and be, in a manner, capitalized as an element in the good will of this complainant. This would be the case if no other dealer were permitted to tell what Matzoon is, and what a considerable portion of the human race has found it useful for, after an experience with it under that name which, according to the record, dates back some eight centuries."

But in Raggett v. Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. N. S. 64, 29 L. T. N. S. 448, 22 Week. Rep. 53, Malins, V. C., remarked *obiter*: "Upon principle it appears to me there must be something to go beyond a mere English adjective describing the quality of the material. If you use a foreign word or a word in a dead language not known to people in general, that word itself, because it is not understood, may very reasonably become a trademark." In support of this doctrine the court cited McAndrew v. Bassett, 4 DeG. J. & S. 380, 4 New Reports, 123, 33 L. J. Ch. N. S. 561,

bad v. Schultz, 78 Fed. 469; Fuller v. Huff, 51 L.R.A. 332, 43 C. C. A. 453, 104 Fed. 141; Revere Rubber Co. v. Consolidated Hoof Pad Co. 139 Fed. 151; Collinsplatt v. Finlayson, 88 Fed. 693; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 435, 48 L. ed. 251, 24 Sup. Ct. Rep. 145; Montgomery v. Thompson, 64 L. T. N. S. 748, 60 L. J. Ch. N. S. 757 [1891] A. C. 217, 55 J. P. 756, affirming L. R. 41 Ch. Div. 35; Gebbie v. Stitt, 82 Hun, 93, 31 N. Y. Supp. 102; Hostetter Co. v. Martinoni, 110 Fed. 524.

There is deception notwithstanding defendant uses its own name, and its package, bottle, label, and wrapping are claimed to be dissimilar.

Menendez v. Holt, 128 U. S. 514, 32 L.

10 Jur. N. S. 550, 10 L. T. N. S. 442, 12 Week. Rep. 777, which holds the word "Anatolia" to be a proper trademark for licorice, although Anatolia was the name of a section of country from which the licorice was obtained. This case, however, was not disposed of on the theory that the word was a descriptive word, but rather that it was a geographical word.

In Partlo v. Todd, 17 Can. S. C. 198, Gwynne, Judge, remarked that a foreign word or a word in a dead language not known to people in general, because it is not understood, may become a trademark of the person who first uses it upon a particular article sold by him; although a descriptive word in the English language could not properly be made a trademark. The case chiefly relied upon in support of this statement was Raggett v. Findlater, supra.

And Rillet v. Carlier, 61 Barb. 435, 11 Abb. Pr. N. S. 186, holds that the word "Grenade" or "Grenadine," adopted from the French language to indicate a syrup made from the pomegranate, was entitled to be protected as a trademark, although in French it signifies pomegranate, and prior to its adoption in this country was used in France to designate a syrup made from the pomegranate. The question under consideration, however, was not discussed in this case.

Where it is not clear that the term is merely descriptive, and the complaint alleges that the complainant adopted it as an arbitrary and fanciful trademark and tradename to designate his preparation, on demurrer the court will not assume that the term is descriptive, but will assume that it is an arbitrary and fanciful trademark. M. J. Breitenbach Co. v. Spangenberg, 131 Fed. 160.

Effect of fact that the word used is not descriptive of the article to which it is applied.

It is not sufficient to disentitle a foreign word to registration as a trademark, that it be descriptive of some article produced in the country wherein such language is

ed. 526, 9 Sup. Ct. Rep. 143; Gillott v. Esterbrook, 47 Barb. 455, 48 N. Y. 374, 8 Am. Rep. 553; Coats v. Holbrook, 2 Sandf. Ch. 586; Battle v. Finlay, 50 Fed. 106; Roberts v. Sheldon, 8 Biss. 401, Fed. Cas. No. 11,916.

Sloss, J., delivered the opinion of the court:

Appeal by defendant from an order granting a temporary injunction. The action is one to restrain the infringement of an alleged trademark.

The complaint avers that since December 8, 1900, the plaintiff has been engaged in the business of manufacturing wines from grapes grown in California, and of selling such wines in said state and elsewhere.

spoken, but it must be descriptive of the article to which it is applied. This distinction has been clearly made by the courts of England. Thus the word "Bokol," although unknown in England prior to its registration as a trademark for a beverage, is not entitled to protection as a trademark, since it properly describes the beverage in the language of the country in which it is produced. Davis v. Stribolt, 59 L. T. N. S. 854. And since the word "Sanitas" as applied to medicines would mean to an ordinary person that the medicines are health medicines, that is to say, health-giving medicines, it is descriptive of quality or the effect of the use of the medicines, and cannot be registered as a trademark for medicinal preparations. Re Sanitas Co. 58 L. T. N. S. 166.

On the other hand "Oomoo," an aboriginal word of Australia, signifying choice, expresses nothing to the ordinary Englishman, and is obviously meaningless with reference to wine, and hence may properly be registered as a trademark for wines. Re Burgoyne, 61 L. T. N. S. 39.

And "Bodega" a Spanish word descriptive of a lofty one-story building, may properly be used for a trademark for wines, and a tradename for restaurants or wine rooms wherein such wines are dispensed. Bodega Co. v. Owens, Ir. L. R. 23 Eq. 371.

To the same effect is Eastman Photographic Materials Co. v. Comptroller-General [1898] A. C. 571, 67 L. J. Ch. N. S. 628, 79 L. T. N. S. 195, 25 Eng. Rul. Cas. 240, wherein the court held that the word "Solio" was capable of registration as a trademark in respect of photographic paper, although it was an Italian word meaning throne, and also a Latin word in the ablative case with the same meaning. The court, however, did not discuss this particular question, but it was apparently assumed that, although "Solio" might designate some article, yet where the meaning, as applied to the article with respect to which it was sought to register it as a trademark, was unintelligible in England, it was a fancy word and capable of registration.

Prior to 1900 the same business was conducted for more than ten years by the Italian Swiss Agricultural Colony, to all of whose rights the plaintiff succeeded on said 8th day of December, 1900. During this period of ten years preceding 1900, the Italian Swiss Agricultural Colony adopted and appropriated to its exclusive use, for the purpose of designating the origin and ownership of wine manufactured by it, the name of "Tipo," which had never theretofore been used by anyone in connection with the manufacture or sale of wine. During said ten years the Italian Swiss Agricultural Colony, and since 1900, the plaintiff, as its successor, has used said name of "Tipo" and affixed it to packages containing wine manufactured by it, and said wine

was during all said time known to the public, and to dealers and consumers, as wine manufactured by the said Italian Swiss Agricultural Colony or by the plaintiff, respectively. The registration of said trademark under the provisions of the act of Congress of February 20, 1905, is alleged. It is averred that the plaintiff's wines have become well and favorably known to the public and to the trade, by the name of "Tipo." The defendant is engaged in business of the same character as that of plaintiff. The complaint charges that said defendant, knowing of plaintiff's appropriation of the word "Tipo" to its exclusive use as a trademark, and knowing that plaintiff's wines were generally known by said name, and with the intent of defraud-

Effect of inaccurate translation.

There is a more serious question as to the right of a person slightly to change an English translation of a foreign descriptive word or phrase, and make it a valid trademark, than the right to make a foreign descriptive word a trademark. The inferior courts of New York apparently support the proposition that a person may, by making a slight change in a foreign descriptive word or phrase use it as a trademark for the article of which it is descriptive. *Dadirrian v. Theodorian*, 15 Misc. 300, 37 N. Y. Supp. 611; *Dr. Dadirrian & Sons Co. v. Hauenstein*, 37 Misc. 23, 74 N. Y. Supp. 709, affirmed without opinion in 74 App. Div. 630, 77 N. Y. Supp. 1125.

In *Dadirrian v. Theodorian*, the court, after pointing out that when the plaintiff came to put his liquid preparation on the market in this country, he adopted as its designation an inaccurate transliteration of the name most commonly applied by the Armenians to a semi-solid product and not the word "Matzoon," which did not correctly indicate the lettering of the Armenian word or its sound, although there was probably sufficient resemblance in the sound to signify to Armenians that the preparation was some sort of a fermented milk,—added: "But I do not think that such a term can properly be regarded as descriptive in this country. It would be absolutely meaningless to all but a little group of Armenians in the millions of inhabitants of the United States. It would be equally meaningless in most of Europe. A Choctaw word would signify just as much. To the medical profession, among whom the plaintiff sought approval for his product, and to the drug trade, the name 'Matzoon' was practically an arbitrary or fanciful designation. It was not incorporated into the English language; it was derived from a language hardly known here, and to the vast majority of our people it meant nothing. Hence, the rule upon which the defendant relies has no application here."

Th Federal courts, however, hold to the contrary. *Selchow v. Chaffee & S. Mfg. Co.* 32 L.R.A. (N.S.)

132 Fed. 896; *Dadirrian v. Yacubian*, 39 C. C. A. 321, 98 Fed. 872, affirming 90 Fed. 812; *Dadirrian v. Yacubian*, 72 Fed. 1010.

On this subject in *Dadirrian v. Yacubian*, 98 Fed. 872, the court said that "any distinction between 'Madzoon' and 'Matzoon' is too refined to be of use with reference to rules so practical as those which appertain to trademarks;" and added: "Section 3 of the act of March 3, 1881, contains a prohibition against registering any alleged trademark, 'which is identical with a registered or known trademark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trademark as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers.' This is a very practical expression of a fundamental rule touching trademarks. While, on the one hand, if the complainant could lawfully claim, the word 'Matzoon,' it would be plain that other persons could not use the word 'Madzoon,' because the two words so nearly resemble each other as to be likely to cause confusion or mistake, as expressed in this citation from the statute, so, on the other hand, if the public at large is entitled to use the word 'Madzoon,' it is quite clear that the word 'Matzoon' would come so well within the practical rules applicable to trademarks as to prevent any lawful appropriation thereof for a monopoly. Therefore, without going into any philological discussion for the purpose of showing how, in different localities, or at different dates, slight changes in pronunciation occur, which make, for practical purposes, 'd' and 't' the same letter, the distinction which complainant makes in this respect is too refined for practical uses in this branch of the law."

Although the Federal courts thus refuse to protect a word as a trademark which is an inaccurate translation in English of a foreign word descriptive of an article to which it is applied, yet protection is accorded such a word on the ground of unfair competition: the theory being that, while such a word cannot properly be made a trademark, yet the user will be protected

ing the plaintiff and acquiring the benefits of its reputation, did wrongfully affix upon barrels and packages of wine manufactured by it, and known as Barbera wine and Puelia wine, the word "Tipo," with intent and purpose to palm off said wine for the wine of this plaintiff. The defendant threatening to continue such use of the word, the prayer of the complaint is for an injunction restraining the defendant from offering for sale or selling any wine under the name of Tipo, for an accounting of profits, and for other relief.

The application for an injunction *pendente lite* was heard upon this complaint, the answer of the defendant (both pleadings being verified), and certain affidavits and exhibits. The answer set up four separate

against its use by another to describe a similar article, since if the purpose of the use was merely to describe the article, one making use of the word later should use a correct translation, and the use of the inaccurate translation is sufficient to show that the purpose of the use is not to describe the article but to obtain the benefit of the reputation established by the first user.

An interesting case supporting this view is *Selchow v. Chaffee & S. Mfg. Co.* *infra*, wherein the court refused to protect a person in the use as a technical trademark of the word "Parcheesi," which was an inaccurate English translation of the Hindustani game, a correct translation of which might be *parchise*, *purchesse*, or *putcheesi*, but not *parcheesi*; protection was, however, given on the ground of unfair competition, the court holding that although there was not sufficient difference in these names to entitle the plaintiff to protect the word "Parcheesi" as a technical trademark, yet, on the ground of unfair competition, there was sufficient difference to entitle him to protect such word against its use by another to designate a similar article. On this point the court reasoned: "It is clear to this court that, if defendant is permitted to make and sell this game (meaning the board, diagram, etc., used for playing the game) under the name 'Parcheesi,' they will take away a part, if not a large part, of complainants' business, to their great damage. That they intended so to do is plain, and they use the word 'Parcheesi' not because it is the Hindustani or foreign name of the game, for they are compelled to concede it is not (although so very similar, as before stated), but because it is the name of the game given to it by the complainants, and whose enterprise in business has caused it to become, under that name, a popular game, and an extensive article of commerce, from the manufacture and sale of which, under that name, large profits have been and may be derived. It seems plain that to permit the defendant to make and sell this article under the name 'Parcheesi' will legalize a fraud upon complainants' rights. It is not intended to hold 32 L.R.A. (N.S.)

defenses, but we think it will be sufficient to refer to the following denials and allegations contained in it. The defendant denies that the plaintiff or its predecessor used the word "Tipo" for the purpose of designating the origin or ownership of wine manufactured by it, and alleges that the word "Tipo" is an adjective of description, kind, and quality, and is a common word of the Italian language, meaning "type" or "kind," or "having the properties or characteristics of" the thing with reference to which said word "Tipo" is used. It alleges that the word has been used by plaintiff as a descriptive term in connection with the word "Chianti," to designate that its wine was a type of the well-known Chianti wine, manufactured in Italy. The defendant has been

that defendant may not use the Hindustani name of this game in putting it on the market and selling it, for that everyone has the right to do. The one who first introduces a foreign game or article under its true name cannot monopolize either the game or article or the name thereof, nor can such person, by slightly changing the name, prevent others lawfully making and selling the same game or article, from selling it under its true name, for the alleged reason that it resembles the name such person saw fit to give it when introducing it. Such person so giving the article a new name closely resembling the true name may gain the exclusive right to his tradename, if such new name becomes such, but he cannot be heard to complain that the true name so closely resembles his name (the name given the article by him) as to lead to possible confusion, etc. It has come to be settled law that one man shall not intentionally put up and sell goods of his manufacture, under such a garb and guise or name as to induce purchasers and users to take and use or sell them, supposing them to be the goods made and sold by some other person or firm. If the doctrine has been of slow growth, it has been, and is, supported by common sense and a desire to promote common honesty in dealing."

Unfair competition.

As to the right to protect a word which is an inaccurate translation of a foreign descriptive word, against use by another on the ground of unfair competition, see *Selchow v. Chaffee & S. Mfg. Co.* *supra*.

Even though a descriptive term adopted from a foreign language cannot be protected as a technical trademark or tradename, it is clear that the court will protect a person in its use by another on a similar article in a manner to deceive, and for the fraudulent purpose of deceiving, the public as to the origin of the article, and thereby obtain the benefit of the reputation the article has acquired as the production of the complainant. *Societe Anonyme v. Western Distilling Co.* 43 Fed. 416;

manufacturing wines having characteristics similar to those of other Italian wines, to wit, those known as Barbera, Puglia, and Gragnano,—and has branded and marked them, as “Tipo Barbera,” “Tipo Puglia,” and “Tipo Gragnano,” in order to indicate that its said wines were, respectively, of the type of the said Italian wines.

An affidavit offered by defendant supported the averments of the answer, to the effect that Tipo is an Italian word in common use signifying type or kind, and that, when used in connection with the name of a certain kind of wine, such as, for example, Barbera, it signifies wine of the general characteristics or qualities of such kind of wine. In this regard there was no conflict in the evidence, the affidavits on behalf of plaintiff going no further than to allege that its wines, red and white, put up under the name of “Tipo Chianti,” had become known to customers as Tipo Red and Tipo White, and that the word “Tipo” had become known to customers and consumers as indicating a wine manufactured by the Italian Swiss Colony. The exhibits, consisting of bottles of the wines manufactured and sold by the plaintiff and the defendant, respectively, have been brought here on this appeal. They bear out defendant’s averments that plaintiff was putting up his wines under the name of “Tipo Chianti,” and that defendant’s product was offered to the public as Tipo Barbera and Tipo Puglia. An inspection of the exhibits shows, further, the most marked differences of appearance between the respective packages and labels. The bottle of plaintiff is distinctive in shape and style. It is bulbous in form, tapering to a narrow neck. Its lower half is encased in a hemp or straw jacket. The defendant’s packages are in the form of the ordinary straight-sided claret bottle. The respective labels are totally different in size, shape, color, and device. The sole point of resemblance be-

tween the two is in the use of the word “Tipo.”

That the law will afford protection against the “unfair competition” of one who seeks, by imitation of label or package or by other artifice, to induce persons to deal with him in the belief that they are dealing with another, is, of course well settled. *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1, 3 Pac. 645; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Banzhaf v. Chase*, 150 Cal. 180, 88 Pac. 704. All of these cases rest upon the basis of fraud. There must be the intent to deceive, or at least, the doing of things reasonably likely to deceive. 12 Enc. Ev. p. 650; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; *Deering Harvester Co. v. Whitman & B. Mfg. Co.* 33 C. C. A. 558, 91 Fed. 376. If the defendant can be shown to have put up his product with intent to palm it off as that of plaintiff, and if it does in fact tend to mislead the purchasing public, a case is made out, even though the plaintiff has shown no exclusive right in any trademark or tradename.

But a technical trademark stands upon an entirely different ground. A trademark is a form, symbol, or name appropriated by one who produces or deals in a particular thing, or conducts a particular business, to designate the origin or ownership thereof. Civ. Code, § 991. If a plaintiff has obtained the exclusive right to such trademark, he is entitled to restrain an infringement, whatever the motive or intent of the infringer. 12 Enc. Ev. p. 638. In such cases the relief is granted not on the ground of fraud, but because a right of property—i. e., plaintiff’s exclusive right to the use of his trademark—has been invaded. It is clear on the facts shown by the record before us that this case must stand as one

Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872; *La Republique Francaise v. Saratoga Vichy Springs Co.* 65 L.R.A. 830, 46 C. C. A. 418, 107 Fed. 459, affirmed in 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; *Selchow v. Chaffee & S. Mfg. Co.* 132 Fed. 996; *American Brewing Co. v. Bienville Brewery*, 153 Fed. 615; *Siegert v. Findlater*, L. R. 7 Ch. Div. 801, 47 L. J. Ch. N. S. 233, 38 L. T. N. S. 349, 26 Week. Rep. 459; *Seixo v. Provezende*, L. R. 1 Ch. 193, 12 Jur. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357.

In *Societe Anonyme v. Western Distilling Co.* the court said that where a foreign descriptive term was used to designate an article similar to that of another to which such descriptive term is applied, and the form of the package of the former is also imitative of the package of the latter, the 32 L.R.A.(N.S.)

only conclusion admissible is that it was intended to thereby deceive the public and fraudulently obtain trade by the similarity of the goods. Under such circumstances, the court added. “It is not very material whether complainant has an exclusive property in the word . . . as applied to its cordial, or has or has not a technical trademark, entitling it to protection under treaty stipulations, as in any event the law will not permit a person to disguise goods of his own production as those of some other manufacturer, for the purpose of purloining the latter’s custom and deceiving the public, although he may make use of no words or symbols except such as standing by themselves, and in ordinary relation are common property.”

A. G. S.

for the infringement of a trademark, and that the injunction cannot be supported as one directed against unfair competition. There is no attempt to allege, or to show, any simulation of plaintiff's goods with the intent or effect of deceiving the public, unless such intent and effect can be found in the use of the word "Tipo." And this word is used in a manner which absolutely disproves the existence of any fraudulent scheme to represent defendant's goods as those of plaintiff. The injunction does not purport to merely limit the use of the word "Tipo" to such extent as may be necessary to prevent deception, as it should in a case of unfair competition (*Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879), but absolutely prohibits the defendant from using the word at all. This order (which follows the prayer of the complaint) can be supported only upon the ground that plaintiff has the exclusive right to use the word "Tipo" in any manner as a name for wines. And such exclusive right can exist only if the word is a valid technical trademark.

As we have pointed out, the showing made on the hearing established beyond question that the word "Tipo" is an Italian word in common use, and that it signifies "type" or "kind." If it were a term of the English language, it would, as is at once apparent, not be available for appropriation as a trademark in the connection in which it was used by plaintiff and its predecessor. "There is no principle more firmly settled in the law of trademarks than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by anyone to his exclusive use." *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Schmidt v. Brieg*, 100 Cal. 672, 22 L.R.A. 790, 35 Pac. 623; *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362. This rule, fundamental in the law of trademarks, finds statutory recognition in § 991 of the Civil Code, which prohibits the appropriation as a trademark of "any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on." That such expressions as "Chianti Type," or "Barbera Type," or the like,

would be descriptive of kinds of wine, is obvious.

Is the case taken out of the general rule by the fact that the descriptive term used is adopted from a foreign language? The authorities, virtually without conflict, answer this question in the negative. In *Re Farbenfabriken*, 63 L. J. Ch. N. S. 257 [1894] 1 Ch. Div. 645, 7 Reports, 439, 70 L. T. N. S. 186, 42 Week. Rep. 488, it was held by the English court of appeal that the word "Somatose," composed of the Greek word "Soma" and the suffix "tose," was not entitled to registration under a statute authorizing the registration as a trademark of "a word or words having no reference to the character or quality of the goods." So as to the word "Monobrut," a combination of foreign words applied to champagne, and found by the court to be descriptive. *Re Vignier*, 61 L. T. N. S. 495. In *Davis v. Stribolt*, 59 L. T. N. S. 854, the Norwegian term "Bokol," meaning the same as the German "Bock Bier," was first used by the plaintiffs in England. It was held, however, that they could gain no exclusive right to the use of a such a descriptive mark. In *Eastman Photographic Materials Co. v. Comptroller-General*, 79 L. T. N. S. 195 [1898] A. C. 571, 67 L. J. Ch. N. S. 628, 25 Eng. Rul. Cas. 240, the House of Lords overruled the *Farbenfabriken Case* on a point of statutory construction not here involved, but the Lord Chancellor took occasion to express the view that "where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language." In our own court a similar view was expressed in *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204. There the plaintiff sought to establish an exclusive right to use the word "Schnapps" as a trademark applied to gin. But it appeared that Schnapps was a Dutch word which had been in common use in Holland, and to some extent in the United States, to designate gin. "That word, therefore," said the court, "could not be appropriated by the plaintiff as his trademark. Had it not been used in New York, or elsewhere in the United States, as the name of gin, prior to its adoption by the plaintiff, he still could not maintain his claim to it. Could he secure his claim to the word on the ground that it was not in use in the United States, prior to the time when he adopted it, the law for the protection of trademarks would be shorn of most of its strength, for on the same principle other persons would be at liberty to adopt and

use the word in other cities, states, or countries, if at the time of its adoption by them it was not in use in such cities, states, or countries." See also *Bolander v. Peterson*, 136 Ill. 215, 11 L.R.A. 350, 26 N. E. 603; *Luyties v. Hollendeer* (C. C.) 30 Fed. 632.

The respondent cites no authority questioning the rule as just stated. Indeed, it places its reliance upon the contention that defendant is guilty of "unfair competition" rather than upon infringement of trademark. We have already stated our reasons for holding this position to be untenable.

We are not called upon to decide, and do not undertake to decide, whether a valid trademark right could be based upon the use of the word "Tipo," standing alone. That term, not associated with the name of any kind of product, might perhaps be regarded as in itself meaningless, and therefore capable of adoption as a fancy name or symbol. The person first using it might be in a position to restrain a similarly restricted use by others. But while the allegations of the complaint indicate such adoption and use, the evidence, and more particularly the exhibits, show clearly that the word was used by plaintiff as part of the phrase "Tipo Chianti." So used it was unquestionably descriptive.

Upon the whole case, we see no ground upon which an injunction can be sustained. The order appealed from is reversed.

We concur: **Beatty, Ch. J.; Shaw, and Melvin, JJ.**

Angellotti, J., dissenting:

I dissent. While I agree with Justice Sloss to the effect that the word "Tipo" is not such a word as is available for appropriation by plaintiff as a trademark in the connection in which it is used, I am of the opinion that a sufficient showing was made to warrant the lower court in concluding that the case was within the rule against unfair competition, as declared in such cases as *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Banzhaf v. Chase*, 150 Cal. 180, 88 Pac. 704.

We concur: **Henshaw, and Lorigan, JJ.**

Petition for rehearing denied September 29, 1910.

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GEORGIA SUPREME COURT.

**VENABLE BROTHERS, Plffs. in Err.,
v.
SOUTHERN GRANITE COMPANY.**

(135 Ga. 508, 69 S. E. 822.)

Abatement — suit against corporation — dissolution.

1. The dissolution of a corporation by the expiration of its charter, pending a suit against it, abates the action. The acts of the two persons in this case who owned all of the stock of the defendant corporation, in continuing to defend the suit, after the expiration of its charter, did not prevent the abatement of the suit because of the expiration of the defendant's charter, and authorize plaintiffs to proceed to judgment against the defendant as a corporation *de facto* or a corporation by estoppel.

Appeal — dissolution of corporation defendant — dismissal.

2. There being no defendant to the action in the court below, after the dissolution of the defendant corporation by the expiration of its charter, it follows that there was no party which could be made defendant in error to the bill of exceptions filed by the plaintiff; and therefore the writ of error must be dismissed.

(December 15, 1910.)

Headnotes by FISH, Ch. J.

Note. — Abatement of action by or against corporation, in the absence of a saving statute, by dissolution or expiration of charter.

Equitable suits.

It was held in *Kelly v. Rochelle*, — Tex. Civ. App. —, 93 S. W. 164, that an equitable action by a corporation was not abated by its dissolution during the pendency thereof, but was merely suspended for the want of a plaintiff, and that a judgment rendered in its favor was voidable merely, and was enforceable by a new corporation that acquired all the assets of the defunct corporation, including such judgment and the cause of action upon which it was rendered, and that in a subsequent action which called in question the validity of the judgment, the latter might intervene and have the judgment revived and enforced. The court said: "There seems to be a well-defined difference in the meaning and effect of an abatement of a suit on account of the death of the plaintiff or defendant, whether a natural or artificial person, as applied to a suit at law, and one in equity. The general rule . . . under which a corporation which has been legally dissolved can neither sue nor be sued, and by reason of which all actions or proceedings commenced against it abate absolutely, and cannot be revived, applies, it seems, only to actions at law."

ERROR to the Superior Court for De Kalb County to review a judgment in favor of defendant in an action brought to recover damages for alleged breach of contract fixing the amount of granite blocks which the respective parties should furnish a certain market. Dismissed.

The facts are stated in the opinion.

Mr. James L. Key, for plaintiffs in error:

The Southern Granite Company is a corporation *de facto* as to plaintiffs, and is a corporation by estoppel as to it.

Brown v. Atlanta R. & Power Co. 113 Ga. 467, 39 S. E. 71; Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co. 94 Ga. 306, 32 L.R.A. 208, 47 Am. St. Rep. 153, 21 S. E. 701; Imboden v. Etowah & B. B.

Hydraulic Hose Min. Co. 70 Ga. 86; Georgia Ice Co. v. Porter, 70 Ga. 637; Beaty v. Atlanta & W. P. R. Co. 100 Ga. 123, 28 S. E. 32; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748; United Bros. v. Williams, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907.

Messrs. A. H. Cox and Charles H. Cox for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

Venable Brothers brought an action against the Southern Granite Company. It does not appear from the record when the suit was instituted, nor what was the alleged cause of action. It does appear that the charter of the defendant corporation

So it was held in Griswold v. Hilton, 87 Fed. 256, that the dissolution of a corporation pending an action in equity against it for an infringement of a patent would not abate it, but that the action might be revived by bill of revivor against the receiver of the corporate assets.

And in Louisville v. Bank of United States, 3 B. Mon. 138, it was held that the expiration of its charter by limitation, pending an equitable suit brought by a corporation to foreclose a mortgage, did not abate the suit. The court said that the expiration of the corporation could not destroy the beneficial interests and rights of natural persons who, for convenience merely, had been constituted one person with a single name, and that as the expiration of the charter could affect the form of remedy only, and not the essence of the right, a court of equity should not abate the action for the impractical purpose of a formal new suit or revivor in the names of the multitudinous corporators.

And a pending appeal in an equitable suit is not abated by the dissolution of the corporate defendant, but may be revived at the request of and in the name of its liquidating trustees, under statutory authority of a court of chancery to make rules for the conduct of pending suits. Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513.

But it was held in Hawley v. Bonanza Queen Min. Co. — Wash. —, 111 Pac. 1073, that the dissolution in effect of a corporation by its failure to pay an annual license fee, pending a suit against it to foreclose a corporate mortgage, abated, the suit, the same rule applying at law and in equity, except as to proceedings strictly *in rem*, notwithstanding that if the receiver of the corporation, in whom vested the title to the assets thereof, had been made a party, the case might have proceeded to judgment against him, notwithstanding the dissolution of the corporation, or the trustees in whom the title vested upon dissolution might have been substituted as defendants.

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Actions at law in general.

The doctrine is well established that in the absence of statutory regulation, the expiration of corporate life by lapse of time or decree of dissolution works an abatement of pending actions at law by or against it, the reason being that its existence as a legal entity is ended, and therefore a judgment subsequently rendered will be void. Nelson v. Hubbard, 90 Ala. 238, 17 L.R.A. 375, 11 So. 428; Wilcox v. Continental L. Ins. Co. 56 Conn. 468, 16 Atl. 244; Morgan v. New York Nat. Bldg. & L. Asso. 73 Conn. 151, 46 Atl. 877; Terry v. Merchants' & P. Bank, 66 Ga. 177; Van Pelt v. Home Bldg. & L. Asso. 87 Ga. 370, 13 S. E. 574; Eagle Chair Co. v. Kelsey, 23 Kan. 632; MacRae v. Kansas City Piano Co. 60 Kan. 457, 77 Pac. 94; Bank of Gallopolis v. Trimble, 6 B. Mon. 509; Musson v. Richardson, 11 Rob. (La.) 37; Read v. Frankfort Bank, 23 Me. 318; Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022; Torry v. Robertson, 24 Miss. 192; Re Norwood, 32 Hun, 186; Frailey v. Central F. Ins. Co. 9 Phila. 219; McNulty v. National Life Asso. 6 Laek. Legal News, 128; Insurance Comr. v. United F. Ins. Co. 22 R. I. 377, 48 Atl. 202; Ingraham v. Terry, 11 Humph. 572; Kelly v. Rochelle, — Tex. Civ. App. —, 93 S. W. 164; Sulphur Springs & Mt. P. R. Co. v. St. Louis, A. & T. R. Co. 2 Tex. Civ. App. 657, 22 S. W. 107, 23 S. W. 1012; Life Asso. of America v. Goode, 2 Tex. L. Rev. 151, S. C. second appeal, 71 Tex. 90, 8 S. W. 639; Hawley v. Bonanza Queen Min. Co. — Wash. —, 111 Pac. 1073; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; First Nat. Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; Pendleton v. Russell, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; Greely v. Smith, 3 Story, 657, Fed. Cas. No. 5,748; Bank of United States v. McLaughlin, 2 Cranch, C. C. 20; Fed. Cas. No. 928; Marion Phosphate Co. v. Perry, 33 L.R.A. 252, 20 C. C. A. 400, 41 U. S. App. 14, 74 Fed. 425; Salton v. New Beeston Cycle Co. [1900] 1 Ch. 43, 48 Week. Rep. 92, 81 L. T. N. S. 437, 16 Times L. R. 26.

expired in June, 1906. Subsequently thereto the plaintiffs amended their petition, and a demurrer to the petition as amended was filed by the attorney who had previously represented the corporation. The demurrer was overruled, and upon writ of error to this court, sued out in the name of the corporation, the judgment was affirmed. Afterwards, when the case came on for trial in the superior court, it was, upon motion of counsel purporting to represent the defunct corporation, referred to an auditor. The auditor having heard the case and made his report, and exceptions having been filed thereto by such counsel, these exceptions came on for a hearing; whereupon such counsel filed a motion to abate the action, on the ground that the charter of the defend-

ant corporation had expired by limitation on June 30, 1906 (which appears to have occurred pending the suit), and that there had never been any renewal or extension of the charter. This motion was supported by evidence which was not disputed. It also appeared from the evidence that all of the stock of the defunct corporation was owned by two named persons, who had paid from the corporation's assets the fees of the attorney representing it, and had given direction as to the defense of the action, and that they had sold some of the property of the corporation after the expiration of its charter. The presiding judge granted an order abating the action, and holding "that the Southern Granite Company was not, as to this case, a corporation *de facto*, and

So, a decree of dissolution of a corporation, rendered in the state of its domicile, abates actions pending by or against it in another state. *Morgan v. New York Nat. Bldg. & L. Asso.* 73 Conn. 151, 46 Atl. 877; *Re Norwood*, 32 Hun, 196; *Re Stewart*, 39 Misc. 275, 79 N. Y. Supp. 525, reargument denied in 40 Misc. 32, 81 N. Y. Supp. 209; *Insurance Comr. v. United F. Ins. Co.* 22 R. I. 377, 48 Atl. 202.

Where, during the pendency of a writ of error in an action against a foreign corporation, it is dissolved in the state of its domicile, and subsequently such judgment is reversed and the case remanded for a new trial, a subsequent default judgment is void notwithstanding the receiver of the corporation, with the consent of the court appointing him, employed counsel to argue such appeal. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

So, cessation of business by a building and loan association, and sale of all its claims for unpaid loans, amounts to a dissolution which will abate a pending action brought by it. *Van Pelt v. Home Bldg. & L. Asso.* 87 Ga. 370, 13 S. E. 574.

And it was held in *Eagle Chair Co. v. Kelsey*, 23 Kan. 632, that the expiration of the charter of a corporation the day before a verdict is rendered in its favor justifies a refusal to enter judgment on the verdict, or to grant a new trial.

So, the dissolution of a corporation during the pendency of an action abates it, notwithstanding the solicitors for the parties did not learn thereof until after entry of judgment. *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43, 48 Week. Rep. 92, 81 L. T. N. S. 437, 16 Times L. R. 25.

And the surrender of a corporate charter and its acceptance by the legislature will abate an action pending against the corporation. *Greely v. Smith*, 3 Story, 657, Fed. Cas. No. 5,748.

It has been held in a few New York cases, although there are decisions to the contrary, that a pending action for tort against a corporation will be abated by its dissolution, and that it cannot be revived against the corporate trustees, as provided 32 L.R.A. (N.S.)

by statute, on the ground that such actions do not survive the life of the corporation. *Grafton v. Union Ferry Co.* 22 N. Y. Civ. Proc. Rep. 402, 19 N. Y. Supp. 966, affirming, 40 N. Y. S. R. 137, 13 N. Y. Supp. 878 (the court declining to follow *Hepworth v. Union Ferry Co. infra*), *Re New York Oxygen Co.* 24 N. Y. Civ. Proc. Rep. 398, 33 N. Y. Supp. 726; *Re Yuengling Brewing Co.* 24 App. Div. 223, 49 N. Y. Supp. 12.

But the contrary rule is sustained in the following cases: *Shayne v. Evening Post Pub. Co.* 168 N. Y. 70, 55 L.R.A. 777, 85 Am. St. Rep. 654, 61 N. E. 115; *Hepworth v. Union Ferry Co.* 62 Hun, 267, 16 N. Y. Supp. 692, 22 N. Y. Civ. Proc. Rep. 407 (appeal dismissed without opinion in 131 N. Y. 645, 30 N. E. 867) *People v. Troy Steel & I. Co.* 82 Hun, 303, 31 N. Y. Supp. 337; *Gordon v. Evening Post Pub. Co.* 66 N. Y. Supp. 828.

It has been held that the consolidation of two railroad corporations works a dissolution thereof, which will abate pending actions against them. *Kansas, O. & T. R. Co. v. Smith*, 40 Kan. 192, 19 Pac. 636; *Council Grove O. C. & W. R. Co. v. Lawrence*, 3 Kan. App. 274, 45 Pac. 125. *Contra*, *Evans v. Interstate Rapid Transit R. Co.* 106 Mo. 594, 17 S. W. 489; *East Tennessee & G. R. Co. v. Evans*, 6 Heisk. 607; *Shackleford v. Mississippi C. R. Co.* 52 Miss. 159.

But in *Shackleford v. Mississippi C. R. Co.* supra, it was held that a legislative act consolidating two railroad companies would not abate an action pending against one of them, as it was not within the power of the legislature thus to prejudice the rights of parties to pending actions against corporations, which continue to exist for the purpose of judgment.

And in *East Tennessee & G. R. Co. v. Evans*, 6 Heisk. 607, it was held that a consolidation of railroad companies did not work a dissolution of their corporate existence, and that would not be available as a defense to a pending action, especially when the question was not raised by plea in abatement, and after judgment against it the corporation appealed in its corporate name.

was not a corporation by estoppel." To this order the plaintiffs filed a bill of exceptions, upon which counsel who had represented the defendant corporation in the action prior to its dissolution, and who had continued to defend the action after the expiration of the charter, acknowledged service as "attorney of record for the Southern Granite Company, defendant."

A corporation is an artificial person, created by law for specific purposes, the limit of whose existence, powers, and liberties is fixed by its charter. Civil Code 1895, § 1831. Every corporation is dissolved by the expiration of its charter. Id. 1892. "When a corporation expires by limitation of time, . . . it can no longer prosecute or defend an action, in the absence of

some saving provision in its governing statute. An action can no more be prosecuted against a dead corporation than against a dead man. In such a case the opposing party suggests the death of the corporation, and upon the fact being admitted or proved the suit abates, just as an action for an injury to the person abates on the suggestion of the death of the defendant, unless there is a saving statute allowing it to be revived against his legal representative." 10 Cyc. Law & Proc. p. 250; 1 Clark & M. Priv. Corp. 247; 1 Thomp. Corp. § 243. In Logan v. Western & A. R. Co. 87 Ga. 533, 13 S. E. 516, a writ of error pending in the supreme court against a corporation when its charter expired was dismissed, on the ground that after the expira-

So, the dissolution of a corporation by judicial decree after the commission of acts of bankruptcy and service upon it of notice of the institution of bankruptcy proceedings, but before the return day therefor, will not abate such proceedings, which are *in rem*, and relate back to the time of the commission of the acts of bankruptcy. Platt v. Archer, 9 Blatchf. 559, Fed. Cas. No. 11,213; Re Adams & H. Co. 164 Fed. 489.

And a judgment in a pending action, rendered against a corporation after decree of dissolution, but while an appeal from such decree remains undetermined, will be valid, as the appeal suspended the decree of dissolution. Giles v. Stanton, 86 Tex. 620, 26 S. W. 615, reversing — Tex. Civ. App. —, 24 S. W. 556.

So, it was held in Shakman v. United States Credit System Co. 92 Wis. 360, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528, that the dissolution of a corporation after the submission to the court of a cause, and before its determination, would not abate the action, but that the findings and judgment would be entered *nunc pro tunc* as of the day of submission.

And where a judgment by default against a corporation is opened at its request, in order to permit a defense to the merits, the subsequent dissolution of the corporation before judgment will not abate the action. McAnulty v. National Life Assn. 6 Lack. Legal News, 128.

So, in Agnew v. Bank of Gettysburg, 2 Harr. & G. 478, the court refused, under a plea of the general issue, to permit the defense of the expiration of a corporate plaintiff's charter pending the action, but permitted the plaintiff to recover, notwithstanding the evidence disclosed the fact that its charter expired by lapse of time pending the action.

And the repeal of a charter of a municipal corporation, and the substitution of a new corporation therefor, with substantially the same inhabitants and locality, will not abate a suit pending on behalf of such corporation. Mobile Transp. Co. v. Mobile, 128 Ala. 335, 64 L.R.A. 333, 86 Am. 32 L.R.A. (N.S.)

St. Rep. 143, 30 So. 645, affirmed on other points in 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170.

So, there will be no abatement of a pending suit instituted by the county by the fact that its name was changed by the abolition of the old county, and the creation of a political body under a new name. Ottawa v. La Salle County, 11 Ill. 654.

But where by statute an order of court may be made continuing a pending action against the trustees of a dissolved corporation, the action will abate unless such an order is obtained. McCulloch v. Norwood, 58 N. Y. 562, modifying 4 Jones & S. 180; Sturges v. Vanderbilt, 73 N. Y. 384; Sturges v. Drew, 11 Hun, 136.

Where it is necessary that want of corporate capacity to sue be raised by demurrer or answer, the right to show the dissolution of a foreign corporation during the pendency of an action is waived by going to trial on the merits. Pyro-Gravure Co. v. Staber, 30 Misc. 658, 64 N. Y. Supp. 520.

—attachment or garnishment.

A pending proceeding by attachment of corporate property is abated by a decree dissolving the corporation. Wilcox v. Continental L. Ins. Co. 56 Conn. 468, 16 Atl. 244; Frailey v. Central F. Ins. Co. 9 Phila. 219; Life Assn. of America v. Goode, 2 Tex. L. Rev. 151, s. c. second appeal, 71 Tex. 90, 8 S. W. 639; First Nat. Bank v. Colby, 21 Wall. 609, 22 L. ed. 687.

And the abatement of such an action is not prevented by a statute permitting a corporate receiver to bring and defend suits in his own or the name of the corporation, such statute not applying to dissolved corporations. Wilcox v. Continental L. Ins. Co. 56 Conn. 468, 16 Atl. 244.

So, a decree of dissolution rendered in the state of incorporation abates a pending attachment of the corporate property in another state. Morgan v. New York Nat. Bldg. & L. Assn. 73 Conn. 151, 46 Atl. 877.

And the repeal of a corporation's charter will abate a pending attachment of its

tion of its charter the corporation was no longer a legal entity.

Upon its dissolution for any cause, all the property and assets belonging to the corporation constitute a fund, first for the payment of its debts, and then for equal distribution among its members. Civil Code 1895, § 1886. If a corporation is not a person in law until after the grant of its charter, and no valid judgment therefore can be rendered against it until after its incorporation, as was held in *Bartram v. Collins Mfg. Co.* 69 Ga. 751, and *Rau v. Union Paper Mill Co.* 95 Ga. 208, 22 S. E. 146, it seems clear that, as the dissolution of a corporation is complete upon the expiration of the term limited by the charter for its existence, there being then no longer

any law under which it can exist (Civil Code 1895, § 1882, ¶ 1; 1 Clark & M. Priv. Corp. 247; 1 Thomp. Corp. § 243), no valid judgment can be rendered against it after the expiration of its charter. It has been held in many cases that, if a corporation becomes extinct pending a suit to which it is a party, the suit thereby abates as to such corporation, and any judgment thereafter rendered against it is a nullity, unless some provision is made for the further prosecution of the suit by the laws of the state in which the suit is pending. *Eagle Chair Co. v. Kelsey*, 23 Kan. 632; *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649; *Thornton v. Marginal Freight R. Co.* 123 Mass. 32; *McCulloch v. Norwood*, 58

property, where the repealing act requires all claims against it to be presented to its receiver in order that there may be an equal distribution of its assets. *Read v. Frankfort Bank*, 23 Me. 318. The court said that as the corporation had ceased to exist, there was no party whom the plaintiff could prosecute or take judgment or execution against, unless it were in a court of equity, and the repeal of its charter presented an obstacle to further proceedings by dissolving the party against whom they were commenced.

Attention is called to *Bowker v. Hill*, 60 Me. 172, which holds that a statute providing that, upon the dissolution of a corporation, designated trustees are to collect its assets and make a ratable division thereof among its creditors, works a dissolution of a pending attachment proceeding in which the property of the corporation has been seized, notwithstanding the provisions of another statute, permitting the continuance to judgment of actions pending at the dissolution of a corporation.

It was held in *People v. Mutual Ben. Life Asso.* 86 Hun, 219, 33 N. Y. Supp. 191, that a lien by attachment upon property of a corporation will not be sustained in the absence of a showing that it was obtained before the dissolution of the corporation.

But it was held in *Life Asso. of America v. Fassett*, 102 Ill. 315, that an attachment proceeding against a foreign corporation was not abated by the subsequent dissolution of the corporation in the state of its domicile, as it is the settled policy in Illinois to permit a foreign corporation to prosecute and defend pending actions during the time limited by a statute of that state for settling the affairs of domestic corporations.

So, it was held in *Lindell v. Benton*, 6 Mo. 361, that a proceeding by attachment and garnishment upon a previous judgment will not be abated by the expiration by lapse of time of a corporate charter before determination of the garnishee's liability, as the attachment of property or debts of

a corporation when it has a legal existence will be disposed of in such proceeding.

And it was held in *Hays v. Lycoming F. Ins. Co.* 99 Pa. 621, where, after judgment against a mutual insurance company for a loss by fire, an attachment was issued and served upon a member thereof as garnishee for his indebtedness to the company upon a premium note for his portion of the losses sustained, it is not abated by the dissolution of the corporation, notwithstanding the garnishee's liability had not been fixed by assessment, and upon a levy thereof by the corporate receiver the proceeding might be continued to judgment.

But in *Walters v. Western & A. R. Co.* 69 Fed. 679, it was held that the dissolution of a corporation before adjudication of its liability as a garnishee in a proceeding pending against it worked an abatement thereof.

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The dissolution of a corporation pending the prosecution of a writ of error by or against it abates all proceedings. *Logan v. Western & A. R. Co.* 87 Ga. 533, 13 S. E. 516.

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The two persons who owned all the stock of the defendant corporation, the Southern Granite Company, were separate and distinct from the corporation, even before it ceased to exist by the expiration of its charter (*Exchange Bank v. Macon Constr. Co.* (*McTighe v. Macon Constr. Co.*) 97 Ga. 1, 33 L.R.A. 800, 25 S. E. 326; *Waycross Air-Line R. Co. v. Offerman & W. R. Co.* 109 Ga. 827, 35 S. E. 275), and their acts, after the expiration of the charter of the Southern Granite Company, in continuing to defend the suit, as set forth in the statement of facts already given, did not operate to make the dead corporation a corporation *de facto*, or a corporation by estoppel, so as to authorize the plaintiffs to proceed

to judgment against it. 1 *Thomp. Corp.* § 243; 1 *Clark & M. Corp.* 247; 10 *Cyc. Law & Proc.* p. 250.

The remedy provided by Civil Code 1895, § 1886, to creditors of the corporation which has been dissolved for any cause, is to have a receiver appointed to administer its assets under the direction of the court, its debts to be first paid, and the balance, if any, distributed among its shareholders.

As, after the dissolution of the defendant corporation by the expiration of its charter, there was no defendant to the case in the court below, it follows, of course, that there was no party defendant to that action, which could be made defendant in error to the bill of exceptions filed by the plaintiffs.

Therefore the writ of error must be dismissed for the want of a party defendant in error. *Logan v. Western & A. R. Co.* 87 Ga. 533, 13 S. E. 516.

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Nor will a statute extending the life of a corporation after dissolution for the sole purpose of terminating suits and pending litigation prevent the abatement of an action by expiration of its charter pending an appeal, as such statute is void as special legislation in violation of a constitutional provision. *Logan v. Western & A. R. Co.* *supra*.

Nor may a corporation which has been dissolved by a decree of court appeal from a portion of such order appointing a receiver, where it acquiesced in the order of dissolution, as its existence for all purposes was thereby terminated. *State v. Fidelity Loan & T. Co.* 113 Iowa, 439, 85 N. W. 638.

But it was held in *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513, that an appeal in an equitable proceeding was not abated by the dissolution of the corporate defendant, and that the action might be revived under express power conferred upon courts of chancery to make rules for the conduct of pending suits.

And this rule was applied in *Commercial Bank v. Chambers*, 8 Smedes & M. 44, where, pending an appeal, a corporate party was dissolved, and the liquidating 32 L.R.A. (N.S.)

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And it was held in *Eau Claire Canning Co. v. Western Brokerage Co.* 213 Ill. 561, 73 N. E. 430, that when by statute of the state of domicile suit may be prosecuted by a dissolved corporation in its own name or that of a receiver, and the court specially authorized a receiver to prosecute a writ of error from a judgment rendered in another state before dissolution, he may do so where it is not contrary to the laws and public policy of the latter state.

See also *Singer & T. Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622, reversing 72 Ill. App. 366, under the subdivision, "Effect on pending actions of expiration of statutory period permitting litigation by corporations after dissolution," *infra*.

Right of foreign corporation to prosecute or defend pending actions after dissolution under statutes of domicile or forum.

While the general question of the right of corporations to prosecute or defend pending actions after dissolution, or to bring new ones, under statute expressly conferring such power, is not within the scope of this note, yet the note does cover the question whether such a statute of the domicile of the corporation will affect an action pending in another jurisdiction, or whether such a statute of the forum will apply to a foreign corporation.

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Right of foreign corporation to prosecute or defend pending actions after dissolution under statutes of domicile or forum.

While the general question of the right of corporations to prosecute or defend pending actions after dissolution, or to bring new ones, under statute expressly conferring such power, is not within the scope of this note, yet the note does cover the question whether such a statute of the domicile of the corporation will affect an action pending in another jurisdiction, or whether such a statute of the forum will apply to a foreign corporation.

Where, pending an action, the charter of a foreign corporation is repealed, and by the laws of its domicile the right to prosecute and defend pending actions vests in the liquidating trustees, they may be substituted for the corporation, and continue the prosecution of the action. *Lombard Bank v. Thorp*, 6 Cow. 46; *Root v. Sweeney*, 12 S. D. 43, 80 N. W. 149. *Contra*, *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599.

And where the law of its domicile permits the prosecution or defense of actions by corporations after dissolution, pending suits in other jurisdictions will not abate. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 63 C. C. A. 62, 128 Fed. 332; *Scott v. Stockholders' Oil Co.* 142 Fed. 287; *White Mountain Paper Co. v. Morse*, 62 C. C. A. 369, 127 Fed. 643, affirming 127 Fed. 180.

But it has been held in New York that as the dissolution of a corporation in the state of domicile abates pending actions against it in another state, a judgment subsequently rendered therein is void and cannot be enforced in the former state, on the ground of comity nor the provision of the Federal Constitution requiring full faith and credit to be given to the judgments of other states, notwithstanding a statute thereof permits judgments to be rendered in pending actions against corporations after dissolution. *Rodgers v. Adriatic F. Ins. Co.* 87 Hun, 384, 34 N. Y. Supp. 323, affirmed in 148 N. Y. 34, 42 N. E. 515; *People v. Mercantile Credit Guarantees Co.* 65 App. Div. 306, 72 N. Y. Supp. 858.

So, in *Olds v. City Trust, S. D. & Surety Co.* 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022, although sustaining a judgment on the ground that it did not affirmatively appear that a court of another state had jurisdiction to dissolve a corporation, it was held that a statute of Massachusetts, continuing the existence of dissolved corporations for three years, for the purpose of prosecuting and defending actions, did not apply to foreign corporations, and that a judgment rendered in another state, in an action pending against such corporation at the time of its dissolution, was void.

Where, during the pendency of an action in New York against an English corporation, it is dissolved and liquidators appointed under an English statute, such action abates and cannot be revived against the corporate trustees whom the liquidators succeeded, under a New York statute permitting the revival of action in such cases against the representatives or successors in interest of the former corporation, where it does not appear that there is any property of the corporation within their possession within the state. *Wamsley v. H. I. Horton & Co.* 12 App. Div. 312, 42 N. Y. Supp. 767, affirmed without opinion in 153 N. Y. 687, 48 N. E. 1107.

But it was held in *Farmers' Bank v. Ely*, 2 N. Y. Leg. Obs. 274, that the New York statute providing that the dissolution of corporations should not abate pending actions applies also to a foreign corporation

suing therein, whose charter expired during the pendency of the action.

And it was held in *Life Asso. of America v. Fassett*, 102 Ill. 315, that it was the settled policy of that state to permit foreign corporations to prosecute and defend to judgment actions pending at their dissolution, under a statute of that state extending the existence of corporations for the purpose of settling their affairs.

The expiration of the charter of a foreign banking corporation during the pendency of an action brought by it will not work an abatement thereof, but it may be prosecuted to judgment in the corporate name notwithstanding the assignment of the claim to another person, under a statute of the forum applying to both foreign and domestic corporations, providing that a banking corporation may, after dissolution, prosecute suits at law or equity in its corporate name, for the use of the party entitled thereto, in the same manner and with like effect as though the dissolution had not occurred. *Stetson v. City Bank*, 2 Ohio St. 167, s. c. second appeal, 12 Ohio St. 577.

See also *Eau Claire Canning Co. v. Western Brokerage Co.* 213 Ill. 561, 73 N. E. 430, which is cited in the preceding subdivision.

Effect on pending actions of expiration of statutory period permitting litigation by corporations after dissolution.

Where it is provided by statute that the termination of the existence of a corporation will not prevent the maintenance of subsequent actions by or against it within a designated time, the expiration of such period will work an abatement of pending undetermined actions which have not resulted in judgment. *Maine Shore Line R. Co. v. Maine C. R. Co.* 92 Me. 476, 43 Atl. 113; *Thornton v. Marginal Freight R. Co.* 123 Mass. 32; *Bank of Mississippi v. Wrenn*, 3 Smedes & M. 701; *Dundee Mortg. & T. Invest. Co. v. Hughes*, 77 Fed. 855, see s. c. second appeal, 89 Fed. 182.

But in *Franklin Bank v. Cooper*, 36 Me. 179, the contrary was held under a statute providing that suits might be instituted by a corporation at any time within two years after dissolution, and prosecuted to final judgment, execution, and satisfaction.

Upon a second appeal of *Dundee Mortg. & T. Invest. Co. v. Hughes*, 89 Fed. 182, it was held that a statute of the forum permitting corporations to prosecute or defend suits for five years after dissolution did not apply to an action begun by a foreign corporation within such period, but not prosecuted to judgment at the expiration thereof, such corporation being governed by the laws of the domicile, which in this case gave the right to maintain actions indefinitely.

The expiration of the time limited by statute after the expiration of a charter in which corporations may prosecute or defend actions will not prevent the subsequent issue of a writ of error to review a judg-

ment against it in an action pending at the expiration of such period, and in which judgment was afterward rendered, where the right to obtain such a review was by statute secured to all parties litigant. *Singer & T. Stone Co. v. Hutchinson*, 170 Ill. 48, 51 N. E. 622, reversing 72 Ill. App. 366. W. J. I.

LOUISIANA SUPREME COURT.

ALFRED HILLER COMPANY, Limited,

v.

INSURANCE COMPANY OF NORTH AMERICA, Appt.

(125 La. 938, 52 So. 104.)

Insurance — padded inventory — effect.

1. The "padding" of an inventory of merchandise by false entries of articles not on hand will work a forfeiture of a fire insurance policy, when such entries cannot be explained on any reasonable theory of honest mistake.

Same — forfeiture — waiver.

2. Under the New York standard policy, a forfeiture is not waived by any requirement, act, or proceeding on the part of the insurer relating to the appraisal of the loss or to any examination of the insured provided for in the policy.

(March 14, 1910.)

Headnotes by LAND, J.

Note. — Insurance: effect of false swearing in proofs of loss.

Most policies of fire insurance contain a provision similar to the one set forth in the above case, avoiding the policy if the insured be guilty of false swearing touching any matter relating to the insurance. The question often arises whether or not this provision is to be strictly and literally applied so as to prevent recovery whenever false statements are sworn to in the proofs of loss, regardless of the circumstances under which the same were made. It may be laid down as a general rule of law, supported by the overwhelming weight of authority, that, in order to make the false swearing in the proofs of loss have this effect, the assured must have made them knowingly and wilfully, with an intent to deceive the insurer, concerning some matter material to the insurance.

Thus, in *Marion v. Great Republic Ins. Co.* 35 Mo. 148, it was held that the clause in the policy in respect to false swearing was to be viewed in connection with all the other parts of the policy and the general nature of the contract, and, so viewing it, it was obvious that it was thereby intended to require the insured to give the insurer real and reliable information as to the amount of the loss, and that a mistake

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to recover the amount alleged to be due on certain fire insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. Clegg, Quintero, & Gidlere, and McLaurin, Armistead, & Brien, for appellant:

An attempt to collect for property known not to have been destroyed amounts to fraud, and will forfeit the policy.

Regnier v. Louisiana State M. & F. Ins. Co. 12 La. 336; *Schmidt v. Philadelphia Under-Writers*, 109 La. 884, 33 So. 907; *Clafin v. Commonwealth Ins. Co.* 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507.

Messrs. Dart, Kernan, & Dart and T. M. & J. D. Miller, for appellee:

False swearing in the proofs of loss, to vitiate the policy, must be intentionally false, whether by a fraudulent overvaluation of the goods destroyed, or a statement of items which really have no existence, or by an undervaluation of what is saved, or as to ownership or encumbrances or origin of the fire or other particulars. An innocent mistake, or an innocent, though exaggerated, estimate of value, will not avoid the policy.

Richards, Ins. 3d ed. § 250, pp. 313, 314; *Israel v. Teutonia Ins. Co.* 28 La. Ann. 689; *Beck v. Germania Ins. Co.* 23 La. Ann. 610; *Daul v. Firemen's Ins. Co.* 35 La. Ann. 98;

or unintentional error or misstatement of an immaterial matter would not avoid the policy, but that the false statement must be wilfully made in respect to a material matter, and with a purpose to deceive the insurer.

A full and clear statement of the rule of law under discussion is found in *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* 31 Fed. 200, in which the court, after declaring the law in the identical language of the Missouri case just cited, except that all reference to materiality and intent was omitted, went on to say: "If any untruthful statements were made in the proofs of loss in respect to the value or quantity of the property destroyed, it must appear, in order to defeat a recovery on that ground, that such false statements were intentionally and wilfully made for the purpose of deceiving and defrauding the insurance company. The mere fact, in a case of this kind, that a party who seeks to recover insurance has even largely overstated the value of the property destroyed, will not, of itself and alone, relieve the company from liability. In order to prevail on this ground, the insurer must show that the insured knew it was worth much less than he swore it to be. There may be an honest difference of opinion as to the real value of property. Such a difference of opinion

Franklin F. Ins. Co. v. Updegraff, 43 Pa. 350; Hoffman v. Western M. & F. Ins. Co. 1 La. Ann. 216; Rafel v. Nashville M. & F. Ins. Co. 7 La. Ann. 244; Marion v. Great Republic Ins. Co. 35 Mo. 148; Erman v. Sun Mut. Ins. Co. 35 La. Ann. 1095; Dunn v. Springfield F. & M. Ins. Co. 109 La. 520, 33 So. 585; 1 Clement, Fire Ins. p. 275, Rule 2; Wightman v. Western M. & F. Ins. Co. 8 Rob. (La.) 442; Lewis Baillie & Co. v. Western Assur. Co. 49 La. Ann. 658, 21 So. 736; Marchesseau v. Merchants' Ins. Co. 1 Rob. (La.) 438; Israel v. Teutonia Ins. Co. 28 La. Ann. 689.

Land, J., delivered the opinion of the court:

This is a suit on two policies of fire in-

surance for \$2,500 each, issued by the defendant on plaintiff's stock of merchandise in a certain storehouse on Magazine street in the city of New Orleans. There was other insurance on the same stock. Plaintiff sued for \$4,120.29 as representing defendant's proportion of liability for the loss.

The petition represents that the plaintiff's stock of merchandise was directly damaged and destroyed by fire to the full amount and value of \$30,969.19, after deducting all salvage, and that the amount of insurance then held by the plaintiff on said property aggregated \$37,250.

The petition represents that the defendant refused, and still refuses, to pay its proportion of the aforesaid loss or any part

does often exist in the minds of men as to the value of property, because that question may rest largely in opinion. And if the jury find that even though a valuation is largely excessive, yet, if it was made by the insured in good faith, his statement in that respect cannot be held to amount to false swearing or fraud, within the meaning of the policy. But the insurance company did not agree to pay, if the plaintiff should intentionally endeavor to make out its loss larger than it really was, although the jury may believe that it did suffer a serious loss. In other words, if the plaintiff comes into court attempting to perpetrate a fraud upon the insurance company, by claiming to recover insurance on losses which it knows it did not sustain, it ought not to succeed in such attempt. While the law allows indulgence for mistakes honestly committed, it does not relieve a party if there be a purpose on his part to commit a fraud."

And in *Tubb v. Liverpool & L. & G. Ins. Co.* 106 Ala. 651, 17 So. 815, it was declared that the authorities seemed to be very uniform that false swearing by the insured after the loss, in proof of the value of the goods destroyed, in order to work an avoidance or forfeiture of the insurance, must have been knowingly and wilfully done, and that a mere innocent mistake or misstatement or overvaluation did not constitute a defense.

And in *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129, it was held that this provision of an insurance policy did not refer to an accidental omission or an innocent misrepresentation of fact on the part of the assured, but, to avoid the policy, the false statement must have been knowingly and wilfully made, thus showing an intention to deceive and perpetrate a fraud on the insurer.

And in *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 33 Pac. 258, it was held that the false swearing and fraud that would forfeit a policy under a clause of this character was wilful fraud or false swearing, not the result of inadvertence or mistake. To quote from the opinion: "It 32 L.R.A.(N.S.)

should be knowingly and wilfully false, and intended to injure the company, . . . or, if not so intended, must relate to some matter material to the inquiry, concerning which the company has a right to know the truth, and the effect of which would have a bearing upon its liability."

And in *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. 183, it was held that the mere fact that the assured in his proofs of loss had made an overvaluation of the property destroyed would not defeat a recovery on the policy for the actual loss sustained. "If the assured, in making proofs of loss, acts in good faith, in the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such overvaluation cannot be held to be fraudulent, and it will not defeat a recovery."

And in *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 326, *Richards, Ins. § 250*, was quoted to the effect that false swearing in a proof of loss, to vitiate the policy, must be intentionally false, whether by fraudulent overvaluation or by a statement of items which really had no existence. "An innocent mistake, or a mistaken, though exaggerated, estimate of value, is not sufficient to void the policy. An overvaluation, in order to work a forfeiture, must be so plain that it cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate on the value of his property."

So, in *Erman v. Sun Mut. Ins. Co.* 35 La. Ann. 1095, it was held that the false swearing that worked a forfeiture was not a discrepancy, though material, between the statements of the assured under oath in his proof of loss, and those made at the trial, nor any overstatement of the value of the property, since a great difference of opinion upon values might coexist with perfect honesty of all persons differing. The court went on to say that the assured might have sworn to what he believed to be true, but which, nevertheless, was false, and his policy would not thereby be for-

thereof, and has denied, and continues to deny, liability in the premises, upon the utterly false pretense that petitioner has exaggerated its loss by making fraudulent entries in its inventories, books, and records, and submitting fraudulent proofs from its books.

The gist of defendant's answer is that the two policies were forfeited through fraud and false swearing,—fraud in the padding of the inventory, and false swearing on the part of the officers of the company in the attempt to perpetrate the fraud. Besides this issue of fraud, there is the secondary question as to what was the actual amount of the loss by fire, which, however, is immaterial, if the policies have been forfeited.

After a protracted trial before a jury,

feited, that in order to accomplish that result, he must knowingly and intentionally and therefore fraudulently, have sworn, with the intent to deceive the insurer and get from him a value falsely put upon the property.

And in *Atherton v. British America Assur. Co.* 91 Me. 289, 39 Atl. 1006, the court in discussing this question, used the following language: "Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true."

And in *Phoenix Ins. Co. v. Summerfield*, 70 Miss. 827, 13 So. 253, it was held that false swearing to any material matter, calculated to mislead or deceive the insurer, knowingly and intentionally done, would defeat a recovery; while false swearing wholly foreign to the matter involved, or a mistake or unintentional misstatement, would not have such effect.

And in *Jones v. Mechanics' F. Ins. Co.* 36 N. J. L. 29, 13 Am. Rep. 405, it was held that while fraud and false swearing would avoid the policy, mere mistakes in stating facts which did not in themselves annul any conditions of the contract, and did not appear to be wilful misrepresentations, would not defeat a recovery. To quote from the opinion: "As to the alleged false swearing in the affidavits, and untrue statements of the value of the property destroyed, it is not sufficient to show that there were errors in the fullness and accuracy of the sworn statement of loss, and in the affidavit of a collateral fact as to who helped in making an appraisal. These may be explained and corrected, if done in good faith."

So, in *Nugent v. Rensselaer County Mut. F. Ins. Co.* 106 App. Div. 308, 94 N. Y. Supp. 605, the court, in discussing the effect of the false-swearing clause, used the following language. "It is not the purpose of such provision in the policy to put every

there was a judgment for the plaintiff in the sum of \$2,115, based on a verdict as follows, to wit: "We, the jury, . . . find for plaintiff in the sum of fifteen thousand seven hundred and fifty-seven dollars and twelve cents (\$15,757.12), to be prorated on \$37,250 of insurance."

Defendant has appealed from the judgment. Plaintiff has not prayed for an increase of the amount awarded by the jury. According to the statement of defendant's expert accountant, the actual total loss of the plaintiff amounted to \$15,767.12. The jury fixed said loss at \$15,757.12, and therefore must have adopted said statement as correct. The amount of loss according to plaintiff's proof of loss was \$31,718.82, and according to the petition was \$30,968.19.

insured in danger of losing the entire benefit of his insurance, if, in an honest effort to determine and state the property lost by fire, and the value thereof, he inadvertently misstates the same or overestimates their values. A mere misstatement of the loss based upon an erroneous estimate of values, which it but the expression of an opinion, does not operate to avoid the policy; the misstatement must be false and fraudulent."

And in *Virginia F. & M. Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8, it was declared that no case could be found in which a forfeiture of an insurance policy for fraud and false swearing as to proof of loss was ever effected, unless the insured swore recklessly, and made statements under oath that were knowingly and wilfully false.

And in *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57, it was declared to be held by an unbroken line of decisions in that court, that the penalty of forfeiture of a policy of insurance for false swearing was not to fall unless the false swearing was knowingly and wilfully done, and that it was not enough that it occurred through mistake, carelessness, or inadvertence, or even through unreasonable reliance on information derived from others.

So, in *Phoenix Ins. Co. v. Munday*, 5 Coldw. 547, it was held that while the false swearing which would cause a forfeiture under such stipulation must undoubtedly be actual and intentional, and that an overestimate of the loss sustained made honestly and in good faith was neither fraud nor false swearing, within the meaning of the policy, yet, where it appeared that the assured had been guilty of wilful or intentional fraud, or of corruptly swearing to a statement known to him to be false, in regard to a material matter in the proofs required by the policy, he must be held to have forfeited his right to recovery thereon.

And in *Fowler v. Phoenix Ins. Co.* 35 Or. 559, 57 Pac. 421, it was held to be well settled that any false swearing touching a material fact or matter of legitimate inquiry under the policy, for the purpose of

This claim of loss based on the inventory and books of the plaintiff exceeds the actual loss by nearly 100 per cent.

Besides errors in bookkeeping, the jury must have found, as contended by the defendant, that three certain items of cement, aggregating \$6,050, appearing on the inventory of January 31, 1908, did not truly represent stock on hand at the time. These three items on the inventory read as follows:

1000 (Bbls.) German Alsen 235... \$2,350 00
718 "Old Stock Lafargue 2.80.... 2,010 40
4214 (Sacks) Atlas 1053½ bbls.... 2,150 69

These entries exhibit marks of erasure and substitution of words and figures, and the footing at bottom of the page has been

deceiving and defrauding the company, knowing the same to be false, would render the policy void.

Overvaluation of property destroyed.

In accordance with this rule of law therefore, an exaggerated estimate of the value of the insured property would not be a breach of this provision in an insurance policy, unless such an estimate was wilfully and fraudulently made. *Huchberger v. Merchants' F. Ins. Co.* 4 Biss. 265, Fed. Cas. No. 6,822; *Huchberger v. Providence Washington Ins. Co.* Fed. Cas. No. 6,823, both affirmed in 12 Wall. 164, 20 L. ed. 364; *Insurance Cos. v. Weide*, 14 Wall. 375, 20 L. ed. 894; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368, 4 Fed. 753; *Mack v. Lancashire Ins. Co.* 2 McCrary, 211, 4 Fed. 59; *Wiede v. Insurance Co. of N. A.* Fed. Cas. No. 17,617; *Shaw v. Scottish Commercial Ins. Co.* 1 Fed. 761; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* 31 Fed. 200; *Spring Garden Ins. Co. v. Amusement Syndicate Co.* 102 C. C. A. 29, 178 Fed. 519; *Tubb v. Liverpool & L. & G. Ins. Co.* 106 Ala. 651, 17 So. 615; *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129; *German-American Ins. Co. v. Brown*, 75 Ark. 251, 87 S. W. 135; *Clark v. Phoenix Ins. Co.* 36 Cal. 168; *Helbing v. Svea Ins. Co.* 54 Cal. 156, 35 Am. Rep. 72; *Commercial Ins. Co. v. Huchberger*, 52 Ill. 464; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. 183; *Franklin Ins. Co. v. Culver*, 6 Ind. 137; *Stone v. Hawkeye Ins. Co.* 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; *Erb v. German-American Ins. Co.* 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; *Goldstein v. St. Paul F. & M. Ins. Co.* 124 Iowa, 143, 99 N. W. 696; *Helm v. Anchor F. Ins. Co.* 132 Iowa, 177, 109 N. W. 605; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 326; *Marchesseau v. Merchants' Ins. Co.* 1 Rob. (La.) 438; *Hoffman v. Western M. & F. Ins. Co.* 1 La. Ann. 216; *Beck v. Germania Ins. Co.* 23 La. Ann. 510; *Israel v. Teutonia Ins. Co.* 28 La. Ann. 689; *Daul v. Firemen's Ins. Co.* 35 La. Ann. 98; *Erman v. Sun Mut. Ins. Co.* 35 La. Ann. 1095; *Dunn v. Spring-* 32 L.R.A. (N.S.)

changed. The president and the secretary-treasurer of the plaintiff company, when examined under oath in the office of the adjustment company, testified that these three items were correct to the best of their knowledge and belief. The president stated that he had no personal knowledge of the items. The secretary, however, testified specifically that the 1,000 barrels of German Alsen cement were on hand when the inventory was taken, and, being asked if he was positive, replied: "I am more positive of that than I am of anything in that book."

A few days thereafter the insurance companies denied all liability. The item of German Alsen was written by the secretary over an erased entry of a small amount of another kind of cement. The second item,

field F. & M. Ins. Co. 109 La. 520, 33 So. 585, *Moore v. Protection Ins. Co.* 29 Me. 97, 48 Am. Dec. 514; *Williams v. Phoenix F. Ins. Co.* 61 Me. 67; *Hilton v. Phoenix Assur. Co.* 92 Me. 272, 42 Atl. 412; *Towne v. Springfield F. & M. Ins. Co.* 145 Mass. 582, 15 N. E. 112; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5; *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388; *Hodge v. Franklin Ins. Co.* 111 Minn. 321, 126 N. W. 1098; *Marion v. Great Republic Ins. Co.* 35 Mo. 148; *Schulter v. Merchants' Mut. Ins. Co.* 62 Mo. 236; *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209; *Probst v. American Cent. Ins. Co.* 64 Mo. App. 408; *Burge Bros. v. Greenwich Ins. Co.* 106 Mo. App. 244, 80 S. W. 342; *Citizens' Ins. Co. v. Herpolsheimer*, 77 Neb. 232, 109 N. W. 160; *Gerhauser v. North British & M. Ins. Co.* 7 Nev. 174; *Barnard v. People's F. Ins. Co.* 66 N. H. 401, 29 Atl. 1033; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 584, affirmed in 44 N. J. L. 210; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291, 40 Am. Rep. 625; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 8 Abb. N. C. 315; *Storm v. Phenix Ins. Co.* 40 N. Y. S. R. 40, 15 N. Y. Supp. 281, affirmed without opinion in 133 N. Y. 656, 31 N. E. 625; *Owens v. Holland Purchase Ins. Co.* 1 Thomp. & C. 285; *Gibbs v. Continental Ins. Co.* 13 Hun. 611; *Cheever v. Scottish Union & Nat. Ins. Co.* 86 App. Div. 328, 83 N. Y. Supp. 732; *Nugent v. Rensselaer County Mut. F. Ins. Co.* 106 App. Div. 308, 94 N. Y. Supp. 605; *Unger v. People's F. Ins. Co.* 4 Daly, 96; *Hickman v. Long Island Ins. Co.* Edm. Sel. Cas. 374; *Boyd v. Royal Ins. Co.* 111 N. C. 372, 16 S. E. 389; *Merchants' Nat. Bank v. Insurance Co. of N. A.* 4 Ohio Dec. Reprint, 340; *Insurance Co. of N. A. v. Melvin*, 1 Walk. (Pa.) 362; *Jacoby v. North British & M. Ins. Co.* 10 Pa. Super. Co. 366; *Phoenix Ins. Co. v. Munday*, 5 Coldw. 547; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063; *Pelican Ins. Co. v. Schwartz*, — Tex. —, 19 S. W. 374; *Virginia F. & M. Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8; *Dogge v. Northwestern Nat. Ins. Co.* 49 Wis. 501, 5 N. W. 889; *Vergeront v. German Ins. Co.*

as originally entered, read: "118 (bbls.) Old Stock Lafargue." And afterwards the figure "7" was written over the first figure "1." A corresponding change was made in the extensions. The third item, as originally entered, read, "214 (Sacks) Atlas," and afterwards the figure "4" was inserted before the figure "2," and the extension figures were altered to correspond. A photographic copy of page 147 of the inventory, on which the three entries appear, is in the record before us, and it is apparent to the naked eye that the original entries and extensions were changed.

It was conceded on the trial that the entry of "German Alsen" was erroneous, and the evidence shows that this item was included in the sworn proofs of loss, but

was excluded in the account of loss sued on in this case. It was proven that the plaintiff had on hand only 2 barrels of German Alsen cement at the date of the inventory, and none at the date of the fire. It is also shown by the evidence that the item of Old Lafargue cement was raised by 600 barrels, and the item of Atlas cement by 1,000 barrels. This conclusion necessarily results from the fact that there is a deficit of 605 barrels of Lafargue and 1,004½ of Atlas cement, which cannot be accounted for on any reasonable hypothesis. The expert accountant employed by the defendants testified that the three items of cement in question were "loaded" to the extent of 2,600 barrels, and that, in addition, all other cement items were short by 359½.

86 Wis. 425, 56 N. W. 1096; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69; Beyer v. St. Paul F. & M. Ins. Co. 112 Wis. 138, 88 N. W. 57; Mortimer v. New York F. Ins. Co. 2 U. S. Month. L. Mag. 452; Steeves v. Sovereign F. Ins. Co. 20 N. B. 394; Harrison v. Western Assur. Co. 35 N. S. 488.

But a wilfully false and fraudulent overvaluation of the property destroyed will, of course, avoid the policy. Huchberger v. Home F. Ins. Co. 5 Biss. 106, Fed. Cas. No. 6,821; Sibley v. St. Paul F. & M. Ins. Co. 9 Biss. 31, Fed. Cas. No. 12,830; Geib v. International Ins. Co. 1 Dill. 443, Fed. Cas. No. 5,298; Howell v. Hartford F. Ins. Co. Fed. Cas. No. 6,780; Regnier v. Louisiana M. & F. Ins. Co. 12 La. 336; Wall v. Howard Ins. Co. 51 Me. 32; Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575; Sternfeld v. Park F. Ins. Co. 50 Hun, 262, 2 N. Y. Supp. 766; Anibal v. Insurance Co. of N. A. 84 App. Div. 634, 82 N. Y. Supp. 600; Furlong v. Agricultural Ins. Co. 28 Abb. N. C. 444, 18 N. Y. Supp. 844; Fire Assn. v. Allesina, 49 Or. 316, 89 Pac. 960; Chapman v. Pole, 22 L. T. N. S. 306; Gastonguay v. Sovereign F. Ins. Co. 15 N. S. 334.

Title of assured to property destroyed.

A misstatement innocently or inadvertently made, regarding the assured's title or ownership of the insured property, will not avoid the policy. West Coast Lumber Co. v. State Invest. Co. 98 Cal. 502, 33 Pac. 258; Merricourt v. Norwalk F. Ins. Co. 13 Haw. 218; Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078; Carey v. Home Ins. Co. 97 Iowa, 619, 60 N. W. 920; Huston v. State Ins. Co. 100 Iowa, 402, 69 N. W. 674; Dalton v. Milwaukee Mechanics' Ins. Co. 126 Iowa, 377, 102 N. W. 120; Little v. Phoenix Ins. Co. 123 Mass. 380, 25 Am. Rep. 96; Walsh v. Fire Assn. of Philadelphia, 127 Mass. 283; Farmers' Mut. L. Ins. Co. v. Garrett, 42 Mich. 289, 3 N. W. 954; Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113; Leach v. Republic F. Ins. Co. 58 N. H. 245; Rohrback v. Aetna Ins. Co. 62 N. 32 L.R.A.(N.S.)

Y. 613; Schuster v. Dutchess County Ins. Co. 102 N. Y. 260, 6 N. E. 406; Dresser v. United Firemen's Ins. Co. 45 Hun, 298, affirmed without opinion in 122 N. Y. 642, 25 N. E. 956; Chamberlain v. Insurance Co. of N. A. 51 Hun, 636, 20 N. Y. S. R. 543, 3 N. Y. Supp. 701; Thierolf v. Universal F. Ins. Co. 110 Pa. 37, 20 Atl. 412; Jacoby v. North British & M. Ins. Co. 10 Pa. Super. Ct. 366; Insurance Co. of N. A. v. Wicker, 93 Tex. 390, 55 S. W. 740; Phoenix Ins. Co. v. Swann, — Tex. Civ. App. —, 41 S. W. 519; Westchester F. Ins. Co. v. Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876; Beyer v. St. Paul F. & M. Ins. Co. 112 Wis. 138, 88 N. W. 57; Reddick v. Saugene Mut. F. Ins. Co. 14 Ont. Rep. 506, affirmed in 15 Ont. App. Rep. 363; Mason v. Agricultural Mut. Assur. Asso. 18 U. C. C. P. 19; Ross v. Commercial Union Assur. Co. 26 U. C. Q. B. 552.

On the other hand, if the insured has sworn to wilfully false statements in his proofs of loss, as to his title or ownership of the property destroyed, this will avoid the policy. Claffin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; Lewis v. Council Bluffs Ins. Co. 63 Iowa, 193, 18 N. W. 888; Security Ins. Co. v. Bronger, 6 Bush, 146; Fitzgerald v. Atlanta Home Ins. Co. 61 App. Div. 350, 70 N. Y. Supp. 552; Gettelman v. Commercial Union Assur. Co. 97 Wis. 237, 72 N. W. 627.

Including property not destroyed.

The inclusion of property not destroyed in the sworn proofs of loss will not avoid a policy, if the assured, at the time of making such proofs, thought it was destroyed. Miller v. Firemen's Fund Ins. Co. 6 Cal. App. 395, 92 Pac. 332; Balestracci v. Firemen's Ins. Co. 34 La. Ann. 844; Lewis Baillie & Co. v. Western Assur. Co. 49 La. Ann. 658, 21 So. 736; Planters' Mut. Ins. Co. v. Deford, 38 Md. 382; Tubbs v. Dwelling-house Ins. Co. 84 Mich. 646, 48 N. W. 296; Knop v. National F. Ins. Co. 107 Mich. 323, 65 N. W. 228; Brunswick-Balke-Clender Co. v. Northern Assur. Co. 142 Mich.

There is no serious dispute as to the figures given by this accountant, and the secretary himself admits a very large apparent shortage in the cement account, which he endeavored to explain by loss in reworking damaged cement within the short period of four months. His explanations did not satisfy the jury, and certainly have made no favorable impression on this court. The same accountant found errors in bookkeeping to a very large amount, and, finally, that the book value of the stock actually destroyed was \$15,767.12, and the jury awarded that sum to the plaintiff company.

The only debatable question on this appeal is whether or not the policies should be declared forfeited under the following stipulation written therein, to wit: "The en-

tire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, or in case of fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, before or after a loss."

If the inventory was "padded," the intent must have been to deceive and defraud the insurance companies in the event of loss by fire. In the course of the cross-examination on the trial of the case, the secretary was driven into the admission that the cement was either "loaded" in the inventory, or was "lost" by waste in reworking. There is no

29, 105 N. W. 76; *Swift v. Teutonia Ins. Co.* 28 Pa. Super. Ct. 253; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99; *Newton v. Theresa Village Mut. F. Ins. Co.* 125 Wis. 289, 104 N. W. 107.

But if the assured wilfully and knowingly includes in his proofs of loss property which was not destroyed, the policy will be thereby avoided. *Schmidt v. Philadelphia Underwriters*, 109 La. 884, 33 So. 907; *Rovinsky v. Northern Assur. Co.* 100 Me. 112, 60 Atl. 1025; *Hanover F. Ins. Co. v. Mannasson*, 29 Mich. 316; *Johnson v. Continental Ins. Co.* 39 Mich. 35; *Monaghan v. Agricultural F. Ins. Co.* 53 Mich. 238, 18 S. W. 797; *Ellis v. Agricultural F. Ins. Co.* 7 Pa. Super. Ct. 264; *Mullin v. Vermont Mut. F. Ins. Co.* 58 Vt. 113, 4 Atl. 817; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467.

Miscellaneous.

These principles of law find support also in the following cases, in which the policies were held not to be avoided by false statements in the proofs of loss, the character being shown parenthetically where the same could be ascertained with certainty from the opinion: *Weide v. Germania Ins. Co.* 1 Dill. 441, Fed. Cas. No. 17,538; *Betts v. Franklin F. Ins. Co.* Taney, 171, Fed. Cas. No. 1,373; *Merrill v. Insurance Co. of N. A.* 23 Fed. 245 (failure to state increased hazard by tenant); *Watertown F. Ins. Co. v. Grehan*, 74 Ga. 642; *Runkle v. Hartford Ins. Co.* 99 Iowa, 414, 68 N. W. 712 (statement that assured was unable to state items or character of goods destroyed); *Garner v. Mutual F. Ins. Co.* — Iowa, —, 86 N. W. 289; *Rafel v. Nashville M. & F. Ins. Co.* 7 La. Ann. 244 (including property not insured); *Tiefenthal v. Citizens' Mut. F. Ins. Co.* 53 Mich. 306, 19 N. W. 9; *Walker v. Western Underwriters' Asso.* 142 Mich. 162, 105 N. W. 597 (undervaluation of loss); *White v. Merchants' Ins. Co.* 93 Mo. App. 282 (mistake by assignee of assured in stating place of origin of fire, through failure properly to

understand assured's statement); *Dolan v. Aetna Ins. Co.* 22 Hun, 396 (including property not insured); *Cochran v. Amazon Ins. Co.* 7 Ohio Dec. Reprint, 276 (including property not insured); *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. 350; *Lion F. Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. 45; *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142; *Mellen v. United States Health & Acci. Ins. Co.* 83 Vt. 242, 75 Atl. 273; *Parker v. Amazon Ins. Co.* 34 Wis. 363 (names of owners of insured property misstated); *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059 (statement that goods were burned up and destroyed by fire, when most of them were destroyed by water).

On the other hand, in *Hansen v. American Ins. Co.* 57 Iowa, 741, 11 N. W. 670, wilfully false statements in the proofs of loss, as to the use and occupation of the insured property, were held to avoid the policy sued on.

Materiality of false statements.

It will be noticed that in the enunciation of the rule of law here discussed, made at the beginning of this note, and also in some of the cases reviewed at length, it was stated that the matter in reference to which the alleged false statement in the proofs of loss was made must be a matter material to the insurance, in order to avoid the policy under a false-swearing clause. The necessity of this element of materiality is questioned in none of the authorities, and is specifically declared in the following cases also: *Weide v. Germania Ins. Co.* 1 Dill. 441, Fed. Cas. No. 17,358; *Feibelman v. Manchester Fire Assur. Co.* 108 Ala. 180, 19 So. 540; *Clark v. Phoenix Ins. Co.* 36 Cal. 168; *Forehand v. Niagara Ins. Co.* 58 Ill. App. 161, reversed on other grounds in 169 Ill. 626, 48 N. E. 830; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Houston v. State Ins. Co.* 100 Iowa, 402, 69 N. W. 674; *Cochran v. Amazon Ins. Co.* 7 Ohio Dec. Reprint, 276; *Herzog v. Palatine Ins. Co.* 36 Wash. 611, 79 Pac. 287; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 62 Am. St. Rep.

evidence in the record to support the assertion that 1,600 barrels of cement was thus lost in the short period of four months, and the testimony of the president and the secretary that such a loss might have occurred within that time in the usual course of business is rebutted by the testimony of other dealers in the same line. The annual loss by waste of 6,400 barrels of cement would soon force any ordinary business concern into insolvency. There is no suggestion of any such depreciation in plaintiff's proofs of loss, or in the subsequent proofs prepared for the purposes of this suit; and plaintiff's claim is based on the assumption that all the cement on the inventory not sold in the usual course of business was on hand at the time of the fire.

The explanation of the item of 1,000 barrels of German Alsen cement is equally unsatisfactory. Plaintiff had only two barrels of this cement in stock on January 31, 1908. The secretary erased an original entry on the second line of page 147 of the inventory, and inserted in lieu thereof "1,000 German Alsen 2.35 2,350." The explanation that this entry was intended to cover 500 barrels of Eagle cement, and 500 barrels of Dromedary cement, just landed, but not in the warehouse, is not plausible on its face, but ceases to be worthy of consideration in the face of the facts that the Eagle and Dromedary cements were entered at the foot of the same inventory, that the entry of German Alsen was not canceled or erased, and that the secretary swore a few months

47, 34 Pac. 1050; Steeves v. Sovereign F. Ins. Co. 20 N. B. 394; Harris v. Waterloo Mut. F. Ins. Co. 10 Ont. Rep. 718; Ross v. Commercial Union Assur. Co. 26 U. C. Q. B. 552.

Fraudulent intent.

It will also be noticed that, in the enunciation of the general rule of law at the beginning of this note, as well as in the various cases reviewed, it is stated that the intent to defraud the insurer was a necessary element of the false swearing, within the meaning of this provision in an insurance policy, and nearly all the cases heretofore cited, specifically support this proposition, while none of them disagree therewith. But in *Linscott v. Orient Ins. Co.* 88 Me. 497, 51 Am. St. Rep. 435, 34 Atl. 405, it was held that if the insured knowingly and purposely made a false statement on oath, concerning the subject-matter, it barred his right of recovery whether his purpose was to defraud the insurer or not, citing as authority *Dolloff v. Phoenix Ins. Co.* 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396, and *Clafin v. Commonwealth Ins. Co.* 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507. But an examination of the *Dolloff* Case fails to disclose any reference to intent, though a proper inference from the language used there is that false swearing alone would be sufficient to forfeit the policy, without it operating as a fraud upon the company. While in the *Clafin* Case, the court, in discussing this question, used the following language: "A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts."

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Injury to insurer.

Some decisions seem to proceed upon the theory that even though the false swearing is wilful, the policy is not thereby avoided, if no injury results to the insurer. Thus, in the following cases, it was held that a wilful overestimate of the loss would not avoid the policy, if the actual loss equaled or exceeded the amount of the insurance: *Shaw v. Scottish Commercial Ins. Co.* 1 Fed. 761; *Home Ins. Co. v. Lowenthal*, — Miss. —, 36 So. 1042; *Springfield F. & M. Ins. Co. v. Winn*, 27 Neb. 649, 5 L.R.A. 481, 43 N. W. 401; *Jensen v. Palatine Ins. Co.* 81 Neb. 523, 116 N. W. 286.

And in *Sullivan v. Hartford F. Ins. Co.* 89 Tex. 665, 36 S. W. 73; *German Ins. Co. v. Jansen*, 18 Tex. Civ. App. 100, 45 S. W. 220, and *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510, 32 N. W. 540, it was held that under a statute making the amount of the policy a liquidated demand in favor of the insured against the insurer, upon the destruction of the insured property, a false estimate of loss would not be material, and would have no effect upon the validity of the policy.

Support for this theory may also be drawn from the language used in *Petty v. Mutual F. Ins. Co.* 111 Iowa, 358, 82 N. W. 767, in which the court, after declaring that the false swearing that would avoid a policy must be wilfully false and done with intent to defraud the company, went on to say: "There was testimony tending to show that whatever misstatement the plaintiff made regarding his loss was through mistake, and that the personal property actually destroyed was worth much more than the amount of insurance thereon."

And in *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69, it was declared that to constitute fraud, the act must be knowingly done, and with intent to injure, and it must be such an act as would be liable to effect that result, and that, if the circumstances were such that the intent to injure could not be effectuated, then

after the fire that he was positive that the German Alsen was on hand when the inventory was taken.

We consider that this case shows very clearly a fraudulent attempt to impose on the defendant insurance company by exaggeration of the loss.

An extended citation of authorities is not necessary to the decision of this case. See *Regnier v. Louisiana State M. & F. Ins. Co.* 12 La. 336; *Schmidt v. Philadelphia Underwriters*, 109 La. 884, 33 So. 907; *Claflin v. Commonwealth Ins. Co.* 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507.

It is argued by counsel for plaintiff that a false swearing by the assured subsequent to the loss must be shown to be material to avoid the policy, and, if the company had knowledge of the facts, a false statement

in regard thereto cannot reasonably deceive or mislead it. 1 Clement, *Fire Insurance*, 279, Rule 9. It is unnecessary to consider the doctrine thus announced, as the case is with the defendant on the question of fraud in the confection of the inventory.

The policy provides that a fraud of this kind shall not be held to have been waived by the insurer "by any requirement, act, or proceeding on its part relating to the appraisal or to any examination" therein provided for.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

Petition for rehearing denied April 11, 1910.

there could be no fraud, within the meaning of the policy.

And in *Knop v. National F. Ins. Co.* 101 Mich. 359, 59 N. W. 653, it was held that the sworn statement in the proofs of loss that the assured was the sole and unconditional owner of the insured building, when in fact he held only under a land contract, would not prevent a recovery, since the insurer could not be prejudiced by such statement.

So, in *Maher v. Hibernia Ins. Co.* 67 N. Y. 283, it was held that the term "false swearing" in such a provision meant "a verified false assertion which does deceive, or is fitted and likely to deceive, the one to whom it is made," and that therefore a sworn false statement in a proof of loss that the building insured was occupied as a dwelling house and for no other purpose would not avoid the policy, where the insurer, through its agents, knew all about the uses of the building.

On the other hand, in *Hanscom v. Home Ins. Co.* 90 Me. 333, 38 Atl. 324, it was declared to be the settled law in that state that if an insured knowingly and purposefully made false statements on oath in his proofs of loss, in relation to the amount or value of the goods, the policy was thereby avoided, although the actual loss exceeded the amount of the insurance. It should be noticed that the last headnote attached to this case disagrees with this statement of the conclusion reached, since it reads as follows: "Erroneous estimates and innocent misstatements are not a cause of forfeiture, when it is conceded that the loss under a policy, honestly stated, exceeds the amount of insurance." The court however, merely took this fact into consideration with other circumstances, in arriving at the conclusion that the charge of wilful false swearing upon the part of the plaintiff was not so plainly and clearly established as to justify a forfeiture of the policy.

And in *Dolloff v. Phoenix Ins. Co.* 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396, it was held that though the actual losses might exceed the whole amount of the insurance, 32 L.R.A. (N.S.)

insurance, a knowingly and purposely false statement on oath in the proof of loss, of other pretended losses, would avoid the policy.

And in *Sleeper v. New Hampshire F. Ins. Co.* 56 N. H. 401, and in *Capital F. Ins. Co. v. Beverly*, 14 Ohio C. C. 468, 8 Ohio C. D. 37, false swearing in the proofs of loss was held to avoid the policy, though the assured's actual loss equaled the amount of the insurance.

And in *Meyer v. Home Ins. Co.* 127 Wis. 293, 106 N. W. 1087, it was held that if there was false swearing within the meaning of the policy, the entire policy would be forfeited, regardless of the amount of insurance compared with the actual loss, or whether the insured derived an advantage, or the insurer sustained a loss, in consequence thereof. See, however, *Cayon v. Dwelling House Ins. Co.* supra.

And in *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754, subsequent appeal, 102 Va. 541, 46 S. E. 692, it was held that if the provision against false swearing had been violated, it was immaterial whether the insurer had been prejudiced or not.

False swearing as to part only of subject of insurance.

Where the false-swearing clause provides for the avoidance of the "entire policy" or "all claims" thereunder, false swearing as to any of the articles covered by the policy will avoid the same. *Dumas v. Northwestern Nat. Ins. Co.* 12 App. D. C. 245, 40 L.R.A. 358; *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 588; *Fowler v. Phoenix Ins. Co.* 35 Or. 559, 57 Pac. 421; *Worachek v. New Denmark Mut. Home F. Ins. Co.* 102 Wis. 88, 78 N. W. 411.

And the rule is the same though the different subjects covered by the policy are severally valued and insured. *Dolloff v. Phoenix Ins. Co.* 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396; *Hall v. Western Underwriters' Asso.* 106 Mo. App. 476, 81 S. W. 227; *Home Ins. Co. v. Connelly*, 104

Tenn. 93, 56 S. W. 828; Moore v. Virginia F. & M. Ins. Co. 28 Gratt. 508, 26 Am. Rep. 373; Moore v. Firemen's Fund Ins. Co. 28 Gratt. 524; Harris v. Waterloo Mut. F. Ins. Co. 10 Ont. Rep. 718; German Ins. Co. v. Reed, 9 Ky. L. Rep. 929.

And in German Ins. Co. v. Reed, 13 Ky. L. Rep. 207 (apparently a subsequent appeal of the case last cited), it was held that a policy was avoided by false statements in the proofs of loss, unless honestly made, though the insured dismissed the claim as to the articles in regard to which the false statements were made.

But in Sullivan v. Hartford F. Ins. Co. 89 Tex. 665, 36 S. W. 73, it was held, under a statute providing that, in case of the total loss by fire of the property insured, the policy should be held and considered to be a liquidated demand against the insurer for the full amount thereof, the effect of which was to preclude any forfeiture for a wilful false statement of the value of the property insured, that a policy covering a building and its contents would not be avoided as to the building by any false statement as to the value of the personal property.

And in Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180, the failure to submit to the jury an issue as to fraud and false swearing which could only affect a recovery as to a portion of the insured property was held not to be reversible error where the policy was divisible, and nothing was allowed in the verdict and judgment for such portion.

Miscellaneous cases.

In Moadinger v. Mechanics' F. Ins. Co. 2 Hall, 490, there is a headnote in the following language: "The terms 'false swearing' (it seems), as used in the conditions annexed to a policy, mean an intentional and corrupt misstatement under oath, for the purpose of proving the existence of property not lost, or of overcharging the property destroyed, or concealing that which was saved." The opinion, however, makes no reference to this question, though the statement of facts show that the trial justice so charged the jury; and, though the decision of the trial court was reversed, the reversal was on other grounds. There is nothing to show that such statement of law met with the approval of the appellate court.

Wilfully false swearing by an agent of the assured will not avoid the policy, unless made "with the knowledge and complicity" of the assured (Metzger v. Manchester Fire Assur. Co. 102 Mich. 334, 63 N. W. 650); or when the false swearing "is known to or acquiesced in" by the assured (Boston M. Ins. Co. v. Scales, 101 Tenn. 623, 49 S. W. 743).

In Henderson v. Western M. & F. Ins. Co. 10 Rob. (La.) 164, 43 Am. Dec. 176, it was held that where a person took out two policies, one in his own right and the other as agent, and in making proofs under his 32 L.R.A.(N.S.)

own policy, he was guilty of wilful false swearing, such fraud would not avail the insurer in an action by the principal on the other policy.

In Williams v. Virginia State Ins. Co. 106 Va. 259, 55 S. E. 680, it was held that where an insured held two policies upon different properties, both of which contained a false-swearing provision, his false swearing as to the property covered by one policy would not vitiate the other.

For a discussion of the question of the effect of fraud by agent *ex necessitate* in making proofs of loss under fire insurance policy, see note in 9 L.R.A.(N.S.) 485.

J. A. C.

MAINE SUPREME JUDICIAL COURT.

ELLEN A. WRIGHT,

FRATERNITIES HEALTH & ACCIDENT ASSOCIATION.

(— Me. —, 78 Atl. 475.)

Insurance — accident — false statement as to life policy.

Rejection by a life insurance company is not within the scope of a question in an application for a health and accident policy, as to whether or not any company, society, or association ever rejected applicant's application, canceled his policy, or declined to renew the same, or refused compensation for disability, and therefore a false statement with reference thereto will not avoid accident policy.

(Emery, Ch. J., and Whitehouse and Peabody, JJ., dissent.)

(December 21, 1910.)

Note. — Character of insurance or company covered by question in application for life or accident insurance as to other insurance or as to previous rejection of application.

For a discussion of the general question whether a beneficial association is an insurance company, see note to Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33.

Accident and life insurance.

The conclusion reached in the above decision finds support in Dineen v. General Acci. Ins. Co. 126 App. Div. 167, 110 N. Y. Supp. 344, in which statements in an application for accident or health insurance, that the applicant had no accident or health insurance, and that no application by him for insurance had ever been declined, were held to relate only to the insurance designated, and not to life insurance, and that therefore the fact that the insured had been rejected by a life insurance company would not avoid the policy. The court

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full bench of an action brought to recover the amount alleged to be due on an accident insurance policy. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Matthew Laughlin, for plaintiff:

If the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, the policy will be construed in his favor.

McEvoy v. Security F. Ins. Co. 110 Md. 275, 22 L.R.A.(N.S.) 964, 132 Am. St. Rep. 428, 73 Atl. 157; Everson v. General

Acci. F. & L. Assur. Corp. 202 Mass. 169, 88 N. E. 658; Clapp v. Massachusetts Ben. Asso. 146 Mass. 519, 16 N. E. 433; Hewey v. Metropolitan L. Ins. Co. 100 Me. 523, 62 Atl. 600; Haughton v. Aetna L. Ins. Co. 42 Ind. App. 527, 85 N. E. 125, 1050.

The question did not refer to life insurance.

Dineen v. General Acci. Ins. Co. 126 App. Div. 167, 110 N. Y. Supp. 344; Fletcher v. Bankers' L. Ins. Co. 62 Misc. 546, 116 N. Y. Supp. 1105; Peterson v. Manhattan L. Ins. Co. 244 Ill. 329, 91 N. E. 466, 18 A. & E. Ann. Cas. 96.

Mr. Harry Manser, for defendant:

The answers were warranties, and their materiality was not open to consideration. 25 Cyc. Law & Proc. p. 798; Cummings

said: "To analyze a little further the scope of the information sought to be obtained by the defendant, it first desired to know if the applicant carried any other accident or health insurance. It also wished to be informed if any accident or health policy had been canceled or refused. In parity with these inquiries, it desired to know if any application had ever been declined. No one would be expected to single out the last inquiry as extending to an application for a life policy. The subject-matter of all these inquiries to gain information was only accident or health insurance. . . . Literally construed, if the plaintiff's application for a fire insurance policy had been declined, the policy in suit would be void from its conception."

So, in *Mutual Reserve L. Ins. Co. v. Dobler*, 70 C. C. A. 134, 137 Fed. 550, it was held that a negative answer to the question "Have you any other insurance?" in an application for life insurance, did not call for an answer disclosing any other insurance than life insurance, and thus the insured's failure to state that he carried policies of accident insurance was not a breach of warranty. The court said that it was true that the question standing by itself was comprehensive and might properly include all kinds of insurance, whether life, marine, or insurance of crops, as well as accident insurance, but when taken in connection with the question preceding it, "Have you now any insurance on your life?" its purpose was only to inquire whether the applicant had fully answered the previous question, and its purport was: "Have you now answered as to all life insurance that you carry?"

The same conclusion was reached in *Montreal Coal & Towing Co. v. Metropolitan L. Ins. Co.* Rap. Jud. Quebec 24 C. S. 399, affirmed in 35 Can. S. C. 266, and the insured's failure to state that he had an accident policy, in replying to a question as to what insurance he then carried on his life, was held not to avoid the policy. Sir Melbourne M. Tait, in delivering the opinion of the court, said that he did not think that an accident policy should be under-

stood to be a life policy, simply because there was an undertaking in it to indemnify the insured in case of death by accident only; that he believed there was a distinction in the mind of every business man between a life policy and an accident policy; that in common parlance an accident policy would not be called a life policy. He then gave a happy illustration of this distinction: If anyone obtained a loan upon a promise to furnish a policy upon his life as security, the lender would not consider the promise fulfilled if the borrower offered him an accident policy.

And, in *Mutual L. Ins. Co. v. Ford*, — Tex. Civ. App. —, 130 S. W. 769, recovery on a policy of life insurance was upheld though the insured, in enumerating in his application the companies in which he was insured, omitted to mention that he had an accident policy.

On the other hand, in *McCollum v. Mutual L. Ins. Co.* 55 Hun, 103, 8 N. Y. Supp. 249, affirmed without opinion in 124 N. Y. 642, 27 N. E. 412, it was held that a negative answer to the question in an application for life insurance whether the applicant was insured in any other company, when he carried a certificate of membership in aid and accident associations, was a breach of the warranty. Here the applicant carried two other policies, one in what is undoubtedly from its name an aid and accident association, and the other in the Buffalo Life and Reserve Association. Nothing further appears in the opinion as to the character of these companies.

Benefit and regular life insurance; other insurance.

This question as to the character of insurance arises also when an applicant for regular life insurance, in answering the questions in his application as to other insurance, fails to disclose that he is a member of a fraternal or beneficial society or association, and it is sought to avoid the policy on that ground. Upon this question the weight of authority supports the proposition that benefit insurance is not insur-

v. Kennebec Mut. L. Ins. Co. 89 Me. 37, 35 Atl. 1032; Johnson v. Maine & N. B. Ins. Co. 83 Me. 182, 22 Atl. 107; Swett v. Citizens' Mut. Relief Soc. 78 Me. 541, 7 Atl. 394; Jeffrey v. United Order, G. C. 97 Me. 176, 53 Atl. 1102; Richards v. Maine Ben. Asso. 85 Me. 99, 26 Atl. 1050; Maine Ben. Asso. v. Parks, 81 Me. 79, 10 Am. St. Rep. 240, 16 Atl. 339; Clapp v. Massachusetts Ben. Asso. 146 Mass. 519, 16 Atl. 433; Langdeau v. John Hancock Mut. L. Ins. Co. 194 Mass. 56, 18 L.R.A. (N.S.) 1190, 80 N. E. 452; Everson v. General Acci. F. & L. Assur. Corp. 202 Mass. 169, 88 N. E. 658.

The question covered life insurance policies.

Bruce v. Connecticut Mut. L. Ins. Co.

ance within the meaning of such a question in such an application.

This principle seems to meet with the approval of the United States Supreme Court in *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87, in which the specific conclusion was that where an agent of the insurer wrote in the application that the applicant had no other insurance, although the applicant told him that he had a certificate of membership in a co-operative company, which the agent said was not considered insurance by him, the company was bound by the agent's interpretation, and was estopped from asserting the contrary. The court declared that the purport of the word "insurance" in the question as to the applicant having any other insurance upon his life was not so absolutely certain as to preclude proof, in an action on the policy, as to what kind of insurance the contracting parties had in mind when that question was answered, and that such proof did not necessarily contradict the written contract.

And, in *Seidenspinner v. Metropolitan L. Ins. Co.* 70 App. Div. 476, 74 N. Y. Supp. 1108, reversed on other grounds in 175 N. Y. 95, 67 N. E. 123, where an application for regular life insurance contained questions as to rejection of previous applications for insurance in whole or in part, as to refusals to restore lapsed policies, and as to pending applications in other companies, the insurance in each case being described as "on your life;" and these questions being followed by the clause: "State amount of insurance you now carry on your life, name of company or association by whom granted, and the year issued. Enumerate each;" and by the final question: "Is there any other insurance on your life?"—the court was of the opinion that an examination of the question as to the amount of insurance, in connection with the other questions preceding it, thoroughly warranted the conclusion that it indicated insurance in some company or association which issued some form of policy or certificate, and that therefore the fact that insured was a member of an association

74 Minn. 310, 77 N. W. 210; *Alden v. Supreme Tent, K. M.* 178 N. Y. 535, 71 N. E. 104.

King, J., delivered the opinion of the court:

The plaintiff was named beneficiary in an accident and health insurance policy issued by the defendant company to her husband, Henry A. Wright, upon his written application and statements. In the application Mr. Wright made answers to various interrogatories therein propounded as to the then present and past condition of his health, and he also stipulated "that, if any of the statements, representations, or answers made herein are not true, full, and complete, all rights to the benefits named

which issued no certificate or policy, the sum to be paid in case of the sickness or death of the member, and its recipient being fixed by its constitution, did not make his negative answers to the questions avoid the policy.

So, in *Mutual L. Ins. Co. v. Ford*, — Tex. Civ. App. —, 130 S. W. 769, the rule was declared to be that if a fair and intelligent person could not conclude from the question, as to other insurance, that fraternal and accident insurance were not intended to be included in his answer, his failure to give the same would vitiate his contract of insurance; but that, on the other hand, if such a person could reasonably conclude that such insurance was not intended, then its omission would not avoid the policy. Here it appeared that the application contained, among others, these two consecutive statements: "I have been accepted for insurance under the following policies in this company;" "I am insured in other companies and associations as follows." The court declared that these questions referred only to insurance in regular companies, or, at least, that an applicant would be reasonably justified in concluding that such was the case; and that the latter question, when read in connection with the former, was certainly sufficient to lead to the conclusion that the information called for was life insurance evidenced by policies in regular insurance companies, and not insurance evidenced by certificate in fraternal orders and by accident policies, and that, therefore, the assured's failure to mention his accident and benefit policies did not avoid his policy.

An opposite conclusion, however, was reached in *Penniston v. Union Cent. L. Ins. Co.* 6 Ohio Dec. Reprint, 830, in which it was held that a negative answer to the question in an application for regular life insurance, as to whether the applicant was carrying other insurance, defeated the policy if at the time he was a member of a mutual association whose members paid a stated sum each upon the death of one of their number. See, however, *White v. National L. Ins. Co. infra*.

in my policy shall be null and void, and all money paid by me to the association forfeited."

The interrogatories and answers were as follows:

"(1) Q. Are you now in good health? A. Yes.

"(2) Q. Have you been in good health for the last five years? A. Yes.

"(3) Q. Have you consulted, been prescribed for, or required the services of a physician or surgeon during the past five years? If so, give date and state particulars, name, and address of attending physician. A. No.

"(4) Q. Have you had fits, vertigo, paralysis, varicose veins, asthma, rheumatism, sciatica, lumbago, cancer, nervous prostration, appendicitis, cystitis, gall stones, gravel, or is your hearing or eyesight impaired? A. No.

"(5) Q. Have you ever had a rupture or suffered the loss of an eye, hand or foot, or use of either? A. No.

"(6) Q. Have any of your near relatives died of or been afflicted with consumption, paralysis, insanity, scrofula, cancer, or any hereditary disease? A. No.

"(7) Q. Have you always been and are

you now of sober and temperate habits? A. Yes.

"(8) Q. Has any company, society, or association ever rejected your application, canceled your policy, or declined to renew same, or refused compensation for disability? If so, give name and date. A. No.

"(9) Q. Are you insured in any other company, society, or association paying sick and accident benefits? If so, give name and amount of benefit in each. A. No."

The application, including the interrogatories, answers, and stipulation, constituted, with the policy itself, the contract of insurance. Mr. Wright was ill and died of disease within the terms of the policy, and the beneficiary brings this suit on the contract.

It appears from the evidence that Mr. Wright previous to his application to the defendant company had made written application through an accredited agent of the North Western Mutual Life Insurance Company for a policy of insurance upon his life, and the application was rejected. The main question in the case is whether the fact of such application and rejection is in contravention of Mr. Wright's unconditional negative answer to the eighth interrogatory in his application to the defendant

—previous rejection.

Another phase of the general question here discussed is presented when it is sought to avoid a policy of regular life insurance by showing that the insured, in answering the question of previous rejection, failed to disclose that a fraternal or beneficial society or association had declined to issue to him a certificate of membership. This question is discussed in a note to *Lyons v. United Moderns*, 4 L.R.A. (N.S.) 247. From the cases there reviewed it appears that there is a conflict of authority on this question, and other decisions show the same disagreement.

In *Peterson v. Manhattan L. Ins. Co.* 244 Ill. 329, 91 N. E. 466, 18 A. & E. Ann. Cas. 96, reversing 115 Ill. App. 421, a negative answer to the question contained in an application for regular life insurance, "Have you ever been declined or postponed by any company? State name of the company," was held not to avoid the policy though the insured had been rejected by a fraternal beneficial society.

And in *White v. National L. Ins. Co.* 11 Ohio Dec. Reprint, 857, it was held that a refusal to grant a certificate of membership by a mutual benefit association was not a refusal to grant a policy on the life of an applicant for old line insurance, within the meaning of the question, "Has any company or association declined to grant a policy on your life?"—and that, therefore, a negative answer to such question was not a breach of warranty though the applicant had been rejected by such an association. See, how- 32 L.R.A. (N.S.)

ever, *Penniston v. Union Cent. L. Ins. Co.* supra.

A different principle, however, seems to have governed the decision reached in *Meyer-Bruns v. Pennsylvania Mut. L. Ins. Co.* 189 Pa. 579, 42 Atl. 297, in which, without discussion of the question presented in this note, a judgment for the insurer was upheld, which had been directed by the trial court upon the ground that the policy sued on had been avoided by the insured's statement in his application that he had never been rejected by an insurance company, when in fact he had been refused membership in a beneficial association.

Paid-up policy.

In *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, a paid-up policy was held to constitute insurance "in force upon the life" of the insured within the meaning of an application calling for information upon that point. It appeared that in this application the clause quoted was preceded by: "State amount of insurance you now carry on your life." The court said that it was inclined to agree with the contention made on behalf of the insured that the negative reply to this question was not applicable to the paid-up policy, since if it had stood alone it would have permitted and perhaps required the word "carry" to be construed in its colloquial sense as equivalent to "possess" or "hold," and so hardly applicable to a paid-up policy that had ceased to be a burden to the insured.

J. A. C.

company, viz.: "Has any company, society, or association ever rejected your application, canceled your policy, or declined to renew same, or refused compensation for disability? If so, give name and date."

The plaintiff claims that the interrogatory does not call for an answer as to application to a life insurance company for a life insurance policy, but is limited to applications to health and accident insurance companies for health insurance policies. The defendant claims that the interrogatory is more comprehensive, and does call for an answer as to applications to life insurance companies as well.

The subject-matter under consideration was health and accident insurance. The conspicuous feature of the application is the name of the company, the Fraternities Health & Accident Association. Life insurance is not mentioned. It is not under consideration. There is nothing in the application calculated in the least to call attention to it. No reason can readily be conceived why a person of ordinary prudence and intelligence should think of it by way of association from any statement contained in the application. Interrogatory 8 reads: "Has any company, society, or association ever rejected your application," etc.? When the phraseology of this question is construed in connection with the subject-matter of the contract, it seems evident that the ordinarily prudent person would be authorized to imply the word "health" before the word "company," so that the question would mean, in the mind of the applicant: Has any health company, etc., rejected your application, etc.

The defendant, however, claims that the language of interrogatory 8 should be interpreted in its most comprehensive sense; that the word "any" should be interpreted to include life insurance, and all other corporations doing a life, health, or accident insurance business. But we think there can be little doubt that interrogatory 8 was susceptible of the interpretation above given, and warranted the assumed understanding of the question disclosed by the answer. In the employment of language so liable to be misunderstood, as that used in giving expression to interrogatory 8, it seems well settled that all doubts must be resolved in favor of the assured. In other words, it is incumbent upon the company which prepares the form of application, containing declarations to be made and questions to be answered, to use language so plain and intelligible that the ordinary person under the usual circumstances of filling out applications can readily comprehend it.

In *Wallace v. German-American Ins. Co.* (C. C.) 41 Fed. 744, it is said: "If the 32 L.R.A. (N.S.)

words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, . . . the policy will be construed in favor of the assured. As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him."

In *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, Judge Taft states the rule as follows: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." See also cases cited.

Dineen v. General Acci. Ins. Co. 126 App. Div. 167, 110 N. Y. Supp. 344, is a case practically identical in facts with the case at bar. In the application the assured said in answer to a question: "No application ever made by me for insurance has ever been declined," etc. It appears that prior to the date of this answer the plaintiff had applied for a policy on his life, which had been refused. The court, however, say: "There is no question in the application which specifically calls upon the plaintiff to disclose whether he has ever been rejected by a life insurance company." In construing the question with reference to the context, the court also say: "The plaintiff might well have inferred that the inquiries were directed solely to accident or health insurance." It should be observed, also, that all the statements of the plaintiff were made warranties. The opinion then proceeds to say in construing the application: "An insurance company which is making every statement, whether material or otherwise, a warranty, must be held to a very strict rule when it is endeavoring to avoid payment on its insurance contract, because of answers to inquiries or declarations which it has framed. They must be so plain and intelligible that any applicant can readily comprehend them. If any am-

biguity exists, the construction will obtain most favorable to the insured." Under these well-settled decisions, it seems clear that it was not incumbent upon the plaintiff to maintain that the question could not be construed to include life companies, but that it was enough for her to show that it was susceptible of the construction given by the applicant,—that life insurance companies were not embraced in it. If the defendant intended to include life companies, it should have left no doubt as to its meaning. A single word would have accomplished the result.

Judgment for the plaintiff for \$324.50, and interest to be added from the date of the writ.

Emery, Ch. J., and Whitehouse and Peabody, JJ., dissenting:

We cannot concur. We see no reason for construing the contract strictly against one party and liberally in favor of the other. The parties were upon equal footing. Neither should be favored or penalized. The contract was mutual, and entered into voluntarily without constraint upon either party. It should receive the construction its language fairly imports, read in the light of the purpose of the parties and of the contract itself. The assured applied for insurance upon his health. The insurance company desired from him information, and sources of information, as to his health, present and past. Such was the obvious purpose of the questions asked of him. He must be held to have known that such was their purpose,—that his condition and history as to health would determine whether the company would assume the risk.

To enable it to ascertain whether there was any reason why it should not assume the risk, the company propounded to him question 8: "Has any company, society, or association ever rejected your application, canceled your policy, or declined to renew the same, or refused compensation for disability?" The applicant answered, "No," although he had applied to and been rejected by a life insurance company because of ill health, and then stipulated that if any of the statements, representations, or answers were "not true, full, and complete, all rights to the benefits named in my policy shall be null and void, and all money paid by me to the association forfeited." His stipulation was, not that his answers should be true according to his knowledge or belief, or recollection, or even according to his understanding of the questions, but that the answers would prove to be "fully and completely" true in fact.

Undoubtedly the company might have

framed their questions differently. Also it may be, that the answer to question 8 was not wilfully false. The applicant may have forgotten, or answered as he did inadvertently. All this, however, is beside the real question, which is, taking the question and answer as they were framed, Was the answer in fact "true, full, and complete?" Inasmuch as life insurance companies, usually at least, accept or reject applications according to the applicant's state of health, and inasmuch as this applicant had applied for a policy in a life insurance company and had been rejected because of ill health, we think it clear the answer was not "true, full and complete." If the applicant, assuming him to have been honest, had remembered the fact of his former application and rejection, he would not have answered as he did. No honest man would.

OREGON SUPREME COURT.

SAMUEL LONEY et al., Respts.,
v.

JOSEPH C. SCOTT, Appt.

(— Or. —, 112 Pac. 172.)

Mine — patent — irrigation — project — withdrawal.

1. Although an entry in mineral land made during the time that it is withdrawn from settlement for irrigation purposes may be ineffectual, yet a subsequent patentee of the land for railroad purposes, after its restoration to the public domain, acquires no right to the possession as against a mining claimant in possession, where he knows of the mineral claim and that it is supported by actual deposits of mineral.

Same — sand — mineral.

2. Land more valuable for the building sand it contains than for agricultural purposes is subject to placer location, and is mineral, within the meaning of the United States mining statutes.

Public land — conflicting claim — right to patent.

3. To entitle one in possession of public land, the patent to which has been awarded to another, to a decree adjudging the latter to hold in trust for him, he must show that he himself is entitled to it, or that, by the law properly administered, the title should have been awarded to him.

(December 13, 1910.)

Note.—The question what lands are mineral lands, and what substances in lands are mineral, is discussed in the note to *Dwinnell v. Dyer*, 7 L.R.A.(N.S.) 763, 791, 805, et seq., covering the general subject of the location of mining claims.

APPEAL by defendant from a decree of the Circuit Court for Umatilla County entitling plaintiffs to possession and control of certain mining claims, staying an action at law by defendant in the Circuit Court against plaintiffs as to lands included in the said claims, restraining defendant from removing sand or other material therefrom, and declaring that defendant holds legal title to the lands in trust for plaintiffs. Modified.

Statement by Eakin, J.:

The N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ section 8, Tp. 5 N., R. 30 E., W. M., in Umatilla County, which includes the land in controversy in this suit, together with 183 sections of adjacent lands, was, by the Secretary of the Interior, on August 16, 1905, temporarily withdrawn "from any form of disposition whatever, under the first form of withdrawal" for irrigation works in connection with the Umatilla project, as provided in § 3 of the act of June 17, 1902, chap. 1093, 32 Stat. at L. 388, U. S. Comp. Stat. Supp. 1909, p. 597. Section 3 of that act provides for two classes of withdrawals: (1) "The Secretary of the Interior shall . . . withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act." (2) He is authorized to "withdraw from entry . . . any public lands believed to be susceptible of irrigation from said works." Those withdrawn under the first form are lands that may possibly be needed in the construction and maintenance of irrigation works, while those included in the second form are lands which may possibly be irrigated from such works.

The land in controversy here was, by order of the Secretary of the Interior, restored to public entry on March 2, 1907. On January 7, 1907, the plaintiffs, the Knights, attempted to locate three placer mining claims in section 8, Tp. 5 N., R. 30 E., W. M., in Umatilla county, Oregon, adjacent to and parallel with the right of way of the Oregon Railway & Navigation Company through that section; these claims being the land in controversy. They posted a notice of location upon each of the claims, and staked the same in the manner required by law,—1,500 by 600 feet. Placer claim No. 1 is described as in section 8, Tp. 5, range 30 N., W. M., "commencing at corner stake No. 1 at the south boundary line of the right of way of the O. R. & N. Company, thence," etc. The other two claims are described by reference to No. 1. The notices were duly recorded in the records of Umatilla county, Oregon.

Plaintiffs also allege the performance of

assessment work each year on each claim, as required by law, and the conveyance by the Knights to plaintiff Loney of an undivided one-third interest in the claims. It is further alleged that the claims are valuable for the mineral they contain, *viz.*, large deposits of building sand and placer deposits of gold. It also appears that, under the provisions of certain acts of Congress, passed in the years 1864 and 1870, a patent was issued by the United States to the Northern Pacific Railway Company, dated March 19, 1908, for the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 8, Tp. 5 N., R. 30 E., W. M., as a lieu land selection, and on May 15, 1908, the railway company conveyed the same to defendant; that about one half of placer claim No. 2, and about two thirds of claim No. 3, are situated upon the 80 acres above described. Defendant relies upon the United States patent to the railway company, and his deed from the railway company as evidencing his title, and further contends that plaintiff could not make a valid location of the mining claim while the land was withdrawn from entry; also, that sand is not such a mineral as can be the subject of mining location; that conceding all that plaintiffs claim, they have no standing in equity, for the reason that defendant's patent cannot be attacked by them, unless they have a right to the title from the United States.

Defendant, Joseph Scott, on June 8, 1907, made the nonmineral affidavit, required under the United States statute, upon the application of the railway company for the land, in which he says: "That there is not, within the limits of said land, any known vein or lode of quartz or other rock in place bearing gold, silver, . . . ; that there is not, within the limits of said land, any known deposit of coal, or any known placer deposit, oil, or other valuable mineral; . . . that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise, except that part of said land is claimed under placer filings, which said filings do not state what minerals said lands contain; that said land is essentially nonmineral in character, unless sand suitable to be used in building constitutes a mineral." The railway company made its application to the United States Land Office for the land on June 12, 1907, being the first day on which such application could be made after the land was restored to entry.

The defendant brought an action against plaintiffs for the possession of the land, and they filed this complaint as a cross bill

in such action, in which they ask that the law action be permanently stayed, and that the legal title which defendant has to that portion of the premises embraced in the mining claims be decreed to be held by him in trust for plaintiffs herein. Decree was rendered for plaintiffs, and defendant appeals.

Messrs. T. P. Gose, O. G. Gose, and Carter & Smythe, for appellant:

No valid location under the mineral laws can be made on public lands which have been withdrawn from entry.

7 Fed. Stat. Anno. pp. 1098, 1099; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, 17 Mor. Min. Rep. 475; Costigan, Mining Law, p. 94; Wood v. Beach, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; Stoddard v. Chambers, 2 How. 318, 11 L. ed. 283; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Wilcox v. Jackson, 13 Pet. 513, 10 L. ed. 271.

Where an original entry is invalid, continuing in possession after restoration of the right to enter is not equivalent to a new entry.

Prosser v. Finn, 208 U. S. 67, 52 L. ed. 392, 28 Sup. Ct. Rep. 192.

A trespasser or squatter has no rights against the United States.

Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102.

The provisions of the statute should have been complied with, and failure to do so renders the location invalid.

Wright v. Lyons, 45 Or. 167, 77 Pac. 81; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36; Strickland v. Commercial Min. Co. — Or. —, 104 Pac. 965; Drummond v. Long, 9 Colo. 538, 13 Pac. 543, 15 Mor. Min. Rep. 510; Brown v. Levan, 4 Idaho, 794, 46 Pac. 661; Darger v. Le Sieur, 8 Utah, 160, 30 Pac. 363; Gilpin County Min. Co. v. Drake, 8 Colo. 586, 9 Pac. 787; Baxter Mountain Gold Min. Co. v. Patterson, 3 N. M. 269, 3 Pac. 741; Faxon v. Barnard, 2 McCrary, 44, 4 Fed. 702, 9 Mor. Min. Rep. 515; Fuller v. Harris, 29 Fed. 814.

Messrs. P. H. Pedigo, Lowell & Winter, and G. W. Phelps, for respondents:

Withdrawal of lands for irrigation purposes does not include mineral lands, unless in the act providing for such withdrawal, it is expressly stated that mineral lands may be so included.

U. S. Rev. Stat. §§ 2318-2346, U. S. Comp. Stat. 1901, pp. 1423-1439, act May 32 L.R.A. (N.S.)

10, 1872; Coleman v. McKenzie, 28 Land Dec. 348; Re Crowder, 30 Land Dec. 92; 35 Land Dec. 216; Re Crafts, 36 Land Dec. 138.

Under the public land laws of the United States, lands valuable for their mineral deposits can be disposed of only under the mining laws.

Ivanhoe Min. Co. v. Keystone Consol. Min. Co. 102 U. S. 167, 26 L. ed. 126, 13 Mor. Min. Rep. 214; Deffeback v. Hawke, 115 U. S. 404, 29 L. ed. 426, 6 Sup. Ct. Rep. 95; Colorado Coal & I. Co. v. United States, 123 U. S. 327, 31 L. ed. 190, 8 Sup. Ct. Rep. 131; Coleman v. McKenzie, 28 Land Dec. 349.

Persons who have appropriated a mining claim on lands of the United States are, as between themselves and all other persons, except the United States, the owners of the land and the mines therein.

Hughes v. Devlin, 23 Cal. 501, 12 Mor. Min. Rep. 241; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262, 7 Mor. Min. Rep. 313.

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substance, when found in the public lands in quantity sufficient to render the land more valuable on account thereof than for agricultural purposes, is within the purview of the mining law.

U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1432; Northern P. R. Co. v. Soderberg, 188 U. S. 534, 47 L. ed. 583, 23 Sup. Ct. Rep. 365; Re Hooper, 1 Land Dec. 561; Creswell Min. Co. v. Johnson, 8 Land Dec. 440; Dobler v. Northern P. R. Co. 17 Land Dec. 103; Winscott v. Northern P. R. Co. 17 Land Dec. 274; Zadig v. Central P. R. Co. 20 Land Dec. 26; Dargin v. Koch, 20 Land Dec. 384; Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233; Report of Director U. S. Geological Survey, Mineral Resources for Year 1907, p. 17, part 1; Alldrift v. Northern P. R. Co. 25 Land Dec. 349; Re Union Oil Co. 25 Land Dec. 351; Deadwood Town Site, 8 Copp's L. O. Costigan, Mining Law, pp. 29, 30, 118, 119; Maxwell v. Brierly, 10 Copp's L. O. 50.

Eakin, J., delivered the opinion of the court:

There are several important questions involved in determining plaintiff's right to relief in this suit. First: It is contended by defendant that plaintiffs could not make a valid location upon land withdrawn from settlement. Withdrawals for forest reserves expressly reserve to the prospector all mineral deposits for mining exploration and location; but withdrawals made by the Secretary of the Interior, under the act of

June 17, 1902, chap. 1093, 32 Stat. at L. 388, U. S. Comp. Stat. Supp. 1909, p. 597, providing for irrigation projects, if made under the first form, that is, for "irrigation works," are not subject to mining locations, as they are intended as permanent reservations for governmental use, and amount to a legislative withdrawal. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *Yosemite Valley Case (Hutchings v. Low)* 15 Wall. 77, 21 L. ed. 82; *Shepley v. Cowan*, 91 U. S. 330, 338, 23 L. ed. 424, 427. While lands withdrawn under the second form, *viz.*, for irrigation purposes under such project, are disposed of thereunder only for homesteads, and all lands open to homestead settlement are also open to exploration and location for mineral deposits. 35 Land Dec. 216; *Re Crafts*, 36 Land Dec. 138. The language of § 3 of the act under consideration, relating to withdrawals under the first form, provides that the Secretary of the Interior "shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act." There were withdrawn under this provision, for irrigation works, about 183 sections, which may be reasonably presumed to be far in excess of what may be required for that purpose, and portions thereof, including the land above described, were, in fact, soon thereafter restored to the public domain, while plaintiffs were in possession of the placer claims. It appears that the Interior Department, under a former statute providing for withdrawals for irrigation projects, which provides that the reservoir shall be restricted to and contain only so much land as is actually necessary for its construction, held that a mineral entry based on a location made after withdrawal of the land for a reservoir site conferred no right, but may be suspended, and, if subsequently restored to entry, the location may proceed to patent. See also *Re Prescott & A. C. R. Co.* 13 Land Dec. 47; *Re Austin*, 18 Land Dec. 4; *Noonan v. Caledonia Min. Co.* 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911. But we do not deem it necessary to determine that question as, under the view we take of the case, the possession by plaintiffs of the ground as mining claims, at the time of the application by the railway company for a patent therefor, is sufficient to defeat its action for possession. The rule is that a patent to government land transfers to the patentee all veins, lodes, or other minerals within its boundaries, unless such mineral deposits were known to exist at the time of the issuance of the patent, in which latter case the known mineral deposits do not pass by the patent. *Reynolds v. Iron Silver Min.* 32 L.R.A. (N.S.)

Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; *Davis v. Wiebbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Kansas City Min. & Mill. Co. v. Clay*, 3 Ariz. 326, 29 Pac. 9; *Re Colorado*, 6 Land Dec. 412; *Re Miner*, 9 Land Dec. 408; *Re Virginia Lode*, 7 Land Dec. 459.

In *Reynolds v. Iron Silver Min. Co.*, a case in which a patent had issued for a placer mine upon which there was a quartz ledge known at the time to the patentee, it is said that the title to the quartz mine remained in the United States, and no title passed to the patentee. "He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defense against one who has no title at all, and never had any." The same language is used in *Davis v. Wiebbold*, 139 U. S. 516, 35 L. ed. 241, 11 Sup. Ct. Rep. 628, where it is held that the patent does not pass the title to known mineral land.

In the case before us it is conceded that, if building sand is mineral, within the meaning of § 2329 of the U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1432, the railway company and defendant knew, at the time the patent was applied for, that the land contained mineral. This is shown by the nonmineral affidavit of Scott, quoted above, expressly referring to the fact that part of the ground is claimed under placer filings, and therefore the title to the mineral ground did not pass by the patent, and defendant Scott has no standing to maintain ejectment against plaintiffs.

The question arises whether building sand is a mineral, within the mineral laws of the United States. The language of § 2329 is: "Claims usually called 'placers,' including all forms of deposits, excepting veins of quartz or other rock in place, shall be subject to entry." Plaintiffs' proof tends to show that building sand is a valuable mineral, *viz.*, worth 50 cents per cubic yard, and is marketable in large quantities, *George Otis Smith*, the director of the United States Geological Survey, in volume 2

of his Report of the Mineral Resources of the United States for 1907, at page 563, by a tabulated statement shows that more than \$5,000,000 worth of building sand had been produced in the United States in 1906, and as great a value in 1907.

In *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 534, 47 L. ed. 575, 583, 23 Sup. Ct. Rep. 365, 368, the court, in discussing whether granite comes within the term, "mineral deposit," say: "The words, 'valuable mineral deposits' [as used in § 2319, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1424], should be construed as including all lands chiefly valuable for other agricultural purposes and particularly as including non-metallic substances [naming a list, and continuing]. We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the act of July 2, 1864 [act July 2, 1864, chap. 217, 13 Stat. at L. 365]. With our present light upon the subject it might be difficult to do so. . . . Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority, to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." This definition seems broad enough to include building sand, and we are of the opinion that land more valuable for the building sand it contains than for agriculture is subject to placer location, and is mineral, within the meaning of the United States mining statutes.

The decree of the lower court, however, in addition to restraining defendant from prosecuting the law action, adjudges "that the legal title which the defendant herein has to said portion of said premises embraced within the said three mining claims is held by the defendant in trust for the plaintiffs herein." This evidently is intended to be an adjudication that plaintiffs have established a right to the title to the claims; but they have not shown themselves entitled to this relief.

If a patent to land to which one is entitled has been improperly issued by the United States to another, the state courts will quiet the title of the former, or adjudge the other a trustee of the title for him. *Wardwell v. Paige*, 9 Or. 517; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Hartman v. Warren*, 22 C. C. A. 30, 40 U. S. App. 245, 76 Fed. 157; *Baldwin v. Keith*, 13 Okla. 624, 75 Pac. 1124; *Graham v. Great Falls Water Power & Townsite Co.* 30 Mont. 393, 76 Pac. 808; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102. But to entitle 32 L.R.A. (N.S.)

one to a decree adjudging another who holds under a patent from the United States to be a trustee for the former, he must show that he, himself, is entitled to it, or show that by the law properly administered, the title should have been awarded to him. See the cases cited last above.

The result of these conclusions is that the lands included in the placer claims are mineral and subject to location as such; that defendant and his grantor knew of its mineral character at the time the patent was applied for; that they acquired no title thereto, but the title remained in the United States; that, at the time the action of ejectment was commenced by defendant, plaintiffs were in possession of the placer claims, working the same as a mine, and seeking to acquire title thereto as such from the United States; that defendant, having no title thereto, cannot maintain an action of ejectment therefor, against plaintiffs, who are rightfully in possession thereof. *Morrison v. Stalnaker*, 104 U. S. 213, 26 L. ed. 741; *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172, 173, 15 So. 780, that equity will enjoin the action; and that plaintiffs, having failed to allege or prove that they are entitled to a patent from the government, cannot have defendant adjudged a trustee of the title for them, even if the title were in him.

The decree of the lower court will therefore be modified, and the defendant enjoined from prosecuting the action at law. Neither party shall recover costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

KATHERINE GLENNEN
v.
BOSTON ELEVATED RAILWAY COMPANY.

(207 Mass. 497, 93 N. E. 700.)

Evidence — crowded street car terminal unruly crowd — former experiences.

1. Upon the question of the negligence of a street car company in permitting people to crowd into a car at a terminal, to the

Note. — Liability of carrier for personal injury to passenger by crowd at station or stopping place.

This note excludes cases of injuries sustained by passengers at places other than stations or stopping places, including those where passengers who were forced to ride on the platform were thrown therefrom by the motion of the car, or by the crowding of passengers during actual transit. And the question of contributory negligence on

injury of a passenger seeking to alight, evidence is admissible of the condition and character of the crowds which had been at that terminal on similar days and at similar times on previous years.

Carrier — protection of passenger — crowd at terminal.

2. A street car company may be liable for injury to a passenger encumbered with a small child, who is prevented from leaving the car at the terminal by a boisterous crowd surging into the car, and injured by the turning of a seat against her, where the employees, although having notice of the probability of a rush to board the car, make no attempt to protect her; and it is immaterial that the terminal is in a public street rather than in its own station.

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the part of a passenger injured by a crowd is not within the scope of this note. It may be stated generally that it is not negligence for a carrier to permit its stations and like premises to become crowded. But where it allows the collection of a crowd, it is bound, in view of this circumstance, to take such precautions as will reasonably protect its passengers from injury. What particular steps must be taken is largely a question of fact, depending upon the circumstances of each case.

A carrier is not liable to a woman passenger weighing more than 200 pounds, where it appeared that her injury resulted from tripping over something while alighting from a crowded car which others were seeking to board, at a transfer point, although the conductor stood in the middle of the car and did not come to her assistance. *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639. The court said: "But a conductor has duties to perform which take him away from the rear platform, and the greater the number of passengers the longer the time during which it is necessary for him to be absent, and properly absent, from it. The duty of collecting tickets, for example, being one which cannot always be postponed, is a duty which, in a crowded car, requires the conductor to be absent from the platform a good deal and for some length of time, and if a passenger wishes to alight while the conductor is so engaged, the inconvenience which she may endure in having to alight without his aid is one of those inconveniences which the passenger assumes by choosing to travel on a street car at a time of day when it is notorious that such conveyances are crowded. . . . The fact that the place where the plaintiff was getting off is a place where passengers are transferred to other lines makes no difference; no distinction can be drawn between the duties devolving upon a street railway company when stopping at such a place for passengers to alight, and those which they have when they stop at other places. Neither does the fact that the plaintiff weighed over 200 pounds make a difference; 32 L.R.A. (N.S.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in defendant's favor. Sustained.

The facts are stated in the opinion.

Messrs. Francis Juggins and Amos W. Shepard for plaintiff.

Messrs. L. R. Chamberlin and R. A. Stewart, for defendant:

There was no evidence which would warrant the jury in finding that the defendant was negligent.

Joy v. Winnisimmet Co. 114 Mass. 63; *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639; *O'Neil v. Lynn & B. R.*

the mere fact that a woman weighs over 200 pounds cannot make it the duty of the conductor to drop all other duties and help her get off. Neither is it material that there was evidence that there were passengers 'trying to get on, as the passengers were alighting from the car,' and 'that there "was a scuffle, a regular scuffle."' There was no evidence that the plaintiff was jostled by anybody; it appeared that the injury was caused by her tripping over something."

And a railroad company is not liable for injuries to a passenger caused by his being jostled off the steps of a car while alighting, by the rudeness of another passenger boarding the car. *Ellinger v. Philadelphia, W. & B. R. Co.* 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132.

And allegations that a passenger when near his destination, owing to the crowded condition of the car, with difficulty forced his way carefully toward the step, and while preparing to alight, was pushed and jostled by the crowd, a portion of which was seeking to alight, and that he was violently thrown to the street and injured, accompanied by an allegation that the injury was due entirely to the act of the carrier in allowing its car to become unusually overcrowded, set forth no cause of action. *Lehberger v. Public Service R. Co.* — N. J. L. —, 74 Atl. 272.

And a company is not liable for the negligence of one passenger towards another, causing an injury, there being no fault on the part of the company, where a passenger, attempting to board a train, receives injuries caused through collision with those attempting to alight. *Buck v. Manhattan R. Co.* 15 Daly, 550, 10 N. Y. Supp. 107; *Thomson v. Manhattan R. Co.* 75 Hun, 548, 27 N. Y. Supp. 608.

It was held in *Buchter v. New York City R. Co.* 90 N. Y. Supp. 335, that to charge the carrier with liability for an injury to a passenger having been pushed from the step by reason of the crowded condition of the car, notice to the carrier's servants in charge of the car that the passenger was about to alight must be shown, since with-

Co. 180 Mass. 576, 62 N. E. 983; Lyons v. Boston Elev. R. Co. 204 Mass. 227, 90 N. E. 419; Ellinger v. Philadelphia, W. & B. R. Co. 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132; Graeff v. Philadelphia & R. R. Co. 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107; Thomson v. Manhattan R. Co. 75 Hun, 540, 27 N. Y. Supp. 608.

Rugg, J., delivered the opinion of the court:

A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business, to carry its passengers to their destination in security, and enable them to alight there with safety. This extraordinary vigilance is owed, not only as to its own instrumentalities and employees, but also as to other passengers or strangers, so far as any harmful misconduct on their part may be foreseen and guarded against. The highest degree of prudence and circumspection is exacted of the carrier in anticipating and suppressing violence to passengers from all outside sources. The precautions which the carrier must take in the performance of this duty depend upon the facts of each case. No positive regulation or absolute usage has been or can be defined as a final standard for the discharge of its obligation. The natural turbulence of a multitude of people to be expected at a public celebration may require provision against unusual occurrences. The kind of

assembly and the character of people likely to attend it, the place from which they have come and to which they are going, the hour of the day, and the normally accompanying impatience of restraint, the probable temper and disposition of a crowd in view of the causes which bring it together, are all circumstances to be regarded in determining whether in any instance the carrier has performed the highly onerous and stringent obligation imposed on it. *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815, and cases cited; *Beverly v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507.

On the other hand, a common carrier does not insure to its passengers immunity from harm. It is engaged in a public service, which must be managed in such a manner as to be practical and adapted to the needs of contemporary society, both as to expense, convenience, comfort, and rapidity. Hence it cannot be held responsible for manifestations of lawlessness, heedlessness, impetuosity, or force which a high degree of prevision and sagacity could not reasonably be expected to forestall. Injury arising from the sporadic act of an individual, or the aggregated impulses of a throng if outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventable wrongs, affords no ground of liability. The carrier is not

out such notice there was no duty to assume his presence in such place of danger, and to protect him from the crowd.

And in *Randall v. Frankford, S. & P. City Pass. R. Co.* 139 Pa. 464, 22 Atl. 639, it was held that a boy who got upon the front platform because of the crowd, and who was crowded off the car by the rush of passengers just before the car came to a stop at a station, could not recover, unless the action of the passengers was of such a disorderly character that the company ought to have prevented it, or had the means of preventing it at that time.

So, an elevated railroad is not in fault in not taking measures to prevent passengers from crowding in passing out of a broad side door, and is not liable to one who is injured in alighting, by getting her foot in the space between the car and the platform, there being no reason to expect anything unusually dangerous, and it not appearing that the passengers were disorderly. *Willworth v. Boston Elev. R. Co.* 188 Mass. 220, 74 N. E. 333.

A carrier is not liable for an injury received by a passenger in alighting, by stepping between the platform and train at a subway station of an elevated road, although the crowd in back were pushing and the guard said, "Step lively, please," it appearing that the passenger had previously

ridden on the elevated railroad several times, and the space through which she fell not being more than 3 to 5 inches. *Field v. Boston Elev. R. Co.* 188 Mass. 222, note, 74 N. E. 334.

And where the testimony of a carrier's guards establish the fact that warning was given of a necessary opening 9 inches wide between the platform of a station and a subway train, one who falls through such opening, and is injured, while getting on in a crowd which prevented her seeing the opening, cannot recover, although she did not hear the warning. *Coogan v. Interborough Rapid Transit Co.* 50 Misc. 562, 99 N. Y. Supp. 382, s. c. on subsequent appeal, 53 Misc. 645, 103 N. Y. Supp. 1120.

Where it appeared that a passenger who was waiting to transfer to another train was injured by being thrown down and crushed by reason of a crowd waiting along side of the track rushing back to avoid injury from two men who jumped and swung onto a train which was backing in, it was held that the carrier was not liable, there being no proof of any invitation or consent by the carrier for the men to board the train, or that their presence was discovered in time to have stopped the car and have avoided the injury, or that there was reason to anticipate that any injury would result from their acts. *Brice v. South Cov-*

bound to adopt all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Joy v. Winnisimmet Co.* 114 Mass. 63; *O'Neil v. Lynn & B. R. Co.* 180 Mass. 576, 62 N. E. 983; *Pitcher v. Old Colony Street R. Co.* 196 Mass. 69, 13 L.R.A. (N.S.) 481, 124 Am. St. Rep. 513, 81 N. E. 876, 12 A. & E. Ann. Cas. 886; *Lyons v. Boston Elev. R. Co.* 204 Mass. 227, 90 N. E. 419; *McCumber v. Boston Elev. R. Co.* 207 Mass. 559, post, 475, 93 N. E. 698. These principles are well settled and have been steadily adhered to. It is not necessary to cite or review the many other cases by which they are illustrated, but only to apply them to the facts before us.

The plaintiff was a passenger upon one of the defendant's open cars, and reached the terminus of the route near a portion of the Charles River reservation, between 5 and 6 o'clock on a Sunday afternoon in May. She was accompanied by her son two and one-half years old. It was customary at this terminus, which was on a public street, for the trolley to be reversed, the seats turned over, and for the car to start to return on the same track. At the time of the events to be narrated, the conductor was on the rear platform. The motorman was at his post on the front platform, and there was a starter in the employ of the defend-

ant 8 or 10 feet away from the car. A great many people were in the habit of going to this reservation, and a boathouse was near by, where canoes were kept. When the car came to a stop at its terminus, the plaintiff's description of what happened was as follows: "I started to get out of the car. . . . There was a crowd of people there. There seemed to be about 100 people or more. There was a great crowd rushed onto the car and started turning over seats. . . . There was a great confusion. I started to get out of the car and I was pushed back . . . into my seat again. . . . I grasped hold of the stanchion, but I was forced back in again, into my seat. . . . [the child] was in my arms. I was going to step down off the car. . . . I had my arm on the back of the seat . . . waiting for a chance to get out of the car, when this seat in back was turned over, and pinned my arm between the backs of the two seats. . . . Passengers [were] getting onto the railing, and on the outside on the right hand and on the left hand as well. . . . Right around me it seemed that most of [the seats] were turned over." She further testified that no employee of the defendant said or did anything to restrain the crowd or assist her, and that the events she had described happened within a period of two or three minutes. The plaintiff offered to show that on preceding Sundays of 1907 and 1906, at about the same hour, there had been rushing and

ington & C. Street R. Co. 29 Ky. L. Rep. 373, 93 S. W. 37.

And a passenger who was carried by her station and returned by the next train cannot recover from the carrier because she was left by the carrier's agent in a crowd of drunken and boisterous negroes, and was jostled by them as she made her way through the crowd, by reason of which she suffered a mental and nervous shock. *Taylor v. Atlantic Coast Line R. Co.* 78 S. C. 552, 59 S. E. 641. The court said: "It is not the duty of a common carrier to provide escorts for unattended ladies until they leave the station premises. It is the duty of a common carrier, when there is reasonable ground to apprehend injury to a passenger by third persons, to use the highest degree of care to prevent it. But where no injury has been sustained, there is no actionable breach of duty."

Where such a crowd of drunken and disorderly men get upon a train at a station as to overpower the carrier's employees, enter the ladies' car, and engage in a fight, during which a passenger is injured, the carrier is not liable if its servants do all they can to stop the fighting; if they fail, however, to make proper effort to stop the disturbance, the carrier is liable for the injury sustained. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224, 32 L.R.A. (N.S.)

But a railroad company is liable for an injury to a passenger caused by the pressure of crowds passing through its terminal gate, where such crowds were expected at the time, and no provision was made for them, only one of the five gates at the terminal being opened to allow the passage of the crowds. *Taylor v. Pennsylvania Co.* 50 Fed. 755.

And where a carrier has reason to expect a very large crowd at a place of amusement which it operates, it may be held guilty of negligence in failing to maintain a sufficient force or guard to prevent a passenger from being crowded under the cars, although it might not be essential to have railings or a fence to hold back the crowd. *Cousineau v. Muskegon Traction & Lighting Co.* 152 Mich. 48, 115 N. W. 987.

And a recovery may be had by a passenger on a street car for an injury received while alighting at a transfer point, by being pushed from the car by a passenger carrying bundles who was in great haste, the transfer point being dangerous by reason of vehicles and other passengers carrying bundles hurrying to make their transfers, and it appearing that the conductor of the car on which the injured person was riding left the car with no one to guard the passengers from injury. *Baldwin v. Fairhaven & W. R. Co.* 68 Conn. 567, 37 Atl. 418.

crowding and jostling by passengers in getting upon the cars at this place; but this line of inquiry was excluded subject to her exception.

Evidence as to what has been the custom of a crowd at a particular place or under special circumstances, in boarding the defendant's cars, was competent, because a railway company has reasonable cause to know what has been habitually done respecting its cars. It bore upon the care which the defendant ought to have exercised, and the protection which it ought to have furnished to its passengers who were entitled to alight, even in the face of a large number of people desiring to become passengers. *Nichols v. Lynn & B. R. Co.* 168 Mass. 528, 47 N. E. 427. The evidence as to the conduct of crowds of the year before the accident, at the same season of the year, when it may be fairly inferred that conditions as to the reservation, boat-houses, and use of canoes were substantially the same, had some tendency in the same direction. The plaintiff appears to have gone far enough to bring herself within the operation of this rule. The fact that the trial judge excluded the line of inquiry excused her from making so complete an offer of proof as would otherwise have been necessary. It is also to be observed that the plaintiff was a woman encumbered with a small child, and

entitled to protection commensurate with the impaired capacity to care for herself resulting from this burden. *Hamilton v. Boston & N. Street R. Co.* 193 Mass. 324, 79 N. E. 734. Her own testimony as to the length of time elapsing after the car stopped and before her injury, and the facts that she had once risen from her seat and been forced back into it again by the violence of the crowd, and having risen again was compelled to pause for opportunity to step, and that, while thus waiting, the seat was thrown against her, tend to show that the boisterousness was not an instantaneous act without forewarning, but was of appreciable duration, and might be found to have afforded, in connection with all the other attendant conditions, a premonition such as to call for action on the part of the conductor or starter. That this occurred upon a public street rather than in a station under the exclusive control of the defendant is not decisive in its favor. It is not a question of policing the public way, but of shielding its passenger while in the car. Evidence of unruly conduct of crowds at this place on previous occasions when the circumstances were similar should have been received, and the case submitted to the jury.

Exceptions sustained.

And a recovery may be had against the carrier where a passenger is injured by being pushed from the platform of a terminal station of an elevated railway, by reason of too large a crowd which it had allowed to gather on such platform. *Beverly v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507.

And a judgment for an injured passenger was affirmed in *Illinois C. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290, where there was evidence that a large crowd was present on the station platform when a train came in, and that, when the passenger who was injured was about to enter one of the cars, the crowd surged and pushed so that she was forced against the car, and into, the open space between the car and the platform.

And where a boy passenger was moved by a street car conductor from his seat, to make room for others, and crowded out on the front platform and there pushed off by the hasty departure of a careless passenger, and killed by the cars, the street railroad company was held liable. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 34 How. Pr. 217, 93 Am. Dec. 490.

So, a passenger who is prevented from alighting from a train by the crowding in of passengers, and is injured as he alights, by the train starting too soon, and not by his carelessness in leaving the car while in motion, may recover. *Pennsylvania R. Co. v. Peters*, 116 Pa. 206, 9 Atl. 317.
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And an elevated railroad company is liable where the guard, in closing the gate without notice, gave a passenger a violent push that carried him off the platform of the car, causing injury, the car being so overcrowded as to cause difficulty in opening and shutting the gate. *Miller v. Manhattan R. Co.* 73 Hun, 512, 26 N. Y. Supp. 162.

And a carrier is not relieved of responsibility to one injured by a defect in its platform, because of the presence and struggle of a crowd to board its cars. *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936. The court said: "But appellant was bound to know that crowds might congregate upon its platform, and that injury to its intended passengers might result from defects in its platform under such circumstances. The presence and struggle of the crowd to get upon appellant's cars only increased the danger of accidents from the unsafe platform; it did not relieve the appellant from responsibility for such accidents."

In *Rand v. Boston Elev. R. Co.* 198 Mass. 569, 84 N. E. 841, where a passenger had been thrown from a crowded car by a sudden jerk, the court said: "It must be taken as settled that a street railway company, as a common carrier, while not an insurer of the safety of passengers, is held to a high degree of care, and, after stopping for those who desire to take passage, they should be allowed a sufficient time to

MASSACHUSETTS SUPREME JUDICIAL COURT.

MABEL S. McCUMBER

v.

BOSTON ELEVATED RAILWAY COMPANY.

(207 Mass. 559, 93 N. E. 698.)

Carrier — crowded car — assumption of risk.

1. One who takes passage on a street car so crowded that he is compelled to stand in the door assumes the risk of being pushed off the car, to his injury, by passengers attempting to force a passage out of it.

Same — rude conduct of conductor.

2. A street car company is not liable for injury to a passenger standing in the door of a crowded car, because the tone in which the conductor tells her to make way for passengers seeking to leave the car, is such that she becomes frightened and falls from the car.

(January 6, 1911.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

safely get aboard before the car is started. . . . If the platform becomes crowded, or there are a number of passengers to get on, more time might be necessary than where the number is small or ingress is unobstructed. *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639. What constitutes a reasonable time depends upon the circumstances of each case, and ordinarily is a question of fact for the jury."

In *Becker v. Interborough Rapid Transit Co.* 128 App. Div. 455, 112 N. Y. Supp. 816, although the charge was held inapplicable to that case, the court said that a charge that it was not negligence for carriers to permit crowding, but that they were obliged, in view of crowding, to take such precautions as would reasonably protect their passengers from injury, correctly stated the law.

The question of the carrier's negligence in failing to take proper precautions to protect passengers from the crowd is properly submitted to the jury, where there is evidence that on the day a passenger was killed, the usual large week-end crowd bound for the seaside was waiting for a late train; that there were no gates to keep the crowd back, or officials of the carrier to guard the crowd, and that when the train came in, the passenger was pushed under the train by the crowd and killed. *Pennsylvania R. Co. v. Stockton*, 184 Fed. 422.

So, where there was evidence that a passenger on a crowded car was crowded or

Messrs. C. E. Tupper and A. F. Tupper, for plaintiff:

The carrier must exercise proper care towards passengers.

McGarry v. Boston Elev. R. Co. 105 Mass. 540, 81 N. E. 194; *Millmore v. Boston Elev. R. Co.* 194 Mass. 326, 11 L.R.A. (N.S.) 140, 120 Am. St. Rep. 558, 80 N. E. 445; *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639; *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 342, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; *Hamilton v. Boston & N. Street R. Co.* 193 Mass. 324, 79 N. E. 734; *Thompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A. (N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488; *Carroll v. Boston & N. Street R. Co.* 186 Mass. 98, 71 N. E. 89; *Lord v. Sherer Dry Goods Co.* 205 Mass. 3, 27 L.R.A. (N.S.) 232, 90 N. E. 1153, 18 A. & E. Ann. Cas. 41.

Messrs. William G. Thompson, George E. Kimball, and F. Delano Putnam, for defendant:

As street cars are run it is not negligent to take on passengers when all the seats are occupied, when there is no more standing room in the passageway of the car, and the new passengers have to stand on the platforms and even on the steps.

Jacobs v. West End Street R. Co. 178 Mass. 116, 59 N. E. 639; *Burns v. Boston*

pushed from the front platform of the car while alighting at a junction point, in the immediate presence of the motorman, who took no precaution to protect the passenger, it was held that the case should be submitted to the jury, to determine whether the injury could have been prevented by the exercise of due care by the carrier. *Hansen v. North Jersey Street R. Co.* 64 N. J. L. 687, 46 Atl. 718.

And in an action by a passenger injured through being pushed under a car by the crowd at an amusement park operated by a railway, the question of whether the carrier was negligent in failing to provide employees or other facilities to control the crowd after the close of a performance is for the jury. *Cousineau v. Muskegon Traction & Lighting Co.* 145 Mich. 314, 108 N. W. 720.

Negligence rendering a carrier liable may be inferred from the starting of a train without warning, while a large crowd of passengers is attempting to enter; and where there is evidence that a passenger was pushed under the cars by a crowd while attempting to board a train that had come to a stop, and then started without signal, the case is properly submitted to the jury. *Pennsylvania R. Co. v. Stockton*, supra.

And where a passenger was pushed or crowded off at his station while the cars were in motion, the question of negligence was for the jury; and if the injury to the

Elev. R. Co. 183 Mass. 96, 66 N. E. 418; *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A. (N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488; *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A. (N. S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; *Beverley v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507; *Hines v. Boston Elev. R. Co.* 198 Mass. 340, 84 N. E. 475; *Crowley v. Boston Elev. R. Co.* 204 Mass. 241, 90 N. E. 532; *Hannon v. Boston Elev. R.* 182 Mass. 425, 65 N. E. 809.

There is no evidence that the plaintiff was in the exercise of due care.

Spade v. Lynn & B. R. Co. 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747; *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639.

Plaintiff assumed the risk of the danger by which she was injured.

Jacobs v. West End Street R. Co. 178 Mass. 116, 59 N. E. 639; *Burns v. Boston Elev. R. Co.* 183 Mass. 96, 66 N. E. 418; *McDonough v. Boston Elev. R. Co.* 191 Mass. 509, 78 N. E. 141; *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A. (N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488.

Assuming that what the conductor said to plaintiff was entirely proper and necessary, the fact that he said it in a "loud, harsh way," the result being "to agitate and disturb her mentally," is absolutely immaterial.

Blackwell v. Old Colony Street R. Co. 193 Mass. 222, 79 N. E. 335; *Hawes v. Boston Elev. R. Co.* 192 Mass. 324, 78 N. E. 480; *Plummer v. Boston Elev. R. Co.* 198 Mass. 499, 84 N. E. 849; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747; *Homans v. Boston Elev. R. Co.* 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737; *Mullin v. Boston Elev. R. Co.* 185 Mass. 522, 70 N. E. 1021.

plaintiff was occasioned by the surging of the crowd, which could not be controlled, or by the fact that such a crowd interfered with and prevented the proper management of the train, it was proper to submit to the jury the question whether appropriate precautions had been taken to guard against danger from the crowd. *Treat v. Boston & L. R. Corp.* 131 Mass. 371.

The negligence or carelessness of a railroad company, and the unfitness or gross negligence or carelessness of its servants, or agents, should be submitted to the jury, on evidence that a train running at extraordinary speed struck a person as he was attempting to get on a somewhat crowded platform from which passengers were accustomed to take trains, which was across

Rugg, J., delivered the opinion of the court:

The plaintiff, with a dress suit case in her hand, became a passenger on one of the defendant's closed surface cars, after dark on a December day. When she boarded the car she perceived that it was crowded, and she was able to get only to the door leading from the vestibule to the aisle. Later she gave way for the conductor to go inside to collect fares, and thereafter she stood just in the doorway, with one foot in the doorway, and the other in the vestibule. After one stop, at which other passengers came upon the car, the plaintiff knew by a bell and the slowing of the car that persons inside were intending to get out, and she saw them begin to push their way to the door or move down the car "as they always do." The conductor, who was near the plaintiff, but inside the car collecting fares, told her she was blocking the passageway, and that she must make room for the other passengers to alight. There was some conflict in the plaintiff's testimony after this point. She said she tried to push back into the vestibule, but it was so crowded there was no room for her there, that people on the step and a gentleman beside her got off and left a narrow passageway, and while she was turning around and trying to see what she could do, the crowd surged against her, and she felt herself going off. In answer to the question, "How did you expect those people who wanted to get off that car . . . at that stop, could get by you, standing, filling up that door?" she testified, "That was the conundrum." Other portions of her testimony tend to show that she thought other men would get off the vestibule, or that the conductor would make room for her by compelling persons to move up inside the door. It is impossible to understand how she could have reasonably entertained the latter opinion in view of her own observation as to the number of people there.

the track from a station, and which was narrow and insufficient for the accommodation of the passengers accustomed to use it. *Young v. New York, N. H. & H. R. Co.* 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455.

For a note on injury by crush in entering car at elevated or subway station, see *Kuhlen v. Boston & N. Street R. Co.* 7 L.R.A. (N.S.) 729.

For a note on duty of carrier to passenger on overcrowded street car, see *Alton Light & Traction Co. v. Oller*, 4 L.R.A. (N.S.) 399.

For a note on duty of carrier permitting cars to become overcrowded, see *Lynn v. Southern P. Co.* 24 L.R.A. 710.

J. T. W.

The plaintiff voluntarily and intelligently became a passenger upon a car so crowded that she could not get a seat, and knew that perhaps she might be obliged to stand in the vestibule. This was not negligence on her part, but, by doing so, she assumed whatever obligation or risk was incident to that condition. One of these might be to alight temporarily in order to enable other passengers to leave the car. It is not negligence on the part of a carrier, in the present state of transportation, to permit passengers to come upon cars which are already crowded. *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639; *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A.(N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488. It was the duty of the defendant to exercise the highest degree of care toward the plaintiff as its passenger, which was consistent with its equal duty to all its other passengers of transporting them, and affording them a reasonable opportunity to alight at the end of their journey. It owed the plaintiff no higher or more exclusive duty than it owed each one of its other passengers on the car. There is nothing in the evidence to indicate that the passengers inside the car were turbulent or disorderly in any respect. They were simply trying to move to the door in the ordinary way, in order to get off the car. It is plain from the testimony of the plaintiff that the narrow door of the car was completely obstructed by her person, and that other passengers could not pass unless she moved. The conductor, in the performance of what appears to have been his obvious duty to other passengers, told the plaintiff she was blocking the passageway, and that she must make room. In this respect he did not fail in his duty to the plaintiff. The plaintiff does not show any conduct on the part of other passengers which would naturally have caused a careful conductor to apprehend violence or disorder on their part, or disregard by them of the rights of the plaintiff as a fellow passenger. That there was some pushing in the effort to pass the plaintiff is not significant. It is only when done in a disorderly way that it becomes of consequence. Hence there was no evidence of negligence on the part of the defendant. The case is fully covered in principle by *Jacobs v. West End Street R. Co.* 178 Mass. 116, 59 N. E. 639, and *Treat v. Boston & L. R. Corp.* 131 Mass. 371, *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A.(N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815, and *Beverley v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507, are distinguishable in that they relate to failure to properly control crowds of people, under circum-

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stances such that the carrier ought reasonably, in the exercise of the high degree of care required of it, to have anticipated violence.

Exception was taken to the refusal of the trial court to permit the plaintiff to testify that the tone of voice in which the conductor told her she was blocking the passageway, and asked her to move, was harsh and loud, with the result that she was agitated and mentally disturbed. The language used was proper in form and substance, and in the performance of duty. It was unaccompanied by threat of speech or gesture. Perturbation of mind which inevitably depends upon individual peculiarities of experience, sensitiveness, and nervousness, and fluctuates in the same person with varying conditions of health and happiness, and which is attributed solely to the inflection of voice in the course of necessary speech, is too unstable a foundation upon which to rest a standard of legal liability in a case of this kind. See *Beal v. Lowell & D. Street R. Co.* 157 Mass. 444, 32 N. E. 653.

Exceptions overruled.

NEVADA SUPREME COURT.

J. MARYMONT

v.

NEVADA STATE BANKING BOARD et al.

(— Nev. —, 111 Pac. 295.)

Bank — limiting business to corporations.

1. The state cannot limit the transaction of ordinary banking business to corporations, where the Constitution protects liberty and the acquisition and protection of property, and provides that no person shall be deprived of them without due process of law.

Same — license — acting without.

2. Where the statutes for the regulation of the banking business provide for issuance of licenses only to corporations, individuals may conduct the business without a license.

(October 1, 1910.)

PETITION for a writ of mandamus to compel the issuance of a license to petitioner to engage as an individual in the banking business. Writ denied.

The facts are stated in the opinion.

Mr. James T. Boyd for petitioner.

Note. — As to power of legislature to limit banking business to corporations, see notes to *State v. Richcreek*, 5 L.R.A.(N.S.) 874, and *Weed v. Bergh*, 25 L.R.A.(N.S.) 1217.

Mr. S. W. Belford, with Messrs. R. C. Stoddard, Attorney General, and L. B. Fowler, for respondents.

Talbot, J., delivered the opinion of the court:

Petitioner asks for a writ directing the State Banking Board to issue a license permitting him to engage as an individual in the banking business. The question presented is whether ordinary banking by individuals may be prohibited by statutory enactment, while corporations are allowed and authorized to conduct this business.

In act March 24, 1909 (Stat. 1908-09, chap. 191), § 2 provides that "it shall be unlawful for any corporation, partnership, firm, or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by means of a corporation duly organized for such purpose under the laws of this state; except agencies of foreign corporations now doing a banking business in this state. . . . Any violations of the provisions of this section shall subject the corporation, partnership, firm, or individual so offending to a penalty of twenty-five (\$25) dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver by the State Banking Board as hereinafter provided, to wind up such banking business." Section 5 creates the Nevada State Banking Board. Section 6 provides that "said board shall have general supervision and control of banks and banking under the laws of this state, and no person or persons shall be permitted to engage in or transact a banking business save corporations having complied with the provisions of this act. . . ." Section 12 provides that "it shall be unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business in this state without having first obtained a license from the State Banking Board in the manner hereinafter provided, which license shall issue only to corporations duly organized for the transaction of such business." Are these provisions in derogation of the state Constitution? Article 1, § 1, provides that "all men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." Section 8 provides that no person "shall be deprived of life, liberty, or property without due process of law," and § 20 that "this enumeration of rights shall not be construed to impair or deny others retained by the people."

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There are only three cases, and these we will review later, which bear directly upon the question as to whether under, or regardless of, an organic act with guaranties similar to the ones contained in our Constitution, the individual may be denied the privilege of engaging in the business of commercial or ordinary banking. One of these opinions holds that he cannot be denied this privilege. The other two carry a contrary conclusion, and cite decisions and extracts from text-books, based on cases which, when properly distinguished, do not give them support, because they relate to statutes repealed more than half a century ago, by which, during the period the state banks as distinguished from the national banks issued currency, the states limited to corporations the privilege of doing a banking business which included the power to issue demand notes to circulate as money. As the control of the circulating medium is clearly a government prerogative, which for obvious reasons may be denied to individuals, it was properly held that these banks of issue in the different states before the general government took over the control of the currency under the Federal Constitution could be limited to corporations at the will of the legislature. These cases have little, if any, bearing upon the question whether the legislature may take away the right of the individual to engage in other kinds of banking, such as receiving and holding deposits with or without interest, the cashing of checks, the issuing and discounting of drafts, and the loaning of money, which have long pertained to the individual without being considered a government prerogative or subject to monopoly or limitation to corporations. That the individual interest must yield to the general welfare, and that banking and other pursuits may be regulated in the public interest, must be acknowledged. *Ex parte Boyce*, 27 Nev. 330, 65 L.R.A. 47, 75 Pac. 1, 1 A. & E. Ann. Cas. 66; *Ex parte Kair*, 28 Nev. 425, 82 Pac. 453, 6 A. & E. Ann. Cas. 897; *Ex parte Pittman*, 31 Nev. 56, 99 Pac. 704; *Ex parte Rickey*, 31 Nev. 104, 135 Am. St. Rep. 651, 100 Pac. 134. It is also conceded that the legislature may suppress any business or calling which is in itself injurious and cannot be so regulated that it will not be detrimental to the public welfare; and, while all occupations are subject to necessary or reasonable regulations and restrictions for the prevention of injury to others, the citizen may not be denied the right to follow ordinary avocations which are not injurious in themselves, or in any way detrimental when properly regulated. All needful enactments may be passed for the

protection and welfare of the people, as new conditions arise in the affairs of men. No good reason appears for upholding as a police regulation a statute which confers no benefit to the public or any portion of the community, and results only in injury by prohibiting citizens from following a beneficial avocation. The legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful avocation, and proper regulation will prevent injury to others. In *Ex parte Pittman*, 31 Nev. 43, 22 L.R.A. (N.S.) 266, 99 Pac. 700, we said: "That the business of banking is a lawful business, in which it is the inherent right of every citizen to engage, will not be questioned." In *First State Bank v. Shallenberger* (C. C.) 172 Fed. 1000, the court stated: "The banking business is one of the ancient and ordinary occupations, and has been and is recognized as a lawful business, not only in the state of Nebraska, but in all states of the Union, and in general in all countries that have developed civilization and commerce. It has not been regarded as a business of such harmful tendencies that society might entirely forbid its exercise. . . . In the *Slaughter-House Cases*, 16 Wall. 36, 116, 122, 21 L. ed. 394, 421, 423, speaking of that portion of the 14th Amendment to the national Constitution, Mr. Justice Bradley said: 'This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed. . . . In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty. Their occupation is their property.' In the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, the court quoted with approval from these remarks of Justice Bradley, and said: 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts

which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.' To the same effect are *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 764, 28 L. ed. 585, 589, 4 Sup. Ct. Rep. 652; *Re Jacobs*, 98 N. Y. 98, 105, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 386, 52 Am. Rep. 34, 2 N. E. 29; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *People v. Steele*, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; *Cooley, Torts*, 277. At common law the business of banking was regarded as one of the lawful occupations in which citizens might engage. In the case of *Bank of California v. San Francisco*, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, the court says: 'Admittedly, the mere right to do a banking business is not a franchise in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual or any number of individuals may, under such regulations as the state, in the exercise of its police powers, may legally make, engage therein, without any grant from the state.' In the *Shallenberger Case*, the court, in holding that the guaranty-fund provision invalidates the Nebraska act, said that it was not necessary to decide whether the state could limit the business of banking to corporations. But the decision itself, although the validity of statutes providing for a guaranty fund has not yet been determined by the United States Supreme Court, supports the contention that the citizen cannot be deprived of the privilege of engaging in banking; for, if he cannot be required to contribute to a guaranty fund as a condition to following the business, how can the legislature prohibit him entirely from pursuing the occupation, when it cannot even enforce such a regulation? In the opinion in *Noble State Bank v. Haskell*, 22 Okla. 84, 97 Pac. 605, sustaining the guaranty provisions of the Oklahoma banking act, the court said: "The question as to what regulations are proper and needful is primarily for legislative decision, yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. *Republic Iron & Steel Co. v. State*,

160 Ind. 379, 385, 62 L.R.A. 136, 66 N. E. 1006."

If the legislature can prohibit the individual from engaging in the banking business, as our statute seeks to do, it is evident that it may also prohibit corporations from engaging in the business; for a corporation, which is merely a creature of the law, can have no greater fundamental rights than the individual, for whom the constitutional guaranties are directly provided. Therefore, if both the individual and the corporation may be prohibited, this business, so essential to the carrying on of commerce and trade, and so necessary to the welfare of the state, may be entirely suppressed. The sustaining of this statute would be an entering wedge and a precedent which would authorize further encroachments upon the rights assured to our citizens by the Constitution. If we should uphold as valid this act, denying to individuals the right to embark in the banking business, and the next legislature should pass another, providing that corporations could not engage in that pursuit, we perceive no ground upon which that act could be held invalid which would not apply to the present one. We have different statutes regulating mining and providing for the safety of the men employed. The desirability and validity of laws for the prevention of the spread of contagious diseases among animals and certain pests which destroy agricultural crops are recognized. If the next legislature should pass a law prohibiting individuals from engaging in the business of mining and farming, and later in the session should pass another act providing that corporations should not engage in either of these pursuits, there would be no reason for holding such acts invalid which would not apply to the statute under consideration. If the argument in favor of this act is good, the same would be sufficient to support legislative enactments prohibiting individuals and corporations, not only from engaging in banking, mining, farming, and the raising of live stock, but from merchandising, keeping hotels, operating factories, and pursuing other avocations. Qualifications, examinations, and regulations are prescribed for the practice of law, medicine, and dentistry. If the individual may be denied the right to engage in the business of banking, may not the right to follow the various professions be limited to corporations, or even denied to both individuals and corporations? If the state has the right to prohibit the citizen from following ordinary pursuits, may not the legislature exercise a less restrictive power, and either for a price or without charge, farm out to favored individuals,

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corporations, and monopolies the right to pursue the various avocations upon which the people depend for their living and prosperity? The constitutional provision that "all men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring and protecting property, and pursuing and obtaining safety and happiness," means more than the protection of property already owned by the citizen. Most people rely for a living upon their pursuit of the ordinary avocations, and the most affluent are dependent in a large degree upon these. Comparatively few are possessed of such means that they will not need to labor or to engage in the ordinary business callings. It would not be creditable for these favored ones, while young and strong, to idle away their time and live as drones upon the world. But, regardless of them, how are the great masses of the people to acquire property, pursue happiness, and enjoy life and liberty, unless they are permitted to engage in the ordinary avocations, which are not injurious in themselves, and are beneficial to the individual and the community? It is quite as important that the people be free to enter these callings, and, by their labor, or investment of money, or use of property, or conduct of business, acquire property which will enable them to obtain safety from want and acquire happiness, as that the vested rights of the wealthy be protected. Any attempt of the legislature to prohibit the pursuit of these harmless and useful avocations, or to restrict them further than necessary for the protection of the public or the prevention of injury to other persons, is an encroachment upon the liberty and just rights of the citizen. If this act can be held a valid exercise of legislative power, other laws may be passed and sustained on the grounds urged in support of this statute, which would be a discredit to a czar or absolute potentate, and which, in the face of the constitutional provisions for the protection of the citizen, secured by the blood of our forefathers, would deny to the people the right to pursue honest, beneficial, and ordinary callings, and result in their injury and distress. That incomparable judge of the human heart and mind said: "You take my life when you take the means whereby I live."

Under the most grinding tyranny, privileges became vested in the lords of France until the peasant was prohibited "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil,

and his cider at his own press, or to sell his commodities at the public market." The subject was not allowed to set a tub of water from the ocean to evaporate in order that he might have salt for his table. The people complained that the taxes and exactions were so great that they could not obtain enough to eat, and the reply from the sovereign was that they could eat grass. In the same year that our own Declaration of Independence was declared, Louis XVI., under the fear of impending revolution, in an edict giving freedom to trades and professions, after reciting the contributions that had been made by the guilds and trade companies, stated that "it was the allurements of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and other infraction of natural right," and that "God, in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible."

In *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970, in a decision rendered twenty years ago, the court sustained an act limiting banking to corporations, and went to the extreme of holding that the legislature had the power, "not only to regulate and restrict the business of banking, but also to grant the right [to engage in it] to one class and to prohibit to others, or even forbid it altogether," and said that this power of the legislature had never been questioned by the courts. The late case of *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 666, upholds as valid the statute in Wisconsin limiting the business of banking to corporations. Notwithstanding the great regard we entertain for the opinions of the highest courts in these two sister states, which have rendered the only opinions sustaining acts forbidding individuals to engage in ordinary banking, we are unable to agree with their decisions, or to find anything in the cases they cite which really support the conclusions they reach. We believe that through inadvertence they have misapplied to ordinary banking one or two cases relating to insurance, and a few others bearing upon the restrictions and limitations which long ago were properly held to pertain to banks that issued notes to circulate as money, a government prerogative, when those institutions were under the control of the states. As we distinguish these cases, *Weed v. Bergh* is without support, except by the decision in *State ex rel. Goodsill v. Woodmansee*, which is, in turn, unsupported. In the Wisconsin opinion are

cited *Myers v. Manhattan Bank*, 20 Ohio, 283, which has no application, because it arose under an act of January 27, 1816, "to prohibit the issuing and circulating of unauthorized bank paper," and *Com. v. Vrooman*, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217, and *People v. Loew*, 19 Misc. 248, 44 N. Y. Supp. 42, which relate to statutes pertaining to insurance. There are reasons for limiting the business of insuring to corporations, which do not apply to ordinary banking. The business of insuring does not appear to have been as commonly exercised by individuals as banking at the time of the adoption of our Constitutions, and we are not aware that any branch of the insurance business was ever conducted in this state except by corporations. Especially with life insurance, to which those cases did not apply, it would be desirable or necessary for the protection of persons holding policies to have the business limited to corporations which would be in existence and able to pay upon the death of the insured, which might not take place for half a century after the demise of the insurer, if the business could be followed by individuals. In the course of a vigorous dissenting opinion in the *Vrooman* Case, Judge Dean said: "Is the business of fire insurance deleterious to the public? If so, the legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class, natural persons, from entering into them, and specifically empowering another and numerically a very much smaller class, artificial persons, to make them? In so doing the state grants a monopoly in a particular business to a particular class. . . . That in some of the states the legislature has restricted the business of banking to corporations has no analogy to the case in hand. The banking intended to be restricted by the New York act was issuing of notes, receiving of deposits, and discounting. In *People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243, and *Bristol v. Barker*, 14 Johns. 205, it was held that the act was only a restraining and regulating act, applying to associations of individuals; that, as to them, to do a banking business they must have corporate authority; that an individual was not prohibited from doing a banking business, except as to issuing bank notes. It has always been held to be within the police power of the legis-

Judge Cooley says: 'What the legislature ordains and the Constitution does not prohibit must be lawful. But, if the Constitution does no more than to provide that no person shall be deprived of life, liberty, or property except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments.' Cooley, *Torts*, p. 277. In these constitutional provisions are found the guaranties to the citizen of his right to liberty, his right to the pursuit of happiness, his right to pursue in his own way any lawful business or calling, and his right to property. . . . Mr. Justice Andrews, in delivering the opinion of the court in *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, says: 'The right to liberty includes the right to exercise his faculties, and to follow a lawful avocation for the support of life.' The case of *Re Jacobs*, supra, . . . involved the right of a citizen to pursue his ordinary calling, of which the legislature by law sought to deprive him. . . . Mr. Justice Earl, in delivering the opinion of the court, discussed very fully the powers of the legislature under the Constitution of New York, and the police, power of the state. In speaking of 'liberty,' as used in the Constitution, he says: 'So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. . . . ' *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, is another important case. . . . The power of the legislature over the business of the citizen was again discussed by Rapallo, J. After quoting the sections of the Constitution of that state bearing upon the question, he says: 'These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions that have been reached bearing upon the questions under consideration. Among these no proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.' . . . In *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, Mr. Justice Field says that 32 L.R.A. (N.S.)

among the inalienable rights as proclaimed in the Declaration of Independence 'is the right of men to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocent in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country, to all alike, upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.' In the same case Mr. Justice Bradley says: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States,' of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution. . . . It will thus be seen that the citizen's right to pursue any lawful business is more than a mere right. It is property that cannot be taken from him 'without due process of law.' In Alabama a statute which made it a misdemeanor for an individual banker to discount negotiable paper at a higher rate of interest than 8 per cent was declared to be unconstitutional because this restriction could not be placed upon the individual banker when it did not apply to incorporated banks. *Carter Bros. v. Coleman*, 84 Ala. 256, 4 So. 161; *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245, 12 So. 579; 10 A. & E. Ann. Cas. 904, note. In the carefully prepared note in 5 L.R.A. (N.S.) 875, it is said: "Thus in *Bank of Augusta v. Earle*, 13 Pet. 519, 596, 10 L. ed. 274, 311, the court said that it was very clear that at common law the right of banking in all its ramifications belongs to individual citizens, and may be exercised by them at their pleasure. . . . The statement in the opinion in *State v. Richcreek* that it is unquestionably settled that the sovereign authority of the state may regulate and restrain the right of banking is also true, if 'restrain' be understood not to include 'prohibit.' The question as to the power of a state to prohibit the business of banking by individuals, and to confine such right to corporations exclusively—in other words, to convert what is conceded at common law to be a natural right into a franchise—cannot be regarded as settled by the authorities, except as to the partic-

ular banking privilege of issuing bills to circulate as money." In *Ex parte Boyce*, 27 Nev. 329, 330, 65 L.R.A. 47, 75 Pac. 2, 1 A. & E. Ann. Cas. 66, we stated: "The right to acquire and hold property guaranteed by our Constitution is one of the most essential for the existence and happiness of man, and, for our purposes here, we may consider it to be the cornerstone in the temple of our liberties, and that it implies and includes the right to labor. . . . Broadly speaking, the right to acquire and hold property, which presupposes the one to labor at all ordinary pursuits, is subordinate to this greater obligation not to injure others, individually or collectively, and to contribute and aid in the support of the government in all its legitimate objects." In *Corfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230, Justice Washington classed among the fundamental privileges of the citizen "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." In the *Slaughter-House Cases*, 16 Wall. 109, 21 L. ed. 419, Justice Field said: "This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them everywhere all pursuits, all professions, all vocations, are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order, and advance the general prosperity of society, but, when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations." In reference to monopolies he said: "All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities." In the same cases Justice Bradley said: "And in my judgment the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a state cannot

not invade, whether restrained by its own Constitution or not. The right of a state to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves." *Allgeyer v. Louisiana*, 165 U. S. 588, 41 L. ed. 835, 17 Sup. Ct. Rep. 427. In *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 501, the court said: "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." In *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133 (*Ex parte Kair*, 28 Nev. 426, 82 Pac. 453, 6 A. & E. Ann. Cas. 897), the Supreme Court of the United States held that an act limiting employment in bakeries to sixty hours a week and ten hours a day was an arbitrary interference with the freedom of the individual to contract and to work longer, as guaranteed by the 14th Amendment to the Federal Constitution. It is said in the opinion: "This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. In the supreme court of New York, in the case of *People v. Beattie*, appellate division first department, decided in 1904, 96 App. Div. 383, 89 N. Y. Supp. 193, a statute regulating the trade of horseshoeing, and requiring the person practising such trade to be examined, and to obtain a certificate from a board of examiners, and file the same with the clerk of the county wherein the person proposes to practise such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law. The same kind of a statute was held invalid (*Re Aubry*) by the supreme court of Washington in December, 1904, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in cer-

tain cities was unconstitutional, as an illegitimate exercise of the police power. The supreme court of Illinois in *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional, as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also *Godcharles v. Wigeman*, 113 Pa. 431, 437, 6 Atl. 354; *Low v. Rees Printing Co.* 41 Neb. 127, 145, 24 L.R.A. 702, 43 Am. St. Rep. 670, 50 N. W. 362." If the legislature of the state of New York cannot prohibit individuals from following the baking business more than ten hours per day, we are unable to perceive how the legislature in this state can entirely prohibit individuals from following the banking business. Although the latter avocation is more importantly connected with the arteries of trade, both are beneficial and for the public benefit, as well as for the profit of the persons who engage in these avocations, and both are subject to all necessary regulations. In the *Lochner* Case the supreme court said that the provisions in the act for the inspection of premises, for separate washrooms, height of ceilings, for cleanliness, and for the health of the employees, were reasonable and valid. Some of the states have laws against the use of alum and other injurious ingredients in baking powders. Because some unworthy or selfish persons may, if not regulated, conduct the baking or the banking business to the detriment of the public in order to enhance their own profits, is no sufficient reason for denying to all individuals the right to engage in avocations which are beneficial when conducted under proper regulations. In § 61 of the banking act it is declared that "the holding of any section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof." From this it would appear that the legislature was in doubt as to the validity of some of the provisions. It is conceded that the banking act of 1907 was repealed. As the present act provides for the issuance of licenses to transact banking to corporations only, and nowhere directs the State Banking Board to issue a license to an individual, there is no authority for the issuance of any license to petitioner. Until provision is made by the legislature, he may conduct the banking business without a license, and without being liable to the penalties sought to be imposed by the act upon individuals for engaging in that business.

posed by the act upon individuals for engaging in that business.

The petition for the writ is denied.

Norcross, Ch. J.:

I concur in the judgment. Upon the question of the power of the legislature, as a police regulation merely, to restrict the business of banking to corporations, I express no opinion. Whether we regard the provisions of the act regulating the business of banking which restrict such business to corporations as unconstitutional or not, nevertheless there is no duty imposed by law upon the banking board to issue to any person as an individual a license, as prayed for in the petition.

MINNESOTA SUPREME COURT.

RE ESTATE OF WILLIAM FALLON.

MARIA FALLON, Resp't.,
v.

WILLIAM FALLON, JR., Admr., etc., of
William Fallon, Sr., Deceased, Appt.

(110 Minn. 213, 124 N. W. 994.)

Limitation of action — money payable on demand.

1. Where, by the contract of the parties, express or implied, the money or debt which is the subject-matter thereof is payable only upon demand in fact, the statute of limitations does not begin to run until an actual demand for the payment is made.

Same — statutory period.

2. The demand, however, must be made within a reasonable time, which is ordinarily the period of the statute of limitations;

Headnotes by START, Ch. J.

Note. — When does statute of limitations begin to run against action on contract payable on demand.

This note is limited, first, to the consideration of cases in which the contracts, like that in *FALLON v. FALLON*, were expressly payable on demand; and, second, to such express contracts as to which an actual demand is deemed necessary before a right of action will accrue. The question is: If an actual demand is necessary to a right of action, will the running of the statute be postponed until actual demand is made, or, in case no demand is made, may an action be barred by mere lapse of time, and if so, how soon? The effect of special statutes is not considered.

In connection with this subject, see L.R.A. notes to *First Nat. Bank v. Security Nat. Bank*, 15 L.R.A. 386, on "Maturity of certificate of deposit;" to *Cook v. Carpenter*, 1 L.R.A.(N.S.) 901, on "When does

but where the parties contemplated a delay in making the demand to some indefinite time in the future, the statutory period for bringing the action is not controlling as to the question of reasonable time.

Interest — Implied contract.

3. A party, as a general rule, is not chargeable with interest unless on his part there is a promise, express or implied, to pay it. An implied contract to pay interest arises where the circumstances of a transaction justify the inference that the parties contracted with reference to interest.

Limitation of action — laches — Interest — money payable on demand.

4. The respondent, as found by the trial court, deposited with her brother, the appellant's intestate, money, upon the understanding that it should be kept and

the statute of limitations begin to run against an unpaid balance of a stock subscription;" to *Elliott v. Capital City State Bank*, 1 L.R.A.(N.S.) 1130, as to when the statute runs on certificates of deposit; to *Koelzer v. First Nat. Bank*, 2 L.R.A.(N.S.) 571, on "The running of the statute as to actions for the recovery of a general deposit;" to *Boyd v. Beebe*, 17 L.R.A.(N.S.) 660, on "When does the statute of limitations commence to run against action to recover money collected by agent not an attorney;" to *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L.R.A.(N.S.) 667, on "When does statute of limitations commence to run against action to recover money collected by attorney;" to *Re Gardner*, 29 L.R.A.(N.S.) 685, on "When does the statute of limitations begin to run on certificate of deposit." The authorities on the subject of the note, as limited, are few and unsatisfactory, and therefore a number of helpful cases involving the same principle have been included.

There is a class of cases in which it is said that if an act on the part of the creditor, such as demand or notice, be necessary to complete the cause of action, demand must be made or notice given within the statutory period; and some cases hold that if the plaintiff is not shown to have made a demand within the statutory period for bringing the action, he will not lose his right, but will be presumed to have taken such preliminary steps at the expiration of the statutory period of limitation. *Daugherty v. Wheeler*, 125 Ind. 421, 25 N. E. 542.

In *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1071, it is said that it is to be noticed that the bar of the statute of limitations differs from laches in suits in equity, inasmuch as it does not depend upon equitable considerations in the particular case, but upon an express provision of the statute, which is to be construed in the usual way. Where a demand must be made before the bringing of an action, it is plain that in a strict sense the cause of action does not accrue until after the demand. Whether the creditor's rights may be lost by delay in making a demand when no time

used by him for an indefinite time in the future, and be paid to her upon an actual demand therefor. She is not chargeable with unreasonable delay nor laches in failing to demand payment before his death, which occurred twenty-three years after the last deposit was made. Held that the facts found are sustained by the evidence, that her claim for the money was not barred at the time of his death, either by the statute of limitations or laches, and that she is entitled to interest thereon.

(February 18, 1910.)

A PPEAL by William Fallon, Jr., administrator of William Fallon, Sr., deceased, from an order of the District Court for Olmsted County denying a new trial after

is fixed for it is a question which is answered differently in different jurisdictions. It has sometimes been held, or seemingly assumed, that, even if many years are permitted to elapse without a demand, the statute will not begin to run until demand is made. Under this doctrine, carried to its extreme limit, a liability to a suit upon a claim might continue for an indefinitely long time. The extreme doctrine in the other direction is that the cause of action accrues; for the purpose of setting the statute in motion, as soon as the creditor by his own action, and in spite of the debtor, can make the demand payable.

The conflicting views of the courts on the question are indicated by the above statements, but the subject seems to have been passed upon one way or the other without much discussion or consideration. If the demand is necessary to mature the obligation, and demand is made within the statutory period for bringing the action, it seems to be generally held that the statute will run from the time of the demand, that is, if an action on the contract is brought in six years from the time the right of action accrues, where the statute requires the action to be brought within that time, and demand is made on the last day before the expiration of this period, the statute of limitations will begin to run, and the action will not be barred until six years from the time of the demand, making twelve years in all. But if on the same contract no demand is made within six years, many courts, as before indicated, hold the action absolutely barred. To restate these positions they are, briefly:

First: That although a demand necessary to a right of action must be made within a reasonable time, if it is not made within the period for bringing the action, it will be presumed to have been then made for the purpose of setting the statute in motion. This gives double the statutory period for bringing the action in case no demand is made.

Second: That demand is necessary to accrue the action, and set the statute going, and therefore, if demand is made on

judgment reversing a judgment of the Probate Court disallowing a claim against testator's estate. Affirmed.

The facts are stated in the opinion.

Messrs. Burt W. Eaton and Joseph A. Bear, for appellant:

Although the statute of limitations does not commence to run against a debt payable on demand, until such demand is made, yet such demand must be made within a reasonable time, and such reasonable time is the period of the statute of limitations of the state.

Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Morrison v. Mullin, 34 Pa. 12; Thrall v. Mead, 40 Vt. 540; Stanton v. Stanton, 37 Vt. 411; Freeman v. Ingerson, 143 Mich. 7, 106 N. W. 278; Smith v.

Smith, 91 Mich. 10, 51 N. W. 694; Angell, Limitations, § 96; Codman v. Rogers, 10 Pick, 112; Keithler v. Foster, 22 Ohio St. 27; Ball v. Keokuk & N. W. R. Co. 62 Iowa, 751, 16 N. W. 592.

A contract for the payment of money on demand in fact does not draw interest before the maturity of the obligation or until demand, unless there is an agreement for the payment of interest.

Horn v. Hansen, 56 Minn. 47, 22 L.R.A. 617, 57 N. W. 315; Ehrlich v. Brucker, 121 Wis. 495, 99 N. W. 215; Brown v. Gurney, 20 Minn. 527, Gil. 473.

Messrs. Brown, Abbott, & Somsen, for respondent:

The claim was not barred by the statute of limitations.

the last day of the statutory period, the plaintiff will have double the statutory period for the bringing of his action; but that if he fails to make a demand within the statutory period, his action will be barred. In other words, if the statutory period is six years, and he makes his demand on the last day of that period, his action is barred in twelve years; if he makes no demand, it is barred in six years.

There is a third position which the courts holding that the action is barred on failure to make demand at the end of the statutory period might take, and that is that demand, although necessary to perfect the action, will in all cases be deemed to have been made, when it could have been made, and that the statute will always begin to run from the date of the obligation. It would seem that the logical result of such a position would be that an actual demand, even if made within the statutory period, would not extend the time for bringing the action. The courts, however, do not appear to take this position. There seems to be no reason to believe that they will not, in all cases where a demand is necessary to perfect a right of action, hold that if demand is made on or before the last day of the statutory period for bringing the action, the statute will be thereby set in motion, and that this will give the plaintiff double the statutory period, from the date of the obligation, within which to bring his action, if the demand is made at the latest possible time within which it may be made.

Some of the courts holding that a demand is necessary to a right of action, and to set the statute of limitations in motion, but that the action will be barred if no demand is made within the statutory period, seem to have been misled by the fact that, in fixing a reasonable time within which demand can be made, the statute is referred to and used by analogy; and they appear to have lost sight of the fact that it is not referred to in that connection for the purpose of determining when the action may be brought, after the right of action has accrued. This has apparently led to 32 L.R.A. (N.S.)

the illogical position that the action is barred at the end of the statutory period, instead of to the logical position that only the limit of the time within which the beginning of its operation may be postponed has expired. One reason, however, given for holding the action barred, is not that the statute has run against it where no demand is made, but that the demand, being a condition precedent, can never be made thereafter; that is to say, after the time for making the demand has expired, it is not within the power of the plaintiff to make his right of action accrue; so that he is as effectually barred as if the statute had run against his right to sue. This, however, leads to the same anomalous result. It puts all contracts in which a demand is necessary before the accrual of a right of action, but on which no demand is made, on the same plane as contracts on which no demand is necessary to a right of action.

Likewise, the third position heretofore referred to—that is, that where the demand is in all cases deemed to have been made for the purpose of setting the statute in motion from the time it could have been made—leads to the illogical result of putting contracts in which an actual demand is necessary to the right of action, on the same level as contracts on which no demand is necessary, so far as the statute of limitations is concerned. An examination of the cases herein collected will show the courts to be apparently in a state of considerable confusion on the subject.

In Stanton v. Stanton, 37 Vt. 411, an action on a note in which an actual demand was held necessary to set the statute in motion, it was contended that if no demand were made, the statutory period of six years would be assumed to be the limit of reasonable time within which it might be made, and that the statute would begin to run from that time; and the court assumed this to be the rule in ordinary cases, the case at bar being taken out of the rule by reason of the fact that an indefinite time for demand was contemplated.

And on a note construed to be payable

Branch v. Dawson, 33 Minn. 390, 23 N. W. 552; *Horton v. Seymour*, 82 Minn. 541, 85 N. W. 551; *Portner v. Wilfahrt*, 85 Minn. 73, 88 N. W. 418; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1071; *Stanton v. Stanton*, 37 Vt. 413.

One element essential to a bar by laches is that injury or disadvantage has been or will be suffered by the opposite party by reason of the delay.

Dutton v. McReynolds, 31 Minn. 69, 16 N. W. 468; *Burke v. Backus*, 51 Minn. 180, 53 N. W. 458; *Lloyd v. Simons*, 97 Minn. 317, 105 N. W. 902; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070.

Start, Ch. J., delivered the opinion of the court:

The respondent herein presented to the

on demand from a certain date, it was held that the statutory period for bringing an action thereon was the limit of the reasonable time to make demand, and that at the end of that six years the statute began to run. *Thrall v. Mead*, 40 Vt. 540.

In *Keithler v. Foster*, 22 Ohio St. 27, an action brought to recover on a sheriff's bond for moneys collected by the sheriff which he had refused to pay upon demand, it was urged that if no demand is made within the period for bringing the action, the statutory bar will take effect by reason of the laches of the party in delaying the demand beyond a reasonable time. The court clearly puts the point made by saying that this would be equivalent to holding that the statute began to run when a demand might have been made, although no right of action had accrued by actual demand, and then declares that it is settled in Ohio that the statute begins to run, in cases like this, from the time of demand; that it would be but reasonable to hold, in the absence of other special circumstances, where no demand is shown to have been made within the statutory period for bringing the action, that, for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which time the statute will begin to run.

In *Thompson v. Whitaker Iron Co.* 41 W. Va. 574, 23 S. E. 795, where more than three times the statutory period for bringing the action had elapsed and the action was held barred, and it was sought to maintain it on the ground that the statute did not begin to run until demand was made, the court said that while demand was necessary before suit could be brought, it must be made within the time limited for bringing the action. It would be impossible from the opinion of the court to tell just when the court considered that the statute began to run, but fortunately in the syllabus, which is by the court, this question is cleared up, the court laying down the rule as follows: "If a demand be necessary before suit, the period of limitation under statutes of limitation does not start until 32 L.R.A. (N.S.)

probate court a claim for allowance against the estate of her deceased brother, William Fallon. It was disallowed, and she appealed to the district court of Olmsted county, and the case was tried by the court without a jury.

The facts found by the court are substantially these: The respondent, Maria Fallon, is a sister of William Fallon, deceased. She came to this country from Ireland about the year 1870, and since that time she has been engaged in domestic service, having never married. At various times between the year 1870 and June 21, 1884, she delivered and intrusted to her brother William divers sums of money saved from her wages, aggregating at least \$500. These sums were so delivered and intrusted to him for safe-keeping, upon the understand-

demand. But demand must be made within reasonable time, which is the term fixed by the statute of limitation, if not made before. Where no demand is shown, it will be presumed as made within that period, and the statute will then run." It is possible that many courts, when they say that the demand must be made within the statutory period, mean that the statute begins to run at that time, even if they hold the action barred where the facts of the case show that more than the double statutory period has elapsed before the bringing of the action.

In *Morrison v. Mullin*, 34 Pa. 12, it is evident that what the court understands by the rule that demand must be made within a reasonable time, that is, the statutory period for bringing the action, is that if demand is not made, the statute will then begin to run,—not that the action will be barred. It is said that to give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued, by the duty of diligence required of the party. Where the time for doing an act necessarily precedent to bringing suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins. And if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run.

In *Smith v. Smith*, 91 Mich. 7, 51 N. W. 694, where the contract was to return on demand logs of a like quality to those delivered, it is apparent that the court, in the absence of demand, deemed that the statute of limitations began to run at the end of the period for bringing the action, for the court said that demand should be presumed at the expiration of the time when an ordinary money claim would be barred by the statute; that this rule gave the party six years in which to make his demand, and six years in which to commence his suit after demand in all cases where a demand was necessary before suit.

In *Travelers' Ins. Co. v. Stucki*, 4 Kan.

ing and agreement that he would return and repay the moneys so intrusted to him, with interest thereon, at any time she might call for or actually demand the same. On June 21, 1884, her brother William married, and she thereafter deposited no money with him. He died intestate on July 31, 1907. She never demanded from him any part of the money so delivered to him, or the interest thereon, nor has any part of either ever been paid. She is not chargeable with unreasonable delay nor laches in failing to demand payment of the money from her brother before his death.

As a conclusion of law, judgment was ordered in favor of the respondent for \$500, with interest at 6 per cent per annum from June 21, 1884. The administrator appealed

from an order denying his motion for a new trial.

The first contention of the appellant to be considered is to the effect that the findings of fact necessary to the support of the conclusion of law are not justified by the evidence. The evidence is ample to sustain the finding that the respondent, prior to the marriage of her brother William, on June 21, 1884, did deliver and intrust money to him from time to time, which in the aggregate amounted to \$500. She so testified, and she was corroborated by the testimony of other witnesses. The evidence as to the understanding between the parties with reference to the money delivered by her to her brother William is less direct and certain; but it must be considered with refer-

App. 424, 46 Pac. 42, an action for a penalty for failing to discharge of record a paid-up mortgage, it was said that the statute of limitations will begin to run within a reasonable time after plaintiff could, by his own act, have perfected his right of action, and such reasonable time will not in any event extend beyond the statutory period fixed for the bringing of such action. But in this case more than the double statutory period had elapsed. It would seem, however, to indicate that the court did not deem that in the absence of demand the statute would begin to run from the time demand could have been made.

On the other hand, in *Hitchcock v. Cosper*, 164 Ind. 633, 73 N. E. 264, conceding that a demand was a condition precedent to a right to maintain an action to recover money intrusted to another for the purpose of investment, it was held that where the demand was not made until more than eight years from the time when the demand could have been made, the action was barred by the six-year statute of limitations.

And in *Ball v. Keokuk & N. W. R. Co.* 62 Iowa, 751, 16 N. W. 592, on a different kind of a contract, neglect for more than ten years,—the statutory period for the recovery of real property,—to make a demand for a deed of land promised to be given upon demand after the happening of a certain event, was held to bar the action. The court said that where there were no special circumstances excusing the party from making a demand, and the same is not made in the time prescribed by statute, it is not made in a reasonable time.

Where one person let another have various sums of money to take care of, upon the express agreement that when the depositor wanted it, he should tell the depository and give him reasonable time to raise the money, so as not to be crowded, it was held that, assuming that an actual demand was contemplated by the parties, an action to recover the money was barred when more than the statutory period for bringing the action had elapsed between the time of 32 L.R.A.(N.S.)

the making of the last deposit and the making of the demand for repayment. *Volli v. Wirth*, — Mich. —, 129 N. W. 9.

Where a soldier was upon demand entitled to a bond as a bonus for military service, and demand was made fifteen years afterwards and suit brought two years later, it was held barred by the six-year statute of limitation, on the ground that the demand should have been made within reasonable time, or within the statutory period. "If the rule was otherwise," said the court, "a party by his own act, or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience, or pleasure to put it in motion." *High v. Shelby County*, 92 Ind. 580. But there is nothing in the case to indicate whether the statute was deemed to run from the date of the obligation, or from the time when demand should have been made.

So, where the promise was to pay on demand a sum of money borrowed, it was held that an action brought to recover the sum nineteen years afterwards was barred by the statute of limitations, although action was brought within the statutory period after demand. The court said that if demand was necessary to start the statute, it should have been made within the statutory period of the loaning. *Laforge v. Jayne*, 9 Pa. 410. Here too it is impossible to tell just when the court thought the statute began to run.

Likewise, in *Shelburne v. Robinson*, 8 Ill. 597, it is said that the statute of limitations begins to run when a cause of action accrues. In a case where some act is to be done, or condition precedent to be performed, by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one or perform the other, or he will be barred by the statute of limitations; otherwise, it would be in his power to defeat the law by his own negligence and wrong. But in this case the double statutory period had elapsed, so that it is impossible to tell whether the court con-

ence to the relation of the parties, and the circumstances under which the money was delivered as disclosed by the evidence. The evidence justifies the inference that she was a prudent, hard-working woman who was able to save a part of her wages as a domestic servant, and that she desired a depository for her money where it would be safely kept until such indefinite time in the future as she should need and call for it. Her brother William was older than she, and was a thrifty farmer and good business man, in whom she had confidence, who was buying land, and in a situation to use advantageously her money. She never made her home with her brother. It was under such circumstances that the money was delivered to her brother as she

earned it. This negatives any presumption that she intended the money to be a gift to her brother. There was competent evidence in the nature of admissions made by William, fairly tending to establish the agreement upon which the money was deposited with him, which was sufficient, if credible, to sustain the findings of the trial court. A brother of the parties, Garret Fallon, testified that about the time his brother William was married, he said that he had made an agreement with the respondent to keep the money for her until she called for it, and would pay her interest on it. Another witness testified that he heard William, about the time he was married, say to the respondent not to be alarmed about her money, and that whenever she called for it

sidered that the action would have been barred at the end of the statutory period, or that the statute would then begin to run.

In *Sinkler v. Indiana & E. Turnp. Road Co.* 3 Penr. & W. 149, it was urged that an action to recover a stock subscription was barred by the six-year statute, but it was held that, a demand having been made within the six years and the action having been brought within five years and five months after, it was not barred, the court saying that the statute did not begin to run until the plaintiff had a right to bring his suit.

But in *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770, an action of the same kind was held barred by the six-year statute, because of the fact that demand had not been made within the statutory period. The question was clearly put by the court in this case. Taking it for true, the court said, that the company could not sue until after demand and notice, were they at liberty to delay these beyond six years, and then have a right to sue within six years thereafter? It was held that the company was bound to demand payment within six years from the date of the subscription, and this in strict analogy to the statute. "For," declared the court, "whether the demand be an essential preliminary to the action or not, it is beyond question one of the remedies given to the company upon the contract. The statute in terms bars only the action. But we ground a presumption on the statute, that a party who did not employ the other means afforded for enforcing the contract within the period of the statute meant to abandon the contract. After that period, demand could not be made with effect."

And in *State ex rel. Slingerland v. Norton*, 59 Minn. 424, 61 N. W. 458, it is said that it has often been held that where there is a condition precedent to the accruing of a cause of action, and it is in the power of the plaintiff to perform that condition, by analogy the statute applies, and will commence to run against the performance of the condition when the proper time to perform it arrives, and when performance is

thus barred, it will prevent the cause of action from ever accruing. In such a case the statute by analogy applied should not always be the one that applies to the cause of action after it accrues, but the one which naturally applies to the performance of the condition itself.

Of course, where the courts hold that the statute does not begin to run until actual demand is made, it would seem as if the holder of the obligation could postpone the running of the statute indefinitely, or at least must longer than the statutory period for bringing the action.

In *Horton v. Seymour*, 82 Minn. 541, 85 N. W. 551, it is held that the statute of limitations does not begin to run against an assignee of an insolvent, who upon the sale of assets agrees to leave the purchase price in the hands of the purchasers to be paid on actual demand, until demand is made, and the fact that the statutory period for bringing action has expired before demand is made does not thereby bar the action.

So, where money was deposited at interest with a person not a banker, and the form of the demand specified in the contract was to be a draft at thirty days or sixty days sight, it was held that demand was necessary to set the statute going, and that the action would not be barred by the mere fact that there had been a delay of twenty years in making such demand. *Sullivan v. Fosdick*, 10 Hun, 173.

An action on a promise to "pay and give on demand" a certain sum of money, with interest from a certain date, more than eighteen months after the date of the promise, was held not barred, although demand was not made for fifteen years, since the contract indicated that it was intended that demand in fact should be made to mature the obligation. *Portner v. Wilfahrt*, 85 Minn. 73, 88 N. W. 418.

In *Holmes v. Kerrison*, 2 Taunt. 323, 11 Revised Rep. 594, it is said that since no debt arises upon a bill payable after sight, until presentment for payment, where there had been no presentment, there was no proof of a complete cause of action at any

she would get it; and a third witness testified that she heard him say to the respondent, some two years before his death, that she need not worry about her money, as he would give her good interest. The credibility of the witnesses was a matter entirely for the trial court. We hold that the findings of fact as to the deposit of the money, and agreement as to its repayment, are sustained by the evidence.

This brings us to a consideration of the question whether the respondent's claim is barred by the statute of limitations or by her laches. It is urged by counsel for the appellant that the claim is so barred, for the reason that, from the date of the last deposit of money, no demand was made for its repayment until after the death of William, a delay of some twenty-three years; and, further, that the delay was unreasonable, and a demand should have been made within the period of the statute of limita-

tions. The evidence to support such a claim against a dead man's estate should be carefully scrutinized by courts, so as to prevent the allowance of stale or fraudulent claims against such estates; but when, as in this case, the facts were found by the trial court upon sufficient evidence, the question becomes simply one of law. The law relevant to the facts found is well settled. Where, by the contract of the parties, express or implied, the money or debt which is the subject-matter thereof is payable only upon a demand in fact therefor, the statute of limitations does not begin to run until an actual demand for payment is made. The demand, however, must be made within a reasonable time, which is ordinarily the period of the statute of limitations; but where the parties contemplated a delay in making the demand to some indefinite time in the future, the statutory period for bringing the action is not

previous time from which the statute of limitations could run.

In *Thorpe v. Booth, Ryan & M.* 388, a note made in 1813 was payable twenty-four months after demand. Demand was not made until 1823, and it was held that the statute was not a bar, on the authority of the last-mentioned case.

In *Sheldon v. Heaton*, 88 Hun, 535, 34 N. Y. Supp. 856, where money was deposited with one not a banker, the court held that action thereon was not barred by the statute of limitations, although begun thirty years afterwards, where the action was brought seasonably after demand.

In *Rhind v. Hyndman*, 54 Md. 527, 39 Am. Rep. 402, 3 Mor. Min. Rep. 166, where one agreed to transfer stock on or after a certain day on demand, it was held that, under a statute providing that "the action shall be commenced or sued within three years from the time the cause of action accrues," the cause of action did not accrue until demand was made, and that the statute would begin to run from that time.

Even in jurisdictions where it is held that without demand an action will absolutely barred within the statutory period of limitation, it is held that this will not be so if it is plain from the terms of the contract, as in *FALLON v. FALLON*, that an indefinite delay in making the demand was contemplated. This reasoning would hold good, of course, where the courts take the position that failure to make demand within the statutory period starts the statute running instead of ends its running.

In *Daugherty v. Wheeler*, 125 Ind. 421, 25 N. E. 542, it is said that all the cases hold that where a speedy demand or notice to pay would manifestly violate the intent and purpose of the contract, or where delay in making the demand was contemplated by the express terms of the contract, a demand need not be made within the statutory period.

In *Massie v. Byrd*, 87 Ala. 672, 6 So. 32 L.R.A. (N.S.)

145, it was held that where the demand is essential to the bringing of the action, it is not necessary that it should be made within the statutory period, if longer delay in making it was contemplated. The court said: "The decisions of this court recognize an obvious distinction between cases where a demand is essential to a cause of action, and no delay in making the demand is contemplated, and where delay is contemplated and intended. In none of them is it held that, when a demand is a condition precedent to bringing an action, it must be made and suit brought within the period prescribed by the statute of limitations. Whether or not the action is barred is made dependent on the particular circumstances of the case, without attempting to define or declare, inflexibly, what is a reasonable time in which the demand must be made. In a court of law, this is a question for the jury."

In *Scovil v. Scovil*, 45 Barb. 517, Bacon, J., said: "Where a note is made payable on demand simply, then the note is deemed to be due at its date, and may be immediately prosecuted, although an actual demand must be made in order to entitle the holder to draw interest upon the principal sum. But by the addition of the words 'with interest' in the body of the note, a different rule obtains. Where these words are inserted, a presumption arises that the parties intended that the note should not be immediately due, but for some customary mode of paying interest, as a quarter or a half year, or perhaps year." He was of the opinion that the statute would not attach until payment was actually demanded.

Where notes payable thirty days after demand were given in part payment of shares of stock of a corporation, which had been payable at such times as the directors might determine, it was held that the failure to demand payment for thirteen years did not bar action upon them as against the maker, the intention being that the notes should

controlling as to the question of reasonable time. Angell, Limitations, 6th ed. § 96; Wood, Limitations, § 118; 25 Cyc. Law & Proc. p. 1207; Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Horton v. Seymour, 82 Minn. 535, 85 N. W. 551; Thrall v. Mead, 40 Vt. 540; Smith v. Smith, 91 Mich. 7, 51 N. W. 694; Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070.

In the case of Branch v. Dawson, the defendants were private bankers, with whom the plaintiff made a general deposit of money, and demanded its payment for the first time eleven years thereafter, and four years after the demand brought suit to recover her money. It was held that the statute did not commence running until the demand was made. The last case cited, Campbell v. Whoriskey, in its facts, is quite similar to the one at bar. The plaintiff in that case came to this country, went into

service, and saved money from her wages, which she gave to her relative, the defendant, in whom she had confidence, upon the understanding that he would keep it for her until she wanted it, and pay her interest. She demanded of him the payment of the money thirteen years after the last amount was delivered to him, and five years thereafter she brought the action to recover the money. The defense was the statute of limitations, and it was held that she was not bound to demand her money within six years in order to save her rights, and, further, that the action was not barred, for the reason that the parties intended that the defendant should keep and use the money for an indefinite time, and to repay it only upon actual demand. The evidence in the case at bar tends to show an exceptional state of facts, in that the relation of the parties was something more than the ordinary one of debtor and creditor,

lie without demand as long as the circumstances of the company would permit. Cooke v. Pomeroy, 65 Conn. 466, 32 Atl. 935.

So, where a woman placed various sums of money in the hands of a relative who was to give bank interest on it, and keep it safe until she wanted it, a delay of nearly twenty years in making a demand was held not to bar an action, since the intention was that the money was to be held for an indefinite time. Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1071.

And a delay of ten years in making demand was held not to bar an action of a promise to pay one day after date, the condition of which was that, if the promisee should demand payment during her life, it should be due and payable, but in case of the promisee's death before payment, the money should be the promisor's as his part of the promisee's estate, since it was the evident intention of the parties that there should be delay in making demand, and that the limit of the delay was the lifetime of the promisee. Jameson v. Jameson, 72 Mo. 640.

Where money loaned was to remain in the hands of the borrower without interest until demand or payment, it was held that the statute would not begin to run until demand was made, since the demand was a material part of the contract. Sweet v. Irish, 36 Barb. 467.

And where the note was to pay a certain sum in produce or wood on demand as the promisee might want to use the same, this was held to indicate such indefinitely prospective payments as to prevent an action from being barred, although the note was allowed to run for over twelve years without demand. Stanton v. Stanton, 37 Vt. 411.

In Smith v. Franklin, 61 Vt. 385, 17 Atl. 838, it was held that there being evidence that bounty money and government money of a soldier had been left on interest in

1863, in charge of a town, until he should return from the war and call for it, it could not be said as a matter of law that the six-year statute had run against an action for the recovery thereof, although demand was not made until 1885.

But where the parties were deemed to have contemplated delay in making demand on a note construed to be payable thirty days after demand or notice, it was held that, the note having been given in 1866, the maker having died in 1874, partial payments having been made up to 1873, and the note having been filed as a claim against the estate, demand would be presumed to have been made within the statutory period for presenting claims against the estates of deceased persons, so as to set the statute of limitations in motion; and the fact that actual demand was not made until 1886 would not be sufficient to rebut such presumption. Massie v. Byrd, supra.

Where a deposit of money with a person was to be held in trust for the depositor until such time as it should be demanded by him, this was held to constitute a trust, so that the statute of limitations would not begin to run until demand had been made. In this case it was urged that if the demand was necessary, it should have been made within the statutory period. Schroeder v. Jahns, 27 Cal. 274. To the same effect, Millet v. Bradbury, 109 Cal. 170, 41 Pac. 865.

But where demand for money held by a trustee is not made in his lifetime, so as to make a cause of action accrue, and the demand is made upon the administrator of the trustee, the statute begins to run at that time. Schroeder v. Jahns, supra.

Moneys deposited with a partnership to be kept for the depositor until demanded constitute an express trust, so that the statute of limitations will not begin to run until demand. Zuck v. Culp, 59 Cal. 142.

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and that they contemplated an indefinite delay in making a demand for the money; and we hold that the finding and conclusion of the trial court, that the respondent is not chargeable with unreasonable delay nor laches in failing to demand payment of her money before the death of her brother, are sustained by the evidence. It follows that the respondent's claim was not barred at the time of her brother's death, either by the statute of limitations or laches.

It is specially urged that the court erred in allowing interest on the respondent's claim. A party, as a general rule, is not chargeable with interest, unless on his part there is a promise, express or implied, or some default in retaining the principal. *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337; *I. L. Corse & Co. v. Minnesota Grain Co.* 94 Minn. 331, 102 N. W. 728. An implied contract to pay interest arises where the circumstances of a transaction justify the inference that the parties contracted with reference to interest. 22 Cyc. Law & Proc. p. 1491. The facts bring this case within the rule, and the respondent was properly allowed simple interest on her claim.

The last assignment of error to be considered relates to a ruling as to the admission of evidence, as follows: The respondent was a witness in her own behalf, and was asked by her counsel these questions:

Q. You then delivered, you say, during that thirteen years you delivered money over to him from time to time?

A. Yes, sir.

Q. How much money did you deliver over to him between 1870 and 1885?

A. Well, the money I gave him to keep for me— (Objected to by Mr. Eaton, and move that that part of her evidence in which she says that the money that she gave him to keep for her be stricken out, as involving a conversation with a deceased person, and incompetent. It is certainly a conclusion.)

Court: It might be immaterial, but I do not think it would be subject to the statute. The fact would remain that she placed the money in the hands of William, and he would be under implied obligation to return it. I think I won't grant the motion to strike out that particular phrase; I do not see that that comes within the prohibition. Exception for respondent.

It may be conceded that it was technical error for the court to deny the motion to strike out the evidence; but it is clear that it was not reversible error, for the trial was by the court without a jury, the objectionable statement of the witness was not responsive to the question and it is 32 L.R.A. (N.S.)

apparent that it was not regarded by the court as a material factor in the determination of the facts found, which are sustained by competent evidence. *Mankato Mills Co. v. Willard*, 94 Minn. 160, 102 N. W. 202.

Order affirmed.

NEW YORK COURT OF APPEALS.

CENTRAL NEW YORK TELEPHONE & TELEGRAPH COMPANY

v.

CHARLES S. AVERILL et al., Appts.

(199 N. Y. 128, 92 N. E. 206.)

Telephone — exclusive contract — validity.

1. A contract giving a telephone company the exclusive right to furnish connections with a hotel for a term of years, although only in partial restraint of trade, is against public policy and void, since it injuriously affects the public interests.

Contract — partial invalidity — effect on whole.

2. A contract to install a telephone exchange in a hotel and furnish connections with the system of the contracting party is not rendered void in its entirety by the invalidity of a provision that the right to furnish connections with the hotel shall be exclusive.

Injunction — partial relief — contract — void in part.

3. Although a telephone company which

Note. — Validity of contract for exclusive right to furnish telephone service.

In *State ex rel. Gwynn v. Citizens' Teleph. Co.* 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257, which was an application for mandamus to compel respondent to place telephones in relator's store and residence, the court, in granting the writ, held that respondent had no right to withhold its service because relator refused to agree that he would use its system exclusively, or because he had broken a previous contract for such exclusive service.

And in the later case of *Gwynn v. Citizens' Teleph. Co.* 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460, which was a suit for damages between the same parties, the question of the validity of such a contract was squarely raised by the telephone company setting up, by way of counterclaim, the breach of the contract to use its system exclusively. The court held that this contract was unreasonable, because its tendency was to stifle competition between common carriers and to create a monopoly in favor of defendant, and could not, therefore, be recovered upon as a counterclaim to the suit against it for damages sustained by plaintiff in being refused telephone service.

R. L. S.

has contracted for the right to place an exchange in a hotel and furnish exclusive connections with the hotel for a term of years cannot enjoin the placing of a rival exchange in the hotel, it may enjoin the discontinuance of its own service until the expiration of the contract period.

Appeal — settled facts — directing judgment.

4. Upon appeal in an equity case, where the facts have all been judicially ascertained, the court, in reversing the decree, may direct the entry of the judgment to which the parties are entitled.

(June 14, 1910.)

APPPEAL by defendants from an order of Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Onondaga County in their favor in an action brought to restrain them from installing in their hotel any telephone system other than that of plaintiff, and from removing or interfering with its use, which was alleged to be in violation of a contract. Modified.

The facts are stated in the opinion.

Messrs. Hiscock, Doheny, Williams, & Cowie, for appellants:

The exclusive clause of the contract is invalid because opposed to public policy.

Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906; Atcheson v. Mallon, 43 N. Y. 149, 3 Am. Rep. 678.

A corporation engaged in a business which affects the public interest cannot enforce regulations or contractual provisions which tend to destroy competition, or which discriminate.

Smith v. Gold & Stock Teleg. Co. 42 Hun. 454; People ex rel. Postal Teleg. Cable Co. v. Hudson River Tel. Co. 10 Abb. N. C. 466; Sterne v. Metropolitan Teleph. & Teleg. Co. 19 App. Div. 316, 46 N. Y. Supp. 110; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Southern Exp. Co. v. Caldwell, 21 Wall. 264-269, 22 L. ed. 556-558; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Texas. 105 U. S. 460, 26 L. ed. 1067; Delaware & A. Teleg. & Teleph. Co. v. Delaware, 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Delaware ex rel. Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co. 47 Fed. 633; Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; State ex rel. Payne v. Kinloch Teleph. Co. 93 Mo. App. 349, 67 S. W. 684; State ex rel. Gwynn v. Citizens Teleph. Co. 61 S. C. 83, 32 L.R.A. (N.S.)

55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co. 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co. 23 Fed. 539; Union Trust Co. v. Atchison, T. & S. F. R. Co. — N. M. —, 6 Am. Elec. Cas. 171; Western U. Teleg. Co. v. American Union Co. 65 Ga. 160; St. Louis & C. R. Co. v. Postal Teleg. Co. 173 Ill. 537, 51 N. E. 382; Western U. Teleg. Co. v. Burlington & S. W. R. Co. 3 McCrary, 130, 11 Fed. 1; Western U. Teleg. Co. v. Baltimore & O. Teleg. Co. 19 Fed. 660; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

If the exclusive clause is void, the whole contract is void, and no enforceable rights arise thereunder in favor of plaintiff.

Saratoga County Bank v. King, 44 N. Y. 87; Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; Munson v. Magee, 22 App. Div. 333, 47 N. Y. Supp. 942; Unckles v. Colgate, 148 N. Y. 529, 43 N. E. 59; Thomson v. Thomson, 7 Ves. Jr. 470, 6 Revised Rep. 151; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Polak v. Gregory, 9 Bosw. 116; Nickelson v. Wilson, 60 N. Y. 362; Belding v. Pitkin, 2 Caines, 147; Tylee v. Yates, 3 Barb. 222; Nellis v. Clark, 4 Hill, 424; Barton v. Port Jackson & U. F. Pl. Road Co. 17 Barb. 397; Seneca County Bank v. Lamb, 26 Barb. 595; Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; People v. Sheldon, 139 N. Y. 264, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Pease v. Walsh, 49 How. Pr. 269; Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; Phoenix Bridge Co. v. Keystone Bridge Co. 142 N. Y. 425, 37 N. E. 562; Gray v. Oxnard Bros. Co. 59 Hun, 387, 13 N. Y. Supp. 86; National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462.

Messrs. Goodelle, Nottingham Brothers, & Andrews, for respondent:

The restraint is clearly reasonable, and not in any way injurious to the public.

Diamond Match Co. v. Roeber, 106 N. Y. 482, 60 Am. Rep. 464, 13 N. E. 419; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Oakes v. Cattaraugus Water Co. 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461; Wood v. Whitehead Bros. Co. 165 N. Y. 551, 59 N. E. 357; Hodges v. Sloan, 107 N. Y. 248, 1 Am. St. Rep. 816, 17 N. E. 335; Lough v. Outerbridge, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; RuTon v. Everitt, 35 App. Div. 412, 54 N. Y. Supp.

896; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Van Marter v. Babcock*, 23 Barb. 633; *Ebling v. Bauer*, 17 N. Y. Week. Dig. 497; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *Underwood v. Smith*, 46 N. Y. S. R. 654, 19 N. Y. Supp. 380, affirmed in 135 N. Y. 661, 32 N. E. 648; *National Wall Paper Co. v. Hobbs*, 90 Hun, 289, 35 N. Y. Supp. 932; *Tode v. Gross*, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280, 73 N. E. 48; *Blauner v. Williams* Co. 36 Misc. 173, 73 N. Y. Supp. 165; *Chicago, St. L. & M. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239; *National Distilling Co. v. Cream City Importing Co.* 80 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864; *American Strawboard Co. v. Haldeman Paper Co.* 27 C. C. A. 634, 54 U. S. App. 416, 83 Fed. 619.

Willard Bartlett, J., delivered the opinion of the court:

This is a suit in equity for an injunction to restrain the defendants from permitting the introduction of any other telephone system except that furnished by the plaintiff corporation in the Yates Hotel in the city of Syracuse. On August 18, 1902, the parties entered into a written contract for the rendition of telephone service in the hotel by the plaintiff, including the maintenance of a private hotel telephone exchange therein for a period of nine years. The contract contained the ordinary subscriber's agreement such as is in common use by telephone companies, but the only part which it is necessary to consider on the present appeal is a provision which, for convenience, I shall call the exclusive clause, reading as follows:

"It is understood and agreed by both of the parties hereto that the switchboard, apparatus, wires, cables, and fixtures furnished under this contract shall be and remain the property of said Central New York Telephone & Telegraph Company, and that the instruments and apparatus are placed in said Yates Hotel for the purpose herein named, and that no instruments or wires other than those furnished by the first party are to be placed or maintained in said hotel, or connected with or maintained in connection with said switchboard, 32 L.R.A. (N.S.)

apparatus or fixtures, and that said instruments, apparatus, line, or fixtures of the first party are not to be connected with or used in connection with any exchange, office, or telephone, except those of the first party, or its connections, and only by lines connecting said switchboard with the company's office and switchboard as within provided."

There was also a provision in the contract under which the defendants claimed the right to terminate it by giving thirty days' written notice to the plaintiff that they desired so to do. It is not necessary to discuss this provision further than to say that the trial judge decided that it did not give the defendants the right which they claimed to terminate the contract.

The telephone system of the plaintiff and the private hotel telephone exchange were duly installed in the Yates Hotel under the contract, and no controversy appears to have arisen under the contract until about the time of the commencement of this action in May, 1906, when another telephone system became available to the inhabitants of Syracuse. The defendants thereupon manifested an intention to introduce this other system in the Yates Hotel, and their threat to do so led to the institution of the present action, in which the plaintiff sought to enforce the exclusive clause in the contract which has already been quoted. The defendants pleaded a termination of the contract by reason of the service of a thirty days' notice thereunder, and also that the contract was invalid and illegal "as void as against public policy for the reasons that the provisions thereof which in substance purport to confer upon the plaintiff an exclusive right to maintain a telephone system and furnish telephone service in the Yates Hotel tend to destroy competition in the telephone business and are discriminatory and therefore void, and contrary to public policy."

Upon the trial the court at special term held (1) that the contract was not terminable by the defendants under the thirty-day clause contained in the printed portion thereof; (2) that the exclusive clause was illegal and void in so far as it purported to grant to the plaintiff the exclusive right to maintain a telephone system in the Yates Hotel, and the exclusive right to furnish telephone service thereto; and (3) that the rights in the Yates Hotel granted to the plaintiff by the exclusive clause constituted an inseparable part of the consideration for the contract, and that, therefore, the contract was wholly illegal and void. Judgment was thereupon rendered dismissing the complaint and awarding costs to the defendants. This judgment has

been reversed by the appellate division, which has held (one member of the court dissenting) that the exclusive clause is not open to any legal objection whatsoever, but is a valid agreement which the plaintiff is entitled to enforce. We are therefore called upon to determine as between these conflicting views which is right.

There is a finding in accordance with the allegations of the complaint, and to which no exception is taken, to the effect that the plaintiff installed the private hotel telephone exchange in the Yates Hotel at an expense of \$2,700, which it was induced to incur by reason of and in reliance upon the nine-year term of service provided for in the contract and the exclusive telephone privilege thereby granted; and that "the plaintiff would not have installed in said hotel said private telephone exchange and incurred said expense in so doing if it had understood said contract might be terminated by the defendants on thirty days' notice after the expiration of one year from the commencement thereof, or that the telephone privilege given by it was not exclusive."

It is manifest that the exclusive clause is a contract in restraint of trade. It prevents anyone in the Yates Hotel from having telephone communication with customers of other telephone companies than the plaintiff. It prevents the persons served by such other companies from having telephonic communication with the Yates Hotel. It likewise destroys competition by shutting out all rivals of the plaintiff.

The restraint of trade thus effected, however, is only partial; and while a contract in general restraint of trade is still deemed illegal and void, the law permits contracts in partial restraint of trade, under some circumstances, where they are not unreasonable, and are supported by sufficient consideration. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357. The respondent contends that the exclusive clause here in controversy belongs to the class of contracts in partial restraint of trade which have thus been sanctioned by the courts; but this view leaves out of sight an essential difference which cannot be disregarded. Where the business to which the contract relates is of such a character that it cannot be subjected even to the partial restraint which is contemplated without injury to the public interest, then such partial restraint cannot be tolerated. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600. 32 L.R.A. (N.S.)

625, 46 Am. Rep. 527. In the case cited it is declared that all the authorities warrant the inference "that, if there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest." The court then proceeds to inquire whether there are any sorts of business of this peculiar character, and concludes that such is the nature of the business carried on by railroad and telegraph companies.

The business of a telephone company, in its broader aspects, at least, is legally indistinguishable from that of a telegraph company, the telephone being a telegraph in all essential particulars. In New Jersey it has been held that a corporation organized under an act to incorporate and regulate telegraph companies, and authorized thereby to exercise the power of eminent domain, may condemn lands for a telephone line although telephones are not mentioned in the statute. *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* 63 N. J. L. 341, 11 L.R.A. 664, 21 Atl. 460. In this state the statutory provisions for the incorporation of telegraph and telephone companies are contained in the same article and section of the transportation corporations law (Consol. Laws, chap. 63), and the same provisions for the exercise of the power of eminent domain and the occupancy of the public roads, streets, and highways apply to each. Article 9, §§ 100, 102. Wherever the character and functions of telegraph companies have been considered by the courts, the prevailing opinion has been that they are to be deemed public service corporations, affected by a public interest, and hence that contracts tending to restrict the free and general use of their lines are invalid. The same doctrine is equally applicable to the business of telephone companies. In the case of *Western U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246, 29 Am. Rep. 28, the contract provided that the railroad company would furnish and erect telegraph poles and wires along its railroad for the telegraph company, and assured to the latter an exclusive right of way along the railroad, so far as it legally might do so. The court held that, so far as this contract precluded the railroad company from permitting other telegraph companies to place wires on the same poles, it was

valid, but that it was contrary to public policy if construed as preventing another telegraph company from erecting a line of its own along the railroad's right of way. To the same effect is *St. Louis & C. R. Co. v. Postal Teleg. Co.* 173 Ill. 508, 537, 51 N. E. 382, where a contract of lease by a railroad company with a telegraph company, whereby the railroad company gave the telegraph company the exclusive use of the railroad right of way, was held to be void upon grounds of public policy as being in restraint of trade and creating a monopoly. A similar contract was condemned on the same grounds in *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781, where the court said: "Shall the means, then, by which it [information] is transmitted be monopolized by a contract? . . . When such . . . [monopolies] exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract." The likeness between telegraph companies and telephone companies is pointed out by the supreme court of New Jersey in *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* supra, and by the supreme court of Nebraska in *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, where it is held that a telephone company is bound, under the doctrines of the common law, to furnish a telephone instrument to any person who desires to become a subscriber, who tenders a full compliance with the rules established for other subscribers, and is willing and able to pay the lawful rates for telephone service.

The limitation of the modern doctrine which sanctions certain contracts in partial restraint of trade is aptly illustrated by the case of *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 545, 2 Am. St. Rep. 124, 13 N. E. 169, 175. A gas company agreed with another gas company that during a period of one hundred years it would not lay any gas mains or pipes or furnish any illuminating gas in the west division of the city of Chicago. This contract was adjudged invalid by the supreme court of Illinois, which said: "The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business and in furnishing that which was a matter of public concern to all the inhabitants of the city."

The telephone is a scientific agency for the transmission of human speech over distances a thousandfold greater than could be covered by the unaided voice. Interesting, strange, and marvelous as the invention 32 L.R.A. (N.S.)

seemed when made, it is improbable to the last degree that the state would ever have granted the right to exercise the power of eminent domain to telephone companies, or have permitted them permanently to occupy the public streets or highways, if the only communication feasible had been between each customer and a single other customer. The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. The franchise having been granted because of this very element,—that is to say, the capacity to serve the community so generally by serving so large a number of individuals constituting the community,—it cannot be tolerated that any grantee of the franchise shall exercise it in such a way as to lessen the value of the telephone as an instrumentality of service to the public. If a telephone company may contract for the exclusion of any other telephone service from the premises of its customers, it may thus deprive all those customers of telephone communication with every person who takes telephone service from rival concerns, and thus prevent just what all telephone franchises are designed to promote,—that is, the availability to every member of the community who desires it, and can afford to pay for it, of the most extensive telephone service attainable.

In return for the franchise which a telephone corporation receives from the state,—including as it does the privilege of occupying highways and the right to exercise the power of eminent domain,—it undertakes to furnish each customer with telephone service to as many other customers as it can obtain at the rates which the law permits it to charge; and the law implies an obligation on its part to do nothing to lessen the facilities of the public to procure a more widely extended service. While it may, of course, adopt every proper expedient to enlarge its own business, this does not include the right to pursue a policy of exclusion which is distinctly injurious to the public by restricting their circle of communication by telephone. It matters not that the customer may be willing to agree to exclude others, or that the contract to do so is supported by a sufficient consideration as between the parties. The evil in such an agreement is its antagonism to the interests of the public. If a telephone company may make a contract of exclusion with one

of its customers, it may make such a contract with all, and thus preclude all from any telephonic communication with persons who happen to be served by a rival company. It is true that the customers who had voluntarily entered into the agreement of exclusion would have no just ground of complaint themselves; but how about the customers of the rival company who are thereby shut out from communication by telephone with their neighbors? They are not parties to the contract, and yet they suffer its consequences, although they constitute a portion of the public for whose benefit the franchise was granted to the corporation whose action deprives them of the more extended telephone service which otherwise they might enjoy.

It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy, and therefore void. It tends to nullify the consideration moving to the public for the grant of the franchise, by lessening the sphere of telephonic service; and it is impossible to regard a contract as consistent with public policy which would defeat the very policy that induced the state to bring one of the parties to the contract into existence as a public service corporation.

If, as we have seen, a railway corporation may not contract with a telegraph company to exclude all other telegraph companies from its right of way, it is difficult to perceive why it should be permissible for the proprietors of a hotel to contract with a telephone company to exclude all other telephone companies from the hotel premises. There is no stronger inducement to the managers of a public service corporation to serve the public well than a healthy apprehension that a rival concern will do so. It is sometimes argued that the presence of two telephone systems in a given district is a disadvantage to the community, which is best served by one system, reaching all subscribers; but one system will never be made to reach all subscribers as cheaply as would otherwise be the case if the possibility of competition is destroyed.

To recapitulate the reasons which lead to the conclusion that this contract (the exclusive clause) is injurious to the public interest generally, the argument may be simply stated. The public franchises which telephone corporations enjoy are granted to promote the transmission of vocal messages between the largest numbers of persons who can be brought into communication with one another under satisfactory economic conditions. This purpose is frustrated by any agreement which operates to prevent

the rendition of telephone service where otherwise it could be obtained. A contract between a telephone corporation and one of its subscribers, whereby the latter excludes all other telephone service from his premises, deprives all the patrons of that other telephone service from telephonic communication with such subscriber and all the occupants of his premises. Though the number affected by one such exclusive contract may not be large, if exclusion may be exacted from one customer it may be exacted from all, and so a corporation first in the field might establish a monopoly to the detriment of a large proportion of the community and their deprivation of telephonic inter-communication. This illustration serves to show the danger to the public which would arise from permitting any such exclusive contracts at all. The validity of a single one cannot be recognized without peril to the public interest.

In the courts below much importance was attached to the case of *Lough v. Outerbridge*, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292, as an authority in support of the validity of the exclusive clause in the present contract. In that case it was held that a contract the tendency of which was to prevent competition in the carriage of goods by ocean steamers running between New York and Barbadoes was not such a contract in restraint of trade as to be contrary to public policy, inasmuch as the rates charged by the defendant were not unreasonable. The case, however, is readily distinguished from the case at bar. It did not relate to the conduct of the business of a public service corporation, or the business of a corporation in any wise affected with a public interest. Here the parties directly and indirectly affected are telephone corporations whose operations continuously and intimately concern the interests of the community which they undertake to serve, and, in the broadest sense, the interests of the public at large.

Having reached the conclusion that the exclusive clause of the contract in controversy is void, we are brought to the question whether its invalidity necessarily avoids the whole contract. I think that it does not. The rule applicable to the solution of this question was admirably stated by Mr. Justice Willes in *Pickering v. Ilfracombe R. Co.* L. R. 3 C. P. 250, 37 L. J. C. P. N. S. 118, 17 L. T. N. S. 650, 16 Week. Rep. 458, where he said: "The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be

created by statute or by the common law, you may reject the bad part and retain the good." Sir Frederick Pollock, in his treatise on the Principles of Contract, § 367, says: "A lawful promise, made for a lawful consideration, is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration." In *Price v. Green*, 16 Mees. & W. 346, 16 L. J. Exch. N. S. 108, 9 Jur. 880, 6 Eng. Rul. Cas. 406, the defendant's testator had covenanted not to carry on the trade of a perfumer, toyman, or hair merchant within the cities of London and Westminster, or within 600 miles therefrom. The exchequer chamber, affirming the judgment of the court of exchequer, held that this covenant was divisible, being good as far as it related to the cities of London and Westminster, but void as to the 600 miles; and, upon evidence that the person bound had carried on trade in the city of London, it was held that he was liable in damages for such breach of the contract. In *Leavitt v. Palmer*, 3 N. Y. 19, 37, 51 Am. Dec. 333, it was said by Bronson, J., that "where a deed or other contract contains distinct undertakings, some of which are legal, and some illegal, the former will in certain cases be upheld, though the latter are void;" and in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, Chitty's statement of the rule applicable to the divisibility of contracts is quoted with approval, where he says "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." It does not seem necessary to specify numerous other authorities which might be cited to sustain the severance of the illegal part of this contract from the portions which are legal.

If I am right in thinking that they may thus be severed, it follows that, upon the facts as they appeared without dispute on the trial, the plaintiff was not entitled to enjoin the defendants from introducing into the Yates Hotel other telephone instruments than those which the plaintiff had furnished under the contract. On the other hand, inasmuch as the defendants admitted that they proposed to discontinue and abandon the use of the private hotel exchange with which the plaintiff had equipped the Yates Hotel, the plaintiff was entitled to prevent such discontinuance and abandon-

ment. In other words, the plaintiff was entitled to a part of the relief which it claimed, but not all. It could lawfully insist that the defendants should retain and continue to employ its telephone exchange and telephone system, but it could not lawfully prevent the defendants from admitting other telephone systems or placing other telephone exchanges in their premises. Under these circumstances, the only remaining inquiry is what relief can be afforded upon the present appeal to the defendants, who are under a legal obligation to comply with every portion of their contract with the plaintiff except that portion which relates to the exclusion of other telephones.

All the facts necessary to a complete determination of the controversy between the parties were found by the trial judge. There was really no dispute as to the facts. The only questions as to which the parties were at variance were questions of law relating to the validity of the exclusive clause of the contract, and its effect, if invalid, upon the remainder of the agreement. Under these circumstances the trial court, having denied to the plaintiff any right of relief whatever, the appellate division properly reversed the judgment. Instead of granting a new trial, however, we think it should have directed judgment for the plaintiff as prayed for in the complaint, except so far as the complaint sought to enforce the exclusive clause of the contract; that is to say, it should have directed judgment awarding the plaintiff an injunction against the removal of the plaintiff's telephone system and appliances from the Yates Hotel, or their severance from the plaintiff's general telephone system, and against any adverse interference therewith. To this extent the plaintiff is clearly entitled to relief; and in an equity suit, where there is no controversy as to the facts, and they have all been judicially ascertained and established in the form of findings, there is no occasion to send the case back for a new trial, and thus put the parties needlessly to further labor and expense. The order of the Appellate Division should, therefore, be modified so as to reverse the judgment of the special term and (instead of granting a new trial) direct judgment for the plaintiff to the extent indicated in this opinion, without costs to either party.

Cullen, Ch. J., and Haight, Hiscock, and Chase, JJ., concur. Gray, J., not voting.

Ordered accordingly.

**WEST VIRGINIA SUPREME COURT
OF APPEALS.**

**STATE OF WEST VIRGINIA
v.**

W. O. DAVIS, Plff. in Err.

(— W. Va. —, 69 S. E. 639.)

Evidence — self-incrimination — druggist's files.

1. The written prescriptions of practising physicians on which a licensed druggist has made sales of intoxicating liquors, and which he has preserved in his possession, as the statute directs, are not his "private papers and documents," within the meaning of the constitutional guaranty against compulsory self-incrimination.

Same — public documents.

2. Such prescriptions are quasi "public documents," and the constitutional privilege is not violated by compelling a druggist who stands indicted for unlawfully selling spirituous liquors, to produce them in court, in order that they may be used as evidence against him on his trial.

Intoxicating liquor — druggist — physician.

3. A licensed druggist cannot sell intoxicating liquor to a practising physician, except upon the written prescription of a practising physician in good standing in his profession, and not of intemperate habits.

Same — prescription — statutory requirements.

4. Such prescription must state substantially the following, *viz.*: (1) The name of the person for whom prescribed; (2) the kind and quantity of liquor; (3) that it is absolutely necessary as a medicine for such person; and (4) that it is not to be used as a beverage.

Same — sufficiency.

5. A written order addressed to a licensed druggist and signed by a practising physician, in the following words, *viz.*: "Send me OJ spts. whisky and oblige. 12-12-09," is not a lawful prescription for intoxicating liquor, and a sale made thereon is unlawful.

Evidence — burden of proof — sale of liquor.

6. When a sale of intoxicating liquors is proven to have been made by a licensed druggist, it is presumed to have been unlawfully made, and the burden is then cast upon him to rebut such presumption.

Appeal — nonprejudicial error.

7. The verdict of a jury will not be reversed on account of the admission of improper testimony, or the giving of an er-

roneous instruction, when it clearly appears that, if such evidence had been excluded, and such instruction refused, the result could not thereby have been changed. Such error is not prejudicial.

Intoxicating liquor — second offense — increased penalty — judicial notice.

8. In order to warrant the imposition of the increased penalty imposed for a second conviction by § 5 of chapter 32, Code 1906, a former conviction must have been alleged in the indictment, and also proven. The court cannot take judicial knowledge of a former conviction for the purpose of imposing the penalty prescribed for a second conviction.

(November 15, 1910.)

ERROR to the Circuit Court for Barbour County to review a judgment convicting defendant of illegally selling liquor. Reversed.

The facts are stated in the opinion.

Mr. Warren B. Kittle for plaintiff in error.

Mr. William G. Conley, Attorney General, for the State:

It was not error to introduce the orders or alleged prescriptions, and it was not, in effect, requiring defendant to testify against himself, and therefore unconstitutional.

State v. Edwards, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; State v. Gillispie, 63 W. Va. 152, 59 S. E. 957.

Evidence of other acts constituting a different offense may be properly submitted to a jury upon a trial for crime.

Hendrick v. Com. 5 Leigh, 707; Burr v. Com. 4 Gratt. 534; Trogon v. Com. 31 Gratt. 862; Piedmont Bank v. Hatcher, 94 Va. 231, 26 S. E. 505; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243; 14 Am. & Eng. Enc. Law, 2d ed. p. 196; Martin v. Com. 2 Leigh, 745.

It is not error to admit evidence of other sales of intoxicating liquors made at or about the time of the sale relied upon.

2 Woolen & T. Intoxicating Liquors, § 931, p. 1611; Sellers v. State, 98 Ala. 72, 13 So. 530; Matkins v. State, — Tex. Crim. Rep. —, 58 S. W. 108; Pitner v. State, — Tex. Crim. Rep. —, 39 S. W. 662; State v. Shaw, 58 N. H. 73; Dobson v. State, 5 Lea, 271.

The orders or alleged prescriptions introduced were not sufficient in form to protect a druggist for making sales of intoxicating liquors thereon.

State v. Tetrick, 34 W. Va. 137, 11 S. E. 1002; State v. Berkeley, 41 W. Va. 455, 23 S. E. 608.

Williams, J., delivered the opinion of the court:

The defendant, a licensed druggist in the

Headnotes by WILLIAMS, J.

Note. — The question whether records of sales of liquor, which a druggist is required by law to keep, may be used as evidence against him in a criminal prosecution, is treated in the note to State v. Pence, 25 L.R.A. (N.S.) 818.
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town of Philippi, was indicted and convicted for making an unlawful sale of spirituous liquors, and the court, proceeding on the theory that it was a second conviction, adjudged him to pay a fine of \$500, sentenced him to be confined in the county jail thirty days, and revoked his license. On writ of error granted, defendant assigns numerous grounds which he insists call for a reversal of the judgment, and a setting aside of the verdict. It is not necessary to take them up seriatim, because they are all so nearly related that the decision of two or three of the leading questions involved will dispose of all the rest.

It is assigned as error that defendant was compelled, over his protest, to produce evidence against himself. It appears that when the witness George Barnes, a registered pharmacist who was engaged in the service of defendant, was testifying on behalf of the state, he was asked if he had access to the physicians' prescriptions on which whisky and other spirituous liquors had been sold within the year next prior to the indictment, and he said he had. He was then asked if, on the 12th of December, 1909, a paper in the following language was delivered to defendant, viz.: "Dr. Davis: Send me OJ spts. whisky and oblige. 12-12-09. E. H. Stump." Witness stated that he did not remember, and he was asked to look and see. He replied that he had access to the prescriptions when they were in the store. But it appears that defendant himself was present at the trial, and had the orders and prescriptions in his possession, and witness was requested to ask defendant for them, to be used for the purpose of refreshing his recollection. The court directed defendant to turn them over to him, which he did under protest, and excepted. An order in the language above quoted was found amongst them. This witness was also examined by the attorney for the state in relation to a number of other orders, more or less similar to the one in question, signed by E. H. Stump, some of which were as follows, viz.:

"Send me OJ of spts. I want to mix. I send pay and oblige. E. H. Stump."

"Dr. Davis: Give Mr. Peoples one half pint of spirits of some kind for a pain in his side. He is suffering. Add ZSS of ginger to it. 12-12-09."

Did the court err in compelling defendant to produce the orders and prescriptions, to be used as evidence against him? Was this compelling defendant to produce evidence to convict himself, in violation of the privilege secured to him by § 5 of article 3 of the Constitution of West Virginia (Code 1906, p. 1), which says that "no person in any criminal case shall be compelled to be 32 L.R.A. (N.S.)

a witness against himself?" It is well settled that the spirit of this fundamental law protects a person against compulsory production of any of his private papers and documents which would tend to criminate him. 3 Wigmore, Ev. § 2264; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; Minsters v. People, 139 Ill. 363, 29 N. E. 45; Logan v. Pennsylvania R. R. Co. 132 Pa. 403, 19 Atl. 137; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Entick v. Carrington, 19 How. St. Tr. 1029; 1 Greenl. Ev. 10th ed. § 409; 1 Wharton, Ev. §§ 533, 534. But are the prescriptions of a physician on which a druggist is authorized to sell intoxicating liquors, and which the statute requires him to file and preserve, his "private papers," within the meaning of this constitutional safeguard? We hardly think so. They partake too much of the nature of public documents. They constitute the only authority under which a druggist can legally sell intoxicating liquors, except alcohol for scientific and mechanical purposes. A druggist is not required to have a general license to sell intoxicating liquors; and a physician's written prescription is, in a sense, his special license to do an act which, without such prescription, would be unlawful. The sale of intoxicating liquors is regulated by law; it is not a business in which everyone has a right to engage; and a druggist can lawfully sell it only upon one condition, that is, "upon the written prescription of a practising physician in good standing in his profession, and not of intemperate habits." The statute, moreover, prescribes what the prescription must contain, and it must be in substantial compliance therewith, else it does not authorize the druggist to sell. Section 6 of chapter 32, Code; State v. Bluefield Drug Co. 43 W. Va. 144, 27 S. E. 350; State v. Tetrick, 34 W. Va. 137, 11 S. E. 1002.

Section 7 of chapter 32, Code, reads in part as follows: "Every such prescription and statement shall be filed and preserved by the druggist selling such liquors thereon, and the same shall be open and subject to the inspection of the prosecuting attorney of the county, or any member of a grand jury thereof, or the husband, wife, or any relative of the person to whom such liquors were sold; and any druggist or person in charge of such prescriptions and statements, who shall wilfully fail or refuse to produce the same, when demanded for inspection by any of the persons aforesaid, shall be guilty of a misdemeanor, and fined not less than twenty nor more than one hundred dollars." The very purpose of the statute is to enable the prosecuting attorney and the other persons named, to

ascertain whether or not the druggist is acting in good faith, and is complying with the law under which he is exercising a privilege, not a right; and shall we say that the prescriptions may be examined in order to discover whether the law has been violated, but cannot be used as evidence to prove the violation, if one is discovered? This would be a very unreasonable view to take, we think. The statute, by giving to the prosecuting attorney the right to demand an inspection of the orders and prescriptions, necessarily carries with it the right to use them as evidence in the trial against the druggist for unlawful selling. They are, at least, quasi public records or documents; and the fact that the druggist is permitted to retain possession of them, subject to the right of inspection by certain named persons, does not change their public character. Therefore, unless the statute itself is a violation of the constitutional guaranty, the court did not violate it by requiring defendant to produce the orders and prescriptions.

The state of Missouri has a statute similar to our own, except that it expressly says the druggist shall produce the prescriptions "in court or before any grand jury, whenever thereto lawfully required." Anno. Stat. 1906, § 3048. A druggist in that state was indicted for refusing to produce before the grand jury, for their inspection, the prescriptions in his possession, when he had been lawfully summoned to do so. A demurrer to the indictment was sustained by the lower court, on the ground that the statute was in violation of both the Constitution of Missouri and the Constitution of the United States. But the court of appeals reversed the lower court, and held that the prescriptions of physicians filed with a druggist were not the druggist's private papers, and that the law requiring him to preserve them and produce them in court was constitutional. *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894.

In *Bradshaw v. Murphy*, 7 Car. & P. 612, it was decided that "a vestry clerk who is called as a witness cannot, on the ground that it may criminate himself, object to produce the vestry book kept under the Stat. 58 Geo. III. chap. 69, § 2." In *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527, the court of appeals of New York held that the defendant, a coroner, who was indicted for making false and fictitious inquest papers for the purpose of being filed with the county clerk at some future time, and on which he had fraudulently received fees, could not shield himself from producing such papers upon his trial, on the ground that they would tend to criminate him. The court took the view that these

were public records, and were intended to be used as such, and that a public officer cannot be privileged to retain in a public office a fraudulent record, made for the purpose of concealing a fraudulent claim for fees.

The following cases, however, are more particularly in point. Under a statute in the state of Iowa, regulating the sale of intoxicating liquor by druggists, they are required to make verified monthly reports of the number of sales made by them, and file them with the county auditor; and it was held by the supreme court of that state, in the two cases of *State v. Smith*, 74 Iowa, 580, 38 N. W. 492, and *State v. Cummins*, 76 Iowa, 133, 40 N. W. 124, that such reports could properly be used as evidence against a druggist indicted for making an unlawful sale of liquors, or indicted for the crime of maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors.

A statute of North Dakota requires a druggist to "keep a book wherein shall be recorded, daily, all sales of intoxicating liquors made by him or his employees, showing the name and residence of the purchaser, the kind and the quantity of the liquors sold, the purpose for which it was sold, and the date of the sale." This record is, by statute, open for the inspection of the public at all reasonable times during business hours, and any person so desiring may take memoranda or copies thereof. It is also made a misdemeanor, for which a penalty is imposed, if a druggist fails to keep such a record, or refuses an inspection of it. In *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709, which was an action to abate a liquor nuisance kept and maintained by the defendant, it was held that the trial court did not err in requiring the defendant to produce the record of sales made by him, as evidence against himself upon the trial.

The fact that our statute makes the prescriptions subject to examination by a few persons only, instead of by the public generally, does not constitute them private papers, within the meaning of the constitutional privilege. If they were, in fact, private in their nature, and within the spirit of the constitutional guaranty, they could not lawfully be made subject to inspection by any one, without the consent of the druggist.

Another case very much in point is *McElree v. Darlington*, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456. In that case the Chester County Guaranty, Trust, & Savings Deposit Company, a corporation, authorized by its charter to receive money on deposit, advertised that it would pay 5 per centum on deposits. Mary A. Burnett deposited with it \$1,300 on December 2, 1896. Within two months thereafter, a bill in equity was

filed against it by some of its creditors, stockholders, and depositors, alleging its insolvency, and praying for an injunction restraining it and its officers from disposing of its assets, and also praying for an investigation of its affairs, and for the appointment of a receiver. It answered admitting its insolvency, and receivers were appointed on the 12th of February, 1897. A large number of the depositors, including Mary A. Burnett, then presented a petition to the court of common pleas, asking for the appointment of an accountant to examine the books, papers, accounts, and securities of said corporation. At the time this petition was filed, the president of the corporation stood indicted for embezzling from Mary A. Burnett \$1,300, in that he had received from her said amount of money with knowledge; at the time, that he and the corporation he represented were insolvent. The purpose of the examination of the books was to ascertain the condition of the corporation at the time when the deposit was made, for receiving which the president stood indicted. The petition was dismissed by the lower court, on the ground that to permit the inspection of the books would be an infringement of the constitutional guaranty against self-incrimination. But upon appeal, the supreme court of Pennsylvania reversed the lower court, and held that the books and papers of the corporation were not the property of its officers or its employees, and that they could not be regarded as privileged so as to shield the officers against the consequences of the frauds which they may have perpetrated in their respective spheres of duty.

We are of the opinion that the prescriptions of a physician on which a druggist makes sales of intoxicating liquors, and which he is required to file and preserve, are not privileged documents, within the constitutional guaranty against compulsory self-incrimination; and that the lower court did not err in requiring the defendant to produce them in court. The order for whisky dated 12-12-09, and signed E. H. Stump, is not a physician's prescription on which defendant could lawfully sell intoxicating liquors, and the filling of the order by defendant constituted an unlawful sale.

There is another reason why the court committed no error in overruling defendant's motion to set aside the verdict, which is entirely independent of the reason above given. A sale, in fact a number of sales, of intoxicating liquors, were proven to have been made by defendant, by the testimony of the prosecuting attorney, who says that defendant had, previous to the trial, shown him his orders and prescriptions, and admitted to him that every one of them represented a sale. He further says that defend-

ant claimed that he was entitled to have prescriptions substituted for some of the orders. This testimony is not disputed, and it clearly proves a sale, independent of the production of the orders and prescriptions in court, although it does not, taken by itself, prove a sale upon the particular order in question. But a sale upon that particular order is immaterial, as the statute (§ 6 of chapter 32) says: "In any prosecution against a druggist for selling alcohol, spirituous liquors, wine, porter, ale, beer, or other intoxicating liquors without a license therefor, if the sale be proven, it shall be presumed that the sale was unlawful, in the absence of satisfactory proof to the contrary." *Miles v. State*, 5 W. Va. 524; *State v. Bluefield Drug Co.* 43 W. Va. 144. 27 S. E. 350. It mattered not whether the sale or sales had been made by defendant himself or by his clerk. *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315; *State v. Nichols*, 67 W. Va. 659, — L.R.A.(N.S.) —, 69 S. E. 304. Neither was it necessary to prove that the sale was made to any particular person, as a sale to any person, unless upon a written prescription of a practising physician (excepting a sale of alcohol for mechanical or scientific purposes), would be unlawful. Section 6 of chapter 32, Code; *State v. Ferrell*, 30 W. Va. 683, 5 S. E. 155. The prosecuting attorney's testimony proved a sale. His testimony was not denied, and the law presumes that the sale was unlawful. Defendant did not attempt to rebut this presumption. He did not testify; neither did he produce any evidence which conflicts with the testimony of the prosecuting attorney. Hence it clearly appears, after excluding the prescription, and also the testimony of witness Barnes in relation to them, that the remaining evidence proves a sale. It therefore became incumbent on defendant to justify the sale by the production of a prescription in proper form. This he made no attempt to do. Consequently, in view of the uncontradicted testimony of the prosecuting attorney, we clearly see that defendant could not have been prejudiced by the use of the orders and prescriptions as evidence against him, even if we had held that they could not be lawfully so used; there would have been enough other evidence, not contradicted, still remaining, to support the verdict. The jury could not have lawfully disregarded this evidence; to have done so would have been a finding against evidence, and, in such event, it would have been the court's duty to set the verdict aside.

It is not necessary for us to decide whether or not the court erred in allowing the prosecuting attorney to testify in relation to the large number of orders and prescrip-

tions found on the files of the druggist, that were issued by Dr. Stump, and the per centum that such prescriptions bore to the whole number on file. It clearly appears to us that defendant was not prejudiced by such evidence, because, after excluding it, we see that the remaining evidence, which is in no wise contradicted, clearly proves a sale; and for the same reason defendant could not have been prejudiced by the state's instruction embodied in bill of exceptions No. 4. Only prejudicial error calls for a reversal. *Davis v. Living*, 50 W. Va. 431, 40 S. E. 365; *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29; *State v. Hull*, 45 W. Va. 767, 32 S. E. 240. Whether defendant intended to violate the law by making the sale, or not, is immaterial; the law looks upon the intention in such cases as immaterial. *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315; *State v. Nichols*, 67 W. Va. 659, — L.R.A. (N.S.) —, 69 S. E. 304.

This brings us to a consideration of the court's judgment rendered on the verdict. The severe judgment was rendered, pursuant to § 5 of chapter 32, Code, on the theory that defendant had been convicted of a second offense. The indictment, however, does not allege that defendant had been previously convicted of a like offense. But the court's order contains the following recital, viz.: "And it being made to appear to the court that there was a former conviction of the defendant at a former day of this court," etc. But how it was made to appear is not shown by the record. The judge certifies that the transcript contains "all the evidence adduced upon the trial," and it contains no proof of a former conviction; neither can we see how a former conviction could have been properly proven, as there is no such allegation in the indictment. There is no pleading on which to base such proof, if it had been offered. The matter of a former conviction is an essential part of the indictment. It must be alleged and proven by the record, if not admitted by the defendant's plea, in order to warrant a judgment for a second conviction. The court could not take judicial notice of a former conviction, as was apparently done in this case, even though such former conviction may have been had in the same court, and on a previous day of the term at which the present trial was had. *Pickens v. Coal River Boom Co.* 66 W. Va. 10, 24 L.R.A. (N.S.) 354, 65 S. E. 865; *United States v. Bliss*, 172 U. S. 326, 43 L. ed. 463, 19 Sup. Ct. Rep. 216. Defendant was entitled to be informed by the indictment of the matter with which he was charged. It did not charge him with a previous conviction, but only with a single unlawful sale.

The following authorities and decisions hold that the indictment must allege the

first conviction, before the added penalty can be imposed; some of them go so far as to hold that the second offense must be shown to have been committed after the first conviction, on the theory that, if the first penalty does not work a reformation of conduct in the guilty party, and he thereafter commits a second offense, he should be then dealt with more severely. But it is unnecessary for us to decide whether it is necessary that the former conviction should have been had before the commission of the second offense, as this point does not arise in this case. We therefore simply hold that it was error for the court to take judicial notice of a former conviction, and that, in order to admit proof of a former conviction, it must be alleged in the indictment. *Rand v. Com.* 9 Gratt. 738; *People v. Butler*, 3 Cow. 347; *Maguire v. State*, 47 Md. 485; 1 Bishop, *Crim. Law*, § 961; *R. v. Allen, Russ & R.* 513; *R. v. Page*, 9 Car. & P. 756; *Wilde v. Com.* 2 Met. 408; *Plumbly v. Com.* 2 Met. 413; *Com. v. Welsh*, 2 Va. Cas. 57; *Long v. State*, 36 Tex. 6; *Garvey v. Com.* 8 Gray, 382; *Walters v. State*, 5 Iowa, 507; *Smith v. Com.* 14 Serg. & R. 69; *Kane v. Com.* 109 Pa. 541.

The judge should have rendered his judgment upon the verdict as for a single offense. Section 5 of chapter 32, Code 1906, fixes the penalty in such case at a fine of not less than \$50 nor more than \$200. Because of the discretion with which the law vests the trial court in regard to the amount of the fine, we will not enter judgment upon the verdict, but will reverse the judgment, and remand the case for the entering up of a proper judgment on the verdict, by the court below.

OKLAHOMA CRIMINAL COURT OF APPEALS.

FRED STEWART et al., Plffs. in Err.,

v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 109 Pac. 243.)

Crimes — what constitute.

1. It is the exclusive province of the legislature to declare what shall constitute a crime, but it is the duty of the courts to

Headnotes by RICHARDSON, J.

Note. — Disorderly language as disturbance of public peace.

This note is confined to cases defining what manner of whooping, yelling, and uttering of language constitutes a disturbance or breach of the public peace. Acts which constitute any other distinct offense, such as disturbing public assemblages, rioting,

determine whether a particular act done or omitted is within the intendment of a general statute.

Same—description.

2. The legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result.

Criminal law—breach of peace—statute—certainty—validity.

3. Section 2782, Snyder's Comp. Laws (Okla.), which provides that "every person who wilfully and wrongfully commits any act . . . which grossly disturbs the public peace or health, . . . although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor," is not void for uncertainty; and

whooping and yelling and uttering loud and vociferous language are acts prohibited thereby, if they grossly disturb the public peace.

Same—statutory crime—common-law definition.

4. There are no common-law crimes in this state; but where the legislature creates, without defining, an offense which was a crime under the common law, the common-law definition of the crime will be adopted.

Same—new trial—bias of juror.

5. Where a motion for a new trial in a criminal case alleged that one of the trial jurors was prejudiced against the defendant, and prior to the trial had stated that the defendant was guilty and should be convicted, which fact was unknown to the defendant or his counsel until after the trial, and which allegation is supported by

disorderly conduct, nuisances, blaspheming and profanity, and railing and brawling, etc., are excluded. Cases involving breach of the peace of a family or of an individual, as well as instances of language tending to cause a breach of the peace, are also excluded, except where such a disturbance of itself also involves the question of a breach of the public peace.

In *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 540, in holding that the use of grossly indecent, profane, and abusive language towards another person upon a public street, and in the presence of others, was a breach of the peace, the court said: "Now, what is understood by 'a breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense."

A conviction of violating a statute providing for the punishment of any person who wilfully and wrongfully commits any act which seriously disturbs or endangers the public peace is justified where it appears that defendants, representatives of the Socialist Labor party, were, in defiance of the police, and without having obtained a permit, loudly haranguing on a public street an immense crowd which had been attracted by their exhortations, and which was, because of the actions and attitude of the speakers, becoming disorderly. *People v. Wallace*, 85 App. Div. 170, 17 N. Y. Crim. Rep. 432, 83 N. Y. Supp. 130.

And one who addresses any offensive, derisive, or annoying words to another in

any street or other public highway is punishable, under a statute providing that no person shall address any offensive, derisive, or annoying words to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, the purpose of the statute being to preserve the public peace. *State v. McConnell*, 70 N. H. 294, 47 Atl. 287.

And loudly cursing and swearing in the presence and hearing of passengers within a railroad depot, in such manner as to create a disturbance, is an offense against the public peace, within the meaning of a statute making swearing in or near any public place in a manner calculated to disturb the inhabitants of such public place, an offense against the public peace. *James v. San Antonio & A. P. R. Co.*—Tex. Civ. App.—, 116 S. W. 642.

And one who, while in a public street, speaks to another in such a loud and angry manner as to be heard around the neighborhood, using profane, obscene, and vulgar epithets, is guilty of a breach of the peace, within the meaning of a statute making quarreling by cursing, swearing, and the calling of opprobrious names which disturb the public peace, a "disturbance of the public peace." *State v. Archibald*, 59 Vt. 548, 59 Am. Rep. 755, 9 Atl. 362.

In *Cohen v. Huskisson*, 2 Mees. & W. 477, *Murph. & H.* 160, 6 L. J. Mag. Cas. N. S. 133, it was held that the uttering of loud and abusive words toward a person on a public street, and the continued repetition thereof after a crowd had been attracted thereby, constituted a breach of the peace.

And a breach of the peace is committed by a person calling at a house in the nighttime, and in a boisterous, loud, and vociferous manner threatening to kill the entire family. *Garrett v. State*, 49 Tex. Crim. Rep. 235, 91 S. W. 577.

Being publicly drunk, cursing, abusing, and assaulting a woman, and threatening to kill her and her husband, and calling her a liar, and throwing rocks through the windows and doors of her house while she and her children are therein, constitute a common-law breach of the peace, although the

the affidavit of the person to whom the juror is alleged to have made the statement, such allegation thus supported by affidavit tenders an issue which the prosecution should meet and the court try out; and if no counter showing is made by the state, the allegation will ordinarily be taken as true.

Same — admission of guilt — effect.

6. Where the accused testifies in his own behalf and admits his guilt under oath, a new trial should not be granted on account of the prejudice of a trial juror.

(June 8, 1910.)

ERROR to the Cleveland County Court to review a judgment convicting defendants of disturbing the public peace. Affirmed.

The facts are stated in the opinion.

acts complained of constitute violations of several express statutes, where such acts are done at the same time, since in such case they constitute but one offense. *King v. Com.* 32 Ky. L. Rep. 79, 105 S. W. 419.

A striker who remains about an establishment in which a strike is in progress, and interferes with the employees by hooting at them and calling them "scabs," is guilty of a breach of the peace. *Com. v. Silvers*, 1 Pa. Dist. R. 281. And *Com. v. Redshaw*, 12 Pa. Co. Ct. 91, is to the same effect.

So, a breach of the peace is shown by proof that defendant approached another in front of the latter's place of business, and began to curse and abuse him, at the same time making demonstrations as if to strike him. *Laur v. State*, 94 Ark. 178, 126 S. W. 840.

And the use of loud, profane, and indecent language constitutes an offense, under a municipal ordinance providing that "if any person shall disturb the quiet of the city, he shall be punished." *Topeka v. Heitman*, 47 Kan. 739, 27 Pac. 1096.

So, one who in his own dwelling house is in the habit of using loud and violent language consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, is a disturber of the public peace. *Com. v. Foley*, 99 Mass. 497.

And a conviction of being a disturber and breaker of the peace is sustained by proof that the defendant had an altercation on the street with a constable, in which he talked in a loud and angry tone, using abusive epithets and profane language which could be heard at a distance of 50 or more rods, and that a large crowd was collected. *Com. v. Harris*, 101 Mass. 29.

So, in *People v. Johnson*, 86 Mich. 175, 13 L.R.A. 163, 24 Am. St. Rep. 116, 48 N. W. 970, it was held that being intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquillity was a breach of the peace.

And the use of profane language near a

Messrs. Williams & Williams and S. A. Horton for plaintiffs in error.

Messrs. Charles West, Attorney General, Charles L. Moore, and George G. Graham for the State.

Richardson, J., delivered the opinion of the court:

The information in this case charged that the plaintiffs in error did "unlawfully, wilfully, and wrongfully commit divers acts of yelling, hollering, and uttering loud and vociferous language, thereby grossly disturbing the public peace of said community."

The information was drawn under running § 2650, Wilson's Rev. & Anno. Stat. 1903 (§ 2782, Snyder's Comp. Laws), which reads as follows: "Every person who wilfully and wrongfully commits any act which . . .

private residence, and in the presence of the occupant, and his wife and family, warrants a verdict of "disturbing the peace." *Watson v. State*, — Tex. Crim. Rep. —, 50 S. W. 340.

And the uttering of blasphemous language in a public place is a breach of the peace. *Neola v. Reichart*, 131 Iowa, 492, 109 N. W. 5.

So, wantonly, wickedly, and maliciously uttering blasphemous language, in a loud voice and in the hearing of many people, was held in *People v. Ruggles*, 8 Johns, 290, 5 Am. Dec. 335, to constitute an offense against the public peace at common law.

And evidence that defendant called a witness a "God damned liar" was held sufficient to justify a conviction of breach of the peace for using language calculated to bring on a difficulty, in *Johnson v. State*, — Tex. Crim. Rep. —, 66 S. W. 1097.

And one who applies vile epithets to another in a public street in the presence of bystanders, with the intention of annoying and disturbing such person, commits a breach of the peace. *State v. Appleton*, 70 Kan. 217, 78 Pac. 445.

And shouting out the name of a newspaper incessantly for the space of six minutes constitutes a violent outcry in the street, to the annoyance of the inhabitants, although but one inhabitant is in fact annoyed. *Innes v. Newman* [1894] 2 Q. B. 292, 63 L. J. Mag. Cas. N. S. 198, 10 Reports, 348, 70 L. T. N. S. 689, 42 Week. Rep. 573, 58 J. P. 543.

So, loud, profane, and obscene outcries in a public highway at 11 o'clock at night constitute the utterer a disturber and breaker of the public peace, although they disturb but a single person. *Com. v. Oaks*, 113 Mass. 8.

And an ordinance relative to breaches of the peace, which prohibits the making of "any noise, riot, disturbance, or improper diversion," is violated by the making of any unreasonable "noise" of a nature to disturb the community, such as shouting upon the streets at night, even though it should so happen that no one is in fact aroused from

grossly disturbs the public peace or health, . . . although no punishment is expressly prescribed therefor by this chapter, is guilty of a misdemeanor." We are met at the threshold of our consideration of this case by the contention that this statute is void for uncertainty; that the legislature,

and not the courts, must declare what acts are criminal; and that it cannot be left to the court or the jury trying the cause to determine what acts do or do not constitute an offense. In support of this contention it is urged that there are no common-law crimes in this state, for the reason that

sleep, alarmed, or disturbed. *State v. Canieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418.

But shouting, blowing of horns, ringing of bells, etc., does not violate a municipal ordinance providing that every person who shall wilfully disturb the peace by loud or unusual noise, by blowing horns, trumpets, or other instruments, or by any other means, shall be guilty of a misdemeanor, unless the peace and quiet of at least some of the citizens are disturbed thereby. *St. Charles v. Meyer*, 58 Mo. 86.

And in *State v. Johnson*, 149 Mo. App. 119, 130 S. W. 110, it was held that cursing and swearing in a loud, boisterous, and offensive manner does not constitute disturbing the peace, where it is not shown that anyone was disturbed thereby.

And in *State v. Schlottman*, 52 Mo. 164, it was said that the direction against a single individual of loud and abusive language did not constitute disturbing the peace, where the statutes provide only against disturbing the peace of families or neighborhoods.

And the fact that one when unlawfully threatened by an officer with arrest, earnestly, and with great excitement, protested against the arrest, and vehemently insisted that she should not be taken to the police station, does not render her guilty of a breach of the peace. *Heath v. Hagan*, 135 Iowa, 495, 113 N. W. 342.

And in *Williams v. State*, 21 Tex. App. 256, 17 S. W. 624, a conviction for disturbing the peace by cursing in a public place was held insufficiently supported by proof that defendant, after being arrested, uttered several oaths while being conducted along a street, where it appeared that there were no private residences within hearing of such oaths. The report of the case does not state whether the oaths were heard by any other than the prosecuting witness, who was a peace officer, and accused had not cursed or otherwise disturbed the public peace until interfered with by such officer.

And one is not guilty of disturbing the peace because, while traveling along a public road, he hollowed loud enough for several people to hear him, where it does not appear that anyone was disturbed thereby, and it was not unusual in that community for persons so to holla. *Hale v. State*, — Tex. Crim. Rep. —, 106 S. W. 354.

And in *Lockett v. State*, 50 Tex. Crim. Rep. 590, 99 S. W. 1010, it was held that proof that accused hooped and yelled did not support an indictment charging disturbance of the peace by going into a public road, and there using "loud and vociferous language."

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certain streets in a town, by then and there using vulgar and profane language in the presence and hearing of complainant and of women and children on such streets, does not constitute a public offense, under a statute prohibiting the disturbing of the peace by the use of "vulgar and profane language in the presence or in the hearing of women and children in a loud and boisterous manner," in that it does not charge that it was done in a loud and boisterous manner. *Ex parte Boynton*, 1 Cal. App. 294, 82 Pac. 90.

Nor can a conviction under a statute making it unlawful for any person to disturb the peace of others by violent, offensive, or boisterous conduct or carriage, or by profane, obscene, or offensive language, be sustained upon the testimony of one witness, that her family lived in the same house with defendant's family, in an adjoining room, and that she heard the defendant in his own room quarreling with his wife, that he was not talking very loud, and she heard no cursing or swearing, but that the father of the witness was sick and the talk disturbed him. *Ellis v. Pratt City*, 113 Ala. 541, 21 So. 206.

The application of a profane epithet by one person to another at the latter's residence does not violate an ordinance providing for the conviction of all persons who shall disturb or breach the peace on the streets or highways or elsewhere within the city, the word elsewhere signifying places *ejusdem generis* with streets and highways, such as parks and other places frequented by the public. *State, Anderson, Prosecutor, v. Camden*, 52 N. J. L. 239, 19 Atl. 539.

In *Ware v. Loveridge*, 75 Mich. 488, 42 N. W. 997, the use of foul, abusive, and insulting language in a dwelling house in the presence of the occupants, unaccompanied by threats and causing no expectation of fear of personal violence, was held not a breach of the peace within the common-law definition of that term, upon the ground that a breach of the peace at common law required personal violence, either actually inflicted or immediately threatened in all cases not involving open disturbance in public places. There was a strong dissent, however, on the ground that the public peace includes and secures the tranquillity of the home as well as the peace of the people in public places.

But under a statute providing that every person who shall disturb or breach the peace by tumultuous and offensive carriage, threatening, etc., it is not necessary to a violation thereof that the act should be such as would constitute an assault or battery at common law. *State v. Farrell*, 29 Conn. 72.

G. J. C.

our statutes (Snyder's Comp. Laws, § 2019) provide that "no act or omission shall be deemed criminal or punishable except as prescribed or authorized by . . . [the statutes of this state]," and that, therefore, the common law cannot be resorted to for the purpose of supplying the omissions or correcting the uncertainties of the act in question. Also, there is cited the case of *Jennings v. State*, 16 Ind. 335, where it is held that a statute declaring it an offense for any person to be guilty of public indecency creates no crime, for the reason that the term "public indecency" is not defined by the act, and has no fixed legal definition. We are also referred to the case of *Hackney v. State*, 8 Ind. 494, where it is held that there are no common-law crimes in Indiana; that the courts cannot look to the common law for the definition of a crime created, but not defined, by the legislature; and that an act prohibiting the maintenance of a common nuisance, and prescribing a punishment therefor, creates no crime, in that it fails to provide what shall constitute a public nuisance. We find, however, that those cases have been overruled by the supreme court of Indiana.

That it is the exclusive province of the legislature to declare what shall constitute a crime, and that neither the court nor the jury have any such power, is undoubtedly true. But the statement of that fact alone furnishes no answer to the question raised. Ordinarily, the legislature speaks only in general terms, and for that reason it often becomes the duty of the court to construe and interpret a statute in a particular case, for the purpose of arriving at the legislative intent, and of determining whether a particular act done or omitted falls within the intended inhibition or commandment of such statute. And the law-making power in this state has laid down for the courts, in § 2027, Snyder's Comp. Laws (Okla.), a rule for the construction of criminal statutes, as follows: "The rule of common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Section 2020, Snyder's Comp. Laws (Okla.), defines a crime or public offense in substance to be an act or omission forbidden by law to which a punishment is annexed upon conviction. Now, in creating an offense, the legislature, we apprehend, may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result. As one instance of the former, it is 32 L.R.A. (N.S.)

made an offense by our statutes for any person to carry concealed, on or about his person, saddle, or saddle bags, any pistol, revolver, bowie knife, etc. That is a certain described act. The result of the act is immaterial, and the offense can be committed only by doing the certain act, namely, carrying one of the prohibited weapons concealed about the person, or about one's saddle or saddle bags. On the other hand, let us examine the law defining murder. Under our statutes (§ 2268, Snyder's Comp. Laws [Okla.]), murder is the killing of one human being by another in the following cases: "(1) When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed or of any other human being. (2) When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. (3) When perpetrated without any design to effect death, by a person engaged in the commission of any felony." Here no particular act is defined or described. Any act, whatever it may be, done under the circumstances stated, and which produces a certain result, namely, the death of a human being, is denounced as murder. Under the first subdivision, it may be committed by shooting, stabbing, striking, hanging, burning, drowning, poisoning, or by any other act which is capable of producing the death of a human being. It may even be committed by a parent by wilfully starving his child, or by abandoning it so that it die. And the same is true of the second subdivision of the definition of the crime,—any act done which is imminently dangerous to others, and evinces a depraved mind, regardless of human life, and which results in death, is murder, even though there be no actual intent to injure anyone. Snyder's Comp. Laws, § 2272. And the same may be said of the general definitions of manslaughter in both the first and second degree. The legislature does not undertake to describe the act or acts by which any of the degrees of unlawful homicide may be committed. It makes unlawful any act committed under the circumstances stated, and which produces the death of a human being. This is true, also, of many other of our statutes creating crimes and offenses. The statutes of many of the states defining murder and manslaughter, as well as many other crimes, are almost identical with ours; and yet we have never heard the validity of any of these statutes questioned. And, if they are valid, we can see no reason why the statute under which this prosecution was instituted and carried on is not

good. If the statute in question is void for uncertainty, because the legislature failed to enumerate or describe the particular acts constituting it, then what can be said of the statutory definition of murder, and especially the second subdivision thereof, which says that homicide is murder "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual?" The statute under consideration says that "every person who wilfully and wrongfully commits any act which grossly . . . disturbs the public peace . . . is guilty of a misdemeanor." Is one any more uncertain than the other? In the former, the act must be imminently dangerous to others, and must evince a depraved mind, regardless of human life, and must result in the death of a human being. In the latter, the act must be wilful and wrongful, and it must produce a certain result, namely, the gross disturbance of the public peace.

Now the expressions "public peace," "breach of the public peace," and "disturbance of the public peace," are legal terms, often defined and well understood. They had a fixed and definite meaning under the common law. *Neuendorff v. Duryea*, 6 Daly, 276; *State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688. In *Galvin v. State*, 6 Coldw. 294, it was said that "a breach of the peace 'is a violation of the public order; the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace.'" In *People v. Bartz*, 53 Mich. 493, 19 N. W. 161, it is said: "The term 'breach of the peace' is generic, and includes riotous and unlawful assemblies, riots, affrays, forcible entry and detainer, the wanton discharge of firearms so near the chamber of a sick person as to cause injury, the sending of challenges and provoking to fight, going armed in public without lawful occasion, in such manner as to alarm the public, and many other acts of a similar character." And it was there held that the discharge of a firearm in a public place was a breach of the peace. In *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 540, it is said: "Now what is understood by 'a breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or a violation of pub-

lic order or public decorum. Actual violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense. The good sense and morality of the law forbids such a construction." This definition is discussed and approved in *State v. White*, 18 R. I. 473, 28 Atl. 968, 9 Am. Crim. Rep. 73. In *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1061, the former definition given by the supreme court of Michigan was reviewed and approved, and it was there stated that "a breach of the peace 'is a violation of public order; the offense of disturbing the public peace. . . . An act of public indecorum is also a breach of the peace,'"—citing *Bouvier's Law Dict.* It is true that there are no common-law crimes in this state, but nevertheless, when the legislature creates, without defining, an offense which was a crime under the common law, the common-law definition of the crime will be adopted. This is reasonable, and is sustained by plenty of authority. For instance, there are no common-law crimes against the United States, and the United States courts can take cognizance only of offenses made punishable by some express provision of the Constitution, laws, or treaties of the United States. *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542. But it is uniformly held in the United States courts that, when Congress creates a common-law offense without defining it, the courts will look to the common law for the definition of the crime. *Re Greene* (C. C.) 52 Fed. 104; *United States v. Cardish* (D. C.) 143 Fed. 640. In *Pettibone v. United States*, *supra*, Chief Justice Fuller said: "The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated." No statute of the United States defines murder. Section 5339 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3627, merely provides that "every person who commits murder" in any place under the exclusive jurisdiction of the United States "shall suffer death;" and by act Jan. 15, 1897, chap. 29, 29 Stat. at L. 487, U. S. Comp. Stat. 1901, p. 3620, it is provided that the jury may qualify their verdict so as to provide for life imprisonment, instead of the

assessment of the death penalty. And the United States courts have uniformly said that, inasmuch as the statutes do not define the crime of murder, resort must be had to the common law for its definition. *United States v. King* (C. C.) 34 Fed. 302; *United States v. Lewis* (C. C.) 111 Fed. 630; *United States v. Outerbridge*, 5 Sawy. 620, Fed. Cas. No. 15,978.

In *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746, it is said that while there are in Nebraska no common-law crimes, yet the definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. To the same effect are the cases of *Benson v. State*, 5 Minn. 19, Gil. 6, and *Prindle v. State*, 31 Tex. Crim. Rep. 551, 37 Am. St. Rep. 833, 21 S. W. 360. In *Wall v. State*, 23 Ind. 150, the cases of *Hackney v. State*, 8 Ind. 494, and *Jennings v. State*, 16 Ind. 335, plaintiffs in error's sole reliance, were expressly overruled. And in the case of *Burk v. State*, 27 Ind. 430, which reviewed a prosecution under a statute providing that "every person who shall erect, or continue and maintain, any public nuisance, to the injury of any part of the citizens of this state, shall be fined," etc., the court said: "It is argued that as offenses in this state are created exclusively by statute, and, as we have an act requiring them to be defined by statute (1 Gavin & H. Stat. [Ind.] 416), the section above quoted is void, because it does not give the definition of a public nuisance. In *Wall v. State*, 23 Ind. 150, we had occasion to consider whether the legislature, at one session, had any power to trammel a future session, as was supposed to be done by the enactment last referred to. It was held in the negative. But in any event, it would not avail the defendant in this case. There is no difficulty in understanding the section of the statute upon which this prosecution was founded. The phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted. To annex a definition of each word employed in the section was certainly never within the purpose of the legislature. Such absurdity is not to be imputed to the lawmaking power. Was it then intended that in creating a crime, words having a comprehensive and exact legal meaning, embracing much in brief, must not be employed; that the virtue of such legislation should depend upon the vastness of its circumlocution? It is hardly conceivable that anything more was intended than that there should be no criminal prosecution in this state for any act, unless the legislature had first declared it a crime, in intelligible terms, and fixed the punishment therefor. In that sense the 32 L.R.A. (N.S.)

enactment against public nuisances is consistent with it. It defines—i. e., marks out with distinctness—a public nuisance as a crime." In *State v. Oskins*, 28 Ind. 364, the same court held a statute good which provided that "any person who shall molest or disturb any meeting of inhabitants of this state, met together for any lawful purpose, shall be fined," etc., saying that "the words 'molest or disturb' have a well-defined meaning." See also *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21, 2 Am. Crim. Rep. 165, and *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117, in which latter case the court said, in substance, that while there are no common-law offenses in Indiana, and criminal prosecutions can be maintained only for offenses prescribed by statute, yet, where the statute does not specifically define the offense created, the common-law definition will be adopted. Here the court also refers to the overruled case of *Hackney v. State*, and says: "All we need say of that case is that the doctrine which it declared has been completely exploded."

New York has a statute almost identical with the one under consideration; the only difference being that where our statute uses the expression, "which grossly disturbs the public peace or health," the New York statute reads, "which seriously disturbs or endangers the public peace or health." And in *People v. Most*, 36 Misc. 139, 73 N. Y. Supp. 220, the statute was held good, the court saying: "The plain and obvious intent of this was to leave in the Code a little of the flexibility of the common law, to meet cases which they had failed to specify in the preceding sections. That the words of this section are general is just what might be expected from the nature of the case. The purpose of the section is to try offenders for something not 'expressly prescribed by this Code.' If the offense was one expressly prescribed by the Code, then clearly the offender must be tried under the section prescribing it. It is only offenses not prescribed in the Code that can be tried under this section." And in *People v. Wallace*, 85 App. Div. 170, 83 N. Y. Supp. 130, a conviction under the same statute was sustained. It is our conclusion that the statute is valid and enforceable; that any act which is wilful and wrongful, and which results in grossly disturbing the peace, is within its terms; that the acts charged in the information were well calculated to grossly disturb the peace, and, if they actually did so, as the jury found, they constituted a violation of the statute in question, and were punishable.

The only other question presented and properly raised is that plaintiffs in error did not have a fair and impartial trial, in

that one of the trial jurors was prejudiced against them, and had previously declared his belief of their guilt. This was alleged in the motion for a new trial, and was supported by the affidavit of one person who swore that, prior to the trial, he talked with said juror, and that the latter stated that in his opinion plaintiffs in error were guilty and should be convicted. The state offered nothing in rebuttal of this affidavit, but stood on the statements of the juror made under oath on his *voir dire*, to the effect that he knew nothing about the case and had formed or expressed no opinion in regard to the guilt or innocence of plaintiffs in error. We doubt whether the state may do this. Such an affidavit would seem to require a counter showing on the part of the state, especially if the oral testimony or the affidavit of the juror is obtainable. In other words, such an allegation supported by affidavits tenders an issue which the state should meet, and the court should try out; and ordinarily, where no counter showing is made, the statements in the affidavit must be taken as true.

But in this case this matter furnishes no ground for a reversal, for the reason that all of the plaintiffs in error took the stand and admitted their guilt, except Ira Butler, and practically all of the others testified that he was a participant in the offense. The testimony shows that they congregated at a public schoolhouse at night, without the permission and against the will of the board of trustees, that they continually rang the large school bell, and whooped and yelled at intervals for an hour or two; that they were heard for more than a mile; that they disturbed at least two families, in one of which there was an old lady feeble and sick. Here is a sample of plaintiffs in error's own testimony:

Q. Did you holler?

A. Why, we hollered a little.

Q. Did you holler very loud?

A. Sometimes we hollered I guess loud.

Q. Was the hollering you did out there calculated to disturb anybody's peace?

A. It might have.

As was said by Justice Harlan in *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1160, 20 Sup. Ct. Rep. 993, where the court held the defendant's constitutional right to have been violated by the introduction of certain evidence against him, "it would be trifling with the administration of the criminal law, to award him a new trial, because of a particular error committed by the trial court, when, in effect, he has stated under oath that he was guilty of the charge preferred against him."

Error in certain of the instructions given 32 L.R.A. (N.S.)

is urged, but the record discloses no exceptions saved to the instructions complained of.

The judgment of the County Court will therefore be affirmed.

Furman, P. J., and Doyle, J., concur.

Petition for rehearing denied.

GEORGIA SUPREME COURT.

COURTLAND S. WINN, Admr., etc., of Sarah E. Brightwell, Deceased, Plff. in Err.,

TABERNACLE INFIRMARY AND HOME FOR HELPLESS WOMEN.

(135 Ga. 380, 69 S. E. 557.)

Will — condition for support — nature.

1. Although the words "condition precedent" may be used in a will in connection with a bequest of income, yet where the duty imposed was a continuing one of furnishing the testator's child with a home in a benevolent institution, and caring for her "as comfortably as the facts and circumstances of the case will warrant;" where the corpus was given to the institution in remainder after the death of the child, provided a Christian burial should be given to her; and where, from the entire will, it is apparent that the estate was not intended to be left to the legatee upon a condition precedent, properly so called, the title will be construed to have vested, and the condition for support made in connection with the bequest of the income will be held to be in the nature of a condition subsequent, or of a charge upon the income, as the intent of the testator may appear to be.

Same — insanity of beneficiary.

2. In such a case, where the child was furnished a home in the institution, and supported there for about three years, and until she became violently insane, and had to be committed to an insane asylum upon regular proceedings therefor, this did not authorize the executor to recover the estate from the legatee.

Same — point undecided.

3. Whether the child was subject to be supported by the state at its public institution, or whether the income was subject in whole or in part to be applied for that purpose on proceedings by the public authorities or on behalf of the lunatic, is not now for decision; the only point urged being that

Headnotes by LUMPKIN, J.

Note. — As to effect of fact that breach of condition in devise or legacy, relating to conduct of devisee or legatee, is involuntary on latter's part, see note to *Lynch v. Melton*, 27 L.R.A. (N.S.) 684.

the executor was entitled to recover the estate.

(November 18, 1910.)

ERROR to the Superior Court for Fulton County to review a judgment in defendant's favor in a suit for the construction of a will. Affirmed.

Statement by Lumpkin, J.:

The facts of this case are sufficiently stated in the judgment filed by the judge of the trial court, as follows:

"Upon agreement between counsel the case was withdrawn from the consideration of the jury, counsel stating that there was no issue of fact involved, and submitted to the court to pass upon all the questions made by the pleadings. No evidence was submitted, and no briefs have been filed; and the court is left to the statements contained in the pleadings to make its findings. On the 2d day of January, 1903, Sarah E. Brightwell, of Fulton county, died leaving a will and leaving one child, Annie E. Brightwell by name. The property left by the decedent consisted of one small house and lot in the city of Atlanta, at No. 21 Henry street, valued at \$500, and the sum of \$1,281.30 in money. The clerk of the superior court was nominated the executor of the will. He refused to qualify, and Hamilton Douglas, the then county administrator, was appointed administrator with the will annexed. After making provision for her burial and the payment of her debts, the will provides as follows:

"Item 3. I give and bequeath to the Tabernacle Infirmary and Home for Helpless Women, a corporation chartered by Fulton superior court, all the income of every character.

"Item 4. The consideration upon which this bequest is made, and a condition precedent to the same, is that this institution shall maintain and care for my child, Annie Brightwell, during her natural life, giving her a home in said institution, and caring for her as comfortably as the facts and circumstances of the case will warrant, even to the extent of all the income from my estate, if necessary. The performance of this obligation on the part of said institution shall commence at my death, or as soon thereafter as practicable.

"Item 5. Upon the death of my said child, all the property of my estate shall vest absolutely in said institution, provided there shall be given to my child decent Christian burial upon my lot in Westview Cemetery, in keeping with condition of my estate.

"Item 6. In the event said institution shall cease to exist, or shall cease to oper-

ate the works of benevolence along the lines that are now followed, then and in that event, all benefits conferred upon said institution by this will shall cease, and the property of my estate shall be vested in my executor to hold for the benefit of my child during her life."

"This petition in the nature of a bill in equity was filed by Courtland S. Winn, as administrator *de bonis non cum testamento annexo*, praying the court to construe the will of Sarah E. Brightwell, deceased; also praying for direction as to his rights and duties in the premises, and that defendant be required to deliver over to him the property at No. 21 Henry street, and that judgment and decree may be rendered against the defendants for the sum of money mentioned herein. The petitioner contends that, by reason of the fact that Annie E. Brightwell was, on or about the 23d day of December, 1907, committed to the state's lunatic asylum by virtue of an order of the ordinary of said county, the defendant has been rendered unable to take charge of the person of said Annie E. Brightwell, and to carry out the terms and conditions of the will; that the remainder interest in the property granted under the will to the defendant has been forfeited, and that said property reverts to the administrator, plaintiff in this case, and should be delivered over to him, and the title thereto vested in him, to hold for the benefit of said Annie E. Brightwell, child of the deceased.

"Soon after the death of Sarah E. Brightwell, and the probate of the will in solemn form, and the qualification of Hamilton Douglas as administrator with the will annexed, to wit, on July 4, 1904, the defendant, under and by virtue of an order from the ordinary, entered into a bond, with good security, payable to Hon. Jno. R. Wilkinson, ordinary of Fulton county, and his successors in office, in the sum of \$2,582.00, to faithfully hold the property in controversy in trust, using only the income from the same, and supplying it in accordance with the terms of the will; and to faithfully comply with each and every obligation imposed upon it by the will. Upon the giving of said bond and the granting of said order by the ordinary, the defendant took the child, Annie E. Brightwell, to its institution, and maintained and cared for her, giving her a home in its institution, and continued to do so until the 25th day of November, 1907, at which date an application was filed to have her adjudged a lunatic; and the administrator, Douglas, turned over to defendant the property in dispute in the case. The defendant has the property intact, and is ready and willing to pay the income thereof to the said Annie

E. Brightwell for her support in terms of the will, and is ready and willing, should the said Annie E. Brightwell be restored to a condition of sanity, or to a condition where it would be safe to do so, to take her back to its institution, and carry out the terms of said will.

"It appears that the defendant is a going concern, and is still carrying out the works of benevolence along lines followed at the time of the execution of the will. In view of the above and foregoing facts, I find: (a) That the defendant holds the income of the property described in trust for Annie E. Brightwell; (b) that the fact of a judgment of lunacy of Annie E. Brightwell, and her commitment to the state's lunatic asylum, does not forfeit the remainder interest in this property granted under the will; (c) that defendant is entitled to possession of the property under said order of court; and that the plaintiff is not entitled to any judgment or decree against the defendant, as prayed for."

The plaintiff excepted.

Mr. Walter W. Visanska, for plaintiff in error:

The testator's general intention must prevail over a particular intention.

Robert v. West, 15 Ga. 122.

If for any reason a condition precedent is or becomes impossible of performance, no estate vests.

6 Am. & Eng. Enc. Law, p. 506; 2 Jarman, Wills, pp. 520, 521; Mackay v. Moore, Dudley (Ga.) 94; Bamfield v. Popham, 1 P. Wms. 54.

Messrs. Etheridge & Etheridge for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The construction of this will is not free from difficulty. In a few brief sentences have been combined some of the most intricate and difficult subjects in the law. The will touches upon bequests of entire income, conditions precedent and subsequent, charges upon income, trusts, a devise in remainder of realty, and a bequest of personalty, with the only proviso stated in that connection that the testator's daughter should receive a Christian burial. And in another item (not copied in the judgment of the court below), is contained a power of sale and reinvestment by the executor.

General rules of construction avail little in such a case. It may be stated that the cardinal rule of construction of a will is to "seek diligently for the intention of the testator, and give effect to the same, as far as it may be consistent with the rules 32 L.R.A. (N.S.)

of law." Civil Code 1895, § 3324. A condition precedent requires performance before the estate vests; a condition subsequent may cause a forfeiture of a vested estate. The law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by forfeiture. Id. § 3137. If a condition is strictly precedent, so that unless it happens no estate vests, reasons why the condition did not happen will not serve to vest a title. A distinction has sometimes been made between a bequest of personalty and a devise of realty in this regard. But our Code does not seem to recognize such a distinction. Civil Code 1895, § 3080. If a condition is subsequent, and the title has vested, subject to be divested in the event of the nonperformance of the condition, and such condition becomes impossible of performance by an act of God, nonperformance is excused, and the estate which has vested in the grantee will not be divested. In *Nunnery v. Carter*, 58 N. C. 370, 78 Am. Dec. 231, it was declared that, if personal property is bequeathed upon a condition which, before the time of performance, becomes impossible to be performed, the property vests in the legatee upon the death of the testator, unless it appears that the performance of the condition was the sole motive for the making of the bequest. It was also held that, where personal property was bequeathed to a son on condition that he take care of his mother during her lifetime, this was a condition subsequent, involving a continuing duty, and the title vested in the legatee, to be divested upon his failure to take care of his mother.

But after these general rules have been stated, and considered with others which might also be recited, we return to the ultimate question, What did this testatrix intend by the will before us? By item 3 she bequeathed to the Tabernacle Infirmary and Home for Helpless Women (the name of which was afterwards changed to the Tabernacle Infirmary and Training School for Nurses) "all the income of every character." By item 4 it was declared that the consideration upon which "this bequest" was made, "and a condition precedent to same," was that the institution should maintain the child of the testatrix during her life, giving her a home in such institution, and caring for her "as comfortably as the facts and circumstances of the case will warrant, even to the extent of all the income from my estate, if necessary." While the words "condition precedent" were used, in the same sentence provision was made for the use by the institution, for the support of the child, of so much as might be

necessary, even to the extent of the entire income. The duty was not the performance of a single act, to be followed by the vesting of the estate; but it was continuing in its character during the child's life, and it was contemplated that the income bequeathed would be consumed at least in part. In spite of the use of the expression quoted, it does not appear to have been the testamentary intent that the title to the income should be left unvested and in the air under a strict condition precedent. Performance is also spoken of as "an obligation." The fifth item declared that, upon the death of the child, all of the testatrix's property should "vest absolutely" in the institution. Here the only condition mentioned is "provided" a decent Christian burial shall be given to the child. This item made no reference to the support of the child. The sixth item provided that "in the event the institution shall cease to exist, or shall cease to operate the works of benevolence along the lines that are now followed, then and in that event, all benefits conferred upon said institution by this will shall cease, and the property of my estate shall be vested in my executor, to hold for the benefit of my child during her life." The statement that, in the event named, the benefits should "cease," carries with it the implication that they had previously begun; and the provision "that then "my estate shall be vested in my executor" indicates that it had not previously been vested in him for the purpose named, but somewhere else. This was plainly a condition subsequent, and inconsistent with the idea that the whole legacy was dependent on a condition precedent.

From a consideration of the entire will, we think that the testatrix had in view two things,—the support of her child, and a gift to a benevolent institution. The legacy was not purely in the nature of a conveyance of bargain and sale upon condition precedent. Even the support of the child was to be only "as comfortably as the facts and circumstances of the case will warrant." It follows, from what we have said, that when, after the child had been taken into the institution and supported for some three years, she became so violently insane that it was necessary to have her committed by due proceedings to the state asylum for treatment, this did not operate to so render impossible a condition precedent as to destroy the estate or interest of the institution; nor did it give the executor a right to recover the entire estate as for breach of condition.

Whether or not the support of the child at the asylum is a charge upon the income of the estate, and whether the authorities 32 L.R.A. (N.S.)

of the asylum, or a guardian or next friend of the child, have any right to have it so applied, or whether she is such a pauper patient that her maintenance devolves on the state (Pol. Code 1895, §§ 1429 et seq.), are questions not determined in the court below, and therefore are not decided by us. The only question urged before us was as to whether the executor had a right to recover the estate.

Judgment affirmed.

All the Justices concur.

WASHINGTON SUPREME COURT.

NATALE LOMBARDO, Resp't.,

v.

A. LOMBARDINI, Admr., etc., of W. Lombardini et al., Deceased, Appt.

(57 Wash. 352, 106 Pac. 907.)

Alteration of note — change of printed figures — effect.

An alteration of the printed figures forming part of the date of a note written on a printed blank, so as to make them correspond with the figures written in ink in the body of the note, is not so material as to avoid the note.

(February 15, 1910.)

Note. — Alteration of date of note.

It may be laid down as a general rule of law, established by the overwhelming weight of authority, that a change in the date of a note, made after its execution and delivery, whether from an earlier to a later date or *vice versa*, is a material alteration, destroying the validity of the note in the hands of one responsible for the change, as to a party thereto who has not consented to the change. *Lemay v. Williams*, 32 Ark. 166; *Warren v. Layton*, 3 Harr. (Del.) 404; *Armstrong v. Penn*, 105 Ga. 229, 31 S. E. 153; *Benedict v. Miner*, 58 Ill. 19; *Brannum Lumber Co. v. Pickard*, 33 Ind. App. 484, 71 N. E. 676; *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577; *Aubuchon v. McKnight*, 1 Mo. 312, 13 Am. Dec. 502; *McMurtrey v. Sparks*, 71 Mo. App. 126; *Sayre v. Reynolds*, 5 N. J. L. 737; *Rogers v. Vossburgh*, 87 N. Y. 228; *Miller v. Gilleland*, 19 Pa. 119; *Hessner v. Wenrich*, 32 Pa. 425; *Hepler v. Mt. Carmel Sav. Bank*, 97 Pa. 420, 39 Am. Rep. 813; *Miller v. Stark*, 148 Pa. 104, 23 Atl. 1058; *Bowers v. Rineard*, 209 Pa. 545, 58 Atl. 912; *Mechling v. Hartzell*, 4 Pennyp. 500; *Low v. Merrill*, 1 Pinney (Wis.) 340; *Boulton v. Langmuir*, 24 Ont. App. Rep. 618; *Gladstone v. Dew*, 9 U. C. C. P. 439.

In *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725, the court said: "The alteration of the

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. F. H. Peterson, Philip D. MacBride, and Vince D. Faben for appellant.

Messrs. Karr & Gregory, for respondent:

A date on a note is never conclusive; it is the actual date of the transaction that the court or jury is interested in determining, and they will not be bound by a clerical mistake made in dating the note.

Collins v. Driscoll 69 Cal. 550, 11 Pac. 244; Story, Promissory Notes, §§ 45, 48,

48a; Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

The alteration of the date of the note by the payee or his indorsee without the knowledge or express consent of the payor, but without any fraudulent intent, and merely to correct a mistake and make the note such as both parties intended that it should be, does not invalidate the instrument.

Duker v. Franz, 7 Bush, 273, 3 Am. Rep. 314; Ames v. Colburn, 11 Gray, 390, 71 Am. Dec. 723; Bowers v. Jewell, 2 N. H. 543; Jessup v. Dennison, 2 Disney (Ohio) 150; Johnson v. Johnson, 66 Mich. 525, 33 N. W. 413; Merchants' Bank v. Stirling, 13 N. S. 439; 2 Am. & Eng. Enc. Law, p. 211, note 2; Turner v. Billagram, 2 Cal. 520; Brutt v.

date, whether it hasten or delay the time of payment, has been uniformly held to be material. . . . The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent, and by a party who had no authority to consent for him. . . . To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged."

And in Lesser v. Scholze, 93 Ala. 338, 9 So. 273, it was held that a change in the date of a note was necessarily a change in the time of payment, and any unauthorized change in the time of payment in such an instrument was a material alteration, whether thereby payment was delayed or accelerated, upon the theory "now fully recognized in this court, that any alteration, whether of detriment or benefit to the party objecting, made by other than a stranger, is material and vitiating, which destroys the legal identity of the instrument, causes it, assuming it were genuine, to operate differently than as originally written, or 'to speak a language different in legal effect from that which it originally spoke.'"

And in Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369, it was held that after an instrument was completed and delivered, no alteration could be made therein except by consent of the parties, and that the alteration of the date of a note, whether it hastened or delayed the time of payment, was a material alteration, and, if made without the consent of the party sought to be charged, extinguished his liability.

And in Stephens v. Graham, 7 Serg. & R. 505, 10 Am. Dec. 485, the court declared that the best and safest rule was the general one that where a note was altered in any material respect, as, for instance, the date or sum, without the consent of the maker, it would discharge him, although the note afterwards came into the hands of an innocent indorsee, not aware of the change. 32 L.R.A. (N.S.)

So, in Fraker v. Cullum, 21 Kan. 555, this rule that the alteration of the date of a note was a material one, and would render the same invalid as to an accommodation maker who had not consented to the change, was held to avoid also a new note executed in lieu of the altered one by such maker, in ignorance of such alteration except in the hands of an innocent holder for value.

The case last cited suggests the question whether the rule established by the cases here reviewed applies to a bona fide holder, so as to render invalid even in his hands an altered note. To this the weight of authority gives an affirmative answer.

In Newman v. King, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 683, it was held that the date borne by a promissory note was a material part thereof, and if the payee, without the knowledge or consent of the maker, altered the date after the delivery of the note to him, the instrument was thereby rendered void even in the hands of an innocent indorsee for value.

And this application of the rule that an alteration of the date of a note will nullify the same even in the hands of one who had no notice thereof, if done without the consent of the party sought to be charged, finds support in the following cases: Wood v. Steele, supra; Lisle v. Rogers, 18 B. Mon. 528; Mitchell v. Ringgold, 3 Harr. & J. 159, 5 Am. Dec. 433; Britton v. Dierker, 46 Mo. 592, 2 Am. Rep. 553; Bank of United States v. Russel, 3 Yeates, 391.

In the following cases it was declared to be the law that an alteration of the date of a note was a material alteration and would avoid the note; but it cannot be ascertained from the opinions whether the persons to whom the rule was applied had any notice of the alteration: Miles v. Major, 2 J. J. Marsh. 155; McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548; Hocker v. Jamison, 2 Watts & S. 438; Clark v. Eckstein, 22 Pa. 507, 62 Am. Dec. 307; Paine v. Edsell, 19 Pa. 178; Kennedy v. Lancaster County Bank, 18 Pa. 347.

Picard, Russ. & M. 37, 27 Revised Rep. 727; Clute v. Small, 17 Wend. 238.

Mount, J., delivered the opinion of the court:

Respondent brought this action to recover upon a promissory note. The cause was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the face of the note, with interest as provided therein. Defendant has appealed.

The complaint alleged. "That on the 24th day of October, 1902, the said W. Lombardini and J. Lombardini made a certain promissory note in writing, bearing date October 24, 1892. (4) That the date of '1892' is a mistake of the scrivener who

wrote the note, and that said note was made on an old form, and due to a mistake the date was given as '1892,' instead of '1902,' the correct date of said note. (5) That since said date plaintiff has changed the date of said note to read '1902,' which is the correct date of said note; said note being in words and figures as follows, to wit:" Then follows a copy of the note. The principal contention at the trial of the cause and the main point made here is that this alteration in the date line of the note avoided it. The original note was introduced in evidence, which shows upon its face that it was written upon a blank form. In the date line at the top of the note the words "Seattle, Wash." and the figures "189" were printed, with a dotted

In accordance with this rule it was held in *King v. Hunt*, 13 Mo. 97, that an alteration of the date of a note by one of two makers, without the consent of the other, extinguished the latter's liability to the payee consenting to such change.

And in *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725, and *Britton v. Dierker*, 46 Mo. 592, 2 Am. Rep. 553, the same conclusion was reached as to the nonliability of a maker who did not consent to an alteration in the date of a note, made by his comaker, though the payee had no notice of the change.

But in *Taylor v. Taylor*, 12 Lea, 714, it was held that where two partners executed a note for borrowed money for the business of the partnership, and one of them changed the date of the note, both were liable on the note as altered.

To the same effect is *Schmelz Bros. v. Rix*, 95 Va. 509, 28 S. E. 890, in which the court, without discussing the question, allowed a recovery upon a note made by partners, though the date had been changed, it appearing that the alteration had been made with the consent of one of the partners.

The only case that casts any doubt upon the correctness of the general rule established by the cases cited at the beginning of the note is *Union Bank v. Cook*, 2 Cranch, C. C. 218, Fed. Cas. No. 14,349, in which it appeared that the note sued upon was altered by the payee to make it fall due on the discount day of a certain bank, though whether this was the intention of the parties was not shown. The whole of the opinion is as follows: "The alteration, prolonging the time of payment, being for the benefit of the defendants, did not make the note void as to them."

In *Gooch v. Bryant*, 13 Me. 386, it was held that if a note was altered after signing and delivery, it would vitiate the note; but, if before, it would not.

But in *Britton v. Dierker*, 46 Mo. 592, 2 Am. Rep. 553, it was held to be immaterial that the alteration was made by one of the makers prior to the delivery of the note.

In *Ruby v. Talbott*, 5 N. M. 251, 3 L.R.A. 32 L.R.A. (N.S.)

724, 21 Pac. 72, and in *Pelton v. Prescott*, 13 Iowa, 567, in each of which a note the date of which had been altered was declared to be void, the amount thereof was also raised.

In *Prather v. Zulauf*, 38 Ind. 155, a change in the date of a note, made by the maker, and authorized by the surety thereon, was held not to invalidate the note as to either party.

In *Van Brunt v. Eoff*, 35 Barb. 501, it was held that the alteration of the date of a note, made by the agent of the maker, under a supposition that he had authority to do so, did not render the note void.

In *Boyd v. McConnell*, 10 Humph. 68, an alteration of the date of a note sued on before him by a justice of the peace, made innocently, and under the mistaken belief that he was only making more plain and legible the true date of the note, was held not to affect the note, and the plaintiff was permitted to show the true date, and to recover as if no such alteration had been made.

When made to correct mistake.

The general rule, as established by the decisions heretofore cited, has been relaxed in some cases to permit recovery on notes the dates of which have been altered for the purpose of correcting mistakes, or of making them conform to the agreement of the parties, but even under such circumstances, according to some of the authorities, the alteration is a material one and avoids the note if done without the knowledge or consent of the party sought to be charged thereon.

In *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369, it was held that the law did not allow the payee of a note to change its terms and conditions without the assent of the maker, even if the alteration was in the latter's favor or to correct a mistake.

And in the following cases the note in suit was declared to be void because of an alteration by the holder in the date thereof, though it was contended that

blank line between them, thus: "Seattle, Wash..... 189 ." The scrivener inserted the words "October 24th" in ink on the dotted line, and the figure "2" also in ink after the printed figures "189," making the date line read "Seattle, Wash., October 24th, 1892." On the last line of the note the word "Due" was printed, followed by a dotted line. The scrivener inserted in ink the words "October 24th, 1903," on that line. The note recites that it was payable

"one year after date." It was conceded upon the trial that counsel for the plaintiff at the time he prepared the complaint drew a pen through the printed figures "189" and above them wrote the figures "190."

It is argued by the appellant that this was a material alteration of the note and avoided it. Numerous authorities are cited to the effect that, where a negotiable instrument is materially altered without the

the change was made to correct a mistake, and to make the note bear the true date: *Lemay v. Williams*, 32 Ark. 106; *Wyman v. Yeomans*, 84 Ill. 403; *Hamilton v. Wood*, 70 Ind. 306; *Owings v. Arnot*, 33 Mo. 406; *Bowers v. Jewell*, 2 N. H. 543; *Taylor v. Taylor*, 12 Lea, 714.

And in *McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 548, it was held that an accommodation indorser of a note was released from liability by an alteration of the date thereof, made without his consent, after he had indorsed the same, though the change was made to make the note conform to the intention of the parties thereto.

So, in *Letcher v. Bates*, 6 J. J. Marsh. 524, 22 Am. Dec. 92, a change in the date of a note, made by a clerk of the payee, who drew the note, to correct his own mistake in regard thereto, so as to make the date correspond with the agreement of the parties, was held to nullify the note in the hands of the payee if made without the consent or knowledge of the maker.

On the other hand, it was held in *Duker v. Franz*, 7 Bush, 273, 3 Am. Rep. 314; *Ames v. Colburn*, 11 Gray, 390, 71 Am. Dec. 723; *Jessup v. Dennison*, 2 Disney (Ohio) 150; *Hammerschlag v. Union Nat. Bank*, 13 W. N. C. 205; *Merchants' Bank v. Stirling*, 13 N. S. 439; and *McLaren v. Miller*, 36 Can. L. J. 680, that if a wrong date were inserted in a note, and it were changed to the true date, as intended by the parties, it would not be considered a material alteration, vitiating the note.

And the principle of the cases last cited would seem to be supported by *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413, in which the date of the note sued upon was changed, and in reply to the claim that the note was thereby avoided, the court used the following language: "But it is found expressly that the note was given at its altered date, and was so intended, and that the change was honestly made. The consideration is also found, in an account stated, at the true date. It is also found that two payments were made on it by the deceased [the maker], and it is not found he was deceived as to the alteration. Under these circumstances we think the subsequent payments remove the presumptive effect of the alteration."

This principle was carried still further in *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733, in which the rule was declared to be that where the alteration in the date of a note was "prompted by honest and pure motives, with a purpose of correcting the instrument

to correspond with what the party honestly and in perfect good faith believed to be the true engagement of the parties at the time of the execution," the legal efficacy of the note was not thereby destroyed, and recovery might be had upon it when restored.

The doctrine of the decision last cited, though not referred to by name, was repudiated in *Newman v. King*, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 683, in which the court declared that the contention that a note could be altered by one party alone, without the knowledge or consent of the others, if, in its altered condition, it conformed to the intention of the parties, and the alteration was honestly made, proceeded upon the ground that as, in its changed condition, it expressed the intention of the parties, no injury had been done by the alteration; which, it was added, was no doubt true in every case of an alteration, in so far as it concerned the parties affected by it. To quote from the opinion: "If, in its altered state, it requires the obligor to do the particular thing he agreed to do, no personal wrong has been inflicted on him. In this view of the matter, the number and extent of the alterations are immaterial, for, however great and numerous they may happen to be, the instrument, in its changed condition, requires the obligor to do just what he promised, and therefore, in good conscience, ought to do. The question, however, does not rest solely upon this aspect of the matter. Regard should be had to the policy of maintaining the integrity of written instruments, particularly those whose character or nature is such that their possession and custody belong to one party only. Promissory notes are of this class. This policy, we think, denies to the custodian of a written instrument, to whose possession its nature necessarily confides it, the power to alter its terms in any material matter whatever, in order that it may conform to his notion of what the parties intended when it was executed. . . . Where, by a mistake, a written instrument does not conform to the intention of the parties, and they cannot agree respecting the mistake and its correction, an adequate remedy has been provided, according to the principles of equity jurisprudence, by courts having jurisdiction to correct such mistakes, where rules of evidence appropriate to establish the fact of mistake are prescribed and enforced." J. A. C.

assent of all parties liable thereon, it is void as against the party who has not himself made, authorized, or consented to the alteration, and § 124, chap. 149, Laws 1899, p. 362, is cited to the same effect. (Rem. & Bal. Code, § 3514.) Appellant relies upon § 125 of the same act (Id. § 3515), which defines a material alteration as follows: "Any alteration which changes (1) the date . . . or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." The argument of the appellant is no doubt sound if the alteration here made is material, so as to change the date or to alter the effect of the instrument. The note upon its face shows that the makers promised to pay one year after date, and recited that the note was "due October 24th, 1903." The words "October 24th, 1903," were written in ink plainly and in the same hand and at the same time the note was made. The figures "189" at the head of the note in the date line were printed. The scrivener followed these printed figures with the figure "2" in ink. The dates contradicted each other upon the face of the note. "Under such conditions, the written figures control the printed ones, so that the true date of the note will be construed as 1902, and not as 1892. The alteration, therefore, did not change the date of the note nor alter the effect of the instrument, and was, of course, not material. The other alleged errors are based largely upon the point just considered.

We find no merit in any of them, and the judgment must therefore be affirmed.

Rudkin, Ch. J., and Crow, Parker, and Dunbar, JJ., concur.

MINNESOTA SUPREME COURT.

O. N. BULL REMEDY COMPANY, Appt.,
v.

HENRY CLARK, Respnt.

(109 Minn. 396, 124 N. W. 20.)

Alteration of instrument — what constitutes.

1. A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed, by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect.

Same — cross-markings.

2. The cross-marking of a material provision in a written instrument, after its execution, by one of the parties thereto,

without the consent of the other, with the intention of canceling or erasing it, constitutes a material alteration of the instrument.

Same — trial — evidence — instruction.

3. Evidence considered, and held sufficient to sustain the verdict. There were no reversible errors in the rulings of the trial court as to the admission in evidence of plaintiff's letters, nor in its charge to the jury.

(January 7, 1910.)

Note. — Alteration of instrument by erasing, crossing out, or otherwise canceling or obliterating a material provision thereof without the substitution of new matter.

This note does not include cases involving erasures in deeds, since such cases will be found fully set out in their proper places in the note to Waldron v. Waller, ante, 284, discussing the general question of alterations in deeds after delivery.

The erasure of a material provision in a written instrument by a stranger is, of course, a mere spoliation, not affecting the rights of the parties thereto. Dinamore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921; White v. Harris, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41.

It may be laid down as a well-established rule of law that the erasing, crossing out, or otherwise removing a material provision from a written contract by one party thereto, without the consent of the other, is a material alteration, rendering the contract unenforceable in the hands of the party responsible for the erasure, or one claiming under him.

Thus, in Fletcher v. Minneapolis F. & M. Mut. Ins. Co. 80 Minn. 152, 83 N. W. 29, it was held that for an insured to strike from a policy of fire insurance a stipulation that he was to pay all assessments was a material alteration, rendering the policy void.

And in Mechanics' Bank v. Valley Packing Co. 4 Mo. App. 200, affirmed in 70 Mo. 643, it was held that where the payee of a bill of exchange indorsed the same for collection on his own account, an indorsement which the court held to destroy the negotiability of the draft, and to operate as a mere power of attorney to the indorsee to receive the proceeds of the draft for the use of the drawer, the erasure of such indorsement without the knowledge or consent of the drawer, by agreement of the acceptor and the one who discounted the paper, rendered the bill void in the latter's hands.

And in Webster Realty Co. v. Thomas, 107 App. Div. 612, 94 N. Y. Supp. 916, affirming 46 Misc. 139, 93 N. Y. Supp. 1077, it was held that the erasure of the letter "s" from the words "walls and buildings" by a vendee, in his counterpart of a contract for the purchase of real estate, the same being delivered to the vendor in exchange for his counterpart, was a material alteration,

A PPEAL by plaintiff from an order of the District Court for Todd County denying a motion for judgment notwithstanding a verdict for defendant Henry Clark, or for a new trial, in an action brought to enforce a guaranty of the faithful performance of a contract for personal services. Affirmed.

The action was originally brought against three defendants. There was no service of summons upon defendant Boyer. Trana settled before trial.

Further facts are stated in the opinion.

Mr. M. J. Daly, with Mr. G. F. Cashman, for appellant:

The question of whether or not the marks placed on the contract amounted to an alteration should have been decided by the court.

2 Cyc. Law & Proc. pp. 142, 146.

The terms "cancellation" and "alteration" are not synonymous.

Warner v. Warner, 37 Vt. 356.

Mr. H. J. Maxfield, for respondent:

The marks amounted to an obliteration or cancellation, and, if placed there wilfully, rendered the instrument void.

2 Cooley's Bl. Com. 2d ed. §§ 308, 309; Warner v. Warner, 37 Vt. 361; Master v. Miller, 2 Smith, Lead. Cas. 9th ed. p. 1150, note; 1 Greenl. Ev. 15th ed. § 566.

The question as to whether there has been an alteration or not is one for the jury.

2 Cyc. Law & Proc. p. 257; State ex rel. Lowry v. Bodly, 7 Blackf. 355; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

Start, Ch. J., delivered the opinion of the court:

On September 7, 1906, the plaintiff entered into a written contract with the defendant Boyer, whereby he was to act as its salesman for its goods, and account for the same. The defendants Clark and Trana guaranteed the faithful performance of the

which precluded any recovery on the part of the vendee for the amount of its deposit under the contract, and for expenses incurred in searching the title.

And that the erasure of a material provision of a written instrument is a material alteration, avoiding the same, would seem to be a proper inference from the conclusion reached in the following cases, that where an instrument of which a material part had been erased was offered in evidence, it should not be admitted until the party relying thereon had explained the erasure: Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Wheadon v. Turregano, 112 La. 931, 36 So. 808; Willett v. Shepard, 34 Mich. 106; Page v. Danaher, 43 Wis. 221.

Promissory notes.

This rule was applied in the following cases also, and erasures of the matters shown parenthetically were held to render the promissory notes sued upon void in the hands of the parties responsible for the erasures, as against other parties thereto who did not consent to the erasures: White v. Hass, 32 Ala. 430, 70 Am. Dec. 548 (place of payment); Dietz v. Harder, 72 Ind. 208 (the words "after maturity," in the clause expressing the rate of interest making the note bear interest from date); Tate v. Fletcher, 77 Ind. 102 (the words "if suit be instituted," in the clause providing for the payment of attorneys' fees, whereby a conditional promise to pay such fees was changed to an absolute one); Kooms v. Davis, 84 Ind. 387 (same erasure as in case last cited); Laub v. Paine, 48 Iowa, 550, 26 Am. Rep. 163 (the word "surety" after the name of one of the signers); Moore v. Hutchinson, 69 Mo. 429 (the word "one," in the clause providing for a rate of interest of "one" per cent a month); Church v. Howard, 17 Hun. 5, reversed on other grounds, 79 N. Y. 415 (the 32 L.R.A. (N.S.)

words "in gold or its equivalent," in the clause declaring that the amount was to be so paid); Todd v. Lederach, 4 Pa. Dist. R. 173 (place of payment); Edwards v. Sartor, 69 S. C. 540, 48 S. E. 537 (an agreement indorsed upon a note, reducing rate of interest); Rogers v. Tapp, 1 Tex. App. Civ. Cas (White & W.) 759 (the word "security" after signature of one of the signers).

So, in Campbell v. McKinnon, 18 U. C. Q. B. 612, it was held that the obliteration of a condition indorsed on a promissory note, whereby its negotiability was restrained, by pasting a piece of paper over the same, so as to render the note negotiable, avoided the note in the hands of a purchaser thereof who knew of the change.

This rule has also been applied so as to render void promissory notes altered by an erasure of a material part thereof, even in the hands of a bona fide holder, as against a party who had not consented to the erasure, where the erasure was patent on the face of the paper.

Thus, in Hert v. Oehler, 80 Ind. 83, it was held that drawing a pen through the words, "interest on this note has been paid to maturity," was a material alteration, avoiding the note in the hands of any subsequent holder.

And in Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245, the erasure of a memorandum indorsed on a note by agreement between the maker and payee, whereby its negotiability was restrained, was held to be an alteration of the note, avoiding the same, even in the hands of one who took it before maturity. Here the erasure was a very emphatic and conspicuous one, in very black ink.

And in Hecht v. Shenners, 126 Wis. 27, 105 N. W. 309, it was held that striking out by a broad red-ink line drawn through them, words relieving the holder of a promissory note from the duty to give notice of

contract of Boyer, who made default, and this action was brought in the district court of the county of Wadena to recover the amount due on the contract. The guarantors, only, answered, and to the effect that the contract was materially altered after its execution. The defendant Trans made settlement for his alleged *pro rata* liability on the contract before the trial, and it proceeded as to the defendant Clark. A verdict was returned for him, and the plaintiff appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

There were on the back of the contract, which were a part thereof, numerous printed provisions as to the duties and obligations of the salesman, Boyer, to which were added in writing at the end thereof these words: "All goods not sold in sixty days to be returned to the company." There was evidence tending to show that this last

provision was a part of the contract when it was signed and delivered by the guarantors, and that it was added to the contract at the request of the guarantor Clark. When the contract was produced by the plaintiff at the trial, and introduced in evidence, the written clause to which we have referred had upon and across the face thereof four pencil marks diagonally crossing each other, which the evidence tends to show were not on the contract when it was delivered.

The plaintiff requested the court to give this instruction: "In order to render a contract void because of alterations therein, it must appear that the writing has been intentionally altered and in a material part, by a person claiming benefit under it, with the intent to defraud the other party." The court instructed the jury that "unless these marks were placed there by the plaintiff, or with the knowledge and consent of the plaintiff or of its officers, it makes no differ-

his election that the principal became due upon default in interest, was a material alteration, avoiding the note, even in the hands of a holder in due course.

But in *Harvey v. Smith*, 55 Ill. 224, and *Seibel v. Vaughan*, 69 Ill. 257, it was held that where one executes a promissory note with a material part written only in pencil, so that such part could be easily erased without leaving any appearance of alteration on the face of the note, and it was so erased, an innocent holder, taking the note before maturity, for a valuable consideration, without notice of the alteration, would take it discharged from any defense arising from the erasure.

On the other hand, it was held in *Lanier v. Clark*, — Tex. Civ. App. —, 133 S. W. 1093, that the erasure without the consent of the maker, of a condition in a negotiable promissory note, showing the consideration for which the same was given, made in lead pencil, on the margin thereof, below the maker's signature, was a material alteration, avoiding the note, even in the hands of a holder in due course, and for value without notice of the alteration.

And in *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473, it was held that striking out the words in promissory notes, written above the signatures, namely, "Agreeing to pay all expenses incurred by suits or otherwise in attempting the collection of this note, including reasonable attorneys' fees," whereby, in the opinion of the court, the notes were changed from non-negotiable to negotiable ones, was held to be a material alteration, avoiding the notes, even in the hands of bona fide holders. Apparently the erasure was done without leaving any trace on the notes, since the court speaks of the notes having "the appearance on their face of valid negotiable paper."

In *Swaisland v. Davidson*, 3 Ont. Rep. 320, in which it appeared that two notes 32 L.R.A. (N.S.)

were executed with a memorandum on the edge of each: "The within notes not to be sold" it was held that the erasure of the word "not" in such memorandum in one of the notes, and the tearing off of the whole of the memorandum in the other note, rendered the notes void, even in the hands of a purchaser for value. It should be stated that the plaintiff was not a bona fide holder, but the conclusion of the court was stated as above before discussing the question of the plaintiff's knowledge of the change.

Where there is written upon the same sheet of paper with a promissory note a condition or memorandum qualifying the terms of the note, their separation without the knowledge or consent of the maker, in such a manner as to leave the note absolute, is a material alteration, avoiding the note in the hands of the party responsible for the detachment. *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474; *Cochran v. Nebeker*, 48 Ind. 459; *Johnson v. Heagan*, 23 Me. 329; *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674.

Such was also held to be the law in *First Nat. Bank v. Carter*, 138 Mich. 421, 101 N. W. 585, as to a note so separated, even in the hands of a holder in due course, to whom it was assigned after separation, and who had no notice thereof.

For a discussion of the question presented by the case last cited, see the note to *Bothell v. Schweitzer*, 22 L.R.A. (N.S.) 263.

In *Kennon v. M'Rea*, 7 Port. (Ala.) 175, it was held that where the words "without recourse," in the last indorsement upon a promissory note, were crossed out with a pen, such fact would not prevent the person to whom the note was so indorsed from recovering against a previous indorser of the note. It does not appear who was responsible for the erasure, though it was probably the plaintiff. J. A. C.

ence whether they are there or are not. If they were placed there with the knowledge and consent of the plaintiff or its officers, then the question arises: Were they placed there for the purpose and with the intent of canceling, erasing, and obliterating this clause in the contract? (If they were placed there by the plaintiff or its officers, or through their connivance, with their knowledge and consent, for the purpose of obliterating and canceling this phrase of the contract, then your verdict should be for the defendant.) Unless you find that to be true, your verdict should be for the plaintiff." The plaintiff's requested instruction was not otherwise given. Error is, here assigned to the refusal to give the requested instruction, and to that part of the court's charge which we have placed in parenthesis.

All of the assignments of error, except those relating to the rulings of the court on the admission of evidence, raise the question whether the evidence justified the submission of the question of the alteration of the contract to the jury, and whether it is sufficient to sustain their verdict. The contention of plaintiff's counsel is to the effect that, upon the evidence, the question whether there was an alteration of the defendants' contract was one of law for the court, and that the evidence is conclusive that there was none. The clause of the contract which was cross-marked out was a material part thereof, for it was restrictive of the defendants' liability; hence, if such cross-marking was an alteration of the contract, it was a material one. The plaintiff claims that the cross-marking of this particular clause was not an alteration of the written contract, because there was no interlineation, substitution, addition, or erasure. A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect. 3 Page, Contr. § 1518; 2 Cyc. Law & Proc. p. 142; 2 Enc. L. & P. p. 185; Fillmore County v. Greenleaf, 80 Minn. 242, 83 N. W. 157.

It is the effect of the act upon the instrument, and not the particular manner in which it is done, which is material, whether it be by interlineation, addition, substitution, change of words, detaching material memoranda therefrom, erasure, or by cancellation of some material provision thereof. The drawing of cross-lines over a written instrument, or any part thereof, is a common mode of expressing an intent to erase or cancel it. The inference to be drawn from such an act is ordinarily a question of fact for the jury. It was so in this case, and upon the whole evidence we hold 32 L.R.A. (N.S.)

that the court properly submitted the question to the jury. *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Warder, B. & G. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300. The charge of the court was as favorable to the plaintiff as it was entitled to have it. The evidence is sufficient to sustain a finding by the jury that the cross-marks were placed upon the clause of the contract in question by the plaintiff after its delivery, with the intention of canceling or erasing it, without the knowledge or consent of the defendants. Such an act constitutes an alteration of the instrument. It was not error to refuse plaintiff's requested instruction, for, in so far as it was correct, it was covered by the general charge.

Error is also urged as to the admission in evidence of certain letters from the plaintiff to the defendant Boyer, on the ground that a proper foundation had not been laid by showing their authenticity. The question whether a sufficient foundation has been laid for the admission of documentary evidence is addressed to the discretion of the trial court, which was not abused in this case, for there was evidence fairly tending to establish the authenticity of the letters.

Order affirmed.

ALABAMA SUPREME COURT.

FIRST AVENUE COAL & LUMBER COMPANY, Appt.,

v.

T. F. JOHNSON.

(— Ala. —, 54 So. 598.)

Nuisance — coal yard — injunction — abutting property owner.

An owner of property in a residence section may enjoin the operation of a coal yard and planing mill on adjoining property, which causes noise, vibration, and dust, to the injury of the health of members of his family and the depreciation of the value of his property.

(February 2, 1911.)

Note. — Coal yard as nuisance.

The question whether noise, with or without vibration, incident to a lawful industrial business, constitutes a nuisance, is covered in the note to *LeBlanc v. Orleans Ice Mfg. Co.* 17 L.R.A. (N.S.) 287.

The present note deals only with the question of whether a coal yard constitutes a nuisance. It excludes cases passing on the question of whether coaling yards and chutes of railroads amount to nuisances. These cases are covered in the notes to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A.

A PPEAL by defendant from a decree of the Chancery Court for Jefferson County in plaintiff's favor in a suit to enjoin the maintenance of a nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. Gaston & Pettus, for appellant:

Every man is entitled to the ordinary and natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbors, it is *damnum absque injuria*.

Joyce, Nuisances, § 32; Wood, Nuisances, § 820; Pom. Eq. Jur. §§ 1347-1349; 14 Enc. Pl. & Pr. p. 1122; Bowling v. Cook, 104 Ala. 130, 16 So. 131; Highland Ave. & Belt R. Co. v. Matthews, 99 Ala. 24, 14 L.R.A. 462, 10 So. 267.

Messrs. Thompson & Thompson for appellee.

579, and Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49, and the supplemental note accompanying Terrell v. Chesapeake & O. R. Co. ante, 371.

Where a coal yard containing a hopper with a capacity of six or seven hundred tons, with eight spouts for loading coal into wagons, causes coal dust and dirt to be deposited upon the premises of an adjoining owner, and to permeate his building and cause damage and physical discomfort, the owners will be restrained from operating it in such a manner as substantially and materially to interfere with the ordinary comfort of physical existence in the building and premises of the complainant. *Wente v. Commonwealth Fuel Co.* 232 Ill. 526, 83 N. E. 1049. The court said: "The business of the defendant is a necessary one, and it is not a nuisance *per se*, but if a business is offensive to such a degree as to materially interfere with ordinary physical comfort, measured, not by the standard of persons of delicate sensibilities and fastidious habits, but by the habits and feelings of ordinary people, and the damages are of a nature which cannot be adequately compensated for in an action at law, a court of equity will grant an injunction. In such a case the court will not balance public benefits or public inconvenience against the individual right."

And it is proper in such a case to exclude testimony as to the cost of constructing the hopper referred to. *Ibid.* The court said: "It is insisted that the evidence was competent to show that great injury would result to the defendant by an injunction, in proportion to the damage caused to the complainant by the operation of the hopper. If the existence of a private right and the violation of it are clear, it is no defense to show that the party has been to great expense in preparing to violate the right. The law does not undertake to estimate the difference between the loss that

Mayfield, J., delivered the opinion of the court:

The bill was filed to abate an alleged nuisance. The nuisance is alleged to consist in the maintenance of a planing mill and a coal yard and bins in the town of Woodlawn, now a part of Greater Birmingham, Alabama, in a residence portion of said town or city, and so near to the residence of complainant as to render the habitation thereof undesirable, unpleasant, and burdensome by reason of the great noise, vibrations, and dust caused by and attending the operation of these plants. The location of the plants is alleged to be just across the street from, and in front of, plaintiff's residence. It is also alleged that by the creation and emission of this coal dust, and these unusual noises and vibrations, in the operation of these plants, so located, complainant's family, his wife and daughters, are disturbed and made nervous and sick and sore, and caused to lose the

would be sustained by the party owning the thing complained of, and the damage to the injured party, nor to grant or withhold relief on such a basis."

As to the doctrine of comparative injury in suits to enjoin a nuisance, see note to *Bristol v. Palmer*, 31 L.R.A.(N.S.) 881.

It was held in *Russell v. Popham*, 3 N. Y. Leg. Obs. 272, that a preliminary injunction restraining the occupation of a lot adjoining a dwelling house should not be granted where the affidavits of the defendant, if true, showed that the yard in question was not a public nuisance, and the complainant had not established in a suit at law that it was a real and substantial injury to his property. The court said: "The alleged injury to the complainant's house by the deposit of coal upon the adjoining lot may be such a private nuisance as to entitle the complainant to the interference of this court, after he has established the fact that it is a real and substantial and continuing injury to his premises, in a suit at law. It would, however, be going much further than this court has heretofore considered itself as justified in going, to interfere by a preliminary injunction, upon the state of facts presented to the vice chancellor upon the complainant's bill, and the affidavits in opposition thereto."

And it was held in this case that a coal yard *prima facie* is not a public nuisance, though it is possible so to use it as to make it noxious to the public. *Ibid.*

And the owner of residential property in the manufacturing and business district of a city cannot recover damage caused by the dust and noise coming from coal elevators erected for unloading coal from vessels, which are a necessary means of discharging coal cargoes from vessels, and are constructed as directed by the harbor authorities, and operated without unnecessary noise. *Robins v. Dominion Coal Co.* Rap. Jud. Quebec, 16 C. S. 195.

J. T. W.

comfort and rest of their home, which they would enjoy but for the alleged nuisance. The bill further alleges that the value of complainant's home is thus being destroyed, to his great damage in the sum of \$5,000, by the maintenance of this nuisance; that these plants are the only industrial ones erected or operated in the immediate vicinity of this residence portion of the town or city, and that they were so located after complainant had built his residence at a great cost, to wit, \$4,000 or more.

It is within legislative competency to declare certain property, or a certain place or business, a nuisance; that is, to enlarge the common-law category of nuisances. But this power, like most others, has its limitations. The exercise of this police power is an attribute of sovereignty. In the exercise of this authority the legislature may regulate persons and property in all matters relating to the public health, the public morals, and the public safety; but always, of course, within the provisions of the Constitution. As a rule, whatever is contrary to public policy, or inimical to the public interests, is subject to the police power of the state. All the particular subjects to which this power may be applied have not been and cannot be certainly defined. It has been well said that this police power of the state or sovereign is the right of self-preservation and self-protection; and that it is to the state, as it is to the individual, the first and natural right. The state's power in this respect, however, is limited and confined by the constitutional provision that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law, be deprived of his life, liberty, or property. The constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulations. The legislature, therefore, cannot, by its mere *ipse dixit*, make that a nuisance which is not in fact or in truth a nuisance, or akin thereto. That which has none of the elements or characteristics of a nuisance, that has no capacity or tendency to injure the public health, the public morals, the public safety, or the public interest, cannot be made a nuisance by the legislature, under the 'guise of a police regulation declaring it such. *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781. Neither can the legislature make that not a nuisance which is 32 L.R.A. (N.S.)

per se such, by merely saying that it is not, or by attempting to legalize it, or to authorize the carrying on of the same, to the extent or to the end of exempting those persons so carrying it on from all liability for the consequences of that which is *per se* wrong and inimical to the public interests, or to the public good, the public morals, or the public health.

The legislature, in such cases, might exempt those who carry on such a business from liability to the state, but not from that to individuals whose property or health was destroyed or injured in consequence of such *per se* wrong. This might be done under the laws of England, but not under the laws of America. See *Goldsmid v. Tunbridge Wells Improv. Co.* as reported in 16 Eng. Rul. Cas. 586-628, and *Metropolitan Asylum Dist. Managers v. Hill*, 16 Eng. Rul. Cas. 556-586, including notes thereto.

The Bills of Rights, or constitutional provisions in the nature thereof, in all the American Constitutions, serve effectually to prevent such legislation in the states or the United States.

The supreme court of Illinois in the case of *Laugel v. Bushnell*, 197 Ill. 20, 58 L.R.A. 266, 63 N. E. 1086, has classified nuisances as follows: "(1) Those which in their nature are nuisances *per se*, or are so denounced by the common law or by statute; (2) those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; (3) those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so. Statutes prohibiting certain nuisances do not supersede the common law as to other acts which constitute a public nuisance under the common law. *State v. Boll*, 59 Mo. 321. Likewise, a statute defining what are nuisances and prescribing a remedy by action does not take away any common-law remedy in the abatement of nuisances that the statute does not embrace. *Stiles v. Laird*, 5 Cal. 120, 63 Am. Dec. 110, 11 Mor. Min. Rep. 21."

The Code of 1907 contains a provision on the subject of nuisances (§§ 5193-5198).

Those defining nuisances (§§ 5193 and 5196) are merely declaratory of the common law, and are as follows:

"5193. What is a Nuisance. A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man."

"5196. Public and Private. Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state. A private nuisance gives a right of action to the person injured."

A nuisance may be at the same time both of a public and of a private character.

The need of speedy and permanent relief from the dangers and discomforts of a continuing nuisance is often sought in and granted by courts of equity, by means of injunction to abate or to compel a discontinuance thereof. To establish the right to injunctive relief at the suit of an individual against a public nuisance, such individual must suffer a loss or inconvenience different in kind and degree from that suffered by the public at large. And in addition to those things necessary to his maintenance of an action in a court of law therefor, he must allege and show a constantly recurring grievance or a continuing nuisance, or a real danger of serious and irreparable injury. In other words, he must allege and prove that his remedy at law is incomplete or inadequate. 2 Story, Eq. Jur. §§ 920 et seq.; 3 Pom. Eq. Jur. § 1350; 2 Wood, Nuisances, 3d ed. chap. 25. The individual must have a legal right, and be without adequate legal remedy for its enforcement, before equity will grant relief.

In determining whether an alleged nuisance should be abated or its continuance enjoined, everything should be looked at from a reasonable point of view. The law does not regard trifles or very small inconveniences, but only those that are sensibly so,—those which diminish the comfort or enjoyment of the complainants or those sought to be relieved, or which sensibly diminish the value of property sought to be relieved, from the effects of such al-

leged nuisance. If one lives in a town, of necessity he must suffer some annoyances from the carrying on of the various trades which are properly located and carried on in his immediate vicinity, and which are necessary for the public trade and commerce, and for the public at large. If one so lives in a shop district of a city, he ought not to complain that a shop is carried on in the next door to him, if it is done in a proper manner; but if he selects as his home the residence district of such town, and builds his house there, then he would have a right to complain, if a third party should establish and carry on a shop or plant next door to him, which annoyed his family and disturbed the quietude and pleasure of his home by excessive noise, offensive odors, dust, etc. And especially would he have a right to complain, if the location and operation of such a plant had the effect to materially impair the value of his property. *Hundley v. Harrison*, 123 Ala. 292, 26 So. 294.

It is but right and proper that plants such as planing mills and coal yards and bins should not be located or carried on in the residence portion of a town or city, to the annoyance of the inhabitants thereof, though the business is a lawful and laudable one and is carried on in a proper manner. Of course, in determining whether or not a given plant, shop, or business is a nuisance by reason of its location, consideration must be given to its effect upon persons of ordinary sensibilities. It is not sufficient that it be considered a nuisance by those persons of very delicate and fastidious tastes or sensibilities; it must be of such character as to be a nuisance to those persons of average mental and physical condition, and those of normal sensibilities and tastes. *Joyce, Nuisances*, § 93.

If the facts set forth in the bill are true, —and on demurrer they must be so treated, —the complainant is entitled to the relief prayed, and the court did not err in overruling the demurrer to the bill, and his decree must therefore be affirmed.

Dowdell, Ch. J., and Simpson and McClellan, JJ., concur.

ARKANSAS SUPREME COURT.

ROBERT MAYFIELD, Appt.,

v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY.

(— Ark. —, 133 S. W. 168.)

Carrier — duty to protect passenger from arrest.

1. A railroad company is not liable in damages to one arrested by a police officer

while a passenger on its train, because the conductor pointed him out to the officer and did not attempt to interfere with the arrest, where the officer had apparent authority to make the arrest.

Master — arrest by servant — liability.

2. A railroad company is not responsible for the act of its station agent in using its telegraph line and his official position as agent, to secure the arrest of a person who was eloping with the daughter of a friend, under a false charge that he had stolen property which had been committed to the charge of the agent, since it is not within the express or implied authority of a station agent to secure arrests for such causes.

(December 12, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Ouachita County in defendant's favor in an action brought to recover damages for the alleged wrongful arrest of plaintiff while a passenger on defendant's train. Affirmed.

The facts are stated in the opinion.

Messrs. Warren & Smith and Stevens & Stevens, for appellant:

Defendant's liability in this case does not necessarily rest in this agent's acts being within the strict scope of his employment.

Chicago, B. & Q. R. Co. v. Dickson, 63 Ill. 161, 14 Am. Rep. 114; Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep. 296; Craker v. Chicago & N. W. R.

Co. 36 Wis. 657, 17 Am. Rep. 504; 1 Clark & S. Agency, § 496; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Dillingham v. Anthony, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; Hayne v. Union Street R. Co. 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219.

Defendant company is liable, even though the message was not sent in its interest or for the protection of its property.

McCord v. Western U. Teleg. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 316; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Dillingham v. Anthony, 73 Tex. 47, 2 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134; St. Louis, I. M. & S. R. Co. v. Dowgiallo, 82 Ark. 289, 101 S. W. 412; Gulf, C. & S. F. R. Co. v. Conder, 23 Tex. Civ. App. 488, 58 S. W. 58; Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369; Louisville R. Co. v. Kupper, — Ky. —, 118 S. W. 266; St. Louis Southwestern R. Co. v. Franklin, — Tex. Civ. App. —, 44 S. W. 701; St. Louis, I. M. & S. R. Co. v. Dowgiallo, 82 Ark. 292, 101 S. W. 412; 2 Hutchinson, Carr. §§ 1093, 1094; Elliott,

Note. — Duty of carrier to protect passenger from arrest.

In this note cases in which the arrest was made by servants of the carrier or at their instigation have been excluded. On that question, see note to Schmidt v. New Orleans R. Co. 7 L.R.A.(N.S.) 162.

As to liability for the acts of special police officers appointed by public authority, see Pennsylvania R. Co. v. Kelly and note appended thereto, in 30 L.R.A.(N.S.) 481.

In Brunswick & W. R. Co. v. Ponder, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, it is held that where a passenger is arrested by an officer of the law, the carrier is not bound to inquire into the legality of the arrest, and is not liable for failing to interfere to prevent an illegal arrest, or for stopping the train to allow the officers to remove their prisoner therefrom, when it had no notice of its illegality.

And in Texas Midland R. Co. v. Dean, 98 Tex. 517, 70 L.R.A. 943, 95 S. W. 1135, reversing — Tex. Civ. App. —, 82 S. W. 524, the court took the same view as to the duty of the carrier to interfere or inquire as to the legality of the arrest, but held that the company would be liable if its servant assisted in making it.

In Owens v. Wilmington & W. R. Co. 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 32 L.R.A.(N.S.)

259, the court said that it would be unreasonable to require the conductor to resist an officer of the law, to prevent the arrest of a passenger, and that whether the officer had authority or probable cause for making the arrest is immaterial. Nor would it be liable because the conductor merely pointed out the men wanted by the officers.

And in Bowden v. Atlantic Coast Line R. Co. 144 N. C. 28, 56 S. E. 558, 12 A. & E. Ann. Cas. 783, this position of the court was reiterated, and the fact that those in charge of a train surrendered to the officers the key to the closet, where plaintiff had taken refuge in anticipation of being arrested, and delayed the train a few minutes while the arrest was affected, was held not to be a sufficient participation in the arrest to make the company liable.

In Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186, the court held that it was for the jury to determine whether the facts showed such participation in the arrest by the conductor as to make the company liable, but said: "He was not, however, required to enter into a contest with, or put himself in opposition to, the officers of the law; and if he merely stood by without taking part in the arrest by known policemen, he was not necessarily bound to inquire into their authority or assert his own against it."

R. L. S.

Railroads, § 1638; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039.

Messrs. W. E. Hemingway, E. B. Kinsworthy, H. S. Powell, and James H. Stevenson, for appellees:

If an officer of the law, having apparent authority to arrest a passenger, enters upon the train to do so, the carrier is not required to resist the officer, or inquire into the legality of the arrest, or see that the officer uses only such force as is necessary. His obedience to the commands of the officer is no breach of duty to the passenger.

2 Hutchinson, Carr. 987; Brunswick & W. R. Co. v. Ponder, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430; Owens v. Wilmington & W. R. Co. 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

Frauenthal, J., delivered the opinion of the court:

This was an action instituted by Robert Mayfield, the plaintiff below, to recover damages for his alleged wrongful arrest while a passenger upon one of defendant's trains. The plaintiff was a singing teacher, and for some time prior to May 5, 1903, he had been attending a singing convention in the neighborhood where one J. W. Burton resided, and a few miles from the town of Donaldson. On that day he eloped with the young daughter of Mr. Burton, and proceeded to Donaldson, where he and the young lady took passage on defendant's train for Camden. Upon the same day, and immediately upon learning of the elopement, Mr. Burton went to Donaldson and requested the station agent of defendant at that place, who was his friend, to assist him in stopping and apprehending plaintiff and his daughter before they should be married. He directed the agent to telegraph to officers at points along the line of the railroad to arrest the plaintiff and his daughter, and to send any telegram necessary to apprehend them. The agent sent telegraphic messages to several points along the line of the railroad, and in doing so used the defendant's wires and signed his name thereto, in some instances, as agent. Among the persons to whom he thus sent messages was the station agent of defendant at Chidester. He talked to this agent over the telegraphic wire, telling him that plaintiff and the young lady were on the train that would shortly stop at Chidester and to have them arrested, and also stated that plaintiff had stolen \$300 from defendant's safe at Donaldson. 32 L.R.A. (N.S.)

He sent to the station agent the following telegram to be delivered to the officer:

To Conductor:

Please advise where young lady and young man that got on at Donaldson got off at, and turn them over to marshal or sheriff, and wire me.

J. P. Dunlay, Agent,
St. L., I. M. & S. Ry. Co.

The station agent at Chidester thereupon sent for the marshal of that town, and handed to him the above telegram, and also told him that plaintiff had stolen \$300 from defendant's safe at Donaldson. When the train arrived at Chidester, the marshal boarded same and handed the above telegram to the conductor, who directed him to hand it to the auditor. This the marshal did, and at the same time asked him if the parties were on the train. After reading the telegram, the auditor told him that "there was nothing in it," but that the parties were on the train, and he would point them out to him, which he did. Neither the conductor or auditor requested or assisted the marshal in arresting the plaintiff; but the auditor simply pointed him out to the marshal upon his demand. The marshal thereupon arrested plaintiff and took him from the train and detained him at the hotel at Chidester until the following morning, when the father of the girl arrived. From him the marshal learned that plaintiff had not stolen any money, but was only eloping with his daughter, and thereupon the marshal released plaintiff. Mr. Burton testified that the agent at Donaldson was acting solely for him and at his direction in sending the various telegraphic messages, and that it was stated that plaintiff had stolen the money in order to make the officers more active in apprehending plaintiff. Under the rules and regulations of defendant which were introduced in evidence, the station agent, in the performance of the duties of his employment, had no authority to arrest or to direct the arrest of any person, or to prosecute or instigate the prosecution of anyone. By these rules he was given charge of and made responsible for the defendant's property intrusted to his care.

The evidence introduced upon the trial of the case was practically undisputed, and it established a state of case as above set out. If, under this evidence, the plaintiff was entitled to recover, then the verdict which was returned and the judgment which was recovered against him should be reversed. On the other hand, if he was not entitled to recover under this evidence, then no instruction given or refused by the

court, of which complaint is made, could be prejudicial, even if it was erroneous; for upon the whole case the verdict and judgment would be right. It is not necessary, therefore, to set out or discuss the various exceptions which plaintiff interposed to the ruling of the court upon instructions given and refused by it. The question involved in the case for determination, then, is whether or not, under the undisputed evidence, the defendant was responsible for the arrest of plaintiff and for the violation of his rights. The liability can be based only on one of two grounds: Upon the acts of the auditor and conductor in charge of the train when the arrest was made, or upon the acts and conduct of the station agents in sending and delivering the telegram to the marshal who made the arrest.

1. A railroad company, as a common carrier of passengers, is bound to use extraordinary care not only to carry its passengers safely, but also to protect them during the carriage from assault or injury from its agents in charge of the train and from others. By its contract the railroad company assumes the obligation to protect the passenger against any negligent or wilful misconduct of its servants while performing the carriage; it also assumes the obligation to exercise diligence and care in protecting its passengers while in transit from violence or wrongful misconduct of others on the train. The conductor has control not only over the movements of the train, but over persons on it, and has authority to compel the observance of the rules of the company by all persons on the train. He has therefore the power, under ordinary circumstances, to protect them from violence or wrongful injury from others, and the law makes the company liable for an injury to a passenger resulting from a negligent failure to exercise such power. It is therefore liable for any wrongful arrest of a passenger made or procured by its servants in charge of the train; and it is also liable for an illegal arrest of the passenger made by others, which in the exercise of due diligence it could have prevented. 2 Hutchinson, Carr. §§ 980, 1100; 6 Cyc. Law & Proc. p. 598; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Brunswick & W. R. Co. v. Ponder, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430.

But no obligation rests upon the railroad 32 L.R.A. (N.S.)

company or upon its servants in charge of the train, to prevent the arrest of one who happens to be upon its train by an officer duly empowered to make such arrest. The law does not impose the duty on the conductor to resist or interfere with the authority of an officer acting under color of his office. As is said in 2 Hutchinson on Carriers, § 987: "The carrier is not required to resist an officer of the law who has apparent authority to arrest a passenger, nor is he under any duty to inquire into the legality of the arrest, or to see that the officer uses only such force as is necessary to make the arrest. . . . Having a right to presume that the arrest is legal, his obeying the command of the officers is no breach of duty to the passenger." The duty to protect the passenger from violence or assault from others does not demand that the conductor should place himself in opposition to the due administration of the law; and he cannot therefore be said to be guilty of misconduct or of negligence where he simply submits to, and complies with the request or demands of, those officers whose duty it is to enforce the criminal laws. In the case of Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186, it is said: The conductor is not "required to enter into a contest with, or put himself in opposition to, the officers of the law, and if he merely stood by without taking part in the arrest by known policemen, he was not necessarily bound to inquire into their authority, or assert his own against it." While a railroad company is liable in damages for a wrongful arrest and false imprisonment of a passenger, made or caused by its conductor in charge of the train without probable cause, although such arrest was in violation of the authority given him by the company, yet it cannot be held liable for an arrest made by an officer without the procurement or instigation of such conductor. Brunswick & W. R. Co. v. Ponder, supra; Mulligan v. New York & R. B. R. Co. 129 N. Y. 506, 14 L.R.A. 701, 26 Am. St. Rep. 539, 29 N. E. 952.

The uncontroverted evidence in the case at bar shows that neither the conductor or auditor in charge of the train procured or instigated the plaintiff's arrest. They did not assist in his arrest, but simply refrained from interfering with a duly authorized police officer in making the arrest. The officer had the apparent right, upon information received by him that plaintiff had committed a felony, to make the arrest with or without warrant, and the servants in charge of the train were guilty of no act of negligence in submitting to the au

thority of the police officer; and in failing to resist or oppose that authority, they did not fail to perform every duty which, under the circumstances, the company owed to the plaintiff. The defendant cannot be held liable in damages, therefore, by reason of the acts or conduct of its servants in charge of the train at the time of the arrest.

2. It is urged that the defendant is liable because its station agent at Donaldson procured or instigated the wrongful arrest of plaintiff, by causing it to be falsely represented to the officer that he had stolen defendant's property. The question thus presented is whether or not the defendant was responsible for this act of its station agent. The station agent had no authority from defendant either to arrest or to prosecute any person, although such person wrongfully took the property of defendant which had been placed in the custody of such station agent. Nor do we think that he had the apparent authority to make such arrest or prosecute such wrongdoer. It was his duty to care for and protect the property in his charge, but, after such property was stolen, it was not his duty, either expressly granted or impliedly given, to put in motion the criminal laws of the land, and cause the arrest or prosecution of the person guilty of the larceny. He had the right to protect the property of defendant placed in his charge, and to recover it back; but the arrest of the offender and his prosecution would not protect or recover the property. Such act was not within the real or apparent scope of his employment, nor was it in the line of the business with which he was intrusted, nor was it for the benefit of the defendant. It may be that it is for the benefit of the public that an offender shall be prosecuted; but it cannot be said to be for the benefit of any individual, except in his relation to the public and the state, that such offender should be apprehended and prosecuted. The arrest and prosecution would lead to the punishment of the thief; but it would not tend to recover or protect the property.

In the case of *Allen v. London* S. W. R. Co. L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox, C. C. 621, it is said: "There is no implied authority in a person having the custody of property to take such steps as he thinks fit, to punish a person who he supposes has done something to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which

is a corporation, and a private individual." In the case of *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311, the principle is thus stated: "Where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party, upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not in the nature of things be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's moneys or goods; and, before the corporation can be made liable for such an act, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation." In the case of *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 446, 39 L. J. C. P. N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 634, the court said: "A servant of a railway company has no implied authority as such to give a person into custody on a charge of felony. It is the duty of anyone who sees a person committing a felony to give him into custody, and it cannot be assumed that Holmes was acting in the matter as the company's servant, and not in accordance with that general duty. . . . It is said that Holmes was in charge of the property which he believed was being stolen, and that from that fact it may be inferred that he had authority to act as he did; but the same would apply to a shopman in charge of a shop, or a servant in charge of a house, and yet it has never been suggested that, if such a person gave a person in charge for felony, the master would be liable." In *Wood on Master and Servant*, p. 546, the doctrine is thus illustrated: A clerk to sell goods suspects that goods have been stolen, and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied. In the case of *Sweeden v. Atkinson Improv. Co.* 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439, we said: "It is well settled that the master is civilly liable for an injury caused by the negligent act of his servant when done within the scope of his employment, 'even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them.' . . . But it is also well settled that the master is not liable for an independent negligent or

wrongful act of a servant done outside of the scope of his employment." In the case of *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57, it was held that a street railway company was not liable for the act of its conductor in causing the arrest and prosecution of a passenger in the absence of authority from the company, because such acts were not within the scope of the conductor's employment. *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; *Goodloe v. Memphis & C. R. Co.* 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 85, 18 So. 166.

It will thus be gathered from these authorities that the liability of the defendant herein, for the act of its station agents in causing the wrongful arrest of plaintiff, depends upon whether such act was performed in the line of their duty and within the scope of the authority conferred upon them by the defendant. The evidence adduced in this case most favorable to plaintiff does not bring it within this principle. The procurement of the arrest of plaintiff was not done in the ordinary course of the business of the company, nor was it for its benefit, except in so far as it might be for the benefit of all the people of the state that a criminal should be arrested, prosecuted, and convicted. If the agent, acting from a sense of public duty, should cause the arrest of an offender, his conduct would in no way be connected with his employer so as to fix upon him a liability.

In the present case, therefore, the station agent had no authority, either express or implied, to cause the arrest of plaintiff, even if he had believed that he had stolen the defendant's property, and was endeavoring to act for it. So that, in such event, the act not being within the line of his duty, or within the real or apparent scope of his authority, it could not fasten upon defendant a liability for the injury resulting therefrom. But under the undisputed evidence adduced in the case, the station agent at Donaldson was solely acting for Burton, the father of the girl, in sending the messages. He was doing a service solely for the benefit of his friend, and not for the defendant. He had stepped aside from the defendant's business and from the line of his employment, and was acting solely for his own purposes.

The defendant, therefore, was not liable for the act of the station agent at Donaldson in sending the message to the station

agent at Chidester, which resulted in procuring plaintiff's wrongful arrest. It follows that, under the undisputed evidence introduced at the trial of the case, the defendant was not liable for the wrongful arrest of plaintiff.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

L. M. RENDER, Appt.,

v.

CITY OF LOUISVILLE et al.

(— Ky. —, 134 S. W. 458.)

Bond—authorization by voters—sufficiency of statute.

1. The submission to the voters of a municipal corporation, of the question of issuing bonds for a public improvement, is not invalid because the statute authorizing it does not require approval by a two-thirds majority of the voters as required by the Constitution, since the statute need not repeat the requirements of that instrument.

Office—bipartisan board—constitutionality.

2. A provision that a commission to have charge of a municipal hospital shall be bipartisan, and that its members shall be chosen from the two dominant parties in the municipality by name, does not violate a constitutional provision that all men are equal and that no grant of exclusive privilege shall be made to any man, on the ground that it requires a political test for office and creates special privileges in those made eligible to appointment.

(February 22, 1911.)

APPPEAL by plaintiff from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, in defendants' favor in a proceeding to enjoin the issuance of bonds for the erection and furnishing of a city hospital. Affirmed.

The facts are stated in the opinion.

Messrs. Trabue, Doolan, and Cox, for appellant:

The legislature failed to comply with § 157 of the Constitution of Kentucky requiring the affirmative vote of two thirds of the voters before bonds can be issued.

Bryan v. Lincoln (Bryan v. Stephenson) 50 Neb. 620, 35 L.R.A. 752, 70 N. W. 252; *Board of Education v. Moore*, 17 Minn. 412, Gil. 391; *Employers' Liability Cases (How-*

Note.—As to constitutionality of statute regulating appointment to public office with reference to party affiliation, see note to *State ex rel. Jones v. Sargent*, 27 L.R.A. (N.S.) 719.

ard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

Statutes providing for bipartisan boards have been held unconstitutional as violative of provisions similar to those contained in § 3 of our Constitution.

State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; Atty. Gen. v. Detroit, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; State ex rel. Geake v. Fox, 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 19; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Messrs. Clayton B. Blakey and Huston Quin, for appellees:

A statutory provision that a commission shall be composed of two members of the Democratic party and two members of the Republican party does not violate any section of our Constitution.

Herndon v. Farmer, 114 Ky. 200, 70 S. W. 632; Miller v. Louisville, 30 Ky. L. Rep. 664, 99 S. W. 284; State ex rel. Jones v. Sargent, 27 L.R.A. (N.S.) 719, and note, 145 Iowa, 298, 124 N. W. 339; State ex rel. Churchill v. Bemis, 45 Neb. 724, 64 N. W. 348; Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; People ex rel. Grinnell v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; Patterson v. Barlow, 60 Pa. 80; Kenneweg v. Allegany County, 102 Md. 119, 62 Atl. 249; Shaw v. Marshalltown, 131 Iowa, 128, 10 L.R.A. (N.S.) 825, 104 N. W. 1121, 9 A. & E. Ann. Cas. 1039.

Though a particular provision of an act may be unconstitutional, the whole act is not necessarily so.

McArthur v. Nelson, 81 Ky. 67; Gayle v. Owen County Ct. 83 Ky. 61; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824; Southern R. Co. v. Coulter, 113 Ky. 657, 68 S. W. 873.

Settle, J., delivered the opinion of the court:

This action was instituted in the court below by appellant, a taxpayer of the city of Louisville, against the appellees, city of Louisville, its mayor, and the persons composing the commissioners of hospital of the city of Louisville, to enjoin the issuance by the city of \$1,000,000 of bonds for use in erecting and furnishing a city hospital. The city of Louisville claims the right to issue the bonds under authority conferred

by an act of the general assembly of the commonwealth of Kentucky, approved March 14, 1910, entitled, "An Act to Enable Cities of the First Class to Construct a Public Hospital" (Laws 1910, chap. 8), which provides that, in order to obtain money for the construction and furnishing of such hospital, the general council of a first-class city may adopt an ordinance submitting to the voters thereof, at the November election, 1910, the question of whether the bonds of the city should be issued for that purpose; and that such ordinance should specify the total number and amount of the bonds to be issued, not exceeding \$1,000,000, the date and maturity thereof, the rate of interest they should bear, and how payable. Also, that the ordinance should contain the necessary details in reference to the execution and delivery of the bonds, their denomination, interest coupons to be attached, tax to be levied to pay the interest thereon, and create a sinking fund to retire the bonds at maturity. The act empowers the mayor of a city of the first class, having in contemplation the issuance of bonds for the construction of a hospital, to appoint four persons, two from the Democratic party and two from the Republican party, who, with the mayor as an *ex officio* member, shall constitute the commissioners of hospital of such city, with capacity as such to contract and be contracted with, sue and be sued; and provides that to these commissioners shall be intrusted the control of the work of constructing and maintaining the hospital, also the duty of fixing the price of the bonds, selling the same, and receiving the proceeds; but with the proviso that none of them shall be sold for less than par, and that any premium obtained from their sale shall constitute a part of the sinking fund for their ultimate retirement.

It appears from the averments of the petition that the general council of the city of Louisville, pursuant to the authority conferred upon it by the act mentioned, adopted such an ordinance with respect to the holding of the required election, issuance of bonds, and other steps, as is by the act prescribed, and that the mayor duly appointed, with the approval of the general council, the four persons, two from each of the parties named, who are to act as commissioners of hospital. It further appears that, after due notice, the question of whether \$1,000,000 of bonds maturing forty years after date bearing interest at the rate of 4½ per cent per annum, payable semiannually, should be issued by the city of Louisville for the purpose of constructing and furnishing a public hospi-

tal, was, as directed by the act and ordinance mentioned, submitted to the qualified voters of the city at the November election, 1910, and that at such election two thirds of the qualified voters voting upon the proposition voted for the issuance of the bonds; that is to say, of 15,942 votes cast thereon, 11,892 were cast in favor of the issuance of the bonds, and 4,050 in opposition thereto. It further appears from the averments of the petition that the appellee city of Louisville is now ready to issue and place in the hands of its commissioners of hospital, for sale upon the market, the bonds for the construction of the hospital, but that appellant objected in the circuit court to its doing so, on the grounds, as alleged, that the act providing for the issuance and sale of the bonds is unconstitutional, and the ordinance adopted in pursuance thereof invalid. Appellees filed a joint demurrer to the petition, which the circuit court sustained, and, appellant failing to plead further, judgment was entered refusing the injunction asked, and dismissing the petition, and from that judgment he has appealed.

The constitutionality of the act of the legislature authorizing the bond issue in question is assailed in the brief of appellant's counsel upon two grounds: "(1) That in providing for the issuance of the bonds, if the voters of the city shall determine that such bonds shall be issued (§ 10 of the act), the legislature failed to comply with a provision of § 157 of the Constitution of Kentucky, which requires the affirmative vote of two thirds of the voters before bonds can be issued under such circumstances. (2) That the act (§ 1), in requiring that two of the members of the hospital commission shall be members of the Democratic party and two members of the Republican party, is in conflict with and repugnant to § 3 of the Constitution of Kentucky." So much of § 157 of the Constitution as bears on the question under consideration provides as follows: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." It was not necessary that the act should embody the provisions of § 157 of the Constitution referred to, or words of similar import, in order to make valid the election held in the city of Louisville to determine whether the bonds should be is-

sued, or to make valid the issuance of the bonds following such election. It is not required that an act of the legislature shall have incorporated in it any provision of the Constitution bearing on the matter therein made the subject of legislation. It is sufficient that it does not in terms or meaning conflict with any provision of the Constitution, and, in determining whether the act conforms to that instrument, it is to be tested by and in the light of its provisions.

In the case of *Board of Education v. Winchester*, 120 Ky. 594, 87 S. W. 768, objection was made that an act of the legislature under which an election had been held, authorizing the issue and sale of bonds by the city of Winchester for the erecting of a school building, was in conflict with § 157 of the Constitution. In refusing to sustain the objection, we said: "Every provision of the Constitution is mandatory. When it is provided that indebtedness to a certain amount shall not be incurred without the assent of two thirds of the electors voting at an election to be held for that purpose, it necessarily follows from the constitutional provision that such an indebtedness may be incurred with the assent of two thirds of the voters. The legislature can neither subtract from nor add to the constitutional requirement. The constitutional provision regulates the subject, and removes it entirely from legislative control." *Cooley, Const. Lim. p. 64.* It is proper to add in this connection that we also held in the case *supra*, that the meaning of § 157 of the Constitution is that the assent of two thirds of the electors whose votes are cast on the question of incurring the indebtedness is all that is necessary; otherwise, the section of the Constitution, *supra*, would have required the legislature to indicate by statutory enactment some means of ascertaining the entire number of legal voters in the municipality. *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773; *Tipton v. Shelbyville*, 32 Ky. L. Rep. 1123, 107 S. W. 810. Section 5 of the ordinance adopted by the general council of the city provides that "none of the bonds shall be prepared or issued unless at said election two thirds of those voting on the said question shall vote in favor of the issuance of said bonds." While this provision of the ordinance would not have cured the omission from the act of the legislature of a like provision, if its insertion therein had been necessary to its constitutionality, its presence in the ordinance shows that the general council knew that two thirds of the votes cast at the election must favor the issuance of the bonds, to authorize

their issuance; and also that the publication of the ordinance would inform the voters of the city of that fact, and prevent any misapprehension as to the vote required to carry or defeat the proposition. It is not apparent that any reason exists for our holding either that the act or ordinance under consideration violates § 157 of the Constitution.

We now come to the consideration of appellant's second and final contention, which is, as previously stated, that § 1 of the act in question, in providing that two of the commissioners of hospital shall be appointed by the mayor from the Democratic party and two from the Republican party, violates § 3 (Bill of Rights) of the Constitution, which declares: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation as provided in this Constitution; and every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment." As well argued by counsel for appellees and conceded by counsel for appellant, if the act should be held unconstitutional for the reason last urged, then, upon the same ground, could the provisions of the present election law with respect to the appointment of the state board of election commissioners and precinct election officers be held unconstitutional; for they are selected equally from the two political parties that polled the largest vote at the last preceding election for state officers or presidential electors, which were the Democratic and Republican parties. But in the case of *Herndon v. Farmer*, 114 Ky. 200, 70 S. W. 632, we held the statute of 1898 and that of 1900, both relating to the subject of elections, constitutional.

In the case of *Miller v. Louisville*, 30 Ky. L. Rep. 664, 99 S. W. 284, we had before us for consideration the constitutionality of a statute authorizing cities of the first class to submit to the voters thereof the question whether bonds should be issued for the raising of money to construct sewers. The 1st section of the act provided, as does the act now under consideration, that the mayor of such cities should appoint four persons who, with the mayor as a member *ex officio*, should constitute a sewerage commission, two of the appointees to be members of the Democratic party and two members of the Republican party. Ky. Stat. § 3037b (Russell's Stat. § 858). In our opinion the statute was not open to the objections made to it, and its constitutionality was upheld. It is true objection was not specifically made to that part of it which provided for the appointment by the mayor of a bipartisan board of sewerage commissioners, but, as the entire statute was before us and its constitutionality was assailed upon various grounds, the fact that we did not in the opinion discuss the provisions with respect to the *personnel* of the sewerage commission gives some force to the argument of counsel, that we found no reason for holding it unconstitutional because of those provisions.

It is stated in the written opinion of the judge of the circuit court, and not denied by appellant's counsel, that the question of the city of Louisville issuing bonds for sewerage purposes was twice defeated by the voters of that city, and that, the necessary two thirds majority was not obtained until the statute was so amended as to allow the appointment of a bipartisan commission, following which the third election was held, resulting in a majority in favor of the bond issue of more than two thirds of the votes cast. It may be that the benefits arising from the control by a bipartisan commission of the sewerage system of Louisville influenced many of the votes cast for the issuance of the hospital bonds; but, whether so or not, we are unable to see that the provisions of the act authorizing the appointment by the mayor of the hospital commission from the two leading political parties will violate the Constitution, or prove disastrous to the interests of the city of Louisville.

It is urged against this feature of the act that it requires a political test as a qualification for office, and creates special privileges in contravention of the Constitution. In our opinion the constitutional provision referred to does not apply to legislative enactments fixing the qualifications for membership on a municipal board of commissioners. The requirement that the commissioners be equally selected from the two political parties imposes no constitutional restriction upon them, nor does it add any new qualification not allowed by the Constitution; and, as the commission is not a permanent body, its members do not hold their places to the exclusion of all others. It is true that an elector who does not ally himself with the Democratic or Republican party cannot be appointed to membership on the board, but there is no such thing as the right to hold office; and if the language of the act had been that the commission should be composed of two members from each of the two leading or dominant political parties in the city or state, the appointees would nevertheless have to be selected equally from the Demo-

cratic and Republican parties. The requirement that the commissioners be equally selected from the two political parties imposes no constitutional restriction upon them, nor does it add any new qualification not allowed by the Constitution; and, as the commission is not a permanent body, its members do not hold their places to the exclusion of all others. It is true that an elector who does not ally himself with the Democratic or Republican party cannot be appointed to membership on the board, but there is no such thing as the right to hold office; and if the language of the act had been that the commission should be composed of two members from each of the two leading or dominant political parties in the city or state, the appointees would nevertheless have to be selected equally from the Demo-

eratic and Republican parties. No elector of the city is deprived by the act of any privilege so far as voting is concerned, as the members of the hospital commission are appointed by the mayor, not elected by the voters. The latter may, however, vote for the mayor, who holds and exercises the power to appoint the hospital commissioners, and in that way they have a voice indirectly in the appointment of the commissioners. It is very common for legislatures, in creating municipal boards and commissions, to provide that the members thereof shall not all be of the same political faith, and to direct that they shall be selected from the dominant political parties. There can be no valid objection to the right of the legislature to fix the qualifications of the members of such boards, or to provide that they shall be appointed from the two principal political parties. It is designed to secure in the action of the board impartiality and freedom from political bias, and violates no provision of the Constitution. Moreover, it is the province of the legislature to determine whether such a requirement is wise. It is apparent that the Democratic and Republican parties were named in the act as the parties from which to appoint the members of the hospital commission, because they are, and for many years have been, the dominant political parties in the city of Louisville and in the state. But if in the future other political parties should get in ascendancy, it would do no violence to the meaning of the statute, to the rights of the city, or the holders of the hospital bonds, for the mayor to appoint the members of the hospital commission equally from the two leading or dominant political parties, whatever may be the names under which such parties exist.

Our attention has been called to a number of authorities cited in the briefs of counsel, some of which differ radically from the conclusions we have reached in the case at bar. Among these are the cases of *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Evansville v. State*, 118 Ind. 446, 4 L.R.A. 93, 21 N. E. 267; *State ex rel. Geake v. Fox*, 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 19; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887. All these cases involved statutes in some respects like the one under consideration, which were held unconstitutional, and at least two of them were so held, as violative of provisions similar to those contained in § 3 of our Constitution. This is notably true of *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887. 32 L.R.A. (N.S.)

We find, however, among the authorities cited, the following, which seem in harmony with the views we have expressed: *State ex rel. Churchill v. Bemis*, 45 Neb. 724, 64 N. W. 348; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Patterson v. Barlow*, 60 Pa. 80; *State ex rel. Jones v. Sargent*, 145 Iowa, 298, 27 L.R.A. (N.S.) 719, 124 N. W. 339. The opinion of the majority of the court in the case last cited very ably and exhaustively discusses the question raised by appellant's second contention in this case, and sustains the constitutionality of the statute substantially like the one before us. Its logic satisfies us of the correctness of the conclusion at which we have arrived.

Finding no error in the judgment of the Circuit Court, it is hereby affirmed.

IDAHO SUPREME COURT.

CHARLES MIX, Appt.,
v.

BOARD OF COUNTY COMMISSIONERS
OF NEZ PERCE COUNTY, Resp'ts.

(18 Idaho, 695, 112 Pac. 215.)

Municipal corporation — amendment of charter.

1. Under the provisions of the Constitution, the special charter of the city of Lewiston may be amended by a special law enacted for that specific purpose, or by a gener-

Headnotes by SULLIVAN, Ch. J.

Note. — Local option law as affecting existing power to regulate liquor traffic under charter of municipality located within local option district.

MIX v. NEZ PERCE COUNTY and other cases passing on the question are agreed that, upon the adoption of a local option law by a popular vote, a municipality within the local option district can no longer exercise its charter power to license or control the liquor traffic.

Thus, it was held in Minnehaha County v. Champion, 5 Dak. 433, 41 N. W. 754, that the exclusive power of a city council under the charter, to license and regulate the sale of intoxicating liquors within the city, was limited by the provisions of a subsequent local option law, that, in case a majority of the ballots cast at an election thereunder should be adverse to the continuance of the traffic, it should be unlawful for county commissioners or for any city council or officers in the county to grant or issue any license for the sale of liquors, and that all acts, special or general, so far as they should conflict with such act, were thereby repealed; and it was further held that the legislative intention to nullify the charter

al law which declares a state policy concerning police regulations or in regard to matters affecting the state at large.

Same — local matters.

2. Ordinances providing for the pavement of streets, construction of sewers, and levying assessments to pay therefor, are matters of local concern, and the special charters of the cities of this state in regard to such local matters can be amended only by special law.

Same — general police regulations.

3. Whenever the legislature enacts a general law declaring a state policy in regard to the prohibition of gambling or the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the state have been given in regard thereto.

power to grant licenses was not negatived by the language: "Provided that nothing in this act shall in any manner interfere with or invalidate any license granted by any city council acting under the authority of a special charter, or act granting exclusive authority in the matter of granting licenses," occurring in an act passed shortly before the local option law, and amendatory of an act giving the board of county commissioners control of licenses within their respective counties. The court said that the construction contended for, that the proviso in the amendatory act was intended to preserve the power to grant licenses to the city, notwithstanding the subsequent local option law, would render nugatory the effect of the local option law and deny its application to correct the very evil, and to the class of persons, it was intended to reach, and that the legislature could not have overlooked the fact that by special charters nearly all the cities had been given exclusive control over the sale of intoxicating liquors, and that the words "all acts, special or general, so far as they conflict with the provision of this act, are hereby repealed," in the local option law, must have been expressly intended to make the law applicable in cities as well as in the county.

So, it was held in *Garrett v. Aby*, 47 La. Ann. 618, 17 So. 238, that the exclusive authority of a city to regulate the sale of intoxicating liquor, given by its charter, was terminated by the vote in an election for the whole parish in which the city was located, to adopt a local option law providing that the police jury of any parish should have exclusive power to regulate or prohibit the sale of intoxicating liquors upon adoption of the law by the voters of a parish, where the law provided further that whenever the majority of the votes cast in a parish, if an election had been held for a whole parish, should be against granting licenses, then said votes should govern the actions of any city within the limits of a parish as fully and completely as if the election had been held by authority of the city. The court said, in reaching this conclusion, that comment upon the meaning of 32 L.R.A. (N.S.)

Same — validating crimes.

4. Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state.

Statute — local option law — general.

5. The law known as the "local option law" (Sess. Laws 1909, p. 9) held to be a general law declarative of the policy of the state in regard to traffic in intoxicating liquors.

Same — special law — definition.

6. A special law is one that applies only to a special locality or to an individual or to a number of individuals selected out of a class to which they belong.

Same — general law.

7. A general law is one framed in general terms, restricted to no locality, and operating upon all alike.

the local option law was quite unnecessary as it was too obvious for discussion. It was, however, contended that, as so construed, the local option law, so far as it purported to repeal or amend the charter provisions of the city, was repugnant to various mentioned constitutional provisions. In answering these contentions the court held that it was not violative of a constitutional provision that the legislature should not pass any local or special law amending or renewing the charter of any corporation, for the reason that the act was neither local nor special, and did not purport to be; that it did not contravene the constitutional provision that the general assembly should not indirectly enact special or local laws by the partial repeal of a general law, but that laws repealing local or special laws might be passed, for the reason that the act was not a special or a local law, and for the additional reason that it came directly within the scope and meaning of the second clause of the constitutional provision, that "laws repealing local or special laws may be passed;" that it was not in conflict with the constitutional provision that the general assembly should not remit the forfeiture [charter?] of any existing corporation, nor renew or amend the same, except upon condition that the corporation should thereafter hold its charter subject to the provisions of the Constitution, for the reason that such provision was directed at private corporations. In answer to a general argument that, in the enactment of this statute, the legislature was not in the proper exercise of its police power, for the reason, among others, that it tended to vest power previously existing in the city, in the police jury of the parish, and that it therefore tended to destroy the autonomy of the city, the court said: "Under the terms of the Revised Statutes, the parochial election did not dominate the sale of spirituous liquors within a town or city within its limits; but the purpose of the proviso of 1884 was to make it govern and control the action of any ward, city, or town within the parish. The statute made no other alteration in the autonomy of the city of Monroe. In all other respects the situa-

Intoxicating liquor — license.

8. Section 7 of the local option law (Laws 1909, p. 12) prohibits the board of county commissioners of any county where said law has been adopted, from granting any person, firm, association, corporation, or club a license to sell or dispose of intoxicating liquors within such county.

Municipal corporation — license — prohibited business.

9. Under the provisions of § 63 of the special charter of the city of Lewiston (Laws 1907, p. 375), said city is prohibited from issuing a license authorizing anyone to do any act or engage in any business which is made unlawful by the general laws of the state.

Definition — law of land.

10. The phrase "law of the land" as used

tion prior to its passage remained unchanged. This repealing statute did not deprive the city of Monroe of any of her charter powers or rights. It placed upon a parochial election the statutory interpretation, that a majority of the voters of the parish of Ouachita could stop the sale of spirituous liquors throughout its domain. The city of Monroe will be deprived of the revenues derived from retail liquor licenses, but of no other. Taking a comprehensive view of the question, it seems to us quite apparent that it comes clearly within the scope of legislative power, unrestrained by any provision of the Constitution, and is quite beyond judicial control. That there is a direct and evident conflict between the provisions of the city charter and the act of 1884 is full proof that the two are 'irreconcilably inconsistent,' and so repugnant that both cannot stand together under any circumstances; and hence the former are repealed by the latter. This case does not, in our conception, involve in any manner the liberties or immunities of citizens. It only involves the constitutional power of the legislature to declare that the vote or decision of the people of a parish shall control the sale of spirituous liquors in a town within its limits: And, substantially, the only reason assigned why it has not that power is that, by prior statutes, the town was, for all political purposes, made free and independent of the parish in that respect."

So, it was held in *Turner v. Forsyth*, 78 Ga. 683, 3 S. E. 649, that a statute prohibiting the sale of liquors in a county, if it should be adopted by a vote of the people, operated, upon such adoption, to deprive a city located in the county of its power under an existing charter to pass ordinances regulating the management of barrooms and saloons licensed by them. The real question in the case, however, and probably the only one raised, was as to the effect of a provision in the local option law "that the provisions of this act shall not prevent practising physicians furnishing liquors themselves as medicine," upon the power of municipal offices under another section of the charter vesting them "with full and exclusive power

in said section includes the general laws of the state.

Intoxicating liquor — local license — invalidity.

11. The legislature, by enacting the special charter of Lewiston, did not delegate to said city the authority to license persons to sell intoxicating liquors within such city, contrary to the general law of the state.

Municipal corporation — licensing forbidden act.

12. When the general law prohibits or makes a certain business criminal, the city cannot make such business lawful by licensing it.

(November 30, 1910.)

er to regulate, control, and direct the sale of liquor; and the court held that, after the passage and adoption of that act, the city had no power to regulate the sale by physicians. The precise ground of the latter portion of this decision is not made absolutely clear, as may be pointed out by observing that the court said that the charter authorized the city to regulate barrooms and saloons, and that unless a physician was a barroom or a saloon it would have no right to regulate him; that they had a right to regulate the sale of liquors in the city under their charter prior to the adoption of a local option act, but that when that was passed they had no right to regulate any sale by physicians, for the reason that there had been no grant of power, either expressly or by necessary implication, to make such regulation. From this and other portions of the opinion it seems reasonable to suppose that the court intended to say that the charter was ineffectual to empower the city to regulate the sale of liquor by physicians irrespective of the local option law.

Recognizing the rule as established by the Oregon cases cited *infra*, the Federal court in *Kuthe v. Farrington* (D. C. Or.) 176 Fed. 579, without discussing the question, held that where there had been an election establishing prohibition in a certain county under the Oregon local option law, the council of a city located within the county became thereby divested of its charter power to regulate the traffic.

In *Ex parte Elliott*, 49 Tex. Crim. Rep. 108, 91 S. W. 570, it was held that the right under the state Constitution of a county to adopt local option by a vote of the electors was not affected by the passage of a charter giving a city the right to regulate the sale of liquor, and that a violation of the local option law adopted by a county subsequently to the granting of the charter of a city located therein could not be justified under the provision of such charter. To the same effect is *Fox v. State*, 53 Tex. Crim. Rep. 150, 109 S. W. 370.

The further question whether the charter power of the municipality is suspended by the passage of the act by the legislature, or

APPEAL by petitioner from a judgment of the District Court for Nez Perce County dismissing an action for a writ of mandate to compel the board of county commissioners to issue a license to petitioner to conduct a retail liquor business. Affirmed.

The facts are stated in the opinion.

Messrs. Charles L. McDonald and Eugene A. Cox for appellant.

Mr. D. C. McDougal, Attorney General, and Messrs. Dwight E. Hodge, J. H. Peterson, and O. M. Van Duyn, for respondents:

It is not the province of the court of equity to interfere in criminal actions.

Nims v. Gilmore, 17 Idaho, 609, 107 Pac. 79; *Story*, Eq. Jur. § 893; *Dan. Ch. Pl. & Pr.* 1620; *Spelling*, *Inj.* 2d ed. § 71; *Moses v. Mobile*, 52 Ala. 198; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Re Sawyer*, 124 U. S. 210, 31 L. ed. 405, 8 Sup. Ct. Rep. 482; *Davis v. American Soc.* 75 N. Y. 362; *Crichton v. Dahmer*, 70 Miss. 602, 21 L.R.A. 84, 35 Am. St. Rep. 666, 13 So. 237; 16 Am. & Eng. Enc. Law, 2d ed. p. 370; *Brown v. Birmingham*, 140 Ala. 590, 37 So. 173; *Paulk v. Sycamore*, 104 Ga. 24, 41 L.R.A. 772; 69 Am. St. Rep. 128, 30 S. E. 417; *Suess v. Noble*, 31 Fed. 855.

Sullivan, Ch. J., delivered the opinion of the court:

This appeal involves the judgment and order of the trial court in refusing to grant a writ of mandate to the board of county commissioners of Nez Perce county, commanding them to issue a license to the

appellant authorizing him to engage in the business of retailing intoxicating liquors in the city of Lewiston. The action was brought to determine the applicability of the local option law to the territory included in the city limits of Lewiston. It is alleged in the petition that the city is operating under a special act or charter; that the petitioner has been engaged for several years last past in the liquor business in said city, and that he now holds a license from that city; that he applied to the county commissioners for a renewal of his county and state licenses, and that such renewal was refused on the sole ground that a local option election was held in the county of Nez Perce on March 9, 1910, at which election the canvassers found that the majority of the votes cast were in favor of the proposition submitted, and that the board was thereby deprived of discretion to issue the license applied for. A general demurrer was interposed to the complaint or petition, which was sustained by the court, and a judgment of dismissal was entered. This appeal is from that judgment.

In limine we desire to say that the oral argument of Eugene A. Cox, of counsel for appellant, which was submitted to the court in typewriting, shows a great deal of thought, study, and painstaking research, and is a very valuable historical treatise, and deserves special mention in this opinion. It is instructive and valuable for its clear and well-reasoned argument, and it traces the history of special charter cities from their early existence down to the present time. It is a splendid production,

by its adoption by popular vote, seems to have been expressly raised in but one jurisdiction, Oregon, where it is held that the city is not deprived of its power until the voters have declared themselves.

Thus, it was held in *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642, that a local option law authorizing an election in any county upon petition to the county clerk, to determine whether the sale of liquor should be prohibited, and providing that in case a majority of the electors voting were in favor of prohibition, the county court should make an order prohibiting further sales, after which it would be an offense for any person to traffic therein, was intended only as a modification on the earlier statute relating to the mode of protesting against the granting of licenses to sell liquor, and was not intended to become operative until the expediency or in expediency of granting licenses was determined by a popular vote, and that therefore the power of a common council under a city charter, to regulate and restrain traffickers in liquor and their places of business would not be affected by the act until it had been rendered applicable to the 32 L.R.A. (N.S.)

territory in which the city was situated, by a vote of the electors. The position here taken by the Oregon court was adhered to in *Renshaw v. Lane County Ct.* 49 Or. 526, 89 Pac. 147, where the court used the following language: "An examination of the local option law convinces us that, though the enactment is general, and became operative in the entire state at the time of its passage, it did not effect any material change in the existing municipal charters which authorized the licensing or permitted the prohibition of the sales of intoxicating liquors in an incorporated town or city, until its provisions were made specially applicable to a particular locality, by a majority vote of the electors thereof in favor of prohibition. The law thus enacted by the people should be read in connection with the charters mentioned, and is, in effect, a declaration that an exercise of the powers granted by the legislative assembly to incorporated towns and cities, as evidenced by municipal charters, to issue or to deny licenses for the sale of intoxicating liquors, might be continued until changed in the manner prescribed."

L. A. W.

and ought to be preserved in proper form for the benefit of any who may be interested in that subject.

The main question presented is: Does the act known as the "local option law" (Sess. Laws 1909, p. 9) apply to the city of Lewiston? It is contended by counsel that § 63 of the special charter of the city of Lewiston (Sess. Laws 1907, p. 375) gives that city the absolute power to regulate or prohibit the sale of intoxicating liquors within said city; and that the local option law, though adopted by the electors of the county, can in no manner affect the right of the city to control the traffic in intoxicating liquors. Said § 63 is as follows: "The mayor and council shall have full power and authority: . . . To license, regulate, restrain, and prohibit for cause places where intoxicating beverages are sold, and all offensive and dangerous trades, occupations, employments, or businesses, and, for the purpose of this act, to define what are offensive and dangerous trades, employments, occupations, or businesses; to limit and define the districts within the city within which intoxicating liquors may be sold, and any dangerous or offensive occupation carried on; but this section does not empower the city of Lewiston to declare a trade, employment, occupation, or business offensive or dangerous contrary to the common understanding of the subject, nor to authorize anyone to do any act or engage in any business contrary to the law of the land." In determining the questions involved, the method or manner of amending said special charter under the provisions of the state Constitution must be considered. It appears from the record that the city of Lewiston was created by an act of the legislature of Washington territory in 1863, prior to the creation of Idaho territory; it then being a part of Washington territory. That city's existence was recognized by the territory of Idaho, and its charter was continued in force by § 2 of article 21 of the state Constitution, which is as follows: "All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." Section 1 of article 12 of the Constitution provides for the organization of cities not operating under special charters, as follows: "The legislature shall provide by general laws for the incorporation, organization, and classification of the cities and towns in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated may become organized under such

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general laws, whenever a majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the legislature." Section 2 of article 11 of the Constitution provides as follows: "No charter of incorporation shall be granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal, or reformatory corporations as are or may be under the control of the state; but the legislature shall provide by general law for the organization of corporations hereafter to be created: Provided that any such general law shall be subject to future repeal or alteration by the legislature."

It is contended by counsel for appellant under the provisions of § 2, art. 11, of our Constitution, and the decisions of this court, that the charter of the city of Lewiston can be amended in two ways only: First, by special act for that specific purpose; and, second, by a general criminal law or a law treating a subject-matter of proper state control and declarative of a state policy, that the latter method is not express, but arises by necessary implication from the nature of state and city government, that cities are organized to deal with local questions, the state with problems and policies of a more general nature, that, before this implied method of amending the charter is applicable, it must appear that the legislature has adjudged some subject to be proper for state regulation, and has declared a state policy with respect thereto. We are in accord with that contention of counsel. In *Boisé City Nat. Bank v. Boisé City*, 15 Idaho, 792, 100 Pac. 93, this court had under consideration the authority of that city to construct sewers and to levy assessments for the payment thereof, and to regulate those matters in which the local community alone was interested, and the court there held that the provisions of the city charter must control, and not the general law of the state. The court said: "In the case at bar it is clear that the construction of sewers and the levying of assessments for the payment thereof are matters of local concern, in which the local community is alone interested, and in which the state at large has no special interest." The question presented for decision in that case was whether the provisions of the *Boisé City* charter of 1907, in regard to constructing sewers and assessing the property benefited and collecting from the property owners the cost thereof, were the exclusive law by which those things must be done, or whether that charter was supplemented by the act of 1905 (Sess. Laws 1905, p. 113), It will be observed that the *Boisé City* charter

of 1907 was re-enacted and amended about two years subsequent to the general law of 1905, which law provided a complete method for building sewers and assessing the property benefited and collecting from the property owners the cost thereof, and applies to cities incorporated under the general law of the state. We held in that case that the special charter of Boise City could not be amended by general law, but that holding was applicable to the facts of that case, and the facts involved were relative to the construction of sewers and the levying of assessments for the payment therefor, and the court there held that that matter was of local concern, in which the state at large had no special interest, and, as to those matters, the charter could be amended only by special law. Section 2 of article 12 of the Constitution is as follows: "Any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with its charter or with the general laws." Said section was construed by this court in *Re Ridenbaugh*, 5 Idaho, 371, 49 Pac. 14, under the following facts: The city of Boise, operating under a special charter which gave it the right to regulate gambling, licensed Ridenbaugh to operate a gambling game in said city. While he was operating under said license, he was arrested under a general law of the state prohibiting gambling, and as a defense to said action he pleaded the license granted to him by the city of Boise. The court, in passing upon that case, said: "It was not the intention of the legislature or the framers of the Constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. The cardinal rule in construing constitutional, as well as statutory, provisions, is to discover and enforce the intention of those who made them. . . . It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state." The real distinction between the case of *Boisé City Nat. Bank v. Boisé City*, supra, and the *Ridenbaugh* Case, is that the former involved a mere matter of local self-government, and the latter a state policy prohibiting gambling in the state. Special charter cities cannot by ordinance make acts lawful that are made criminal

by the general law of the state. Section 2, art. 12, of the state Constitution, prohibits special charter cities from making or enforcing any local, police, sanitary, or other regulation that is in conflict with its charter or the general law of the state.

But it is contended that the local option law is not a declaration of a state policy; that it is not a general law; that it is local and special, and applicable only to the counties that adopt it, hence in no manner amends the special charter of the city of Lewiston. The local option law is made applicable to every county in the state alike, and its provisions become operative in any county upon the electors of such county complying with its provisions and holding an election to determine whether the sale of intoxicating liquors as a beverage shall be prohibited; and if, at such election, the majority of the electors vote in favor of prohibiting such sale, the law becomes operative in the county, as provided by said act. A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality. *State v. California* Min. Co. 15 Nev. 234. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology. *Ladd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714; 7 Words & Phrases, pp. 6578, 6579; *Black's Law Dict.* p. 535, under title "General Law."

In *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788, the court had under consideration the question whether a certain law was general or special, and said: "Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not; but because every person who is brought within the relations and circumstances provided for is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.'" See also *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *People ex rel. Klokke v. Wright*, 70 Ill. 388.

In the case of *State, Paul, Prosecutor, v. Circuit Judge*, 50 N. J. L. 585, 1 L.R.A. 86, 15 Atl. 272, the court had under consideration a local option law. The law was attacked on the ground that it was local or special in its application, and the court held: "The law is not in contravention of our constitutional provision that 'the legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties.' This inhibition in the Constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another." The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law. It is applicable to every county in the state, and under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a "general law" within the meaning of that phrase as defined by the leading law writers and the courts of last resort of the nation. The legislature has undertaken by this act to make a general law applicable to all of the counties in the state alike, as to whether the sale of intoxicating liquors shall be prohibited or not.

It is almost universally recognized that indulgence in intoxicating liquors leads to immorality, crime, and pauperism, and that such liquors are in their nature dangerous to the morals, good order, health, and safety of the people, and intoxicating liquors are not placed on the same footing with ordinary commodities. The business of selling such liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor, and it does not stand upon the same plane of utility and morality with the useful arts, trades, and professions. *Joyce, Intoxicating Liquors*, § 76. It has been held by a long line of decisions from the United States Supreme Court down, that there is no inherent right in a citizen of a state or of the United States to sell intoxicating liquor by retail. *Id.* § 77. and authorities there cited. The right to engage in the retail liquor traffic is a mere privilege, and, in defining the extent to which the privilege goes, the law should be strictly construed against the traffic.

32 L.R.A.(N.S.)

Id. § 77. See also *Woolen & T. Intoxicating Liquors*, §§ 88 et seq. Considering the view that is generally held in regard to the retail liquor business, by the adoption of the local option law the legislature intended to authorize the electors of each county to determine whether the sale of intoxicating liquors should be prohibited in the county. Section 7 of the local option law shows the intent of the legislature to make that law apply to all territory within a county, in special charter cities as well as cities incorporated under the general law. It provides, among other things, that "if a majority of the votes cast at such election shall be in favor of the proposition submitted (that is, to prohibit the sale of intoxicating liquors in such county), it shall thereafter be unlawful for the board of county commissioners of the county to grant any person, firm, association, corporation, or club a license to sell or dispose of intoxicating, spirituous, malt, or fermented liquors or wines within said county." It is there declared that it shall be unlawful for a board of county commissioners to grant a license to sell or dispose of such liquors "within said county,"—not within said county exclusive of special charter cities. Had the legislature intended to exclude special charter cities from the operation of said act, it would have been an easy matter to use clear and explicit language to that effect, but the phrase "within said county" has been used, which clearly means within every part and parcel of said county, and does not exclude special charter cities from the operation of said local option law.

In § 63 of the special charter of *Lewiston*, which section authorizes the council of that city to license, regulate, and prohibit the sale of intoxicating beverages, it is also specified that its provisions do not empower the city of *Lewiston* to authorize anyone to do any act or engage in any business contrary to "the law of the land." What does the phrase "law of the land" mean as used in said section?

In the noted case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629, which has received the sanction of the courts, *Webster* said: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." In many decisions it has been held that the "law of the land" and "due process of law" are synonymous phrases, and, though verbally different, ex-

press the same thought and have the same meaning. In many of those decisions the phrase "due process of law" refers to procedure according to the law of the land, which process in each state is regulated by its own laws. "Due process of law" affords a hearing before it condemns, and renders judgment only after trial. And it is often stated that "due process of law" is that constitutional right which provides that no citizen shall be deprived of life, liberty, or property except as provided by law. It was held in *Huber v. Reily*, 53 Pa. 112, and in *Kalloch v. Superior Ct.* 56 Cal. 229, that due process of law ordinarily implies and includes a complaint, a defendant, a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. The term "due process of law" relates primarily to the remedy or means of redress where rights are invaded, rather than to matters of substantive law. *Alfalfa Irrig. Dist. v. Collins*, 46 Neb. 411, 64 N. W. 1090. The phrase "law of the land" in state Constitutions imports a general public law equally binding upon every member of the community. See authorities cited in 3 Words & Phrases, pp. 2232 et seq.

In *Sheppard v. Johnson*, 2 Humph. 285, the court held that whether a statute is the "law of the land" within the meaning of that term as used in the Bill of Rights depends upon two propositions: (1) That the legislature had the power to pass it; (2) that it is a general and public law equally binding upon every member of the community. The phrase "due process of law" in many decisions refers more particularly to the procedure prescribed by statute for the protection of life, liberty, and property, and the method of enforcing rights or obtaining redress for their invasion, while the phrase "law of the land" includes the remedial law as well as substantive law. It includes that part of the law which the courts are established to administer, as opposed to the rules according to which the substantive law itself is administered. The substantive law is that part which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. *Black's Law Dict.* under title "Substantive Law," p. 1132.

The phrase "law of the land" as used in said § 63 of the charter of Lewiston means the law of the state, so far as the provisions of said section are concerned, and it prohibits the city of Lewiston from authorizing "anyone to do any act or engage in any business contrary to the law of the land,"—the general law of the state. By the provisions of said section, the legislature has not abdicated the right to enact police regulations, to license, regulate, restrain, and prohibit the sale of intoxicating liquors in said city. The city of Lewiston was not granted thereby the absolute power to regulate its own saloons without reference to the laws of the state. By the provisions of said § 63, the state has reserved to itself the ultimate right to control and govern the liquor traffic within the state. The city of Lewiston was given the right to regulate, restrain, and prohibit it, but it was not given the right to violate the general police laws of the state by authorizing the sale of intoxicating liquors when such sales were prohibited by the general laws of the state. The legislature did not abdicate or delegate to the city of Lewiston its power of police regulation over intoxicating liquors. Section 63 authorized the city of Lewiston to license and regulate the sale of intoxicating liquors within the corporate limits of such city, so long as licensing and regulating were not contrary to the general law of the state. So long as the state recognized the retail liquor business and licensed it, the provision of said charter would be operative, and the city might place additional restrictions and limitations upon the business within its corporate limits, or might totally prohibit it; but when the general law prohibits it, there is nothing left in that business for the city to regulate.

We therefore conclude that said local option law is a general law of the state, and the legislature, in adopting it, established thereby a state policy in regard to the regulation of the traffic in intoxicating liquors, and, since the majority of the electors in Nez Perce county have voted in favor of prohibiting the sale of such liquors as a beverage in said county, the county commissioners are prohibited from issuing a license to retail intoxicating liquors to any person within the corporate limits of the city of Lewiston or within said county. The judgment must therefore be affirmed, and it is so ordered. Costs awarded to respondent.

Ailshie, J., concurs.

IOWA SUPREME COURT.

WILLIAM BLAIN, Appt.,
v.
TOWN OF MONTEZUMA.

(— Iowa —, 129 N. W. 808.)

Municipal corporation — lighting streets — permitting shadows — nuisance.

1. Permitting trees to remain along a street in such a way as to interrupt at places the light from the street lamps, casting shadows in which a traveler cannot see his way, does not constitute a nuisance which will render the municipality liable for injuries to a traveler through an accident while in such shadow, which might have been avoided had he been able to see.

Same — inefficient system — liability.

2. A municipal corporation which has undertaken to exercise its charter power to light its streets cannot be held liable on the ground of negligence for an accident to a traveler on the street, because the lighting system is not as efficient as it might have been.

(February 7, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Poweshiek County in defendant's favor in an action brought to recover damages for injuries to plaintiff's horse, alleged to have been caused by the negligent failure of defendant properly to light its street. Affirmed.

Statement by McClain, J.:

Action to recover damages on account of injuries to plaintiff's horse, resulting from an accidental collision while being driven in the nighttime along the street of the defendant town. The alleged negligence of defendant consisted in failure to properly light the street. A demurrer to plaintiff's petition was sustained and judgment rendered for defendant, from which plaintiff appeals.

Note.—A search has failed to disclose any additional case passing upon the liability of a municipal corporation for permitting trees to remain on the streets at points where they interfere with the street lights.

The subject of the liability of municipal corporations for injuries resulting from obstructions in streets because of a failure properly to light them is covered in a subdivision of the note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 686.

For a note on the right of municipal corporations to cut or trim trees within limits of highway, see note to *Rosenthal v. Goldsboro*, 20 L.R.A. (N.S.) 809.

And for a note on authority of municipal officers to cut or trim trees on private property to facilitate use of street, see *Com. v. Byard*, 20 L.R.A. (N.S.) 814. 32 L.R.A. (N.S.)

Mr. J. M. Goodson, for appellant:

Appellee's failure properly to perform its duty was the proximate and efficient cause of the injury.

Pratt v. Chicago, R. I. & P. R. Co. 107 Iowa, 287, 77 N. W. 1064; 21 Am. & Eng. Enc. Law p. 496; *Thomp. Neg.* § 6027; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; 16 Am. & Eng. Enc. Law, p. 440; *Walrod v. Webster County*, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Faulk v. Iowa County*, 103 Iowa, 442, 72 N. W. 757; *Burk v. Creamery Package Mfg. Co.* 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; *Brown v. West Riverside Coal Co.* 143 Iowa, 662, 28 L.R.A. 1260, 120 N. W. 735; *Van Camp v. Keokuk*, 130 Iowa, 716, 107 N. W. 933.

Failure properly to light, and allowing the obstructions to remain, made the street, at this place, less safe for travel than if it had not been lighted at all, thereby creating and maintaining a nuisance.

Wheeler v. Ft. Dodge, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

Messrs. Talbott & Talbott and J. W. Carr, for appellee:

A failure of defendant to light its streets is not sufficient negligence to render it liable.

Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 316; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Abbott, Mun. Corp.* p. 2200.

The manner of street lighting is a matter confided exclusively to the judgment and discretion of the municipal authorities.

Wolf v. District of Columbia, 21 App. D. C. 464, 69 L.R.A. 83; *Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277; *Hazelrigg v. Frankfort*, 29 Ky. L. Rep. 207, 92 S. W. 584; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L.R.A. 789, 46 Am. St. Rep. 760, 54 N. W. 1044.

Large thrifty trees standing along the sidewalk inside the street curb are not a nuisance.

Everett v. Council Bluffs, 46 Iowa, 66; *Emerson v. Babcock*, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656; *Burget v. Greenfield*, 120 Iowa, 432, 94 N. W. 933.

McClain, J., delivered the opinion of the court:

While plaintiff was driving a horse along a street of the defendant town, one Sterna, who, as alleged, was driving a horse and vehicle in a careless and reckless manner along said street in the opposite direction and upon the wrong side of the street, ran the shafts of his vehicle into

the plaintiff's horse, causing the damage complained of. The alleged negligence of the defendant town contributing to the injury consisted in the fact that, although the town had undertaken to light said street and to secure safety to travelers thereon, it failed in its duty to reasonably light the same; such failure being caused by the use of lights of low and insufficient power, placed at too great a distance apart at the extreme outer edge of the street, and in permitting the trunks of large trees and their branches to obstruct the light, with the result that at intervals between the lights, and where such lights were obstructed by the trees, a traveler on the street was blinded by passing from the light into the darkness; the street being thus rendered unsafe for travel. Plaintiff alleged that the acts of the town in these respects created a nuisance. The demurrer challenged the sufficiency of plaintiff's petition to show negligence or the existence of a nuisance, and also interposed the objection that the alleged negligence of the town was not the responsible and proximate cause of the injury.

1. It is provided in Code, § 753, that cities and towns shall have the care and supervision and control of their streets, and cause the same to be kept open and in repair and free from nuisance; but no breach of this duty is alleged in plaintiff's petition, unless the trees along the sides of the streets, or the shadows cast by them into the streets, where their trunks and branches intercepted the street lights, constituted a nuisance. It is admitted by counsel for appellant that trees along the side of the street of a city or town do not constitute a nuisance *per se*. No system of lighting has as yet been devised which will prevent the trunks and branches of trees which stand between the traveled portions of the street and the sidewalks from casting shadows, either in the street or across the sidewalks. We should be unwilling to adopt any ruling which would necessitate the destruction of all the trees between the lot lines, in order to avoid the casting of shadows into the streets or across the sidewalk. Such shadows are necessarily incident to the artificial lighting of the streets, no matter how carefully it may be devised. It is equally impossible in pursuance of the methods of lighting in common use which are practicable in the ordinary residence streets of a city or town, to adopt any system of lighting which will not occasion contrasts of high light and comparative darkness in the intervals between the lights, so that the effect on the traveler at the intervals of comparative darkness may be to measurably blind him as to vehicles approaching. 32 L.R.A. (N.S.)

It seems very clear to us that the shadows of trees and the intervals of comparative darkness between the lights did not constitute nuisances which the defendant was bound to abate, and for the natural consequences of which it could be held responsible in damages.

2. Cities and towns are given power to light their streets (Code, § 756), but no duty is expressly imposed upon them to do so. Counsel for appellant concedes that mere failure to undertake the duty of lighting any particular streets cannot, in the absence of some peculiar condition rendering it necessary to light in order to render the streets safe for travel, constitute negligence; and he does not contend that there was any peculiar condition of this street, rendering lights necessary to ordinary safety of travel. He does contend, however, that, as the defendant town had undertaken to light the street, it was negligent in providing an inefficient system of lighting. But it is well settled that the exercise of the power given to a city or town to light its streets rests in the discretion of the corporation, and that the conferring of such power does not give rise to absolute obligation, either as to the extent or the method of lighting to be adopted. It is not left with the courts to say how the lights shall be distributed or how any particular street shall be lighted. *Wolf v. District of Columbia*, 21 App. D. C. 464, 69 L. R. A. 83. In general, the exercise of power to light its streets is left discretionary with the city. *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Lyon v. Cambridge*, 136 Mass. 419; *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277; *Hazelrigg v. Frankfort*, 29 Ky. L. Rep. 207, 92 S. W. 584; 3 Abbott, Mun. Corp. 2290; *Elliott, Streets*, 623.

As the plaintiff's petition does not state facts tending to show that the defendant town permitted a nuisance in its streets or was negligent in failing to make them safe for travel, we need not discuss the question of proximate cause.

The judgment is affirmed.

NEW YORK COURT OF APPEALS.

R. ROSS APPLETON, Receiver, etc., of the
Cooper Exchange Bank, Appt.,
v.

CITIZENS' CENTRAL NATIONAL BANK
OF NEW YORK, Resp't.

(190 N. Y. 417, 83 N. E. 470.)

Bank — guaranty of note — ultra vires
— estoppel.

1. Although a guaranty by a national

bank of repayment of a loan made by a stranger to its debtor, which is larger in amount than he owes it, but out of the proceeds of which it is to receive its claim, is *ultra vires*, it is liable to the lender for the sum which it receives by reason of such guaranty.

Pleading — complaint — wrong theory — effect.

2. That a complaint is framed on a wrong theory will not render it demurrable if it states all the facts necessary to entitle plaintiff to relief upon some theory.

(January 7, 1908.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part V., for

Note. — Guaranty of loan by national bank.

The cases involving the liability of a national bank upon its promise to honor checks to be drawn upon it by one who has no funds on deposit to meet the same rests upon principles applicable to the question indicated by the foregoing title. This precise question, however, has been already considered, as may be seen by referring to *Merchants' Bank v. Baird*, 17 L.R.A. (N.S.) 526, and note thereto appended.

Want of power to guarantee, — generally.

Although national banks are expressly authorized by the national banking act to lend money upon personal security, they are without right to loan their credit, either under such express authority or under their incidental powers. *Johnston Bros. v. Charlottesville Nat. Bank*, 3 Hughes, 657, Fed. Cas. No. 7,425; *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, 647, Fed. Cas. No. 12,642; *National Bank v. Atkinson*, 55 Fed. 465; *Thilmany v. Iowa Paper Bag Co.* 108 Iowa, 333, 79 N. W. 68. Under this rule a national bank cannot become an accommodation indorser. *National Bank v. Atkinson*, 55 Fed. 465.

The bank's power of guaranty is confined to paper bought and sold by it in the ordinary course of its business. *City Nat. Bank v. Thomas*, 46 Neb. 861, 65 N. W. 895; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907.

And it has been held that, since a national bank cannot guarantee a debt to be contracted by another for his sole benefit, one who, upon the presentation of the alleged guaranty, allows such other to become his debtor, must be presumed to know that the guaranty imposed no legal obligation upon the bank. *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799.

But the power of a national bank to receive deposits authorizes it to make an indorsement upon a contract of sale, that the vendee has deposited with it certain money which it undertakes to hold as security for

New York County, sustaining a demurrer to the complaint in an action brought to recover upon the guaranty of repayment of a loan. Reversed.

The facts are stated in the opinion.

Mr. Julius M. Mayer, with Mr. John W. Hutchinson, Jr., for appellant:

Contracts, including those of surety or guaranty, are to be construed in the light of surrounding circumstances.

Crist v. Burlingame, 62 Barb. 351; *Wysong v. Meyer*, 58 App. Div. 424, 69 N. Y. Supp. 286; *Gamble v. Cuneo*, 21 App. Div. 413, 47 N. Y. Supp. 548, affirmed in 162 N. Y. 634, 57 N. E. 1110; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669.

The transaction between the Central Bank and the Cooper Bank was not such a

faithful performance of the contract, and, upon default by the vendee, the vendor maintain an action against it for the deposit. *Bushnell v. Chautauqua County Nat. Bank*, 74 N. Y. 290.

And in *Schofield v. State Nat. Bank*, 38 C. C. A. 179, 97 Fed. 282, it was held to be within the powers of a national bank to assume the liabilities of another bank in consideration of the transfer to it by the latter of bills receivable to be selected by the former to a sufficient amount to protect it against loss. The court said that the power of a national bank to discount or purchase commercial paper includes the power to loan money upon the security of paper, instead of discounting or purchasing it outright, and to contract to pay out the money agreed to be loaned at some future time, instead of at the time when the agreement was made.

—as affecting remedies of bank.

The violation by a national bank of a section of the national banking act forbidding the overcertification of checks does not preclude the bank from enforcing its claim out of collaterals pledged to secure the obligations of the drawer of the checks, in view of the further provision of the act that any check so certified shall be a valid obligation against the bank, and of the fact that the act makes the forfeiture of the bank's charter and the winding up of its affairs the only penalty for its violation. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66, affirming 113 N. Y. 325, 21 N. E. 57.

It was held in *Volts v. National Bank*, 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69, affirming 57 Ill. App. 360, that, irrespective of whether a standing guaranty by a national bank of all checks and drafts to be drawn upon a nonmember of a clearing house, made for the purpose of securing the privileges of the clearing house to it, was *ultra vires* and void, the guarantor bank, which, in pursuance of its guaranty, paid a check drawn upon such nonmember after it became insolvent, was entitled to maintain

contract of guaranty as is inhibited against national banks, but was a written promise made to a third party in the prosecution and collection of an existing valid debt.

American Nat. Bank v. National Wall-Paper Co. 23 C. C. A. 33, 40 U. S. App. 648, 77 Fed. 85; Morris v. Third Nat. Bank, 73 C. C. A. 211, 142 Fed. 25; Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679; Cockrill v. Ables, 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505; Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 52 C. C. A. 149, 114 Fed. 263.

The doctrine of *ultra vires* is not applicable.

Peoples' Bank v. Manufacturers' Nat.

assumpsit against the drawer of the check. The court, while going out of its way to say that it would seem that, under the Federal decisions, the guarantor could not, in an action brought on the guaranty, have availed itself of the defense of *ultra vires*. went on to say that, even if it could have done so, it did not, but paid the check in accordance with its guaranty, the validity of which could not be questioned by the drawer of the check, and it seems that the precise ground upon which the recovery was allowed was that the guarantor, upon payment of the check, became subrogated to the rights of the payee against the drawer, and was therefore entitled to recover in assumpsit against the latter.

And in a *dictum* in First Nat. Bank v. Bennett, 33 Mich. 520, the court, while saying that it was a serious question whether a national bank had power to guarantee against loss sureties upon a note to be made in its favor, declared that such a contract would be a complete defense to an action by the bank against the sureties, it appearing that the note was given as a substitute for another note of the maker held by the bank.

—as affecting bank's liability on accommodation guaranty.

The majority of cases coming within this subdivision indicate the rule to be that the bank cannot be held liable upon its accommodation contract of indemnity, even where another has, in reliance upon it, altered his position to his own detriment.

Thus, in was held in Bailey v. Farmers' Nat. Bank, 97 Ill. App. 66, that an action upon a replevin bond was not maintainable against a national bank which had joined therein as surety, for the reason that such act was not expressly or impliedly within the powers conferred upon it by the national banking act. The court added that, even if the bond had been delivered and accepted by the sheriff, and if, upon faith thereof, he had incurred liabilities by executing the replevin writ, still the bank was without

Bank, 101 U. S. 181, 25 L. ed. 907; Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628.

Mr. John A. Garver, with Messrs. Shearman & Sterling, for respondent:

Unless expressly empowered by statute, corporations have no power to act as accommodation indorsers or guarantors, even for a consideration.

Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567; Fox v. Rural Home Co. 90 Hun, 365, 35 N. Y. Supp. 896, affirmed in 157 N. Y. 684, 61 N. E. 1090; Ætna Nat. Bank v. Charter

authority to execute it, and could not be held liable in an action thereon.

And a contract to indemnify the surety on a building contractor's bond, made for the sole benefit of others, is not within the statutory power conferred upon a national bank, and therefore is not binding upon it. Fidelity & D. Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

And an undertaking made without consideration, to indemnify against loss one who was thereby induced to become a surety upon a replevin bond in a suit instituted by a customer of a national bank, is not within the power of the bank, and therefore a contract of this kind made by the cashier of the bank will not be regarded as having been intended as the bank's contract, for the purpose of defeating the personal liability of the cashier thereon. Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

See also Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601, holding that, under the theory that the officer of a corporation cannot bind it by transactions which are outside of the corporate power, no liability attached to a national bank by reason of the falsity of a representation by its president as to the genuineness of the signatures to a note, where the note was sent to him for the purpose of procuring the signature merely as a courtesy to the sender, and without consideration.

So, a national bank is not bound by the promise, without consideration, of its cashier, to pay a draft drawn or to be drawn upon a depositor, for such transaction is not within the section of the national banking act giving national banks power to exercise all incidental powers necessary to carry on business of banking, by discounting and negotiating notes, drafts, bills, and other evidences of debt, receiving deposits, buying and selling exchange, coin, and bullion, loaning money on personal security, and issuing and circulating notes. Flannagan v. California Nat. Bank, 23 L.R.A. 836, 56 Fed. 959.

And upon the theory that a contract by

Oak L. Ins. Co. 50 Conn. 167; Lucas v. White Line Transfer Co. 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221; Madison W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co. 7 Wis. 59; Pennsylvania R. Co. v. St. Louis A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094.

Under the doctrine of *ultra vires* the contract sued on was prohibited and void.

California Nat. Bank v. Kennedy, 167 U. S. 362, 371, 42 L. ed. 198, 201, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567.

a national bank to honor a draft, made for the purpose of enabling one of its customers to purchase goods, was essentially a contract of guaranty, and therefore without the powers conferred by the national banking act, it was held in First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059, that, notwithstanding the person to whom the guaranty was made had acted upon it by discounting the drafts whose payment it purported to assure, the bank was not estopped to set up the plea of *ultra vires*, and that such plea was a complete defense to an action against it upon the draft.

So, declaring the undertaking of a national bank, made without consideration, to accept drafts for goods to be sold to one of its customers, to be merely a contract of guaranty, and not a purchase of drafts, the court in National Bank v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889, held that the undertaking was *ultra vires* of the bank, and therefore the bank was not liable in an action of assumpsit for the amount of unpaid drafts. This case was followed in Bank of Barnwell v. Sixth Nat. Bank, 28 Pa. Super. Ct. 413.

An undertaking, made without consideration, to stand responsible for the value of goods to be sold and delivered to a specified person, is not within the express or implied powers of a national bank, whether the undertaking be regarded as a guaranty or a letter of credit, and therefore it cannot be held liable in an action thereon. Thilmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N. W. 68.

And accommodation drafts drawn by a national bank for the purpose of enabling another to secure a loan are unenforceable against the drawer or its receiver by the lender, who accepted them as collateral security for the loan, with knowledge of their character as accommodation paper. Johnston Bros. v. Charlottesville Nat. Bank, 3 Hughes, 667, Fed. Cas. No. 7,425.

On the other hand, it was held in Farmers' & M. Nat. Bank v. Illinois Nat. Bank, 146 Ill. App. 136, that the promise of a national bank to honor a draft to be drawn

A national bank has no unusual powers in collecting debts.

California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739.

Cullen, Ch. J., delivered the opinion of the court:

This action is brought by the plaintiff as receiver of a dissolved bank against the defendant, who is the successor of the Central National Bank of the city of New York. The complaint, which thus far has been held not to state a good cause of action, alleges that on the 4th day of January, 1904, the bank which the plaintiff represents loaned and advanced to one

upon it for the value of goods to be forwarded to one who appeared to be its customer was not *ultra vires*. It did not appear in this case whether the alleged customer had funds on deposit sufficient to cover the draft, but the court sought to justify its position upon the rather far-fetched theory that the extension or promotion of the dealings of its customers, from a business standpoint, was a promotion of the interests of the bank. Perhaps it should also be noted that the only language tending to indicate the form of the action was the statement of the court that the action was brought "to recover the amount alleged to be due from appellant to appellee by the terms of" a promise to honor a draft.

And it was held in Hutchins v. Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252, that a contract by a national bank to honor a draft for the amount of goods sent to another, even if *ultra vires*, was not expressly prohibited or illegal, and that where the vendor had parted with his goods in reliance thereon, the bank could not set up the plea of *ultra vires* to defeat its liability. The court sought to justify its decision by following People's Bank v. Manufacturers' Nat. Bank, *infra*, but it did not even appear in the Hutchins Case that the bank received any benefit whatever from its guaranty, there being, on the other hand, a clear inference that it did not receive such benefit.

—as affecting liability of bank benefited by transaction.

Granting that a national bank is without power to guarantee the debt of another, either in terms or in effect, the question arises, where it has received benefit as a result of the execution of the guaranty, whether it may be held responsible for the amount of benefit so received. The two cases published in connection with this note declare what seem to be two correct principles of law: Where the action against the bank is solely upon the guaranty, the bank is not estopped to set up the plea of *ultra vires*, and such plea is a complete de-

Mikael Samuels the sum of \$12,000 on the written agreement of said Samuels to repay said sum on or before four months after date, with interest; the repayment of which said loan the Central National Bank guaranteed by the following instrument: "For and in consideration of \$1 and other good and valuable considerations, the Central National Bank of the city of New York hereby guarantees to the Cooper Exchange Bank the payment, at maturity of a loan of \$12,000, made this day to Mikael Samuels & Company by the Cooper Exchange Bank." That, at the time of said loan, said Samuels was indebted to said Central Bank in the sum of \$10,000. That said loan was obtained by said Samuels, and guaranteed

by said Central Bank, for the purpose, and upon the agreement, that the said Central Bank should receive out of said loan the sum of said \$10,000, which Samuels owed to it, which said sum said Central Bank did receive from Samuels. That Samuels failed to pay said loan except the sum of \$1,000. Judgment is demanded for the remaining sum of \$11,000, and interest. The appellate division decided the case by a divided court on the authority of a decision on a previous appeal. The complaint now before us is an amended one, and the record does not contain the original complaint. Consequently, we are not informed as to what difference exists between the allegations of the two pleadings.

fense to the action, irrespective of whether the bank has reaped any benefit from the transaction. This is the rule of *First Nat. Bank v. Monroe*, post, 550. On the other hand, where the bank has reaped advantage as a result of making the guaranty, it cannot avail itself of the plea of *ultra vires* to defeat its liability, at least to the extent of the benefit which it has received, where the alleged right of recovery is not based upon the guaranty, but is, for instance, grounded upon implied contract. This is the doctrine of *APPLETON v. CITIZENS' CENTRAL NAT. BANK*, which, it will be observed, was affirmed by the United States Supreme Court in 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364, both courts taking care to point out that the action need not be regarded as grounded on the written contract of guaranty, but as based on an implied contract.

This distinction between forms of action is also made in *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 335, where it appeared that the plaintiff conveyed certain land to another at the request of a third person, and that such other made certain promissory notes payable to the third person, and executed to him as many mortgages to secure the payment of the notes, and that this transaction was in consideration of the third person's contract to deliver to the plaintiff certain building material, the performance of which was guaranteed by the defendant national bank. The third person, that is, the obligor in the building contract, was indebted to the bank, which received, in discharge of such indebtedness, his note, together with a pledge of one of the mortgage notes and an assignment of the corresponding mortgage. Upon default in the payment of the note of its debtor, the bank procured from the plaintiff's immediate grantee a quitclaim deed of the lot described in the mortgage, and the plaintiff brought assumpsit against the bank upon the written guaranty. The court held that, inasmuch as the bank received a tract of land which the plaintiff conveyed in reliance upon the guaranty, and that the guaranty, the conveyance, and the pledge of the note and 32 L.R.A. (N.S.)

mortgage, were parts of the same transaction, and notwithstanding the land was not received directly from the plaintiff, it received a benefit from the guaranty, and that it could not be permitted to repudiate the contract and retain the fruits of it. It was held, however, that, inasmuch as the action was upon the guaranty, no recovery could be had against the bank in that form; but the plaintiff was given permission, if he should desire, to amend his declaration by adding an appropriate count for the recovery of the land or its value.

So, a national bank cannot be held liable in an action upon its guaranty of a letter of credit, although paper has been deposited with it as collateral security for its undertaking. *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, 647, Fed. Cas. No. 12,642.

So, it was said in *Groos v. Brewster*, — Tex. Civ. App. —, 55 S. W. 590, that the contract of a national bank that, in consideration of the payment by the drawee of drafts held by it, it would pay return drafts to be drawn by him for the amount by which he claimed the drafts drawn upon him exceeded the amount for which he was liable to their drawer, was not within its powers, and could not therefore be made the foundation of liability on its part.

Attention is also directed to *Barron v. McKennon*, 179 Fed. 759, holding that the contract of a national bank, made upon selling stock held by it and taking in return therefor a promissory note from the vendee, to guarantee the latter against any loss in the transaction from the execution and delivery of the note, was *ultra vires*, and that therefore the bank could not be held liable for loss resulting from a depreciation in the value of the stock, the action apparently being brought upon the contract of indemnity.

In *First Nat. Bank v. Greenville Oil & Cotton Co.* 24 Tex. Civ. App. 645, 60 S. W. 828, in which it appeared that a national bank was sought to be held liable as upon *quantum meruit*, it was held that where the bank contracted to pay for feed to be furnished to a cattle owner, after the vendor had refused to deliver it upon the personal

The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant bank was *ultra vires*, and not binding upon it; and upon this ground the judgments below are sought to be sustained. Had the guaranty been limited to the amount which the bank, under its agreement with Samuels, was to receive out of the loan, we should be entirely clear that it was within the legitimate powers of the bank, under the decisions of the Supreme Court of the United States in

People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907, and Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628. It was there held that a contract of guaranty of paper held by it was within the implied powers of a national bank, and this though, as in the later of the cases cited, the note was not made to the guarantying bank, but directly to the order of another bank to which the guaranty was made. We think, however, that the defendant's power

credit of the latter, and also received 10 per cent on the money advanced by it, induced the cattle owner to transfer his deposit from another bank, and accepted from him a mortgage lien upon his cattle, the proceeds of which, upon sale, were given to the bank, it could not defeat a recovery, upon the theory that the contract was *ultra vires*.

Some cases permit a recovery on the guaranty where the bank has been benefited; but a part of such cases, if they are to be distinguished at all, may possibly be differentiated from those just cited, upon the rather narrow ground that the former involve the guaranty of paper transferred by the bank, which had been transferred to, or at least accepted by, it, for the purpose of enabling it to apply the proceeds to its debt against the transferor. In such circumstances, the transaction has been upheld under the bank's power to transfer and negotiate commercial paper. However, it is difficult, from a practical view point at least, to perceive any vital difference between such a transaction, and those involved in the APPLETON CASE and the Monroe Case.

A case permitting a recovery on the guaranty is People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907, where it was held that the statutory power of national banks to discount and negotiate promissory notes included the power to guarantee notes transferred by it, for the reason that a contract of guaranty was a less burdensome one than that of indorsement. It appeared that in this case the notes transferred by the bank with the accompanying contract of guaranty had been made and transferred to it by its debtor in pursuance of an understanding that the bank should negotiate the note and apply the proceeds to the cancellation of his indebtedness; and that the bank was credited with the full amount of the note by the transferee. The bank was held liable to the transferee apparently upon the guaranty, for the declaration contained a special count upon the guaranty, and also a common count for money had and received; and the court's intention to hold the bank liable upon the guaranty is indicated by the fact that it said that whether, if the guaranty were void, the fund received by the bank could be recovered back upon the common count, was a point which it was unnecessary to consider. Perhaps, in this 32 L.R.A. (N.S.)

connection attention should be again directed to the affirmance of the APPLETON CASE in 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364.

The decision in People's Bank v. Manufacturers' Nat. Bank, just cited, both as to results and reasons, was adopted in Thomas v. City Nat. Bank, 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943, where a guaranty was held enforceable against a national bank which had received notes from its debtor, and had transferred them to a third person, accompanied by the contract of guaranty, applying the proceeds to the discharge of the obligations of its debtor.

In Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107, the power of a national bank to make an accommodation indorsement seems to be assumed,—or at least it is not questioned,—for the bank is held liable thereon. It appeared that there was some evidence to show that the indorsement was made to enable the payee to get the instrument discounted for the purpose of using the proceeds to take up paper which the bank had previously discounted for him, and the court seems to think that if this fact had been established, it would have taken the transaction from the category of an accommodation indorsement, but unqualifiedly states that even if it was an accommodation indorsement, the bank was liable thereon, at least as against a purchaser in good faith and without notice.

In Seeber v. Commercial Nat. Bank, 77 Fed. 957, it was held that a national bank was liable upon its contract to indemnify one whom it induced to become surety upon an attachment bond in a suit upon a note owned by it, instituted by one to whom it had indorsed the note for collection. The court said that, notwithstanding the surety was aware that the transaction was in excess of the authorized power of the bank, the contract was not void; and that, although, so far as a contract of this kind remains unexecuted, it is entirely consistent with public policy to avoid it, where the promisee has executed the contract, or has altered his position on the face of it, the repudiation of the contract by the bank would be inconsistent with that honesty which is the highest public policy, and that in such a case the contract should be enforced even if, by its terms, the consideration did not move to the bank.

L. A. W.

to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum, in order that the bank might receive or retrieve a lesser sum, would be to permit it to enter upon very hazardous speculation, and authorize very wild and unsafe banking. The learned counsel for the appellant frankly conceded on the argument that a recovery should be limited to the amount received by the defendant. It is insisted, however, that the contract of guaranty must be deemed either good or bad as an entirety, and cannot be upheld in part and rejected in part. I am not willing to concede this claim; but it is unnecessary to discuss it, for its determination is not necessary to the decision of the case. We may assume that the contract was *ultra vires*. We may further assume that in transactions by national banks we should adopt the law of *ultra vires*, as it prevails in the Federal courts, and not the local law on the subject. Yet the defendant, in our opinion, became plainly liable for the amount which it received under the *ultra vires* contract. The law which obtains in this state and in several other jurisdictions is that, where one party has received the full benefit of an *ultra vires* contract, it cannot plead the invalidity of the contract to defeat an action upon it by the other party. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 38 L.R.A. 664, 45 N. E. 390. A contrary rule obtains in the Supreme Court of the United States. There it is held that the execution of an *ultra vires* contract by one party cannot confer upon it validity, or authorize the other party to sue on its obligations (*Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478); but at the same time it is also held that a party cannot retain money or property received by it under an *ultra vires* contract when it refuses to perform that contract (*Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496). It was there said by Judge Harlan: "The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in *March v. Fulton County*, 10 Wall. 676, 684, 19 L. ed. 1040, 1042, 'rests upon all persons, natural

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and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation." In a great many cases the difference between the law prevailing in the Federal courts and that in our own would lead to great difference in results. In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other. Whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract, and refuse to perform the contract.

It is urged by the counsel for the respondent that payment by its debtor of the claim it held against him constituted no consideration for the guaranty, for the debtor was bound to perform his obligation. There is no force in this suggestion. The money the defendant received was not that of Samuels, but the plaintiff's, and Samuels was merely the conduit through which it was paid to the defendant. It is not a question of consideration between Samuels and the plaintiff, but of consideration between the plaintiff and the defendant. The plaintiff parted with its money solely on the guaranty of the defendant. Whoever heard that the loan of money to the principal was not sufficient consideration for the obligation of the surety? In this case it was the surety who got the money. Nor is there any force in the suggestion that this action is not brought in disaffirmance of the contract for money had and received, but on the contract of guaranty. All the facts are set forth in the complaint, and if these facts entitle the plaintiff to relief on any theory, then the complaint states a good cause of action.

The judgments of the Appellate Division and Special Term should be reversed, and judgment rendered for plaintiff on demurrer, with costs in all the courts, with leave, however, to the defendant, within twenty days, to withdraw demurrer and serve answer upon the payment of such costs.

Gray, Haight, Werner, Willard Bartlett, and Hiscock, JJ., concur. Edward T. Bartlett, J., taking no part.

Affirmed by Supreme Court of the United States February 21, 1910 (216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364).

GEORGIA SUPREME COURT.

FIRST NATIONAL BANK OF TALLA-
POOSA et al., Plffs. in Err.,
v.

J. M. MONROE et al.

(135 Ga. 614, 69 S. E. 1123.)

Bank — indorsement — liability on.

1. A national bank, in negotiating its paper, can bind itself for the payment thereof by its indorsement thereon; but it cannot guarantee the payment of the paper of others, or become surety thereon solely for the benefit of the latter.

Same — borrowing for customer — guaranty — ratification.

2. A national bank loaned to one of its customers, a private corporation, an amount greater than 10 per cent of its unimpaired capital stock and surplus, in violation of the provisions of the Federal statute. The cashier of the bank, who was secretary and treasurer of the bank's debtor, notified another of this fact, and stated to him that the "only way the bank could extend any further credit" to its debtor "was by procuring a loan" from him, "to be secured by said bank," and induced such other person to lend the bank's debtor \$15,000, upon the guaranty of the cashier individually, and of the bank through its cashier, of the payment of the notes of the bank's debtor for the amount borrowed. Held: (a) A national bank cannot ratify such an *ultra vires* act. (b) The fact that the cashier's object in making statements to the lender to induce him to make the loan "was to procure to said bank the payment to it of the said amount so due said bank" by its debtor, and to release the cashier from his liability "in making said excessive loan," and the fact that the bank received \$11,640.02 of the \$15,000 borrowed, do not estop it from setting up the invalidity of such guaranty on its part.

(January 11, 1911.)

ERROR to the Superior Court for Haralson County to review a judgment in plaintiffs' favor in a suit to recover upon a guaranty of the payment of notes of a debtor of the defendant bank, which had been given to one induced to lend money to him by promise of the guaranty. Reversed.

The facts are stated in the opinion

Mr. P. H. Brewster, with Messrs. G. R. Hutchens and Dorsey, Brewster, Howell, & Heyman, for plaintiffs in error:

Any act done by a national bank, not

Headnotes by HOLDEN, J.

Note.— The question of the guaranty of a loan by a national bank is the subject of the note appended to Appleton v. Citizens' Central Nat. Bank, ante, 543. 32 L.R.A. (N.S.)

authorized by the national bank act, or incidental to the banking business, is illegal, being beyond its power, and is *ultra vires*. It is not voidable, but absolutely void.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 315, 16 Sup. Ct. Rep. 379; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 568, 41 L. ed. 266, 16 Sup. Ct. Rep. 1173; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925, s. c. 87 Fed. 430; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Merchants' Bank v. Baird, 17 L.R.A. (N.S.) 526, 90 C. C. A. 338, 160 Fed. 642; Western U. Teleg. Co. v. State, 165 Ind. 492, 3 L.R.A. (N.S.) 153, 76 N. E. 100, 6 A. & E. Ann. Cas. 880; State v. Warner, 165 Mo. 399, 88 Am. St. Rep. 422, 65 S. W. 584; McLucas v. St. Joseph & G. I. R. Co. 67 Neb. 603, 93 N. W. 928, 97 N. W. 312, 2 A. & E. Ann. Cas. 715; Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895; Merchants' Laclede Bank v. Troy Grocery Co. 144 Ala. 605, 39 So. 476; Groos v. Brewster, — Tex. Civ. App. —, 55 S. W. 590; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N. W. 68; Chemical Nat. Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; National Bank v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889; Harp v. Fireman's Fund Ins. Co. 130 Ga. 726, 61 S. E. 704, 14 A. & E. Ann. Cas. 299.

A national bank cannot guaranty the payment of debts contracted by third parties, and acts of that nature, whether performed by the cashier of his own motion, or by direction of the board of directors, are necessarily *ultra vires*.

Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; State Nat. Bank v. Newton Nat. Bank, 14 C. C. A. 61, 32 U. S. App. 52, 66 Fed. 691; Farmers' & M. Nat. Bank v. Smith, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925, 87 Fed. 430; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567; Merchants' Bank v. Baird, 17 L.R.A. (N.S.) 526, 90 C. C. A. 338, 160 Fed. 642.

Messrs. Lloyd Thomas, Griffith & Mat-

thews, and King & Spalding for defendants in error.

Holden, J., delivered the opinion of the court:

The defendants in error, hereinafter called the plaintiffs, in a suit to recover upon the guaranty hereinafter referred to, and for other purposes, made substantially the following allegations: The First National Bank of Tallapoosa, one of the plaintiffs in error, through its cashier, had loaned one of its customers, the Southern Car Wheel Iron Company (a private corporation), an amount in excess of the amount permitted by law to be loaned to one person, and the debtor was unable to make any payment thereon. The cashier of the bank stated to the plaintiffs, who had in the bank the "sum of \$20,000 on a deposit of twelve months," that the bank would "readily let said iron company have whatever money it needed, but for the fact that the bank had already loaned said iron company more money than was authorized by its charter, and the only way it could extend any further credit to said iron company was by procuring a loan from petitioners, to be secured by said bank," and that, if the loan was made, he and the bank would guarantee the payment thereof; "that the entire management of the bank was left with him; that he had frequently made such guaranties for the bank; and that he had full authority to make such guaranty." On or about May 3, 1907, the cashier stated that he had become the secretary and treasurer of the iron company, that he was then in position to make the loan for the plaintiffs of \$15,000, and that, if the loan was made, "the same would be sufficient to pay off all the urgent and pressing debts, and would afford said Southern Car Wheel Iron Company a sufficient working capital for one month's run in advance." The statement as to the amount of urgent and pressing debts was false, and known by the cashier to be false when made. Such debts amounted to \$50,000. The plaintiffs relied upon such statements as true. "Statements of the said cashier that he was allowed by the officers and directors of said bank to have the entire control and management of said bank were true." The cashier's object in making statements to the plaintiffs to induce them to make the loan "was to procure to said bank the payment to it of the said amount so due said bank by said Southern Car Wheel Iron Company, and to release Rowe Price from his liability as cashier in making said excessive loan." Upon the statements of the cashier, and relying upon the guaranty as a valid and sufficient security,

the plaintiffs on May 14, 1907, made the loan of \$15,000 to the iron company, and took the latter's several notes therefor and the guaranty of the cashier and the bank of the payment of the notes. The notes were placed for collection with said bank, which reported four of the notes paid as they matured. The other seven notes are unpaid, and the iron company "is hopelessly insolvent and is now in bankruptcy." The bank and the cashier are indebted to the plaintiffs \$13,000 principal, besides interest and attorneys' fees, on the guaranty, which, as appears from a copy of it set out in the petition, was signed by Rowe Price individually, and by the bank "by Rowe Price, Cashier." Eleven thousand six hundred and forty dollars and two cents of the \$15,000 loaned was applied to the payment of debts due the bank by the iron company. The petition also alleged a sale by the national bank of its assets to a state bank, and prayed for a receiver to take charge of its assets and for an injunction. We deem it unnecessary to set forth in detail all of the remaining allegations of the original petition and of the several amendments thereto by which others were made parties. Demurrers were filed, and to the order overruling them the defendants excepted.

1. Corporations are creatures of the law, and their powers are limited. Every person is presumed to know the law, and is charged with notice of the limitations on the powers of a corporation fixed thereby. U. S. Rev. Stat. § 5136, U. S. Comp. Stat. 1901, p. 3455, give to a national bank the power to "make contracts" and "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." The provisions referred to do not give power to a national bank to guarantee the payment of the obligations of others solely for their benefit, nor is such power incidental to the transaction of the business of banking. A bank can lend its money, but not its credit. See Magee, Banks & Bkg. § 248; 1 Morse, Banks & Bkg. §§ 65, 169; 1 Bolles, Modern Law of Bkg. § 25; Bolles, National Bank Act Annotated, 4th ed. 40, § 10. A national bank, in negotiating its paper, can bind itself for the payment thereof by its indorsement thereon, but it cannot guarantee the pay-

ment of the paper of others, or become surety thereon, solely for the benefit of the latter.

2. The plaintiffs in their petition seeking to recover against the bank on its guaranty of notes amounting to \$15,000 of the iron company, given to the plaintiffs, allege, among others, the following facts: The cashier of the bank stated to them that the bank would "readily let said iron company have whatever money it needed but for the fact that the bank had already loaned said iron company more money than was authorized by its charter, and the only way it could extend any further credit to said iron company was by procuring a loan from petitioners, to be secured by said bank;" and that, if the loan was made, the bank and its cashier, as an individual, would guarantee the payment thereof. The cashier became secretary and treasurer of the iron company, and stated to the plaintiffs that he was then in position to make the loan for them of \$15,000, and falsely stated that, if the loan was made, "the same would be sufficient to pay off all the urgent and pressing debts, and would afford the said Southern Car Wheel Iron Company a sufficient working capital for one month's run in advance." The object of the cashier in making statements to defendants in error to induce them to make the loan "was to procure to said bank the payment to it of the said amount so due said bank by said Southern Car Wheel Iron Company, and to release Rowe Price from his liability as cashier in making said excessive loan." It is contended by counsel for the plaintiffs that, by reason of the facts stated in the petition, and especially by reason of the fact that, in pursuance of an understanding between the bank and the iron company, the bank was paid part of the money loaned by them, the bank is estopped from contending that its guaranty was unauthorized. We cannot agree with this contention. It will be observed that the bank did not receive on the debt of the iron company all of the money loaned by the defendants in error. In the cases of *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907; *Talman v. Rochester City Bank*, 18 Barb. 123, the entire amount realized in the transaction went to the bank, in pursuance of an agreement between it and its debtors, and the transactions there involved were not illegal. While it is alleged that the money was loaned on the guaranty of the bank, the loan was really made to the iron company, and the payment of its notes was guaranteed by the bank. U. S. Rev. Stat. § 5200, U. S. Comp. Stat. 1901, p. 3494, as amended by act June 22, 1906, 32 L.R.A. (N.S.)

chap. 3515, 34 Stat. at L. 451, U. S. Comp. Stat. Supp. 1909, p. 1331, prohibits a national bank from making to any one person, firm, or corporation a loan in excess of one tenth of its unimpaired capital stock paid in and its unimpaired surplus. The allegations of the petition, that the cashier told the plaintiffs that the bank had loaned the iron company an amount in excess of that prohibited by law, evidently had reference to this law. The petition, therefore, shows that the defendants in error knew, when the loan was made by them, that the bank had loaned the iron company an amount exceeding 10 per cent of its unimpaired capital stock and surplus, in violation of the Federal statute above mentioned. It does not appear from the petition that the plaintiffs knew, when the loan was made, that any of the money loaned was to go to the bank. Treating the case on the theory that the loan was made by the plaintiffs to the iron company for the sole benefit of the latter, the guaranty would be void under the ruling made in the 1st division of the opinion; and the fact that the bank was a creditor of the iron company, and therefore interested in its securing more money, and interested in its success, would not make the guaranty valid, nor would the guaranty be valid because the plaintiffs made the loan to the iron company because of the guaranty of the bank. The amount of the loan received by the bank reduced its debt against the iron company to that extent, but the bank, by reason of its guaranty, engaged to pay it back to the plaintiffs if the iron company did not pay it. Before the loan, the bank had the obligation of the iron company for this amount. After the loan, the bank had this amount paid in cash, but with its obligation outstanding to repay this amount to the plaintiffs if the iron company did not. But the bank got only \$11,640.02 of the \$15,000 loaned, though it guaranteed the payment of the full amount thereof. The balance of something over \$3,000 was kept by the iron company. Neither in fact nor in theory had the bank reduced the amount it was liable to lose on the iron company. The law will not look merely to the form, but it will look to the substance of a transaction in determining its legality and effect; and, on examining this transaction, we find, taking the allegations of the petition to be true, that, while the cashier of the bank, in undertaking to evade the Federal statute prohibiting a loan of over 10 per cent of its capital stock and surplus to the iron company, had wiped from its books a showing of indebtedness of the iron company to the bank, in practical

effect the bank had attempted to assume liability for a greater indebtedness of the iron company than it originally owed the bank. According to the allegations of the petition, the very purpose of the cashier was to obtain a loan from the plaintiffs of \$15,000 for the iron company on the guaranty of its payment by the bank, in order that a part of the money might be used to pay the debt of the iron company, which was an excessive loan, in violation of the Federal statute. The plaintiffs knew that part of the \$15,000 they loaned was to go to pay some of the pressing debts of the iron company and part to defray the expense of operating its plant for a month; and while they did not know that part of the loan was to pay debts due the bank, if they are to take advantage of the fact that part of the money went to pay debts of the iron company to the bank, in an action on the contract, they will have to let the legality of the matter be governed by all of the facts, and all of the alleged facts show that, after the loan and receipt of a part of it by the bank, the latter had a risk on the iron company for a greater amount than it had before the loan, and that the cashier, in obtaining the loan, was endeavoring by indirection to circumvent the statute prohibiting a loan of over 10 per cent of its capital stock and surplus to the iron company. The loan by a national bank of more than 10 per cent of its capital stock and surplus to one customer is an act prohibited by law, whether done directly or indirectly. The transaction in question offended this express prohibition of the law.

It has been ruled in many cases that one who received from a corporation a benefit under a contract involving merely an *ultra vires* act of a corporation cannot defeat the enforcement of the contract, though the commission of *ultra vires* acts by a corporation subjects it to a forfeiture of its charter by the government. 1 Clark & M. Priv. Corp. § 225(b), p. 600; 1 Bolles, Modern Law of Bkg. § 24; 2 Morse, Banks & Bkg. § 732. But an *ultra vires* act of a corporation is not binding upon it, and it cannot ratify such an act or be estopped from claiming it to be void, under the decisions of the Supreme Court of the United States. In *Frist Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 158, 72 S. W. 1059, 1060, it was said: "The powers of a national bank under the national banking act are essentially matters for Federal construction and interpretation, and whatever rules may obtain in the several states as to the powers of corporations under state statutes, all state courts must yield to the decisions of the Supreme Court of 32 L.R.A.(N.S.)

the United States, construing the powers of national banks under the national banking act." The court then proceeds to show that the Supreme Court of the United States has decided that a national bank has no power to bind itself that a draft drawn on its customer will be paid, and, when sued on such a contract, it can plead *ultra vires*, and the fact that the other party to the contract has performed his part of it does not estop the bank from so pleading. The court concludes its opinion in these words: "It will be of no profit in this case to consider the rules of law adopted by the several states, bearing upon the power of banks organized by authority other than the Federal government to enter into such contracts, or to interpose the defense of *ultra vires* after the other party to the contract has fully performed it; for the decisions of the Federal courts treat all such contracts as void and unenforceable as to national banks, and this court is in duty bound to defer to those Federal decisions." See, in this connection, *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799. In *California Nat. Bank v. Kennedy*, 167 U. S. 362, 368, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831, 833, the court quotes approvingly from a previous decision of that court the following language: "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." In *De la Vergne Co. v. German Sav. Inst.* 175 U. S. 40, 58, 44 L. ed. 65, 71, 20 Sup. Ct. Rep. 20, 25, the court says: "Whatever doubts might have been once entertained as to the power of corporations to set up the defense of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that, where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although, in an action upon a *quantum meruit*, it may be compelled to respond for the benefit actually received." In 2 Page Contr. § 1094, it is said: "If the contract is invalid as against public policy or forbidden by statute, estoppel has no application." Also, in this connection, see *Pullman's Pal-*

ace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Reese, *Ultra Vires*, §§ 58-60, 69, 70, 74, 78. In the recent case of *Citizens' Central Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364, the facts were in many respects the same as they are in the case we are considering, but the suit there held to be maintainable was construed to be one on an implied contract, and not on the express contract of guaranty. Whether the plaintiffs could recover the amount received by the national bank in a suit other than one on the guaranty is a question not involved and it need not be considered.

The petition in this case, properly construed, is to recover solely on the guaranty of the national bank. In an amendment the plaintiffs prayed, if it be determined that the guaranty was not legal and binding, that they recover \$7,131.02, with which their twelve months' time deposit was debited and the account of the iron company credited some time before the loan was made, and \$400 interest due on the time deposit, which amount of interest they had agreed to release the bank from paying by reason of certain facts alleged. No recovery of either of these amounts could be had under all the allegations of the petition and amendments. Mere unauthorized entries on the books of the bank, whereby the time deposit of the plaintiffs was debited with \$7,131.02, did not change the existing liability of the bank to them, nor create any new liability as to them. Viewing the transaction from any standpoint, the guaranty of the national bank was one which the bank could not ratify, or estop itself from having declared void; and the petition, for the reasons hereinbefore set forth, was subject to the first and third grounds of the demurrer, which were grounds of general demurrer. Whether the petition was subject to general demurrer for any reason other than the ones we have based our decision on, or to the second, fourth, and fifth grounds of the demurrer, or either of them, is left open without prejudice to any of the parties.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.
32 L.R.A. (N.S.)

NEW YORK COURT OF APPEALS.

CITY OF ROCHESTER, Resp't.,

v.

MACAULEY-FIEN MILLING COMPANY,
App't.

(199 N. Y. 207, 92 N. E. 641.)

Municipal corporation — smoke ordinance — authority.

1. An ordinance prescribing the density of smoke which shall be allowed to issue from stationary stacks within the limits of a city is within statutory authority to enact ordinances for the preservation of health, for the safety and welfare of the inhabitants, and for the protection and security of their property.

Evidence — judicial notice — harmfulness of smoke.

2. The courts will take judicial notice of the fact that some injury must result from substance-laden smoke pervading the atmosphere in which persons and property necessarily remain.

Appeal — review of facts — intermediate affirmance.

3. The court of appeals cannot consider the question of the reasonableness of a municipal ordinance as one of fact after a finding in its favor has been affirmed by the appellate division.

Municipal corporation — smoke ordinance — reasonableness.

4. An ordinance forbidding stationary stacks in a city to emit smoke for more than five minutes at a time once in four consecutive hours, except between the hours of 5 and 7:30 A. M., which is darker than a scale prepared by covering a dead white surface with dead black lines one twenty-fourth of an inch in width drawn at right angles one fourth of an inch from centers and viewed from a distance of not less than 100 feet in the open air, is not unreasonable as matter of law.

(September 27, 1910.)

Note. — Municipal control over smoke as a public nuisance.

The subject of municipal control over smoke as a public nuisance is covered in the note to *St. Louis v. Edward Heitzberg Packing & Provision Co.* 39 L.R.A. 551, and the supplemental note thereto accompanying the case of *Atlantic City v. France*, 18 L.R.A. (N.S.) 156. The present note covers only the cases which have passed on the point since the writing of the last note.

Where the Constitution confers the exercise of the police power upon cities, and the legislature has given a city power to determine what are nuisances and to prevent the same, an ordinance providing that it shall be unlawful for any person, firm, or corporation to permit any soot to escape from the smokestack or chimney of any furnace within the city in which distillate or crude oil is consumed is within the power

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Monroe County Court which affirmed a judgment of the Municipal Court in plaintiff's favor in an action brought to recover the penalty for an alleged violation of the plaintiff's smoke ordinance. Affirmed.

Statement by Chase, J.:

The common council of the city of Rochester duly enacted an ordinance relating to public safety and good order, which, so far as it relates to the defendant, is as follows:

"Sec. 39. As to Smoke from chimneys—

"Subdivision (a). Color Scale.—For the

purpose of regulating the emission of smoke from chimneys, stacks, flues, or open spaces within the city of Rochester, and to determine by comparison the degree of darkness of smoke so emitted, a color scale shall be and the same is hereby adopted as follows:

"A dead white surface or cardboard or other material, not less than 16 inches in length and in width, shall be divided into squares by straight dead black lines drawn at right angles to one another across said surface. Each of said lines shall be of a uniform width of one twenty-fourth of an inch, and shall be spaced one quarter of an inch from centers. The color of the above scale when viewed from a distance of not less than 100 feet in the open air shall be

conferred. *Re Junqua*, 10 Cal. App. 602, 103 Pac. 159.

And an ordinance declaring the use of soft coal in traction engines, switch engines, and locomotive engines within the limits of a city a nuisance, and prohibiting the use of soft coal other than smokeless coal in such engines, tends to prevent a nuisance, and is within the legislative discretion and a valid exercise of the police power. *State v. Chicago, M. & St. P. R. Co.* — Minn. —, — L.R.A. (N.S.) —, 130 N. W. 545.

And such an ordinance is not an interference with the property right of the owners of such engines, or an abridgment of their privileges protected by the Federal and state Constitutions. *Ibid.*

And where a city is given power to enact laws for the preservation of the health, peace, and good order of the community, and for the benefit of its trade and commerce, and also authority to regulate and control the construction of buildings and chimneys, and to prevent nuisances, an ordinance prohibiting smokestacks less than 50 feet high and making it a nuisance for the same to exist is not palpably unreasonable and beyond the powers of the city. *State ex rel. Hainsworth v. Shannon*, 130 Mo. App. 90, 108 S. W. 1097.

And an ordinance prohibiting the emission of dense smoke within the limits of a city was held valid in *St. Paul v. Robbins*, 93 Minn. 138, 100 N. W. 1124, and a conviction thereunder was sustained.

And it is within the power of Congress to declare the emission of dense, or thick black or gray smoke to be a nuisance. *Bradley v. District of Columbia*, 20 App. D. C. 169.

The fact that an ordinance prohibiting the use of soft coal on yard and switch engines used within a city does not include road engines or stationary engines does not render it invalid as class legislation, since there is a valid basis for a distinction between these engines and switch engines. *State v. Chicago, M. & St. P. R. Co. supra.*

Prescribing a certain scale for measuring the density of smoke, and declaring anything in excess of that scale to be a public

nuisance, is the same thing as declaring smoke to be a public injury and annoyance. *Cincinnati v. Burkhardt*, 30 Ohio C. C. 350.

A smoke ordinance will not be declared void unless it is clearly unreasonable or in restraint of trade. *Ibid.*

And where the court cannot say that there is anything apparent on the face of an ordinance prohibiting the allowing of soot to escape, which would indicate that it is unreasonable or oppressive, or that its enforcement would necessarily interfere in the slightest degree with the right of property or other inalienable rights of a petitioner in habeas corpus proceedings, the judgment entered against him is within the jurisdiction of the court, and he will be remanded. *Re Junqua*, 10 Cal. App. 602, 103 Pac. 159.

Where a smoke ordinance prohibits the emission of dense smoke within the corporate limits of cities of one hundred thousand inhabitants, and further provides that it shall be a good defense in a proceeding under this act if the defendant shall show to the satisfaction of the jury or the court trying the facts that there was no known practical device, appliance, means, or method by application of which to the building, establishment or premises by which the emission of the smoke could have been prevented, it is no defense to show that a smoke abatement device could not be used with the boiler which caused the smoke, where it appeared that these could be replaced by other boilers to which such devices could be attached. *State v. Dower*, 134 Mo. App. 352, 114 S. W. 1104.

In a prosecution of the manager of a building for the violation of the smoke ordinance, evidence that he had done all that could be practically done in installing a high-grade plant should be admitted to guide the jury in fixing the penalty assessed. *Chicago v. Knobel*, 232 Ill. 112, 83 N. E. 459.

A provision in an act prohibiting the emission of black and gray smoke, "that no discrimination shall be made against any method or device which may be used for the prevention of smoke and which accomplishes

used as a basis of comparison of the color of smoke in the city of Rochester.

"Subdivision (b). Dark Smoke Forbidden. It is forbidden and hereby declared to be unlawful to suffer or permit the escape of smoke from any fire not in motion or fire banked or in a state of rest, or from any burning or active fire through a stationary stack, flue, or chimney, of a color darker than said scale, provided, however, that the provisions of this ordinance shall not apply to the escape of smoke from any stationary stack, flue, or chimney, for a period of not to exceed five minutes whenever the successful operation and management of any fire necessarily requires such escape of smoke, but such escape of smoke shall not be permitted or allowed for such period of time more often than once in four consecutive hours. . . .

"Subdivision (d). Time Excepted. The provisions of this section shall not apply between the hours of 5 A. M. and 7:30 A. M.

"Subdivision (e). Special Penalties. Any corporation or person or persons who shall violate any of the provisions of this section, or shall suffer or permit any of

the acts in this section forbidden or declared to be unlawful, shall be subject to a penalty of \$25 for each offense, to be recovered in a civil action by the city of Rochester.

"Subdivision (f). Enforcement. It is hereby made the duty of the commissioner of public safety to enforce the provisions of this section."

The defendant is a domestic corporation operating and conducting a flour mill in said city. After the ordinance quoted became in force as a law of the city, and on November 2, 1906, the defendant continuously between 10:16 A. M. and 11:15 A. M. suffered and permitted the escape of smoke from a stationary smokestack on said flour mill, in violation of said ordinance.

This action was commenced in the municipal court of the city of Rochester to recover of the defendant \$25, the penalty for such disobedience of said ordinance. Judgment was recovered against the defendant, which has been affirmed by the county court of the county of Monroe and the appellate division of the supreme court in the fourth judicial department, respectively, on ap-

the purposes of this act," does not imply that the act is designed to prevent the emission of smoke only so far as the adoption of smoke consuming or other devices can secure such prevention. *Bradley v. District of Columbia*, supra.

Dense smoke is not a nuisance *per se*, but only becomes such when it permeates the air surrounding people, and invades their residence and places of occupation. *State v. Chicago, M. & St. P. R. Co.* supra.

But while the legislature cannot prevent a lawful use of property by declaring a certain use to be a nuisance which is not in fact a nuisance, it may declare acts or conditions which are detrimental to the comfort and health of the community nuisances, although they were not such at common law. *Ibid.*: *Re Junqua*, 10 Cal. App. 602, 103 Pac. 159.

And under a statute making it unlawful "to permit or allow, or cause to be permitted or allowed, the discharge or escape into the open air of large quantities of smoke, soot, dust, steam, or offensive odor, or to permit or allow any smoke, soot, dust, gas, steam, or offensive odor to escape in such manner or in such quantities as to cause or have a natural tendency to cause injury, detriment, or annoyance to any person or persons or the public, or to endanger the comfort, repose, health, or safety of any person or persons or the public, or in such a manner as to cause or have the natural tendency to cause injury or detriment to business or property," it is not necessary to find from the facts that a nuisance exists, before a conviction can be had. *Buffalo v. George P. Ray Mfg. Co.* 124 N. Y. Supp. 913.

The court said: "The right to pass or-

dinances in reference to matters of police presupposes that there may be conditions which would not constitute a common-law nuisance, but which are, nevertheless inconsistent with the rights of individuals and the public, and the test of an ordinance is not whether there is, in fact, a nuisance, but whether the ordinance is reasonable. If it were necessary to establish the fact of a nuisance, to convict one of a violation of an ordinance, then there would be no need of the ordinance, for the maintenance of a nuisance is unlawful at all times, and may be reached without the aid of municipal ordinances. The right to adopt ordinances is limited only by the Constitution and the statutes, and the reasonableness of the same, and if an ordinance regulating a matter of this kind is reasonable, then it does not matter whether it deals with a condition constituting a common-law nuisance or not, and no citation of authority is necessary upon this point."

In the absence of statutory authority a municipal corporation cannot maintain an action to enjoin a public smoke nuisance which does not affect corporate property or property in which it occupies some relation of trust, even though private property of a number of citizens is affected. *Yonkers v. Federal Sugar Ref. Co.* 136 App. Div. 701, 121 N. Y. Supp. 494.

And this is true although the common council was given authority to determine public nuisances and to prevent, restrain, remove, and abate the same, and also power to cause any public nuisance to be abated by any public officer, it not having acted upon the authority given and enacted ordinances in pursuance thereof. *Ibid.*

J. T. W.

peals to such courts, and an appeal is taken by permission from the judgment of the said appellate division of the supreme court to this court.

Messrs. Webster, Meade, Straus, & Raines, for appellant:

Smoke is not a nuisance *per se*, and the ordinance is invalid.

McCarthy v. Carbonic Gas Co. 189 N. Y. 46; People v. Transit Development Co. 131 App. Div. 181, 115 N. Y. Supp. 297; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 535; St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49; Atlantic City v. France, 75 N. J. L. 910, 18 L.R.A.(N.S.) 156, 70 Atl. 163; People v. Sturgis, 121 App. Div. 407, 106 N. Y. Supp. 61; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Wood, Nuisances, 976.

The smoke ordinance of the city is unreasonable and oppressive.

McQuillin, Mun. Ord. § 186; New York v. Dry Dock, E. B. & B. R. Co. 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; Brooklyn Crosstown R. Co. v. Brooklyn, 37 Hun, 413; Ford v. Standard Oil Co. 32 App. Div. 596, 53 N. Y. Supp. 48; People v. Jarvis, 19 App. Div. 466, 46 N. Y. Supp. 596; 17 Am. & Eng. Enc. Law. pp. 247, et seq.; Brooklyn v. Nassau Electric R. Co. 44 App. Div. 462, 61 N. Y. Supp. 33.

Mr. William W. Webb, for respondent:

The legislature granted to the common council of the city of Rochester ample authority to enact the smoke ordinance.

People ex rel. Dunn v. Ham, 166 N. Y. 477, 60 N. E. 191; People ex rel. McLean v. Flagg, 46 N. Y. 404; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 21 L.R.A.(N.S.) 744, 86 N. E. 824, 16 A. & E. Ann. Cas. 695; People ex rel. Wineburgh Advertising Co. v. Murphy, 195 N. Y. 123, 21 L.R.A.(N.S.) 735, 88 N. E. 17; New York v. Dry Dock, E. B. & B. R. Co. 133 N. Y. 111, 28 Am. St. Rep. 609, 30 N. E. 563; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564.

The smoke ordinance of the plaintiff is a reasonable exercise of its legislative power upon a subject affecting the public health, safety, and welfare, and has not deprived the defendant of any of its constitutional rights.

Tenement House Depart. v. Moeschon, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 21 L.R.A.(N.S.) 744, 86 N. E. 824, 16 A. & E. Ann. Cas. 695;

86 N. E. 824, 16 A. & E. Ann. Cas. 695; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097, 13 A. & E. Ann. Cas. 1198; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & E. Ann. Cas. 580; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 535; Field v. Chicago, 44 Ill. App. 411; People v. Lewis, 86 Mich. 273, 49 N. W. 140; Atlantic City v. France, 75 N. J. L. 910, 18 L.R.A.(N.S.) 156, 70 Atl. 163.

Chase, J., delivered the opinion of the court:

At the time when this action was commenced Rochester was a city of the second class, governed by the second-class cities law (chapter 55 of the Laws of 1909 [Consol. Laws, chap. 53]), which, so far as we are now concerned, is a re-enactment of chapter 182 of the Laws of 1898. Said act of 1898 was in force when said ordinance was enacted. The common council of the city is vested with legislative power by a provision of the statute as follows: "The legislative power of the city is vested in the common council thereof, and it has authority to enact ordinances, not inconsistent with the law of the state, for the government of the city and the management of its business, for the preservation of good order, peace, and health, for the safety and welfare of its inhabitants, and the protection and security of their property. . . ." Second-class cities law, § 30, chap. 182, Laws 1898, § 12. This court in People ex rel. Dunn v. Ham, 166 N. Y. 477, 481, 60 N. E. 191, 192, in construing the section from which we have quoted, said: "The evident purpose of that section was to confer upon the common council entire legislative authority as to matters relating to the municipal government, except as limited by that statute and others not inconsistent with its provisions. This is clearly indicated by the act itself, and was plainly avowed by the commission which reported it to the legislature. 5 Senate Documents 1896, No. 24." (p. 481). The common council is thus the judge as to what ordinances it will pass for the safety and welfare of the inhabitants of the city and the protection and security of their property, and, unless an ordinance passed by it is wholly arbitrary and unreasonable, it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 21 L.R.A.(N.S.) 744, 86 N. E. 824, 16 A. & E. Ann. Cas. 695.

This court, referring to the police power in *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 131, 21 L.R.A.(N.S.) 735, 88 N. E. 17, 19, say: "The police power, so difficult to define. but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals, and safety, and to conserve public peace, order, and the general welfare. Regulations and ordinances within such general definition are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all."

The emission of smoke from a chimney when it includes dust, soot, and cinders to such an extent that it is rendered very dark or black, must materially affect the purity of the atmosphere surrounding the place where it is so emitted. The pervading substances in the smoke necessarily darken its color in proportion with the amount thereof. As soon as the impelling force is removed, such substances obey the law of gravity and fall upon the adjoining property. In a city or closely populated community where persons and property cannot be removed from the effects of the disagreeable contamination, it not only pollutes the air that must be breathed, but it mars the appearance, destroys the cleanliness, and affects the value of the property within the circle upon which such substances from the smoke so fall. The extent of the injury is a matter to be established by evidence, to include all the facts and circumstances relating to it, although doubtless it is a matter of common knowledge of which the courts may take judicial notice that some injury must result from substance-laden smoke pervading the atmosphere in which persons and property necessarily remain.

The court of appeals of the District of Columbia, referring to smoke as a nuisance, say: "Now, whilst the emission of ordinary smoke from the chimneys of houses does not amount to a nuisance *per se*, it is nevertheless a matter of common knowledge not to be ignored by the courts that the emission of a volume of dense black smoke from a single smokestack or chimney of a large furnace may under some circumstances work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. When-

ever it may become a special source of legal injury to an individual, he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction." *Moses v. United States*, 16 App. D. C. 428, 50 L.R.A. 532. The courts of this state have frequently exercised their restraining power against persons so using their property as to unreasonably interfere with the property and personal rights of others. *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 A. & E. Ann. Cas. 840; *Pritchard v. Edison Electric Illuminating Co.* 179 N. Y. 364, 72 N. E. 243; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745; *Garvey v. Long Island R. Co.* 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57; *Morton v. New York*, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Yocum v. Hotel St. George Co.* 18 Abb. N. C. 340; *Beir v. Cooke*, 37 Hun, 38; *Hutchins v. Smith*, 63 Barb. 251.

Ordinances relating to the emission of smoke have been enacted in nearly every city and village. There is a great difference in the smoke, dirt, and soot-producing qualities of fuel, and in the furnaces where consumed, and in the manner of stoking the fires, and, as the careless and unrestrained use of some fuels tends to produce and discharge into the atmosphere surrounding the places where such fuels are so carelessly used, dirt, and soot-laden smoke that is disagreeable and injurious. The production and discharge of such smoke is a proper subject for reasonable police regulation. If an ordinance so enacted is reasonable, it should be upheld, and, if unreasonable, it should be declared inoperative and void.

The municipal court by the judgment rendered in this case has, in substance, found that the ordinance is reasonable and enforceable. Such judgment was affirmed by the county court, and it has been unanimously affirmed by the appellate division. As a question of fact it is not open for our consideration. It is not unreasonable upon its face or as a matter of law. The judgment should be affirmed, with costs.

Cullen, Ch. J., and Gray, Haight, Vann, Werner, and Willard Bartlett, JJ., concur.

PENNSYLVANIA SUPREME COURT.

DOROTHY E. WALSH, by Next Friend,
et al.,
v.
PITTSBURG RAILWAYS COMPANY,
Appt.

(221 Pa. 463, 70 Atl. 826.)

Negligence — unsafe property — care — child.

1. The duty of a property owner to exercise active care to keep trespassers off the property, or to protect them after they have entered thereon from injury which might result from the condition of the property, is the same whether the trespasser is an adult or a child.

Same — negligence — injury.

2. A servant's setting in motion in the line of his duties machinery drawing a car by means of a wire cable, with knowledge that a trespassing child is so near the cable

that its clothing will likely be caught by its frayed strands, will render his master liable for injury to the child, caused by its being so caught and drawn into the machinery.

(May 25, 1908.)

A PPEAL by defendant from a judgment of the Court of Common Pleas No. 3, Alleghany County, in plaintiffs' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Clarence Burleigh, James C. Gray, and William A. Challenger, for appellant:

To enable a trespasser to recover for an injury, it must appear that there was a wanton or intentional injury inflicted upon him by the owner.

Gillespie v. McGowan, 100 Pa. 144, 45

Note. — Duty of property owner to trespassing child.

- I. Introduction, 559.
- II. Theory that children cannot be trespassers, 560.
- III. Dangerous premises in general, 561.
- IV. Railroad tracks and premises.
 - a. In general; duty before discovery, 563.
 - b. Duty to discover, 565.
 - c. Duty after discovery, 569.
- V. Trespassers on cars.
 - a. In general, 572.
 - b. Duty to keep children off, 574.
 - c. Duty after discovery, 576.
 - d. Removal of trespasser, 577.

I. Introduction.

It is not intended to collect in this note all the cases in which it has been attempted to hold a landowner liable for injuries to trespassing children. The question considered here is whether the infancy of the trespassers raises any duty where none would otherwise exist. For that reason this note will not cover cases holding one liable, or not liable, for injury to a trespassing child under such circumstances as would have required a like decision had the trespasser been an adult, although a few decisions of this kind have been included. The great multitude of child-trespassing cases are nothing but trespass cases, the infancy of the trespasser having no bearing on the decision, no point being made that a different rule should be adopted in the case of a child than in the case of an adult. The only exception which seems to have been successfully established in favor of children is that arising under the attractive-nuisance doctrine, or the doctrine of the turntable cases, which, of course, proves the general rule that infants are to be treated as other trespassers; at least, up to the time their danger is discovered. In 32 L.R.A. (N.S.)

connection with this note, therefore, the notes to Pannill v. Potomac, F. & P. R. Co. 4 L.R.A. (N.S.) 80, on the doctrine of the turntable cases, and that to Cahill v. E. B. & A. L. Stone Co. 19 L.R.A. (N.S.) 1094, on attractive nuisance should be considered. See also notes to Louisville, H. & St. L. R. Co. v. Hathaway, 2 L.R.A. (N.S.) 498, on Duty of train men upon perceiving object, the character of which is unknown, but which is a trespasser, helpless on the track; Southern R. Co. v. Chatman, 6 L.R.A. (N.S.) 283, on Right of persons in charge of train to presume that child will get out of danger; Temple v. MeComb City Electric Light & P. Co. 11 L.R.A. (N.S.) 449, on Duty in stringing electric wires to guard against danger to children; New York C. & H. R. Co. v. Price, 16 L.R.A. (N.S.) 1103, on Duty of railroad company to fence tracks against children; and Lebov v. Consolidated R. Co. 26 L.R.A. (N.S.) 265, on Duty and liability of street railway company to newsboys who board cars to sell papers. On the duty towards trespassers generally, see notes to Smith v. Norfolk & S. R. Co. 25 L.R.A. 287, on Duty to maintain lookout on railroad train; Frye v. St. Louis, I. M. & S. R. Co. 8 L.R.A. (N.S.) 1069, on Duty of railroad company to keep lookout for trespassers on track; and Union P. R. Co. v. Cappier, 69 L.R.A. 513, on Care due to sick, infirm, disabled, and otherwise helpless persons, with whom no contract relation is sustained.

After the discovery of the trespasser, a different course of conduct is often expected of the property owner than would be demanded if the trespasser were not an infant, notably in the case of children of tender years, seen in a place of danger on railway tracks, the usual presumption as applied to adult trespassers, that they will get out of danger, not holding good in the case of the little ones. When it is remembered with what slight success the attempts

Am. Rep. 365; *Rodgers v. Lees*, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Bannon v. Pennsylvania R. Co.* 29 Pa. Super. Ct. 231; *Grogan v. Pennsylvania R. Co.* 213 Pa. 340, 62 Atl. 924; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *Uthermohlen v. Bogg's Run Min. & Mfg. Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; *Thompson v. Baltimore & O. R. Co.* 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894.

to extend the doctrine of the turntable cases to other kinds of dangerous attractions to children have met, it is not a matter of surprise that the courts have been little inclined to impose a duty towards trespassing infants, merely because of the fact that they are, perhaps, too young to be guilty of contributory negligence. One very peculiar reason, not very flattering to the parents, has been given for not making a different rule in the case of the children from that which pertains to adults. In *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664 (same holding on reargument 98 Pa. 498), the rule that no duty is owed to a trespasser because of the fact that he is a child is said to be demanded by humanity. "There are many unfeeling parents," said Mr. Justice Paxson, "who not only neglect, but maltreat their children. It would be cruel to such children to lay down a rule which would make it an object for unprincipled parents to expose them to injury and death upon a railroad track." It is scarcely possible, however, that such a fanciful danger could have had any general influence in maintaining the equality of infant and adult trespassers.

II. Theory that children cannot be trespassers.

There has been an inclination on the part of some courts to hold that a child of tender years cannot be a trespasser; but the overwhelming weight of authority is the other way.

In *Cincinnati, N. O. & T. P. R. Co. v. Dickerson*, 102 Ky. 560, 44 S. W. 99, it was held that a four-year-old child could not be a trespasser so as to release the company from liability, when the engineer of the train running over it saw it in time to have prevented the accident. The court said that the company was liable if the injury was the result of failure of those having charge of the train to discover the peril of the child by reason of not using such ordinary care as their duty to the train and passengers required them to exercise in looking along the track.
32 L.R.A. (N.S.)

Messrs. Thomas M. Marshall and Rody P. Marshall, for appellees:

The company, in starting the machine with the defective cable attached to it when the minor plaintiff was standing immediately alongside, was grossly reckless and careless.

Enright v. Pittsburg Junction R. Co. 198 Pa. 170, 53 L.R.A. 330, 82 Am. St. Rep. 795, 47 Atl. 938; *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 547.

Wanton or wilful negligence consists of a conscious and intentional failure to perform a manifest duty.

In *Ludden v. Columbus & C. Midland R. Co.* 7 Ohio N. P. 106, 9 Ohio S. & C. P. Dec. 793, the court in substance, in charging the jury, said that a child under two years of age, and incapable of knowing or understanding that she ought not to go upon a track at a place other than the crossing, is not to be treated as a trespasser, and that the company will be held liable if she is injured by the negligence of its servants without showing that they acted either wantonly, recklessly, or maliciously.

The Pennsylvania courts have been on both sides of the question. In *Keegan v. Luzerne County*, 8 Kulp, 160, it was said that the doctrine that a child of tender years cannot be treated as a trespasser, so as to keep him from setting up negligence of the property owner, is not the law of Pennsylvania. To the same effect *Feehan v. Dobson*, 10 Pa. Super. Ct. 6.

The doctrine that a child cannot be treated as a trespasser was repudiated in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365. To apply such a doctrine to a boy lacking two months of being eight years old would, said the court, overturn the law as it has existed in England and in this country for two hundred years.

In *Rodgers v. Lees*, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399, it was held that a child of tender years may be a trespasser and subject to the consequences of his trespass.

But in *Barre v. Reading City Pass. R. Co.* 155 Pa. 170, 26 Atl. 99, where a child between eleven and twelve years of age, who was catching a ride on a street car, was rudely thrust off the front platform by the driver, and fell so as to be run over, it was said that the child's youth exempted it from the charge of being a trespasser in the legal signification of the word.

In *Levin v. Second Ave. Traction Co.* 201 Pa. 58, 50 Atl. 225, the court said that what was meant by the declaration in the last-mentioned case, that "the youth of the boy exempted him from the charge of being a trespasser in the legal signification of the word . . . and no negligence was

21 Am. & Eng. Enc. Law, p. 477; Kramm v. Stockton Electric R. Co. 3 Cal. App. 606, 86 Pac. 738, 903; Alabama G. S. R. Co. v. Guest, 144 Ala. 373, 39 So. 654; Hydraulic Works Co. v. Orr, 83 Pa. 332; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684; Biddle v. Hestonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894; Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628; Palmer v. Gordon, 173 Mass. 410, 73 Am. St. Rep. 302, 53 N. E. 909; Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333;

2 Wood, Railroads, 1894, Minor's ed. ¶ 320; 3 Elliott, Railroads, 1257.

Fell, J., delivered the opinion of the court:

The defendant was the owner of a lot 185 by 400 feet, at the corner of Preble avenue and Juniata street, in Allegheny city, on the end of which furthest from Preble avenue it had an electric power house. A part of the lot nearest Juniata street was unoccupied, and was at times used by children who lived in the neighborhood as a playground. Back of this part were piles of coal, paving stones, ties, and rails; and back of these a railroad track, used for the transportation of coal cars, extended from Preble avenue to the power

imputable to him," was that the boy was not a trespasser to whom no duty was owed.

In Dublin Cotton Oil Co. v. Jarrard, — Tex. Civ. App. —, 40 S. W. 531, it is said that children are not trespassers within the meaning of the law until they are old enough and intelligent enough to know and appreciate the right of the proprietor to exclude them from his premises by a simple command. "They understand," said the court, "that they are required to keep out only when they cannot get in. They pause not to read signs of warning, or to inquire if they are welcome. Their little hearts tell them they are welcome everywhere, and they must be protected from dangers they know not of."

A four-year-old child is not a trespasser within the meaning of the terms, as one to whom no duty is owed. Gunn v. Ohio River R. Co. 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465.

A child under three years of age cannot, of its own volition, acquire the status of being either a trespasser, a visitor, or licensee. Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385.

But undoubtedly it would generally be considered that a child, as well as an adult, may be a trespasser. Southern R. Co. v. Forrister, 158 Ala. 477, 48 So. 69.

So, in Nashville, C. & St. L. R. Co. v. Harris, 142 Ala. 249, 110 Am. St. Rep. 29, 37 So. 794, it was held that a nineteen-months-old child is capable of being a trespasser upon the same facts as would impress that character upon a person of legal discretion.

In Jordon v. Grand Rapids & I. R. Co. 162 Ind. 464, 102 Am. St. Rep. 217, 70 N. E. 524, an action to recover damages for the killing of an eight-year-old boy who fell from a box car upon which he had climbed without invitation, the court said that it was manifest that the boy, although an infant in years, was a trespasser.

That the child is but two years old will not prevent it from being a trespasser. Baltimore & O. S. W. R. Co. v. Bradford, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

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A child, although but seven years old, may nevertheless be a trespasser. Dull v. Cleveland, C. C. & St. L. R. Co. 21 Ind. App. 571, 52 N. E. 1013; Trudell v. Grand Trunk R. Co. 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250.

In Udell v. Citizens' Street R. Co. 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799, it was held that the fact that one riding in a dangerous position on a car, without paying his fare, and who fell and was hurt, was only eight years old, did not make him any the less a trespasser.

In Mason v. Southern R. Co. 58 S. C. 70, 53 L.R.A. 913, 79 Am. St. Rep. 826, 36 S. E. 440, it is said that while in strictness of law an infant may be a trespasser when it goes upon the track of a railroad company, there are nevertheless well-defined distinctions drawn between an infant and an adult trespasser. That an infant sixteen months old does not know right from wrong, and therefore when it goes upon a railroad track it cannot be said that it intended to commit such an act as, in an adult, would make him a trespasser or wrongdoer; it cannot be guilty of contributory negligence; it is not amenable to criminal law; and is not liable in damages as an adult would be under similar circumstances.

But it was held that a technical error in saying that an infant sixteen months old could not be a trespasser was not prejudicial error in an instruction to the jury as to the killing of an infant by a train, when a distinction was drawn between the infant and an adult, the court stating that such an infant could not be guilty of contributory negligence, and did not know right from wrong. *Ibid.*

III. Dangerous premises in general.

As has already been stated, the general rule is that, up to the time of the discovery of the trespasser, no different duty toward him is demanded because of the fact of his tender years from what the law would impose if he were grown up.

In Hargreaves v. Deacon, 25 Mich. 1, in holding the owner of premises not liable

house. At the side of this track, on an embankment 7 feet high, there was a track on which a car used to remove ashes was operated by means of a wire cable. At the end of this track 50 feet from the top of an incline rising from ash pits connected with the power house, there was a building 10 feet square, in which there was an electric motor and a drum around which the cable was wound. The ash car, when loaded, was drawn from a tunnel in front of the ash pits up the incline and on the embankment, and the ashes were dumped into a railroad car on the lower track. There had been no permissive use of any part of the lot, except that fronting on Juniata street and nearest to it. The plaintiff, a girl eight years and eight

months old, went to the lot to witness a fight in which some boys were engaged. She walked from Juniata street across the vacant part of the lot, a distance of 130 feet, to the vicinity of the power house and up the embankment, and stood between the rails, close to the cable, and a foot and a half or 2 feet from the door of the motor house. While she was standing there, an employee of the defendant, whose business it was to operate the motor, came along the track from the power house, passed by and close to her, "so close he nearly brushed her clothes," and entered the motor house. Within a few seconds after he entered the house the machinery was put in motion. The cable when in motion was raised a foot or two from the ground. It was worn

for the drowning of a child of tender years by falling into an uncovered cistern, the court said: "There is some danger in dealing with these questions, of confounding legal obligations with those sentiments which are independent of the law, and rest merely on grounds of feeling, or moral consideration. We feel, usually, more indignation at wrongs done to children, than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children. Those who have any special dealings with them, as parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection, and the risk of injury. But those who have no such relations with them are not liable for negligence in carrying on their own business, beyond what would be their liability to others, as well as children, who are equally free from blame."

The fact that the person injured or killed was a child does not create a liability where none would have existed in case of an injury to an adult under similar circumstances. *Clark v. Manchester*, 62 N. H. 577.

In *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790, a turntable case, it is said that the owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise the duty where none otherwise exists.

In *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891, it was held that no liability arose from the killing of a seven-year-old boy trespasser who was playing in front of a building that was being erected 3 feet from a public street line, and who tipped a heavy stone over upon himself, since the defendant owed him no duty except a negative one not wantonly or maliciously to injure him.

In *Penso v. McCormick*, 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 25 N. E. 156, it is said that it is a well-recognized 32 L.R.A. (N.S.)

doctrine that persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion, and that greater care is required to avoid injury to them, even when they are trespassers.

Ordinarily the owner of premises owes no duty to trespassers, though the latter be infants. *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598.

A body of water, natural or artificial, not amounting to a dangerous allurement to children, does not require of the proprietor any higher duty toward infant trespassers than toward adults. *Akron Waterworks Co. v. Swartz*, 22 Ohio C. C. 627.

A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to wanton injury. *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993.

Northwestern Elev. R. Co. v. O'Malley, 107 Ill. App. 599, a case of an eight-year-old boy who went upon a private right of way and was struck by a piece of iron which fell from an elevated railroad then in process of construction, was no exception to the rule that an owner of private grounds is under no obligation to keep them in safe condition for the benefit of trespassers.

In *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A. (N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, where a boy was killed by climbing an electric wire pole and coming in contact with a live wire, it was said that children, no less than adults, when they trespass upon the property of another, take the risk, unless the circumstances bring the case within the principle of the turntable cases, where a dangerous instrumentality is maintained with knowledge, actual or constructive, that it is alluring to children, and endangers them.

In *Faurot v. Oklahoma Wholesale Gro-*

and frayed, and at places loose ends of wire stuck out. It caught the plaintiff's dress, and she was drawn into the drum and injured.

The plaintiff was on the private property of the defendant, where she had no right to be. Its employees were not bound actively to care for her by keeping her off the lot or by protecting her after she had entered it from injury that might result from the condition of the property. The standard of duty in such a case is the same whether the person injured is an adult or a child. *Thompson v. Baltimore & O. R. Co.* 218 Pa. 444, 19 R.L.A.(N.S.) 1102, 120 Am. St. Rep. 897, 67 Atl. 748, 11 A. & E. Ann. Cas. 894. There was, however, a duty not to injure her intentionally, or wanton-

ly by any act to expose her to danger. "Even trespassers are entitled to human consideration." *Barre v. Reauing City Pass. R. Co.* 155 Pa. 170, 26 Atl. 99. If the man who started the motor knew at that time that the plaintiff was standing between the rails, close to the frayed cable, which would touch her dress when in motion, and from his knowledge of the circumstances was conscious that she would be exposed to danger if the machinery was put in motion, a duty of care arose, as it would in the case of an engineer who sees a child on the track in front of his engine. The case would then come within the class of which *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485; *Levin v. Second Ave. Traction Co.* 194 Pa.

cery Co. 21 Okla. 104, 17 L.R.A.(N.S.) 136, 95 Pac. 403, a person injured, although an infant, by falling down an elevator shaft which was left unguarded, must show that he came upon the premises by invitation of the owner, express or implied, in order to recover damages therefor.

In *Williamson v. Gulf, C. & S. F. R. Co.* 40 Tex. Civ. App. 18, 88 S. W. 279, it is held that a railroad company owes a child trespasser upon one of its bridge abutments no duty except to avoid wilfully inflicting injury upon him.

The rule that denies to a trespasser a duty on the part of others to observe care towards him is not changed by the fact that he is an infant. *Hoberg v. Collins, L. & Co.* — N. J. —, 78 Atl. 166.

No duty rests upon a city to make a swing bridge safe for children to play upon. *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99.

In *Coppner v. Pennsylvania Co.* 12 Ill. App. 600, a five-year-old boy caught his foot between the projecting rails of a drawbridge and the abutment while the bridge was in motion. It was urged that it was the duty of the company to keep a lookout, and to use reasonable precautions to prevent children from approaching the bridge while in motion. And the court said that if the presence of trespassing children could reasonably have been anticipated, the company would have been liable; and held that it was a question for the jury whether the bridge was a dangerous structure from which the company should reasonably have anticipated such accident as actually happened, and whether the servant in charge of the bridge used ordinary and reasonable care and precaution to prevent the injury.

In *Oil City & Petroleum Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128, a seven-year-old boy while crossing a bridge got upon a gas pipe 5 inches in diameter at a place where there was an opening in the floor, and while walking there fell into the river and was drowned. It was held that the bridge company was not bound to maintain such a structure as to prevent the possibility of accident to children. It was said not to be necessary to impute negli-

gence to children; that it was sufficient that he was injured in consequence of his venturing, in his childish recklessness, where no one, child or adult, had any business to be.

It is the duty of the driver of a low-gear vehicle upon a public highway, when he wishes to eject from his wagon an intruder six years old, to use reasonable care in so doing to avoid injury to the child, and to give the child an opportunity to get off without injury. *Bucci v. Waterman*, 25 R. I. 125, 54 Atl. 1059.

IV. Railroad tracks and premises.

a. In general; duty before discovery.

In *St. Louis Southwestern R. Co. v. Davis*. — Tex. Civ. App. —, 110 S. W. 939, a statement made by Mr. Elliott in his work on Railroads, vol. 3, § 1259, that "in actions of injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty."

... There is sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees not invited or enticed by it, than it is to keep them safe for adults," was approved.

The fact that a trespasser is of immature years puts no higher duty on the company until his danger is discovered than if he were an adult. The company is no more required to look out for infants than for adults. *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Highland Ave. & Belt R. Co. v. Robbins*, 124 Ala. 113, 82 Am. St. Rep. 153, 27 So. 422.

An engineer is only required to refrain from wilful or wanton injury to a five-year-old child trespasser on the track. Grand

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and passed close by her at the door of the building as he entered it. He must have known that the cable would be raised when in motion, because it was a part of the machinery he operated. Presumably he knew that it was frayed, because it was constantly before his eyes. He had the fullest opportunity to see the plaintiff, to observe where she stood in relation to the cable, and to realize the consequences that would probably result from his act. Whether he actually saw her, and was conscious that his act exposed her to danger, were questions for the jury.

The judgments are affirmed.

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When liability of the company was based upon failure of the motorman to stop his car in time to avert injury to a child less than two years old, it was said that no liability could attach unless gross negligence were shown. *Estep v. Webster Coal & Coke Co.* 213 Pa. 471, 62 Atl. 1082.

In *McCarty v. Fitchburg R. Co.* 154 Mass. 17, 27 N. E. 773, it was assumed that, in the absence of statute, where a boy strayed upon railroad tracks near a highway, recovery could not be had for his injury unless the company was guilty of gross or reckless carelessness.

In *Alabama G. S. R. Co. v. Moorner*, 116 Ala. 642, 22 So. 900, the doctrine that a railroad company is no more bound to keep its tracks safe for trespassing children than for trespassing adults was approved.

The company is under no greater obligation to anticipate the presence of children upon its tracks than adults. *Lake Shore & M. S. R. Co. v. Clark*, 41 Ill. App. 343.

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In *Crawford v. Railroad Co.* 5 Phila. 359, it was said that if the plaintiff was unlawfully on the railroad track, the company would not be liable though guilty of negligence, and though the plaintiff was an infant.

In *Kinnare v. Chicago & N. W. R. Co.* 114 Ill. App. 230, the rule as to the care due to adult trespassers was upheld in the 32 L.R.A. (N.S.)

case of a seven-year-old child trespassing on railroad tracks.

And in *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013, the rule that the only duty which a railroad company owes to trespassers upon its right of way and tracks is to refrain from willfully injuring them, and that it owes no duty of active vigilance, and is not liable for mere negligence, was applied to a seven-year-old trespasser.

A railroad company owes a ten-year-old trespasser no higher duty than if he were an adult. *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106.

So, the fact that a boy ten years old, who was run over while lying between railroad tracks, was a trespasser, was held to prevent him from recovering damages, notwithstanding his youth. *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27.

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So, failure to blow the whistle or sound the bell as the engine approached the crossing would not render the company liable, since it imports nothing but simple negligence. *Nashville, C. & St. L. R. Co. v. Harris*, 142 Ala. 249, 110 Am. St. Rep. 29, 37 So. 794.

Mere failure to whistle and signal will not render a railroad company liable for an injury to a seven-year-old trespasser on railroad tracks not at a public crossing. *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457.

Excessive speed, absence of lookout, and failure to fence, are not violations of any duty a railroad company owes trespassers, and the fact that the trespassers are of tender age does not raise a duty where none otherwise exists. *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106.

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Merely knowledge by a railroad company that numerous persons, including children, without any public or private right, passed daily and hourly through its yards near a populous part of the city, and crawled under stationary cars on its tracks, will not render it liable for an injury to a child by a sudden movement of a long line of cars, due to the company's negligence in handling their cars, several hundred yards distant from the scene of the accident, while the child was under one of the standing cars. *Central R. & Bkg. Co. v. Rylee*, 87 Ga. 491, 13 L.R.A. 634, 13 S. E. 584.

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b. Duty to discover.

An engineer is not bound to exercise care with reference to children at play upon the track until they are actually discovered. *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680.

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And where a switch yard is commonly used by children of the neighborhood as a playground, and they are constantly in and about the cars standing on the tracks without objection from the defendant, it is the duty of the defendant's employees to use ordinary care to discover the presence of children, and to avoid inflicting injury upon them. *Ollis v. Houston, E. & W. T. R. Co.* 31 Tex. Civ. App. 601, 73 S. W. 30.

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No duty is cast upon a railroad company to exercise greater vigilance to discover a two-year old child trespasser on the tracks than would be required in the case of an

adult trespasser. *Palmer v. Oregon Short Line R. Co.* 34 Utah, 466, 98 Pac. 689, 16 A. & E. Ann. Cas. 229.

Until an engineer sees a child on the tracks, he owes it no duty beyond that which he owes to any trespasser. Only when he sees that the trespasser is a child is he brought under a rule of greater care or caution. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957.

In *Matson v. Port Townsend Southern R. Co.* 9 Wash. 449, 37 Pac. 705, 707, it is said that while it is true that the duty of a railroad company to a child, upon discovering it upon its right of way, would be different from what it would be in the case of an adult, yet this obligation will not arise until the company has notice of the presence of the infant.

The test of responsibility, said the court in *Louisville, N. O. & T. R. Co. v. Williams*, supra, is, did the striking of the child by the train occur after the engineer had seen,—not might or ought to have seen,—that is, discerned or distinguished, it? Until the child had been seen,—discerned to be a human being,—the engineer was under no obligation to the trespasser to check or stop his train, whatever may have been his obligation to the passengers that were being hauled by him.

A railroad company owes a two-year-old child trespassing on its tracks no duty except, when discovered in a place of danger, to use every effort to prevent its injury. *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

An engineer is under no obligation to act for the safety of children until they are discovered. *Burg v. Chicago, R. I. & P. R. Co.* supra.

In *Thomas v. Chicago, M. & St. P. R. Co.* supra, an instruction that it was not what the defendant's employees could have seen, but what they did in fact see, of children on the track, and what they did after they saw them, was held not open to the objection that it was erroneous because limiting the question to what, by ordinary care, the employees might have seen. The court said that if the children were trespassers, the employees of defendant owed them no duty until they saw them on the tracks and in a place of danger.

The fact that the train was not stopped before the trespassing boy, who was caught by one of the cars and dragged some distance, was killed, does not make the company liable for his death, where the men on the train did not actually see the boy caught, but, as soon as their attention was called to the accident, promptly brought the train to a standstill. *Steele v. Pittsburgh, C. C. & St. L. R. Co.* 4 Ohio S. & C. P. Dec. 350.

Where a six-year-old boy went under cars standing on a side track not at a public crossing, and was run over when the cars were put in motion, it was held that being 32 L.R.A. (N.S.)

a trespasser without the knowledge of the company's servants, the law did not impose upon them the duty of exercising any care to ascertain his position of peril before moving the cars. *Flores v. Atchison, T. & S. F. R. Co.* 24 Tex. Civ. App. 328, 66 S. W. 709.

Where a child, while a train was standing at a station, got upon the track behind a car in such a position that it was not seen by the employees of the company sent back to see if the track was clear before the backing of the train, and was injured, it was held that the fact that the child might have been seen while it was making its way to the place where it was injured did not create a duty upon the part of the employees to discover it. *Texas & N. O. R. Co. v. Brouillette*, — Tex. Civ. App. —, 117 S. W. 1014.

Maintenance of lookout.

The doctrine that the company is not bound to keep a lookout for trespassers applies to infants as well as to adults. *Birmingham R. Light & P. Co. v. Jones*, 153 Ala. 157, 45 So. 177; *Southern R. Co. v. Smith*, 163 Ala. 174, 50 So. 390; *Southern R. Co. v. Forrister*, 158 Ala. 477, 48 So. 69.

A railroad company is not required to look out for infant trespassers on its tracks, where it is not under such a duty in respect to adult trespassers. *Louisville & N. R. Co. v. Logsdon*, 118 Ky. 600, 81 S. W. 657. The court said that if infants were made an exception to the rule, and railroad companies were required to keep a lookout for them in all places along their track, on account of their helplessness, the same principle would have to be applied to idiots, lunatics, epileptics, the deaf, the blind, and the like. This would destroy the rule, and make it inconsistent with itself; for if the presence of no person is to be looked for on the track, the presence of persons infirm or unable to take care of themselves is not to be anticipated, and the defendant cannot be required to guard against a danger which is not to be anticipated.

A railroad company is not more bound to look out for trespassers in its yards than on its main tracks, away from the yard, or to signal the movements of trains and cars; and the fact that such a trespasser is an infant does not affect the legal rights of the company. *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380.

The rule that a railroad company is not required to presume that anyone will trespass upon its exclusive right of way, and it is not bound to look out for them, but only to avoid injury to them if possible when their presence and liability to danger become known, applies in the case of a child as it does in that of a grown person. *Givens v. Kentucky C. R. Co.* 12 Ky. L. Rep. 950, 15 S. W. 1057. "If those operating a train were required to look out and guard against danger to children trespassing upon the track," said the court, "then this would necessarily afford an opportunity to see all other persons who might be upon it and in

danger. Undoubtedly a greater degree of care is required of them as to children not old enough to be aware of the danger, than as to grown persons, when they have been once discovered upon or near the track, but until their presence is known, the rule applies equally to both."

In *O'Bannon v. Southern R. Co.* 33 Ky. L. Rep. 315, 110 S. W. 331, Nunn, J., said: "It is a lamentable fact, for which the court is not in any way responsible, that the general assembly of the state of Kentucky has enacted a law requiring those in charge of trains to keep a lookout for stock upon the track, to keep from killing or injuring it; yet they have not enacted any law for the protection of children who have not arrived at the age of discretion and accountability. It seems that it felt a greater concern for the protection of property than for human lives. The statute was passed for the protection of stock upon the idea that it could not think and act with reason, therefore it must be protected by those in charge of trains. Is there not a greater reason for the protection of infants under the age of discretion?"

Those in charge of a locomotive are not bound to discover at the earliest possible moment the presence of infants on the track at a place remote from highway crossings, or other places where their presence might not be anticipated, in order to stop the train upon seeing an object upon the track, until it is known to be a person; the duty in such cases being the same as in cases of adults. *Goodman v. Louisville & N. R. Co.* (Craddock v. Louisville & N. R. Co.) 118 Ky. 900, 63 L.R.A. 657, 77 S. W. 174.

A railroad company owes no duty to a trespasser in the switching yards to give warning of the approach of engines, or to have a person in a position to see the track ahead of them, and the fact that such trespasser is an infant does not affect the rights of the company. *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380.

But in *Birmingham R. Light & P. Co. v. Jones*, 153 Ala. 157, 45 So. 177, it was held that if a motorman has reason to be apprehensive of the presence of trespassers on the track at any place, especially children, then, as a matter of law, it would be negligence on his part not to keep a lookout at that point.

In *Smith v. Atchison, T. & S. F. R. Co.* 25 Kan. 738, it was held an act of negligence for one acquainted with the character of the railroad track near a city in a populous neighborhood, knowing that children are occasionally found thereon, to loosen the brakes of a heavy car and send it down a steep grade with no means of stopping it until it reaches the bottom, without looking to see if the track is clear, when by looking the presence of children could be discovered.

On appeal in 28 Kan. 541, it was held that, assuming that the child run over could not have been seen by those who set the car in motion, and they had no reason to suppose that it was behind a standing car which was run into by the car sent down 32 L.R.A. (N.S.)

grade, the setting of the car in motion was not *per se* culpable negligence. But whether, under such circumstances, it was culpable negligence at all, or whether the question was one of fact for the jury, the court were unable to agree.

In *Lindsay v. Canadian P. R. Co.* 68 Vt. 556, 35 Atl. 513, it was held that whether an engine crew, on passing a place near dwelling houses where children were liable to stray on the track, and finding the track clear, had, upon return trip in two or three minutes, the right to assume that no child would escape from one of the houses and get upon the tracks, and thereafter omit to watch the tracks as the engine moved backward, was a question of fact.

In *Missouri, K. & T. R. Co. v. Hammer*, 34 Tex. Civ. App. 354, 78 S. W. 708, a charge that it is the duty of a railroad company running trains to use ordinary care to discover children who may be on or near the track in front of the train by keeping a reasonable lookout for that purpose, the degree of such care being such as a person of ordinary prudence would commonly exercise under like circumstances, and varying as the known probabilities of danger may vary along different portions of the road on which the train is being run, was held not, because of the fact that it imposed an affirmative duty of keeping a lookout upon the company to prevent injuring children, erroneous. But it should be remembered that in Texas the doctrine that a railroad company owes no duty to one wrongfully on its track except to refrain from wanton injury to him has been expressly repudiated.

In *International & G. N. R. Co. v. Vallejo*, — Tex. Civ. App. —, 108 S. W. 1187, it was held that the duty to keep a lookout ahead of a moving train did not excuse employees of the company from observing due care for the safety of an infant trespasser on a parallel track who has been passed by the engine, and who may still be in danger of crossing over to the track upon which the train is moving. The court said that ordinarily they might assume that a person proceeding parallel with the moving train, though close to it, will not change his route so as to come in contact with the train. But this may, for manifest reasons, be different in the case of a child. That where a child is near a moving train, and age and experience and surroundings are such as to suggest to a person of ordinary prudence that it might, through its unconsciousness of danger and its impulse, come in contact with the moving cars, ordinary prudence would dictate the exercise of care with regard to guarding against such a result, and such matter is properly for the jury. The case was reversed in 102 Tex. 70, 113 S. W. 4, in which it was held that, under the circumstances, there was no duty imposed on the employees of the company to keep a lookout toward the rear of the moving train.

In *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 27, it was held that the company would be

liable for injury to a trespassing child although everything possible was done to avert injury after the discovery of the infant, if, by the exercise of proper watchfulness, it could have been discovered in time to have prevented the injury.

A railroad company will be liable for the killing of a trespassing child on a railroad bridge if, in the exercise of ordinary care, it could have been seen in time to have stopped the train before reaching it. *Texas & P. R. Co. v. Harby*, 28 Tex. Civ. App. 24, 67 S. W. 541.

The duty of a railroad company is not to keep a reasonable lookout for children on its tracks, but to exercise ordinary care under all the circumstances existing with reference to keeping a lookout. *Olivaras v. San Antonio & A. P. R. Co.* 37 Tex. Civ. App. 278, 84 S. W. 248.

If a child is shown to be lacking in that discretion that would render him capable of contributory negligence, it is the duty of a railway company to use such care as a person of ordinary prudence would exercise under like circumstances to discover his presence upon the track; and a failure to use such care would be negligence. *St. Louis & S. W. R. Co. Shifflet*, — Tex. Civ. App. —, 56 S. W. 697.

But it is not the duty of employees of a railroad company when a train is at a standstill, who see a child less than two years old on the porch of its parents' house, 50 feet from the track, in a position of safety, to keep watch of it to see that it does not get under the cars, so as to be run over when they are put in motion. *Douglass v. Central Texas & N. W. R. Co.* 90 Tex. 125, 36 S. W. 120, 37 S. W. 1132. The court said that while in Texas it is the duty of servants of a railway operating its trains to use reasonable diligence to discover a child which, by reason of its tender years, is unable to apprehend and protect itself from danger, and therefore incapable of negligence if on or near its track, to prevent its injury, it has never been supposed to be the duty of such servants, when they see a child in a position of safety, and where it may be protected from danger by those upon whom the laws of nature have imposed such duty, to keep watch of it and see that it does not get under standing cars, or to look under the cars before placing them in motion, to see that those whose duty it is to take care of it have not allowed it to stray from its place of safety and place itself in one of the most imminent peril.

In *Crawford v. Southern R. Co.* 106 Ga. 870, 33 S. E. 826, it was urged on behalf of the company, that as a child struck by a train was a trespasser upon the tracks, the engineer owed it no duty until its presence was discovered. The court held that an allegation that the train was running from 25 to 30 miles an hour through the limits of a populous city, and that the engineer could have discovered the child in time if he had not allowed his attention to be diverted from the track in front of him to

objects on the side of the road, stated a case for the jury.

In *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595, where the track was level, the view unobstructed, the road unfenced, dwellings on either side, a path across the track, and a train approaching a crossing, it was held that if the company's servants saw, or, by the exercise of ordinary care, could have seen, the child in time to have avoided injuring her, and failed to do so, the company was liable; and that whether the servants of the company were using such care was a question for the jury.

A railroad company is liable for the killing of a child run over near a depot, although the child was not on the track at the time when the engineer could, by the exercise of ordinary care, have discovered it and stopped the train, if it was evident that it was running into danger, and would go upon the track. *Livingston v. Wabash R. Co.* 170 Mo. 462, 71 S. W. 136.

The duty of an engineer of a moving train to see a child running toward a track with the evident intention to go upon it in front of the engine is not excused by the fact that, after warning trespassing boys away from a place of danger, he continues to look and speak to them after they are out of danger. *Ibid*.

In *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L.R.A. 784, 41 Am. St. Rep. 799, 19 S. E. 730, Clark, J., said that a charge that if the defendant, by the exercise of reasonable care and prudence, could have discovered the injured child on the track in time to have stopped the train, it was his duty to have done so; or if the defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going towards the track, or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was the defendant's duty to stop, and the defendant would be guilty of negligence in failing to stop,—was correct.

A railroad company is liable for causing the death of an infant upon its track if the direct and proximate cause of the accident was negligence in failing to keep a reasonable lookout, and to discover the child in time to prevent the injury. *Mason v. Southern R. Co.* 58 S. C. 70, 53 L.R.A. 913, 79 Am. St. Rep. 826, 36 S. E. 440.

In *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149, where it appeared that an eight-year-old slave, asleep on the tracks was run over, it was held that a charge that it was the duty of the engineer to use the utmost care and skill in the discharge of his duty by a vigilant and careful lookout for boys on the tracks, to blow the whistle and check the speed when necessary to protect life and property, and that if injury could have been avoided by the utmost care and skill by careful and vigilant lookout for boys ahead by giving proper signals,

or by checking speed, the defendants be liable for the value of the boy, was proper, either as stating the statutory rule then in force, or the rule at common law.

It is the duty of a railroad company to maintain a reasonable lookout for a four-year-old child on the track, insensible of its danger, and helpless to escape. *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465.

The law is clear that those in charge of a train must, by keeping up a reasonable lookout, use fairly ordinary care to discover animals and persons on the track, both to save them and passengers from injury. The public interest and necessity, not merely the company's, demand that the company have sole possession of its track; but as people live and move along the route, they do go upon the track, children, in their thoughtlessness and indiscretion, will go upon it, stock will wander upon it, and sheer necessity calls for such care as is exacted by this rule. *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L.R.A. 575, 26 S. E. 546.

And loaded cars cannot be left to run alone down grade in the street without the precaution of seeing that children too young to take care of themselves are not in danger. *Smith v. Pittsburgh & W. R. Co.* 90 Fed. 783. The court said that this ordinarily might be a safe practice as to adults and older children, but not as to those too young to take care of themselves. In this case the injured child was five years old.

It is the duty of the employees of a railroad company when they see a child six years old in a place of danger in the yards of the company, where trains are standing still for short periods, and are then started up, not only to order it away, but to see that it is away out of the reach of danger. *Devereaux v. Thornton*, 4 Ohio Dec. Reprint, 449.

Where children were removed from the company's switch yards, and the employees satisfied themselves that the children had left the premises and were no longer in danger, it was held that the employees were not bound to anticipate that the children might return, and to keep a lookout for them before moving the cars, and were under no duty to exercise care toward their discovery. *Smalley v. Rio Grande Western R. Co.* 34 Utah, 423, 98 Pac. 311.

c. Duty after discovery.

The age of a child, however, may be an important element to be considered in determining whether the person who injured him was negligent, as well as in determining whether the child himself was guilty of contributory negligence. *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

The presumption, for example, that a trespasser will leave the track in time to avoid injury, does not apply to very young children. *Omaha & R. Valley R. Co. v. Cook*, 42 Neb. 905, 62 N. W. 235.

In *Anderson v. Great Northern R. Co.* 15 32 L.R.A. (N.S.)

Idaho, 513, 99 Pac. 91, the court said: We cannot conceive of any higher duty of diligence incumbent upon a railroad company to exercise (except the one it owes to its passengers) than that of protecting an infant found on its tracks from injury or death. When an engineer sees an adult on the track ahead of him, he ordinarily has a right to presume that he will get off the track before the train reaches him; but not so when he sees a child of tender years on the track. There is no presumption that it will move from the track. We conceive it to be the duty of an engineer when he observes a child of the age of four years on the track ahead of him, to take immediate action to control his train so that he may stop it before reaching the child, and thereby save injuring or killing it in the event it does not remove from the track before he reaches it. In our opinion, when he fails to do that, he fails to act as a reasonably prudent man would act under such circumstances; and if he wounds or kills the child, his company is properly chargeable with reckless and wanton conduct.

An engineer has no right when he sees a child fourteen months and twenty-three days old on the tracks, to presume that it will get off before injury. *Southern R. Co. v. Forrister*, 158 Ala. 477, 48 So. 69.

The presumption that an adult trespasser will leave the track in time to prevent being run over cannot be indulged in as to a child twenty-five months old; therefore a discovery of its presence is a discovery of its peril. *Galveston, H. & N. R. Co. v. Olds*, — Tex. Civ. App. —, 112 S. W. 787.

So, in the case of a child six years old, the company's employees may not wait until they discover that he cannot or will not extricate himself from his dangerous position. *Southern R. Co. v. Smith*, 163 Ala. 174, 50 So. 390.

In *Foley v. New York C. & H. R. R. Co.* 78 Hun, 248, 28 N. Y. Supp. 816, it was held that an engineer of a train running at a high rate of speed, who blew the whistle when he saw small children on the track 1,200 feet away, was not then bound to stop his train, where it was light and there was no noise to drown the blast of the whistle, and he had the right to assume that the children would leave the track, when there was no difficulty in doing so.

The rule or principle that the mere seeing, or capacity of seeing, a person walking or running along at or near the center of a platform 15 or 20 feet wide, paralleling a railroad track, will not of itself demand in law of an engineer in charge of the train that he stop to inquire the intention of such person, has no application to a child three and one-half years old. *Livingston v. Wabash R. Co.* 170 Mo. 452, 71 S. W. 136.

And the rule that the company will not be responsible for the injury of a spectator who, on sudden impulse, through fright or panic, rushes suddenly and unexpectedly in front of a moving train, cannot be applied in the case of a child who runs 50 feet diag-

onally across a platform towards the track, her manner and course indicating that she was going upon the track. *Ibid.*

Under such circumstances, the engineer has no right to presume that a child three and one-half years old will step on the platform before reaching or attempting to cross the track, although it may be presumed that a person of mature years would do so. *Ibid.*

But where there was no question of trespassing, that is, where the accident happened at a public crossing, the court in *Southern R. Co. v. Daves*, 108 Va. 378, 61 S. E. 748, said that a person approaching a railroad crossing will stop and not to go upon the track immediately in front of a moving engine in plain view is a presumption that arises in the case of a child eight years old, running along the public road, as well as in the case of an adult, providing there is nothing in the situation to put a reasonably prudent man on his guard to use extraordinary care to avoid a collision. There must be something in the situation or appearance of things to suggest that the child is not going to stop; otherwise the failure of the engineer to stop the train is not negligence.

In *Smalley v. Rio Grande Western R. Co.* 34 Utah, 423, 98 Pac. 311, the court said that there is much reason for holding that when a child of tender years or of immature judgment, though a trespasser, is discovered or seen about the premises, it may not be regarded in the same situation as that of an adult or conscious trespasser, where no duty is owed except to refrain from inflicting a wilful injury, or an injury by gross negligence. An adult or conscious trespasser may be expected to take care of himself and kept out of danger, and the employees about the premises may regulate their conduct upon the assumption that he will do so until a situation is disclosed making it apparent that he is not aware of the peril or danger threatening him. But when a child of tender years, or of immature judgment, although a trespasser, is discovered about the premises, the employees may not, as in the case of an adult, act upon the assumption that it will take care of itself and keep out of danger, but a further duty is imposed upon the employees to exercise care commensurate with the situation to avoid injuring it.

The degree of care and prudence required of those operating locomotive engines is ordinarily not affected by the age or physical condition of the party injured, when not involving the question of contributory negligence. But if a child, or person known by those operating the engine to be deprived of sight or hearing, is by them seen upon the track, or known to be there, or about going on the same, then a greater degree of prudence would be required than if the person were of full age and understanding. In the latter case it may be assumed that such person would leave the track and avoid the danger, while the assumption may not be justified in the former case. *Houston & T. C. R. Co. v. Boozler*, 2 Posey Unrep. Cas. (Tex.) 452. 32 L.R.A. (N.S.)

All the engineer is bound to do after he is aware of the peril is to use reasonable diligence and care to avert it. *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380.

In *Payne v. Humeston & S. R. Co.* 70 Iowa, 584, 31 N. W. 886, it was conceded that it is the duty of a railroad company, after discovering a child on the tracks, to use every means reasonably within their power to avert accident.

In *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680, the court said that when a child is discovered and the engineer has reason to believe that for any reason it will not leave the track, he must stop the train, if necessary for its safety. The engineer may rightfully presume that a person on the track will leave it on the approach of a train until the contrary is in some way manifested. Of course, when the engineer knew the fact that there were small children on the track, he had sufficient reason to know that they would remain, and he was at once charged with the highest degree of care in their behalf.

As a general rule, an engineer, when he sees a person running towards the track, has a right to presume that that person will use his eyes and see the train and let it pass; yet, if he can see from the size of the person approaching that it is a child too young to be counted on to exercise the required discretion, he has no right to act on that presumption, and therefore failure to signal by blowing a whistle or stopping the train, when this could be done in time to avert the accident, will render the company liable. *Holmes v. Missouri P. R. Co.* 190 Mo. 98, 88 S. W. 623.

In *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 543, it is said that when, in the country, the company's employees see children on or near the track, it is their duty to use the same precautions as when running through a city.

It is the duty of the employees of a railroad company, upon seeing a four-year-old child between the rails or so near the track upon which the engine is running as to be in danger, either to see that the child is placed in the care of someone competent to take charge of him, or else to take such care in the movement of the engine as would be required from the child's situation. *Chesapeake & O. R. Co. v. Hawkins*, 26 L.R.A. (N.S.) 309, 98 C. C. A. 443, 174 Fed. 597.

It is negligence for which the company is liable to make a flying switch at a time when the employees of the company see that trespassing children are running on or between the tracks. *Lange v. Missouri P. R. Co.* 115 Mo. App. 582, 91 S. W. 989.

If the engineer can see that a child on the tracks is of such tender years as to be incapable of exercising sufficient capacity to take care of himself, in view of the fact that his retreat is cut off in the direction in which he has left the track by the approach of another train, the fact

that the child has stepped off the first track does not relieve the engineer of negligence if he could have stopped the train in time to save the child, who, becoming confused, steps back upon the track he has just left, and is run over. *Kelly v. Philadelphia & R. R. Co.* 30 Phila. Leg. Int. 140.

Where the employees of the company knew that children were at play at a place of danger, and a child was left there unattended after the engine passed, it was held that it might be left to the jury whether a prudent man, under such circumstances, in returning past the danger point where the child was seen unattended a few minutes before, would have taken some means to ascertain that he was in a position of safety. *Chesapeake & O. R. Co. v. Hawkins*, supra.

When an engineer becomes aware that a three-year-old child and a nineteen-months old child are playing on the track, he has sufficient reason to know that they will remain, and is at once charged with the highest degree of care to bring his train to a stop before striking them. *Burg v. Chicago, R. I. & P. R. Co.* supra.

A railroad company is liable if the engineer saw a two-year-old child on the track in time to have stopped the train and prevented the injury if he had used all the appliances provided on the engine for that purpose. *Union P. R. Co. v. Ure*, 56 Kan. 473, 43 Pac. 776.

Where the engineer saw a child on the track, and immediately afterwards observed a woman greatly excited run on or near the track towards the train, gesticulating as she ran, throwing up her hands, it was held not enough for the engineer to put his hand upon the throttle, thinking that something might turn up, and make no effort to check the speed of the train until within 600 feet of the child, and to make no call for brakes until within a much shorter distance. *Donahoe v. Wabash, St. L. & P. R. Co.* supra.

When an engineer learns by the ringing of the bell and the sounding of the whistle that a child of tender years on the track does not heed the signals, he must stop his train if he can, so as to prevent injury. *Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449. The court said that when adults are on the track, engineers have the right to presume that they will heed the signals; but that this is not so in the case of children, towards whom an affirmative duty of care arises.

In *Kelly v. Philadelphia & R. R. Co.* supra, an engineer in charge of a train passing a populous center is bound to watch with ceaseless vigilance the track in front of his engine in order to avoid casualties, both to his train and to pedestrians; and if he sees a five-year-old child walking upon the track, it becomes his duty to stop or check the speed of his engine if that can be done in the exercise of 32 L.R.A. (N.S.)

the power under his control until the child has so effectually cleared the track as to convince a man of ordinary prudence that he cannot return to it before the train has passed the point where he was.

But mere failure to reverse an engine after discovering a child on the track cannot be said as a matter of law to be such negligence as will render the company liable for running over it, where, in view of the grade and the weight of the train, and its nearness to the child, reversing would not, in the judgment of the engineer, affect the speed, but would endanger the engine and the lives of all on the train. *Texas & P. R. Co. v. Harby*, 36 C. C. A. 353, 94 Fed. 303.

And it was held that an engineer is not bound to slow up his train, ring the bell, or blow the whistle, merely because a seven-year-old boy is running along the path parallel with the track and 6 feet from it, where he is not in apparent danger. *Cross v. Southern R. Co.* 109 Ga. 170, 34 S. E. 277.

The company is not liable under such circumstances for injury to the boy caused by a rope, which is trailing behind him in playing horse, catching in the passing train in such an unexpected manner as to drag the child under the wheels, since this would require an unreasonable degree of diligence on the part of the company. *Ibid.*

In *Pennsylvania R. Co. v. Morgan*, 82 Pa. 134, it was held not to be the absolute duty of the engineer to stop the train on seeing a child on the tracks, if the child apparently perceives its danger, and starts to leave the track, with every indication that it will be able to get out of danger.

In this case a child, in attempting to leave the track, caught her foot between a rail and inner planking and was unable to escape, everything having been done by the train crew to stop the train after her peril was discovered. The court declared it is for the jury to say whether it is negligence not to stop, even in case of a child, for the question depends upon the proper view of all the facts.

In *Louisville & N. R. Co. v. Vanarsdell*, 25 Ky. L. Rep. 1432, 77 S. W. 1103, it was held that a mistake of judgment of an engineer in supposing that a child would get off a bridge in time to prevent being struck by the train, which resulted in running over the child, would render the company liable.

In *Sutzin v. Chicago, M. & St. P. R. Co.* 95 Iowa, 304, 63 N. W. 709, an engineer was held not justified in assuming that children eleven and twelve years old on a railroad bridge, on the approach of two trains will step upon planking between the tracks where but few men would care to take chances in standing, and where a child could not stand without imminent danger of injury, and that it therefore became his duty to stop his train when he had opportunity to do so; and the fact that

his failure to stop was a mere error of judgment will not relieve the company from liability for running over one of the children.

But in *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380, it was held that a railroad company is not responsible for any error of judgment on the part of the engineer as to the speed of his train, the distance, age, and peril of the child, and his ability to stop the train in time to avoid him. In this case a seventeen-months-old child was run over because the engineer did not see it in time to stop the train. The court said that an engineer is not bound to stop his train the moment he sees some living object on the track. He has the right in broad daylight, when his train is perfectly visible and its approach may be heard and known, at least, in the first instance, to assume that the object, whatever it is, will leave the track in time to escape injury. He is not bound to expect helpless infants upon the track, without sufficient knowledge or ability to escape when warned of danger. He could not know when he first saw the child that it was too young to be conscious of the danger to which it was exposed, and without the imputation of negligence he could run on until he discovered that he was heedless of the danger. Reasonable care in the management of trains, which must make their time between stations, and have a right of way, does not require more.

If, in the exercise of ordinary care, the engineer can see a three-year-old-child on the tracks by looking ahead in time, and can stop the train without injury to the passengers before running over the child, it is his duty to do so; and failure to stop, in the belief that the child will leave or be taken from the track, will render the company liable for running over it. *Jeffries v. Seaboard Air Line R. Co.* 129 N. C. 236, 39 S. E. 836.

In *Thomas v. Chicago, M. & St. P. R. Co.* 114 Iowa, 169, 86 N. W. 259, an instruction in effect, that even if the engineer saw children on the track, still the injured child could not recover unless the engineer actually saw and knew they were children so young as not to be able to take care of themselves, but that if he did see the children in a place of peril, and did not know at the time that they were so young as not to be able to take care of themselves, it was his duty to keep a lookout and see whether they did get out of the way, and if they were of such tender years as to be unable to take care of themselves, and that it would be his duty to have such control of his engine that he might prevent the accident when he did discover such fact,—was held proper, and not open to the objection that it was inconsistent and contradictory.

In *Thomas v. Chicago, M. & St. P. R. Co.* supra, it is said that it is no doubt true that the severity of the rule as to trespassers on railway property is greatly relaxed in case of trespassers who are of 32 L.R.A. (N.S.)

tender years; nevertheless it must appear that the employees in charge of the trains knew that the objects in front of them were children. When a person is seen ahead of the train, the employees have the right to assume that he will take care of himself, unless they have reason to believe that such person is, for some reason, not able to take care of himself. If the object turns out to be a child *non sui juris*, this is sufficient to give the employees warning; and after notice of that fact, they must do all in their power to stop the train.

In *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475, an engineer and fireman, after discovering an object on the track in plenty of time to have stopped the train before reaching it, debated what it was until too late. It was held that a charge that if those in charge of the train, by the exercise of ordinary skill and caution, might have discovered the child on the track, and recognized him as an infant in time to have stopped the train before it reached and ran upon him, the jury should find for the plaintiff, was not improper under the facts in the case, it being susceptible of the construction that if the employees, by using ordinary skill and caution after they observed the object on the track, could have distinguished that it was a child, etc. In this case it appeared that the company had run its road close to the house where the child lived, and had left the well where the family got its water on the other side, which fact the employees knew; they also knew that the family were accustomed to cross the track to obtain water, and this, said the court, ought to have increased their vigilance.

It would seem hardly open to question that it would be culpable negligence for an engineer to blow off steam so as to frighten children on a station platform, and cause any of them to step upon a side track in front of an approaching car, so as to be run over. *Lange v. Missouri P. R. Co.* 115 Mo. App. 582, 91 S. W. 989.

V. Trespassers on cars.

a. In general.

The rule that the only duty a railroad company owes a trespasser is not wilfully or wantonly to injure him applies to a child of tender years on its cars. *Wabash R. Co. v. Norway*, 7 Ohio C. C. 449, 4 Ohio C. D. 674.

In *Bannon v. Baltimore & O. R. Co.* 24 Md. 108, it is said that the infancy of the plaintiff does not change either the degree of care or diligence to be used by the defendants in the management of their cars and engines, or enhance the measure of damages to be adopted by the jury.

Nor is any higher duty imposed upon a railroad company towards trespassing children of the poor than trespassing children of the rich. *Steele v. Pittsburgh, C. C. & St. L. R. Co.* 4 Ohio S. & C. P. Dec. 350.

In *Hastings v. Southern R. Co.* 5 L.R.A.

(N.S.) 775, 74 C. C. A. 398, 143 Fed. 260, it was held that the only duty a railroad company owed an eight-year-old boy who, because the crossing was blocked, walked to the station platform, 50 feet distant, stepped upon a car standing on a side track, and while there was injured by the striking of the car by an engine in shifting cars, was not to injure him wilfully or wantonly. The court approved the rule that the company owes trespassing children no higher duty than it owes trespassing adults, unless there is something in the case to show that it knew, or ought to have known, that the child was on or about the premises.

In *Monehan v. South Covington & C. Street R. Co.* 117 Ky. 771, 78 S. W. 1106, a six-year-old boy riding without permission on the step of the rear platform of a street car was considered as an ordinary adult trespasser with respect to the duty the company owed him in that position. The court said that the question of his infancy was immaterial until it had been established that the company owed him an active duty, as opposed to the passive duty of not injuring him after his peril was discovered.

An infant of tender years may not be able to be guilty of contributory negligence, and in that respect his position is superior to that of one who has reached years of discretion, but contributory negligence presupposes the existence of negligence, and never becomes a factor in the problem until the defendant's duty and his breach of it have been established. If the company owed the child no duty, then the question of infancy was immaterial. *Ibid.*

In *Ft. Worth & D. C. R. Co. v. Cushman*, 51 Tex. Civ. App. 308, 113 S. W. 198, it is said that many authorities, and, as the court thought, the better reason, always required those engaged in a dangerous business at least to exercise ordinary care in conducting such business to avoid loss of life or limb of a trespasser, even when a reasonable probability of such injury is known, or where, in the exercise of ordinary care, it would have been known; and the court thought that such rule was unquestionably to be applied in the protection of a trespassing child of such tender years as to be devoid of discretion, and that might reasonably be contemplated to act upon the childish impulse to assume a position of danger.

The company owes to a seven-year-old trespassing boy on one of its cars no duty except to abstain from knowingly and wilfully injuring him. *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

A railroad company is not required to take such care to prevent injury to infant trespassers as would interfere with the usual and ordinary running of its cars, but only such as would be reasonable and proper under all the circumstances and conditions surrounding the case at the particular time. *Goldstein v. Peoples' R. Co.* 5 Penn. (Del.) 306, 60 Atl. 975.
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In *Pittsburgh, C. C. & St. L. R. Co. v. Redding*, 140 Ind. 101, 34 L.R.A. 767, 39 N. E. 921, where an eight-year-old boy, in catching a ride on a passing train, in direct violation of the order of the engineer, fell off and was injured, the court said the only question was whether the company was guilty of wilful or wanton neglect in not stopping the train and removing the boy when his danger was discovered; and it was held that it was not.

Liability for the death of a four-year-old boy who goes upon a standing car in the yards of a railroad company, loosens the brake, and sets it in motion, and jumps off in front of it, cannot be based on the theory that the company is required to construct its tracks so that there shall not be a steep grade, and to fasten its cars so that they cannot be unfastened by boys. *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167.

It is not negligence for a street railroad company to permit two horse cars to be coupled together, so as to render the company liable for injury to a boy who jumped upon the back platform of the rear car and fell off and was injured, where the cars were driven slowly and were never dangerous, nor reasonably inconvenient. *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386.

A railroad company is not required to anticipate the presence of trespassing children on its cars, and it is not an insurer of them. *Goldstein v. Peoples' R. Co.* supra.

It is not the duty of a railroad company to be on the watch for boys on and about the cars. *Wabash R. Co. v. Norway*, 7 Ohio C. C. 449, 4 Ohio C. D. 674.

A company is not bound to anticipate the presence of an eleven-year-old trespasser on a coal car standing on a side track near a depot, and to examine to ascertain whether he is there, and the fact that the employees might have seen him constitutes no neglect which renders the company liable for injuries received by him by being thrown off the car by the collision of other cars in the process of coupling. *Louisville & N. R. Co. v. Hunt*, 11 Ky. L. Rep. 825, 13 S. W. 275.

It is not the duty of a driver of two cars coupled together, attending to his duty of looking forward to his horse and to the road before him, to know whether a boy has jumped onto the rear platform of the forward car. *Bishop v. Union R. Co.* supra.

It is not the duty of a railroad company to ascertain that a boy of tender years, warned not to do so, has jumped upon the footboard of a switch engine, and therefore it cannot be liable for the injury sustained by him when his peril is unknown to the company's employees. *Oregon R. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Am. St. Rep. 860, 26 Pac. 973.

No recovery can be had for the injury of an eleven-year-old trespassing boy on the platform of a street car, on the theory that the car was driven so rapidly around a

curve as to throw him off the platform, if the driver had no actual knowledge of his presence, or, by the exercise of proper diligence, could not have been so informed. *Wynn v. City & Suburban R. Co.* 91 Ga. 344, 17 S. E. 649.

In *Harris v. Southern R. Co.* 25 Ky. L. Rep. 559, 76 S. W. 151, it is said that if a thirteen-year-old boy went upon a train without the consent or knowledge of the company's employees, they owed him no duty until they discovered his peril; and if they did not discover his peril in time to have prevented his injury by the exercise of ordinary care, the company would not be responsible therefor.

Where a five-year-old child fell through a car upon which he had climbed, and was run over, it was said that the company could not be held liable unless it could be shown that the employees of the company knew the boy was on the car and in a perilous situation, and could have relieved him before injury. *Wabash R. Co. v. Norway*, *supra*.

But where the rule as to the duty of the company to anticipate the presence of an infant trespasser is no more rigorous than in the case of an adult, there are cases where the company would be justified in assuming that an adult would extricate himself from his position of peril when it would not be authorized to presume that an infant of immature years and lacking in discretion and judgment would do so. *Ashworth v. Southern R. Co.* 116 Ga. 635, 59 L.R.A. 592, 43 S. E. 36.

In *Ashworth v. Southern R. Co.* *supra*, it is said that railroad companies may not be bound to anticipate that children will be allured by passing trains and attempt to board and ride upon them; but when the right of way of a railroad company extends through a place used as a playground by a number of children of ages varying from six to fifteen years, and when these children are accustomed continuously, every time the train enters the playground when they are upon it, to swarm upon the train and ride to the limits of the playground, and when the employees of the company know of this custom, and make no objection to it, the company is bound to carry the burden which such tacit permission imposes, and this burden will require the company to comply with the demands of ordinary care for the prevention of injury to children.

If boys of immature years and discretion are on or about a train so frequently that persons of ordinary prudence would apprehend danger to them, although the employees at the time do not know that a boy, afterwards killed, is on the train, it is the duty of the employees to use ordinary care to ascertain whether children are on the train, and to prevent injury. *St. Louis Southwestern R. Co. v. Abernathy*, 28 Tex. Civ. App. 613, 68 S. W. 539.

Where a six-year-old boy who was on top of a car in the company's switch yards was thrown off while in the act of descending, by the sudden jolting of the car by collision 32 L.R.A. (N.S.)

with other cars in switching, and was run over, it was held that evidence that there was no warning given of the intention to move cars, that the cars which struck the one on which the plaintiff was must have been moving 20 miles an hour, that there was a man short in the switching car, and that no care was exercised to discover the plaintiff and other boys on the cars, showed negligence on the part of the company. *Houston, E. & W. T. R. Co. v. Ollis*, 37 Tex. Civ. App. 231, 83 S. W. 850.

But in *St. Louis Southwestern R. Co. v. Davis*, — Tex. Civ. App. —, 110 S. W. 939, it is said that the duty that requires the employees of railroads to see that the track is clear in front, or that at the time of starting their machinery trespassing children are not in a place of danger upon any portion of the track, certainly should not be extended to a requirement that they should inspect their trains after being set in motion, for the purpose of preventing even children from leaping upon the cars as they pass.

But it was held that a boy who goes upon the platform of a car is a trespasser, and cannot hold the company liable for injuries due to the sudden movement of the train merely because his presence was known to the railroad employees, if, at the time they knew of his presence, he was not in peril, and they did not discover his peril, which arose from the movement of the cars, in time to avoid injury to him. *Arkansas & L. R. Co. v. Sain*, 90 Ark. 278, 22 L.R.A. (N.S.) 910, 119 S. W. 659.

Mere ignorance of a child's exposed position would not, in every instance, relieve the company from liability; for a case can easily be conceived of where failure to note the child's peril would in itself be gross and palpable neglect and inattention to duty on the part of those having the control and management of the car. *Wynn v. City & Suburban R. Co.* *supra*.

b. Duty to keep children off.

It is not the duty of a steam railroad company to keep children from climbing on moving trains at crossings. *Chicago & W. I. R. Co. v. Roath*, 35 Ill. App. 349.

Nor to keep a flagman at a street crossing to warn and prevent children from getting upon the platform of a standing car. *Haberlau v. Lake Shore & M. S. R. Co.* 73 Ill. App. 261.

The mere fact of the presence of a child near the track at a crossing, but not in a place of danger, does not require those in charge of the train to stop it and warn the infant to go further away, so as to prevent him from swinging onto the train as it passed him, as they could not have anticipated that he would do so. *Green v. Maysville & B. S. R. Co.* 25 Ky. L. Rep. 1623, 78 S. W. 439.

There is no duty to blow a whistle or ring a bell as to an infant trespasser standing near a railroad crossing, waiting for a passing train in order to catch a ride. *Steele*

v. Pittsburgh, C. C. & St. L. R. Co. 4 Ohio S. & C. P., Dec. 350.

A company is not required, while a train is standing at a crossing within a block from a schoolhouse, to have its train men on the lookout for children crossing the track, and to have them stationed in proper positions to keep them from climbing on the cars in an attempt to cross over. *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107, 26 Pac. 401, rehearing denied in 47 Kan. 112, 26 Pac. 824.

Nor is the company bound to watch for trespassing boys near a crossing, endeavoring to catch rides on a passing train. *Steele v. Pittsburgh, C. C. & St. L. R. Co.* supra.

The operation of small cars by a dummy engine in a street at a low rate of speed, with occasional stops, without precautions to prevent children from getting upon them, was held not to create a liability for the death of a five-year-old boy who got upon the cars, and was thrown or fell from them. *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 294, 38 L.R.A. 458, 67 Am. St. Rep. 116, 22 So. 546.

Where the brakeman let two boys ride on a car, and they, without his knowledge, beckoned to a third, who got on and then fell off and was killed, it was held that the company could not be held liable on the theory that the company's servants were negligent in failing to prevent boys of tender age from riding on the car and enticing other boys to join them. *Woodbridge v. Delaware, L. & W. R. Co.* 105 Pa. 400.

A railroad company cannot be held liable for the killing of a six-year-old boy who climbed upon a slowly moving car and afterwards fell off, on the theory that the brakeman should have prevented him from getting on the car, or should have taken care of him after getting on, if the brakeman was busy with his other duties, and did not see the boy, or have reason to suppose that he was near the train. *Ibid.*

A railroad company is not obliged to keep a lookout to prevent boys from swinging on ladders of its moving freight trains. *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062.

A street railway company's employees are not bound to keep a lookout for boys catching rides. They need only see that they are not injured wantonly. *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

A railroad company is not required to anticipate the presence of and look out for a ten-year-old boy in its private yards, so as to stop him from trying to jump upon a moving engine. *Vertrees v. Newport News & M. Valley R. Co.* 95 Ky. 314, 25 S. W. 1.

The company is not required to guard its cars so as to prevent a trespassing child from getting off or on while the cars are in motion. *Goldstein v. Peoples' R. Co.* 6 Penn. (Del.) 306, 60 Atl. 975.

Nor is it under any duty to keep a guard over its standing cars in its yards 32 L.R.A. (N.S.)

in order to keep boys from getting upon or under them so as to be injured by their starting up or loosening the brakes; nor is the brakeman required to give a signal before loosening the brakes, for the protection of such trespassers. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265.

A railroad company is not bound to use such extraordinary care as would be required to prevent a six-year-old boy from climbing upon the front platform of a slowly moving car and getting hold at a time when the driver was lawfully on the rear platform with no reason to apprehend such danger. *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 32 Am. Rep. 472.

A contractor engaged in grading a public street was held not bound to provide police supervision of the movement of cars used in carrying earth, to prevent plaintiff from boarding them, since he was not obliged to keep constant watch, or use extraordinary care to prevent the approach of children, but was only required, after their discovery, in the exercise of ordinary care, to use proper diligence to prevent injury. *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311.

It is not the duty of a railroad company permitting two horse cars to be coupled together to provide, besides a driver, a second man to have charge of them while en route, so as to prevent children in the street from getting on the platforms. *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386. The court said: "Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred."

An engineer would not be bound to stop his train simply because he saw boys in the highway, close to the track, and not in places of danger, but only when he saw some act on their part indicative of an intent to board the cars. *Horn v. Chicago, M. & St. P. R. Co.* 124 Iowa, 281, 99 N. W. 1068.

But in *Thompson v. Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191, it was said that, under the duty of a railroad company to exercise ordinary care, it may be negligence in some instances to fail to provide guards and lookouts at public crossings to prevent children from getting upon the cars, and whether it is negligence in any particular case is a question for the jury.

It is the duty of a railroad company knowing that boys persistently frequent its yards and catch on moving cars, although it made some effort to stop the custom, to

use ordinary care to prevent injury to any of them; and it is a question for the jury whether the company's employees used ordinary care to prevent boys from getting upon a moving train, or to discover them while hanging on and riding on moving cars. *Davis v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 92 S. W. 831.

Where small boys of immature years have habitually frequented railroad yards and persistently ridden on freight trains, to the knowledge of the employees of the company, it is the duty of such employees to use ordinary care to prevent injuring them, though they may have attempted to stop the custom. *Texas & N. O. R. Co. v. Buch*, — Tex. Civ. App. —, 102 S. W. 124, reversed on other grounds in 101 Tex. 200, 105 S. W. 987.

In *Mason v. Minneapolis Street R. Co.* 54 Minn. 216, 55 N. W. 1122, the question whether a motorman, on seeing a child about five years old approaching in such a manner as to indicate that he was going to take hold of the cars, ought, in the exercise of due care, to have stopped before the child reached them, was, after some hesitation, held to be for the jury.

c. Duty after discovery.

A railroad company is not ordinarily obliged to keep a lookout for trespassers, whether adults or children, on its cars and tracks, nor to presume that they will expose themselves to danger; but, having notice of their presence and that they are in danger, reasonable care must be used to avert it. *Hepfel v. St. Paul, M. & M. R. Co.* 49 Minn. 263, 51 N. W. 1049.

In *Wynn v. City & Suburban R. Co.* 91 Ga. 344, 17 S. E. 649, it is said that while the degree of care which a street railway company owes to a trespasser upon its cars is no more than ordinary or reasonable diligence, yet, where such trespasser is a child of tender years, due regard should be paid to the known indiscretion of a child and the inability of children to exercise proper precautions for their own safety. The duty resting upon the company to employ proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed position. Accordingly it would generally be negligence to allow such a child to ride upon the steps of the front platform when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to know his peril palpable neglect and inattention to duty on the part of those having the control and management of the car.

In *Anternoitz v. New York, N. H. & H. R. Co.* 193 Mass. 542, 79 N. E. 789, it was assumed that the only duty the company owed an eight-year-old trespasser on a freight car after discovering him was not 29 L.R.A. (N.S.)

willfully to injure him, and not to act with wanton disregard of his safety; and it was held that starting the train without removing him and taking measures for his safety was not a wanton disregard of his safety.

A railroad company can be held liable for injury to an eight-year-old boy who has been ordered off the rear step of an engine tender and is run over by the sudden starting of the engine, only in case there is gross and wanton negligence on its part such as would indicate an indifference to the safety of the boy. *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. 830.

That a boy was ordered off the step, and the engine started without any warning before he had gotten out of the way, do not show such negligence, where neither the engineer nor fireman knew the boy was there at all. *Ibid.*

A railroad company owes an eight-year-old trespassing boy trying to catch a ride on a passing train no duty except to refrain from running over him maliciously, wantonly, and recklessly, and to stop the train as due care requires after his peril is discovered. *Steele v. Pittsburgh, C. C. & St. L. R. Co.* 4 Ohio S. & C. P. Dec. 350.

In *Levin v. Second Ave. Traction Co.* 194 Pa. 156, 45 Atl. 134, it was held it was the duty of a motorman when he discovered a five-year-old boy catching a ride on the front platform of the car to stop and take him inside, or put him off; that failure to stop instantly became negligence. In this case the motorman knocked on the window, kicked on the platform, and so frightened the boy that he jumped off and was run over.

When a child of years so tender that negligence cannot be imputed to it is found by a conductor or motorman on the platform of his moving car, his duty is to remove it from its peril. This can be done by stopping the car and putting it off, or taking it inside. *Levin v. Second Ave. Traction Co.* 201 Pa. 58, 50 Atl. 225.

If employees of a railroad company, operating a train, know that a child is in a position of peril, or is attempting to place himself in a position of danger with reference to the moving train, or could have known that fact by the exercise of ordinary vigilance and care, and under such circumstances fail to exercise ordinary care and diligence to prevent injury to him, and as a consequence he is injured, it will be actionable negligence. *Thompson v. Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191.

But the mere fact that employees of the company saw a boy as he jumped or swung upon the passing train in an effort to catch a ride does not render the company liable for his death, if he is immediately thrown under the wheels, before it is possible for the servants of the company to prevent the accident. *Green v. Maysville & B. S. R. Co.* 25 Ky. L. Rep. 1623, 78 S. W. 439.

The fact that the engineer, in a bona fide effort to prevent injury to an eight-year-

old boy who had jumped upon a locomotive, and to carry out the reasonable rules and order for such emergencies, made a mistake in reversing the engine, which caused the boy to be thrown off and killed, does not render the company liable. *Miles v. Atlantic, M. & O. R. Co.* 4 Hughes, 172, Fed. Cas. No. 9,544.

d. Removal of trespasser.

A twelve-year-old child who climbs upon a car standing in railroad yards, and who sees an engine coming, and is ordered to get down in a harsh manner by an employee, and, in fear of being hurt, jumps and is injured, cannot recover damages on the theory that the company's servants did not exercise ordinary care in looking out for trespassers, and because, when discovered, proper precautions were not observed to keep from frightening her and causing her to jump, since the company owed her no duty until her presence actually became known to its servants, and then none except not wilfully or wantonly to have disregard for her safety. *Nashville, C. & St. L. R. Co. v. Priest*, 117 Ga. 767, 45 S. E. 35. The court said: "Though a child only twelve years of age may oftentimes occupy a much better position than would an adult under similar circumstances, in that a plea of tender years can be made to a charge of contributory negligence on the part of a child, yet it remains true that a trespasser, be he man or infant, is not legally entitled to complain of lack of diligence on the part of a third person which falls short of gross negligence."

Where one obtained a passage on a coal car by collusion with an employee of the railroad company by paying the latter a nominal sum, and later was ordered, with a threat of violence, to leave the train, the purpose being to prevent detection of both in the wrong done to the company, and the trespasser jumped from the train while in motion, and was injured, it was held that the company was not liable, although the trespasser was a minor, if he had sufficient knowledge and discretion to understand and participate in the fraud practised on the company. *Smith v. Georgia R. & Bkg. Co.* 113 Ga. 9, 38 S. E. 330.

In *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664, same holding on appeal in 98 Pa. 498, a seven-year-old boy was ordered off a moving car, and, in jumping, fell and was run over. It was held that negligence in forcing the boy to jump could not be shown even in an action for the boy, because of the fact that he was a trespasser. It is sufficient to say, declared the court, that the child being unlawfully on the car, the company owed it no duty.

A conductor is bound to use much greater care in putting a seven-year-old boy trespasser off a train, miles from his home, than he would if the trespasser were an adult. *Indianapolis, P. & C. R. Co. v. Pitt-*

zer, 109 Ind. 179, 55 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

Although a trespasser on a train had been more than once warned off, but persisted in getting on again when the train started, it was held that this would not warrant the employees of the company in using that degree of force necessary to remove him, at a time when the train was in motion, especially in the case of a trespasser of tender years. *Southern R. Co. v. Shaw*, 31 C. A. 10, 58 U. S. App. 201, 86 Fed. 865.

H. C. S.

VIRGINIA SUPREME COURT OF APPEALS.

C. M. NEBLETT, Appt.,

v.

A. B. SHACKLETON, Sheriff, et al.

(— Va. —, 69 S. E. 946.)

Appeal—refusal to enlarge injunction—statutory authority.

1. An appeal from an order dismissing a bill seeking an injunction against the sale under execution of property alleged to be exempt, and directing the sheriff to proceed with the sale, after refusing to enlarge the preliminary injunction so as to extend the time of its operation, is not prevented by a statute denying an appeal from a refusal of the court to enlarge an injunction.

Homestead—crops—exemption.

2. The crops grown on a homestead are exempt from execution where the constitutional provision for homestead exemptions declares that it shall be liberally construed.

(January 12, 1911.)

Note.—Crops grown on homestead, or proceeds thereof, as exempt.

Upon the general subject as to how far proceeds of exempt property retain the exempt character, see note to *Wylie v. Grundysen*, 19 L.R.A. 33.

The principal, if not the sole, object of most of the homestead exemption laws, says 15 Am. & Eng. Enc. Law, 2d ed. p. 526, is to protect debtors and their families in the possession and enjoyment of their homes, so as to give to them shelter beyond the reach of financial misfortune. But the "shelter beyond the reach of financial misfortune" spoken of is believed to have reference to something more than a mere house topped with a roof and in other respects complete and inhabitable as a dwelling place. It might be stated that the object of the homestead exemption is not merely to afford a naked shelter to the family, but, like all other exemptions, to afford it a means of livelihood, and thus to prevent its members from being driven by destitution to seek a support from public charity. The policy of the law has always been, so far as possible, to prevent persons, whether through

A PPEAL by plaintiff from a decree of the Circuit Court for Lunenburg County dismissing a bill filed for an injunction against the sale under execution of property alleged to be exempt under the homestead laws, and directing the sheriff to proceed with the sale after refusal to enlarge the injunction. Reversed.

The facts are stated in the opinion.

Messrs. W. E. Neblett, W. M. Gravatt, and W. E. Nelson for appellant.

Messrs. R. Turnbull & Son & Bell, for appellees:

Crops grown upon the tract of land claimed as a homestead exemption, and severed therefrom, are subject to levy.

Tex. Const. art. 16, § 51; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725, 8

S. W. 922; *Horgan v. Amick*, 62 Cal. 401; *Citizens' Nat. Bank v. Green*, 78 N. C. 247.

Keith, P., delivered the opinion of the court:

It appears from the bill filed by the appellant in this case that he is a resident and citizen of the county of Lunenburg, a married man with a wife and several small children dependent upon him for support, and that he was entitled to the benefit and protection of the exemptions under the laws of Virginia in such cases made and provided; that he had previously declared his intention to claim and has claimed the benefit of the homestead exemption, and on the 15th day of September, 1902, executed a deed in which the

misfortune or improvidence, from becoming a charge upon the public purse; and, to this end, the statutes of exemption have been so framed as to secure to all persons the means of obtaining a support through their own exertions. Keeping in mind, then, the purpose of the statutes, it seems fair to suppose that the legislatures intend that the land and buildings constituting homesteads shall be of practical use and value to their owners.

So, this note gives consideration to the question whether crops grown on the homestead, or property which may be bought with the proceeds of crops grown thereon, are exempt as a part of the homestead or as incidental to its ownership. The courts are not in accord upon the subject, as appears hereafter. Preliminarily, too, it may be stated that, since homestead laws are remedial in their nature, they are to be construed liberally, even where there is no constitutional provision to that effect, as there was in *NEBLETT v. SHACKLETON*.

Where crops are growing.

With the possible exception of *Re Sullivan*, *infra*, which appears to hold that a crop fully matured and ready for harvesting is subject to levy, it is not believed that any case will support the proposition that crops while growing upon the homestead are not exempt.

Thus, a number of cases in the jurisdiction of Texas hold that crops while growing upon the homestead are exempt. *Nunn-Weldon Dry Goods Co. v. Haden*, — Tex. Civ. App. —, 95 S. W. 73; *Parker v. Hale*, — Tex. Civ. App. —, 78 S. W. 555; *Staggs v. Piland*, 31 Tex. Civ. App. 245, 71 S. W. 762; *Phillips v. Warner*, 4 Tex. App. Civ. Cas. (Willson) 210, 16 S. W. 423.

One reason for this rule was stated by Mr. Justice Gaines, of the supreme court of Texas, in *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725, 8 S. W. 922: "Upon a levy upon such property [growing crops], the officer must either take possession of the land to gather the crop or must sell it ungathered. In the latter case the right would

pass to the purchaser at the sale to go upon the land and take off the crop. In order to complete a sale or to make it effective, possession must be taken of the land upon which the crop is found, and for a time, at least, the officer or purchaser must exercise dominion and control over it. This, in our opinion, is an invasion of the homestead right and cannot be permitted."

In *Alexander v. Holt*, 59 Tex. 205, it was said: "We are of opinion, also, that the crops of corn and cotton growing on the homestead were also exempt, as necessary to its beneficial enjoyment. . . . The beneficial enjoyment of a rural homestead supposes that the owner may use it for purposes of cultivation and raising upon it the fruits of the earth. Of this right he would be deprived if creditors are allowed to invade it and seize his growing crops, and subject them to their debts." See, to the same effect, *Cunningham v. Coyle*, 2 Tex. App. Civ. Cas. (Willson) 371.

And in *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200, it was said: "The occupation by the head of a family of a homestead for agriculture is for the purpose of realizing therefrom something to support himself and family, rather than to employ it as a mere place wherein to shelter him and them from the winter's cold or summer heat. If the exemption extended to him does not include an ungathered crop, whether matured or not, it is of no benefit to the owner. In such an event he and his wife and children would only have the privilege of standing in the house or yard, and seeing an officer invade their field and take possession of, by virtue of an attachment or execution, the crops growing or standing thereon, and appropriate the fruits of their toil without any benefit from what the law was intended to secure them."

The exempt character of a crop growing upon the homestead is not lost, and it is not reduced to a nonexempt state, where one, under a writ of garnishment, unlawfully and wrongfully gathers it in order to subject it in satisfaction of a judgment. *Staggs v. Piland*, 31 Tex. Civ. App. 245,

homestead exemption was set apart in certain property therein described, consisting of a tract of land in the county of Lunenburg, containing about 500 acres, valued at \$1,500; that this farm is still retained as his homestead, and that he has from year to year cultivated it, and in the year 1908 raised and housed about 7,000 pounds of tobacco, worth at least \$900; that of this amount about one fourth belonged to a colored tenant; that the entire crop was raised on the homestead farm in the ordinary course of cultivation and husbandry, and, being so raised, he claims that it was part and parcel of his homestead exemption, exempt from levy, seizure, garnishment, or sale under any execution or process known to the laws of Vir-

ginia, but that he had the right to use it for the maintenance and support of his family.

The bill states that judgments at various times had been gotten in the courts of Lunenburg against appellant; that none of the judgments is upon a contract waiving the homestead exemption; and that on the 21st day of September, 1908, executions were issued upon these judgments, and were delivered to the sheriff of Lunenburg, who, upon the 23d day of September, 1908, levied on the tobacco before referred to, and made on each of the executions the following return: "Levied on 1,000 sticks of tobacco, the one-half interest of C. M. Neblett in share crop, and also on 2,650 sticks of said C. M. Neblett's individual

71 S. W. 762, wherein it was said: "They will not be permitted to profit by their own wrongful conduct."

By express statute in Georgia (Civil Code, § 2848) it is provided that "all produce, rents, or profits arising from homesteads in this state shall be for the support and education of the families claiming said homesteads, and shall be exempt from levy and sale, except as provided in the Constitution." The provision in the Constitution of 1877 referred to specifies that property set apart as a homestead is not exempt from claims for taxes, for the purchase money of the same, for labor done thereon, for material furnished therefor, or for the removal of encumbrances thereon.

So, it has been held that where a husband and father, after a homestead in land has been set apart to him, individually mortgages growing crops thereon in order to obtain supplies to be used in making such crops, the holder of the mortgage cannot, by foreclosing it against the mortgagor as an individual, after the maturity of the crops, subject the same to the satisfaction of the mortgage execution. Under such circumstances, the crops are not subject to such execution. *Martin v. Davis*, 104 Ga. 633, 30 S. E. 753, wherein effect was given to a provision in the Constitution of 1877 which provides that the debtor shall not, after the homestead is set apart, alienate or encumber the property exempted.

In *Cox v. Cook*, 46 Ga. 301, it is held that, even though the defendant has claimed the growing crops as a homestead in personalty, he has not prejudiced his rights thereby, and is still entitled to any crops raised on the land set apart as a homestead, whether growing or not.

In *Jewett v. Guyer*, 38 Vt. 209, it was said: "The exemption of the annual products of the homestead from attachment and execution is as distinctly and absolutely declared in the statute as is the exemption of the homestead itself; and it was intended as a substantial privilege or benefit to the person on whom it was conferred."

And in Missouri, even in the absence of a specific statutory provision, it is held 32 L.R.A. (N.S.)

that the owner of the homestead is entitled to all the issues and products thereof during the existence of the homestead estate. *Mahoney v. Nevins*, 190 Mo. 360, 88 S. W. 731; *Ailey v. Burnett*, 134 Mo. 321, 33 S. W. 1122, 35 S. W. 1137.

In *Re Sullivan*, 78 C. C. A. 505, 148 Fed. 815 (petition for revision of judgment denied in 142 Fed. 620), where the question was whether a bankrupt, after having his homestead and all other personal property declared to be exempt by statute of Iowa set off to him by the trustee in bankruptcy, was also entitled to ripe corn grown on the homestead, merely because it was grown there, the court held that he was not so entitled. The court criticized *Morgan v. Rountree*, 88 Iowa, 249, 45 Am. St. Rep. 234, 55 N. W. 65 (cited and quoted in *NEBLETT v. SHACKLETON*), as being *obiter* on this point, and said: "No interpretation having been placed on the homestead statute in its relation to the question before us, we are left to exercise our independent judgment. . . . A homestead of 40 acres is specifically exempt to the head of a family. The land as an alienable and inheritable estate, and its use, whether for shelter or rent reserved, are recognized in Iowa and elsewhere as the limit of what is exempt as the homestead. Difficult questions sometimes arise in determining what is included in 'the use.' Does it include ripe crops which have grown on the homestead? They represent more than the actual use or rent reserved by lease. The latter accurately measure the value of the homestead itself to the owner. The former (the crops) measure that use, together with the brain, brawn, and money which the owner has put into raising them, and the increase of value which favorable markets and other fortuitous advantages give them above the cost of production. This latter may be called their speculative value. All these things, which add much to their value, cannot, in our opinion, be exempt merely because the owner of the homestead on which they are grown is entitled to the use of the homestead. Much of the crops are exempt

crop of tobacco found on the premises." He prays for an injunction restraining the sheriff of Lunenburg and the judgment creditors from selling this tobacco, grown and raised upon his homestead, alleging that there is no complete and adequate remedy at law, and if the sheriff is allowed to sell his tobacco under the executions, he will be materially and irreparably injured. He therefore prays that A. B. Shackleton, sheriff of Lunenburg, and the several execution creditors may be made parties defendant, and that they be enjoined and restrained from selling the tobacco and collecting their judgments.

On the 9th day of October, 1908, an injunction was awarded in accordance with the prayer of the bill, to take effect upon

the execution of the required bond, and to remain in force until Monday, the 16th day of November, 1908, unless previously enlarged or dissolved in the manner prescribed by statute in such cases made and provided.

At the November term of the court, the defendants appeared, demurred to the bill, and filed their answers, and at the April term, 1909, the cause was brought on to be heard upon the bill and exhibits, the demurrer and answer of the defendants, the temporary injunction theretofore granted, upon the motion of plaintiff to enlarge, and upon the motion of the defendants to dissolve the injunction; notice of motion to dissolve being waived. The court after mature consideration declined to enlarge the

under some provisions of the statutes referred to, and such exemptions, we think, exhaust the legislative will concerning the subject. If all crops growing on an exempt homestead are *ipso facto* exempt, anyone may secure a homestead near a large city, expend much money for seed, in fertilizing the ground, and in growing and harvesting the crops, and in that way secure large returns of vegetables and other products, sell them in a convenient and favorable market, accumulate a fortune, and successfully defy his creditors. Such possibility demonstrates that the theory of law which makes it possible is probably not sound, and induces us to give a construction to the statute, if the same can reasonably be done, which will not permit it. We think a reasonable construction conduces to the result reached by the learned trial court, namely, that ripe crops, because they were grown on an exempt homestead, are not for that reason alone exempt also." *Re Hoag*, 97 Fed. 543, cited in the foregoing cases, is a similar one to the same effect.

In the northern district of Texas, notwithstanding the decisions of the state court, it was held in *Re Coffman*, 93 Fed. 422, that a bankrupt could not hold as exempt crops growing on the homestead at the time of the adjudication in voluntary bankruptcy.

And so, in *Re Daubner*, 96 Fed. 805, it was said: "When such owner [of growing crops] voluntarily goes into bankruptcy, he must be held to intend that such of his property and rights as are the subject of disposition by him, and are not expressly exempt, shall vest in the trustee for the benefit of creditors. Such crops are the fruits of the bankrupt's industry, or of his investment of money, or both. It would be productive of great injustice if the owner of a homestead is permitted to spend his money in planting crops upon exempt land, and then between seed time and harvest procure a discharge in bankruptcy, and so reap what was sown at the expense of creditors. By such a device the bankrupt might secure a discharge from his debts, and retain his property with its increase; and 32 L.R.A. (N.S.)

the bankruptcy law be made an instrument of fraud."

In *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725, 8 S. W. 922, it was said: "The reasons given in *Alexander v. Holt*, 59 Tex. 205, for holding crops growing upon the homestead exempt, apply to matured crops, but not with the same degree of force."

Where crops have been gathered.

In Texas a different rule applies where the crops have been gathered.

Thus, in *Coates v. Caldwell*, *supra*, it was held that cotton grown upon the homestead, upon being severed from the land by gathering, becomes subject to levy and sale under execution, but that until it is gathered it is exempt.

And the same distinction is made in *Silberberg v. Trilling*, 82 Tex. 523, 18 S. W. 591; *Bailey v. Oliver*, — Tex. —, 9 S. W. 606. And the same distinction was recognized in *Allen v. Ashburn*, 27 Tex. Civ. App. 239, 65 S. W. 45, wherein the surviving husband of a family claimed that corn which had been gathered and placed in cribs was exempt to him under a statute which made it exempt to a surviving wife, but it was held that such right was not secured to the surviving husband.

But in *Ross v. McGuffin*, 2 Tex. App. Civ. Cas. (Willson) 403, it appears to have been held that even severed crops grown upon the homestead are exempt from seizure.

In *Horgan v. Amick*, 62 Cal. 401, it was held that grain harvested from lands constituting a homestead is not exempt.

Given, J., in *Morgan v. Rountree*, cited and quoted in *NEBLETT V. SHACKLETON*, in the course of an opinion upon a point not within the scope of this note, said, in criticism of *Horgan v. Amick*, and *Coates v. Caldwell*, *supra*: "The reasoning . . . seems to be that to exempt the gathered crops would be to add to the exemptions of personal property provided in the statute without its being specified therein. . . . Such crops, if exempt, must, in the

injunction, and "ordered that the bill of complainant be dismissed, and that the defendants recover of the said plaintiff their costs by them in this behalf expended. And A. B. Shackleton, sheriff, is hereby directed to proceed upon the executions in his hands as set out in the bill of the plaintiff just as if no injunction had been granted." To that decree an appeal was allowed.

The first point to be determined is the motion of appellees to dismiss the appeal as having been improvidently awarded; the ground relied upon being, that § 3435a of the Code of 1904 provides: "Every court or judge authorized to award injunctions may, if, in the opinion of the court or judge it be proper so to do, prescribe in the injunction order the time during which

the injunction shall be effective, and after the expiration of such time the said injunction, unless previously enlarged as hereinafter provided, shall stand dissolved. The party to whom such injunction is awarded may within such time give notice to the adverse party or to his attorney at law or in fact, of the time and place at which he will move the court or judge to whom the bill is addressed to enlarge such injunction or to grant a further injunction, and such adverse party may, within such time and after like notice, move the said court or judge to dissolve such injunction; and, on such motion by either of said parties the said court or judge may dissolve or enlarge said injunction or grant a further injunction. From any such in-

absence of such specifications, be so under the law exempting the homestead. The reasoning in these cases seems to us to lose sight of the spirit and purpose of the law exempting homesteads. The conflict in the cases is explained, in part at least, by the differences in the statutes of these states. It will be observed, however, that in none of them it is held that crops, while growing upon the homestead, are not exempt." It is submitted that *Re Sullivan*, 78 C. C. A. 505, 148 Fed. 815, and *Re Hoag*, *supra*, may be open to the same criticism.

The Georgia courts make no such distinction, but under the statute cited, *supra*, hold that harvested crops are also exempt from levy and sale.

So, the head of a family in possession of land may take a homestead thereon, though the legal title may be in another, and, after so doing, a crop made on the land by the head of the family is protected from levy and sale under ordinary judgments against him. *Whitehead v. Mundy*, 91 Ga. 198, 17 S. E. 287; *Pendleton v. Hooper*, 87 Ga. 108, 27 Am. St. Rep. 227, 13 S. E. 313.

Not only are growing crops, as well as those harvested, exempt in Georgia, but the proceeds of the crops and the property bought therewith are also exempt.

Thus, in *Wade v. Weslow*, 62 Ga. 563, which was decided after the passage of the statute referred to, but prior to the ratification of the Constitution of 1877, it was held that sheep purchased with the proceeds of a crop grown upon the homestead, and put on the homestead, are exempt. Great stress was placed in this case upon a constitutional provision. Thus, the court said: "According to the Constitution of 1868 (Code, § 5135), both realty and personality are to be valued at the time they are set apart, and there is no intimation that if the value afterwards changes, any deficiency is to be made up, or any excess is to be pruned off. It is not the policy of the Constitution to maintain permanently an estate in realty worth \$2,000, and an estate in personality worth \$1,000, but to allow these values as a maximum to start with, and leave families to the hazard of

depreciation or loss, and to the chances of appreciation or gain. The property of both kinds is valued once for all, and no subsequent valuation is contemplated. And from the time it is set apart, the Constitution dedicates it 'to the sole use and benefit' of the family. Neither the debtor nor his ordinary creditors are to have any right in it or powers over it, inconsistent with the enjoyment by the family of this use and benefit. One of the uses of land is to produce crops; and to enjoy the use of land is to take the crops while they remain *in specie*, and their proceeds after they are converted by sale or exchange into other property. . . . We cannot suppose that, in making provision for families, the Constitution intended that the head of a family should not be allowed to cultivate the farm . . . without subjecting the proceeds, or a part of them, to seizure by his creditors. In many instances, perhaps in most instances, vain indeed would be the homestead . . . if the labor and management of the head of the family were not added to make the property productive. If by industry, economy, and thrift, a surplus is produced, over and above what is consumed by the family, and this surplus is invested, the investment, we think, goes to enlarge the corpus, just as it would do in the case of an ordinary trust estate. There is a public policy in encouraging families to save, and in not pressing them with motives to spend or waste all their income. To stimulate production, and discourage extravagant living, is for the best interest of the state. In average human nature, there is a deep-seated antagonism on the part of debtors, and often on the part of their families, towards creditors who press for payment; and if the surplus income from homesteads, whether before or after investment, was exposed to seizure by those very creditors to baffle whom, perhaps, the homestead right was asserted, the practical effect would be surplus income from such estates would soon become very scarce. None would be produced, or if produced, the scale of consumption would be varied so as to absorb and exhaust it.

junction which shall stand dissolved as aforesaid, and from any order dissolving such injunction and refusing to grant a further injunction, there shall be no appeal; but if such order of dissolution and refusal be made by a circuit [court] or corporation court, or a judge thereof, application for an injunction may be made to a judge of the supreme court of appeals, as provided in § 3438 of the Code of Virginia, who may award an injunction in accordance with that section."

The preliminary injunction was awarded on the 9th day of October, 1908, and was to continue until the 16th day of November, 1908, unless previously enlarged or dissolved. At the November term the defendants answered, and at the April term, 1909, the case came on to be heard upon the papers filed and upon the motion of the plaintiff to enlarge the injunction theretofore granted, and the motion of defendants to dissolve that injunction; whereupon the court entered an order dismissing the bill.

If the court had refused to enlarge the injunction, or had dissolved the injunction, and had done no more, it may be that the orders would not have been appealable under the section quoted, 3435a. But the court did not stop there. It dismissed the plaintiff's bill, awarded costs against him and in favor of defendants, and directed the sheriff to proceed upon the executions in his hands as if no injunction had been granted. This is in all respects a final decree, over which this court has jurisdiction by appeal.

This brings us to a consideration of the case upon its merits.

A homestead of the value of \$1,500 was

set apart in land upon which the plaintiff, his wife, and infant children resided, and upon which, in the ordinary course of husbandry, he raised and gathered a crop of tobacco. This tobacco was levied upon after it was severed, and the sole question for decision is whether or not it is protected from sale under the executions issued upon judgments founded upon contracts in which there was no waiver of the homestead exemption.

Our homestead laws rest upon article 14, § 193, of the state Constitution (Code 1904, p. cclxxi.), which, among other things, declares that "the provisions of this article shall be liberally construed," thereby embodying into the organic law a principle of construction which courts everywhere apply to such laws as being remedial in their character, and therefore to be liberally construed.

The courts of some other states and some text writers hold that "the usufruct of homestead property is not exempt because that which produces it is so. In the absence of any law creating the exemption, the income of such property, when it has taken independent form, is liable to the creditor. Were a different rule to prevail, the income 'could be capitalized and re-capitalized from that one nucleus to the building up of colossal fortunes in defiance of debts past and future. And what a door would be opened to frauds and perjuries, as each owner of a homestead would be tempted to allege and establish that all his estate, no difference how acquired, was but the increment of his own, or the homestead of some remote ancestor.'" This is the view presented at page 242 of *Waples* on

The right to seize would thus prove barren to creditors, and the wealth of the state receive no accession from the millions of capital locked up in homesteads. Both policy and principle are with the rule as we lay it down, and we know of no precedent against it."

Property purchased by the head of a family, and paid for exclusively with the income of the homestead, is regarded as an addition to the corpus of the homestead estate, and is exempt.

Hence, where the property is bought with part, at least, of the proceeds of crops raised on the homestead, and partly with means derived from another and independent source, the proportionate part will be added to the homestead, and the balance left subject to levy and sale. *Kiser v. Dozier*, 102 Ga. 429, 66 Am. St. Rep. 184, 30 S. E. 967. While the court in this case makes no reference to the statute previously referred to, it will be observed that the statute is explicit on the point.

But in North Carolina in *Citizens' Nat. 32 L.R.A. (N.S.)*

Bank v. Green, 78 N. C. 247, it was held that a tract of land the title to which was in the name of the wife of the debtor, and which tract was acquired from a crop of cotton that was grown on the homestead tract, would not be exempt. It was said: "It is urged in argument that a homestead having been secured to the debtor by law, all income derived from its use is merely an incident which follows the principal, and belongs absolutely to him, and may be used either in improving the property or in other investments; and that unless this be so, the law rather discourages than invites improvements and enterprise, by cutting off all inducement to industry, the legitimate rewards of which when in excess of the exemption would be seized and sold by the creditor. Such an argument should not be addressed to a court which cannot make, but only construe and administer, the law as it is written. If worthy of consideration it should be directed to the legislature as a reason for changing the law."

E. M. S.

Homestead and Exemption, and the decision cited in support of it is *Citizens' Nat. Bank v. Green*, 78 N. C. 247.

Appellees rely also upon *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725, 8 S. W. 922, in which it appears that a part of the cotton levied upon had been picked, but not removed from the field, and a part had matured, but had not been picked. It is held that the unpicked cotton was not the subject of levy, but that the cotton which had been picked could not be exempted. The case of *Horgan v. Amick*, 62 Cal. 401, seems to be to the same effect.

Unless these decisions are governed by something in the statutes of the states referred to, they strike us as being narrow and technical in the extreme. Of what value unpicked cotton could be to the householder it is difficult to perceive. As long as it remained in the field exposed to the weather and to be utterly wasted, it was protected by the homestead, but as soon as it was picked and assumed a useful and marketable form, the protection of the homestead was withdrawn, and it became subject to seizure by the creditor.

It was pressed upon the court in *Citizens' Nat. Bank v. Green*, supra, that a homestead having been secured to the debtor by law, all income derived from its use is merely an incident which follows the principal, and belongs absolutely to him, and may be used in improving the property or any other improvements, and that, unless this be so, the law rather discourages than invites improvement and enterprise by cutting off all inducements to industry, the legitimate rewards of which, when in excess of the exemption, would be seized and sold by the creditor. That this is true cannot be successfully refuted, and the answer which was made by the court does not appeal to us. We have no fear that colossal fortunes in defiance of debts past or future will be built up upon the nucleus of incomes derived from a capitalization and recapitalization of the proceeds of crops derived from land set apart as homesteads.

The supreme court of Iowa has had this subject under consideration in *Morgan v. Rountree*, 88 Iowa, 249, 55 N. W. 65, and also reported in 45 Am. St. Rep. 234, where the conclusion was reached that moneys due for rent of a homestead are exempt from execution. In the course of the opinion, the court said: "We think it is in harmony with the evident spirit and purpose of our statute, to hold that the head of a family owning a homestead has a right to hold as exempt not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead." 32 L.R.A. (N.S.)

If the homestead is terminated by abandonment or otherwise, the exemption ceases. To hold that the owner of a homestead can only hold as exempt such proceeds of its use as the industry of himself or family has produced would be in many cases to deny the benefits of such exemption entirely. Take the case of an owner who cannot, from any cause, cultivate the homestead garden of 40 acres; there is no good reason why he may not rent them to another, and hold the proceeds exempt for the use of his family. This case furnishes another apt illustration; also the case of one having spare room in the homestead, who takes lodgers, or one who, having no use for a stable on the homestead premises, rents it to another. We are clearly of the opinion that proceeds derived from the use of the homestead while it remains such are exempt to the head of a family. Whether property purchased with such proceeds, not otherwise exempt, would be subject to execution, we do not determine."

This case derives additional value from having been annotated by Mr. Freeman, who in a note says in part as follows: "As to certain classes of homestead, the object of the statute is not restricted to affording a mere shelter of the family; and perhaps there is no class of which it may fairly be said that the statute did not intend the debtor to have the advantage accruing from the profitable use of the homestead for such purposes as it might be devoted to without impairing its homestead character or abandoning all exemption rights therein. The principal case goes further than any other falling within our observation in securing to a debtor the profits of his homestead accruing when he was absent therefrom. We are not inclined to doubt or criticize it on that account. The claimant has a right to the full use of his homestead, and if he denies himself part of this right, and thereby becomes entitled to compensation, as when he lets the whole or some part of it, the courts, in denying creditors the right to garnish or otherwise subject to execution the proceeds of such letting, inflict no wrong on the creditor. A case equitably still less subject to doubt arises when the owner of an agricultural homestead plants and harvests a crop which his creditor undertakes to seize in satisfaction of a debt. By not restricting such a homestead to the dwelling house and its appurtenances, and in permitting it to extend over lands useful only for the production of crops, the legislature impliedly expressed an intention to include the beneficial use of those lands in the homestead exemption. It is true that in many instances there is an enumeration of

the personal property which a debtor is entitled to retain as exempt from execution, and that the produce of the homestead may exceed this enumeration or be of a different character. Hence some courts have denied that the produce of a homestead is exempt from execution, unless of a character or quantity which would exempt it though it had been acquired from any other source. Others affirm that the exemption of a homestead extends to the crops grown thereon."

This case is one of first impression, we believe, in this state, and in passing upon it, it has been our object so to construe the Constitution and statutes bearing upon the subject as to advance their humane purpose. To deny to the homestead claimant exemption of the crops raised upon the homestead property would be injurious to the public, as tending to discourage good husbandry and the general improvement of the land set apart as a homestead, and would render the benefit intended to be secured to the head of the family for the support of those dependent upon him, in many instances, utterly vain and illusory.

We are therefore of opinion that the decree of the Circuit Court should be reversed, and this court will enter such decree as that court should have rendered.

Harrison and Whittle, JJ., absent.

NORTH CAROLINA SUPREME COURT.

J. C. THOMAS, Appt.,

v.

HAMMER LUMBER COMPANY.

(153 N. C. 351, 69 S. E. 275.)

Master — setting fire — independent contractor.

1. The owner of a logging railroad is not relieved from liability for injury to adjoining property through fire set out on its right of way, which has been permitted to become covered with inflammable materials, by the fact that the cutting, logging, and hauling of the timber, including the operation of the trains, was being done by an independent contractor.

Same — independent act of contractor's servants.

2. The owner of a logging railway is not answerable for fire set out by employees of an independent contractor independently of any apparatus used in the operation of the road.

Note. — As to liability of employer for acts of an independent contractor in setting out fire, see note to *St. Louis & S. F. R. Co. v. Madden*, 17 L.R.A. (N.S.) 788. 32 L.R.A. (N.S.)

Same — defective apparatus — use by contractor.

3. The owner of a logging railroad is liable for injury to adjoining property from fire set out by a spark from a defectively equipped engine which was being operated by an independent contractor for hauling logs over the road.

(November 10, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for Brunswick County in defendant's favor in an action brought to recover damages to plaintiff's land and timber from fire alleged to have been negligently set out by defendant's engine. Reversed.

Statement by Manning, J.:

This action was brought to recover damages to plaintiff's land and growing timber by fire alleged to have been negligently set out by defendant's engine operated on a lumber road constructed for the purpose of hauling the logs cut from plaintiff's land. The plaintiff had sold certain timber trees growing upon his land to one Hammer, who had conveyed them to the defendant company, and had sold him (Hammer) a right of way 100 feet wide through his land in fee for the purpose of operating a railroad thereon. This right of way had also been conveyed to the defendant by Hammer. The defendant, denying all allegations of negligence and any liability to the plaintiff offered the following evidence to show that, if the alleged negligent acts were done as charged, they were caused and done by one Ellis, an independent contractor. H. C. McKeel, the general manager of defendant, testified: "J. W. Ellis was operating road. I made contract with Ellis for company to log certain tracts of timber, contracts indefinite or until he wound up these tracts of timber. I employed Ellis to put logs to mill. Was to pay so much per thousand. He was a suitable man. Had been in the business ten years. Defendant had nothing to do with his teams, road, or hands. He controlled them. I had nothing to do with directing hands. Defendant company furnished locomotive, iron, and cars. Ellis built roads. . . . Ellis was to cut timber from lands of plaintiff, Sam Thomas, and others (naming them). Ellis constructed tramroad. Timber was owned by company. He contracted to deliver logs grounded at \$3.25 on tram tracts. No specified time; defendant had ten years to get timber off. . . . If Ellis was to leave timber in woods, I would tell him to haul it in. I am very seldom in woods." T. B. Hammer also testified: "I am secretary and treasurer of defendant company. El-

lis was to deliver logs for \$3.25. Company to furnish engine and iron. Afterwards agreed to pay Ellis 50 cents to deliver logs to mill. Defendant had not control over logging business. Ellis had full control. . . . Contract was to cut timber from tracts. Engine, iron, and cars owned by defendant." Upon this evidence his Honor, at the request of defendant, charged the jury as follows: "First. That if the jury shall find from the evidence and by the greater weight thereof that the defendant company employed J. W. Ellis, a competent and suitable person, to do its logging, and by the terms of the contract the defendant company furnished the rails, engine, and tram cars, and the said Ellis furnished the logging tools and outfit, mules and wagon, cut the cross-ties, and constructed the tramroad, and was to employ at his own expense the men and pay them, and that the lumber company did not supervise the cutting, and had no general control in respect to the manner of doing the work or the agents employed to do the work, and had no right to issue orders which the contractor was bound to obey, and paid the contractor \$3.25 for the hauling, cutting, and delivering the timber to the water, and the defendant was not interested in the steps of the work as it progressed, but only in the ultimate result, then the defendant would not be liable, however much the contractor would, if he be negligent." The plaintiff excepted. The following issues were submitted to the jury: First issue: Did the defendant negligently set fire to and burn the lands and property of the plaintiff, as alleged in the complaint? Second issue: What damage, if any, has plaintiff sustained by reason of said burning? And, the jury having answered the first issue, "No," there was a judgment upon the verdict for the defendant, and plaintiff appealed to this court.

Messrs. Cranmer & Davis for appellant.
Messrs. J. D. Bellamy & Son and Herbert McClammy for appellee.

Manning, J., delivered the opinion of the court:

It appears, without contradiction, in the evidence that the engine, at the time it was furnished Ellis by the defendant, was in good condition and properly equipped with a spark arrester; but as to its condition at the time of the fire,—some nine months thereafter,—there was serious conflict in the testimony. It does not appear by whom the right of way was located, whether by defendant or Ellis, but it is fully established by the evidence that it was at its location covered with highly inflammable

matter, and continued in this foul condition up to the time of the fire. There was evidence tending to prove that the fire, causing the injury for which plaintiff seeks in this action to recover damages, originated on the right of way from the engine operated thereon, and was thence communicated to plaintiff's adjacent land. In *Craft v. Albemarle Timber Co.* 132 N. C. 151, 43 S. E. 597, it was held that the rule "applicable to railroad corporations, which makes them liable for fires negligently caused by igniting combustible material on the right of way, has been applied to private railroads constructed for logging purposes." *Simpson v. Enfield Lumber Co.* 133 N. C. 95, 45 S. E. 469; *Hemphill v. Buck Creek Lumber Co.* 141 N. C. 487, 54 S. E. 420; *Knott v. Cape Fear & N. R. Co.* 142 N. C. 238, 55 S. E. 150. In *Williams v. Atlantic Coast Line R. Co.* 140 N. C. 623, 53 S. E. 448, this court formulated the rules of liability applicable to railroad corporations for negligently causing fires, and the second of these rules is as follows: "(2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. Wilmington & W. R. Co.* 124 N. C. 341, 32 S. E. 710; *Phillips v. Durham & C. R. Co.* 138 N. C. 12, 50 S. E. 462, 3 A. & E. Ann. Cas. 384." In *Knott v. Cape Fear & N. R. Co.* 142 N. C. 238, 55 S. E. 150, Mr. Associate Justice Walker, speaking for the court, said: "It is true he [the plaintiff] alleges that the spark arrester was defective, but in the seventh section of the complaint he states generally that the fire was caused by a spark emitted from the engine, which ignited the combustible material on the right of way, and thence spread to his standing timber, which was destroyed. But can it make any difference, in the legal aspect of the case, whether the spark or live coal came from the smoke-stack or the fire box, even assuming them to have been in the best condition, if eventually it fell upon the foul right of way and produced the conflagration? We think not, because the permitting its right of way to remain in a dangerous condition was an act of negligence, sufficient of itself to cause the damage and necessarily proximate to it, if the fire immediately, and without any intervening, efficient, and independent cause, spread to the plaintiff's woods. *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321; *Phillips v. Durham & C. R. Co.* 138 N. C. 12, 50 S. E. 462, 3

A. & E. Ann. Cas. 384; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256."

We consider it to be established by these authorities that it is negligence in a timber company, as well as a railroad corporation, to permit its right of way to become and remain in a foul condition; that such a condition is so dangerous that it may reasonably be anticipated that injury will occur to adjacent landowners from fires originating thereon from engines being operated on it, though such engines be in the best condition and have the best equipment. The defendant, however, contends that it is not liable to the plaintiff because Ellis, who was operating the engine and train and doing the cutting, logging, and hauling, was an "independent contractor," as defined by this court in *Craft v. Albe-marle Timber Co.* 132 N. C. 151, 43 S. E. 597; *Young v. Fosburg Lumber Co.* 147 N. C. 26, 16 L.R.A.(N.S.) 255, 60 S. E. 654; *Davis v. Summerfield*, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654; *Gay v. Roanoke R. & Lumber Co.* 14 N. C. 336, 62 S. E. 436; *Midgett v. Branning Mfg. Co.* 150 N. C. 333, 64 S. E. 5; *Hunter v. Southern R. Co.* 152 N. C. 682, 29 L.R.A.(N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237. Defining the "independent contractor" as contained in these cases, his Honor instructed the jury that, if they found as a fact that Ellis was an independent contractor, and was working under the contract creating him such at the time the injury was caused to the plaintiff, then the defendant would not be liable. We think this instruction erroneous, not because of an inaccurate definition of "independent contractor," but because, conceding Ellis to have been an independent contractor, we do not think the defendant, as his employer, is relieved of responsibility to the plaintiff for the injury of which he complains, upon the view of the evidence we are now considering. In our opinion this case falls under one of the recognized exceptions to the rule of nonliability of employer for the acts of the independent contractor. This exception is thus stated by this court in *Davis v. Summerfield*, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654: "And there is still another class of cases to be excepted from the exemption, and that is where the contract requires an act to be performed on the premises, which will probably be injurious to third persons if reasonable care is omitted in the course of its performance. The liability of the employer in such a case rests upon the view that he cannot be the author of plans and actions dangerous to the property of others, without exercising due care to anticipate

and prevent injurious consequences." In *Bower v. Peate* (1875-76) L. R. 1 Q. B. Div. 321, Chief Justice Cockburn thus states the principle upon which this exception rests: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." In *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, Lord Justice Smith said, after quoting the above language of Ch. J. Cockburn: "It should be noted that in *Hughes v. Percival*, L. R. 8 App. Cas. 443, Lord Blackburn doubted whether that duty was not too broadly stated, for he said: 'If taken in the full sense of the words, it would seem to render a person who orders post horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which is necessary, when driving the coach, to prevent mischief to the passengers.' It is not for me to criticize this statement of Lord Blackburn; but, with all respect, I would point out that it seems to me that it is not, in the natural course of things, to be expected, when a man hires post horses and a coachman from an innkeeper, that, unless means are adopted to prevent them, injurious consequences will arise to his neighbor. In such a case, in the ordinary course of events, no injuries would occur to anyone. The coachman would drive and the hirer would ride in the carriage, and, in the ordinary course, the transit would come to an end without injury to anyone." The doctrine of this case has not only been approved by this court in *Davis v. Summerfield*, *supra*, but has been generally accepted by the American courts. *Wertheimer v. Saunders*, 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn.

495, 28 Atl. 32; *Williams v. Fresno Canal & Irrig. Co.* 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L.R.A. 213, 31 Am. St. Rep. 427, 21 N. E. 482; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618. To this case, as reported in the American State Reports, there has been appended an elaborate note by the editor, in which a large number of cases, both English and American, has been collected, and the principles decided carefully arranged.

We do not find, upon a careful examination of the decisions of this court, any conflict with or modification of the principle stated in *Davis v. Summerfield*, *supra*. The difficulty to be met with is in the application of the principle to the facts of the particular case, and not in the recognition of the soundness of the principle itself. In *Young's Case*, 147 N. C. 26, 16 L.R.A. (N.S.) 255, 60 S. E. 654, the injury inflicted was done by the employees of the independent contractor in felling a tree,—a work not dangerous in itself, and from which, if properly done, no injurious consequences would arise. In *Gay's Case*, 148 N. C. 336, 62 S. E. 436, it does not appear from the reported case how the injury complained of was caused, except the statement that the action was brought to recover damages caused by fire negligently put out; but an examination of the record of that case on file discloses that the fire doing the damage was negligently started from a mill camp established by the independent contractor, this negligence being what is termed in many of the cases "casual" or "collateral" negligence, and for injuries resulting therefrom the employer would not be liable. 76 Am. St. Rep. at page 388, note. The liability for these negligent acts is thus stated at that page of the editor's note: "While the contractor alone, and not his employer, is generally liable in cases where work is carried on under an independent employment, this rule of liability is limited to those injuries which are collateral to the work to be performed, and which arise from the negligence or wrongful act of the contractor or his agents or servants. Acts 'collateral' to the work contracted for are to be distinguished from those which the contractor expressly agrees and is authorized to do, and from which injury directly results." *Smith v. Milwaukee Builders' & T. Exch.* 91 Wis. 360, 32 L.R.A. (N.S.)

30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041, clearly illustrates this doctrine. In that case the plaintiff was injured by the negligent act of the contractor's employees in permitting a brick to fall from an uncompleted building. The employer was held not liable. *Reedie v. London & N. W. R. Co.* 4 Exch. 244, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, 19 Eng. Rul. Cas. 168, and *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743, further illustrate this doctrine. In *Midgette's Case*, 150 N. C. 333, 64 S. E. 5, this court ruled that the jury was warranted in finding from the evidence that the contractor was not an independent contractor, because the employer retained control and direction of the work. In the course of the opinion in that case, Connor, J., says: "How far this exception to the nonliability of the owner of the property is applicable to a case like this, we do not undertake to say. It is well worthy of consideration, whether the owner of machinery unsafe for use and dangerous to employees can, by contracting with an insolvent person to operate it to do the owner's work, and by simply surrendering control of the manner of doing the work, avoid liability for injuries sustained by employees." In *Hunter's Case*, 152 N. C. 682, 29 L.R.A. (N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237, this court ruled that the work there handed over to the independent contractor to be done, to wit, blasting of rock, fell well within the established exception to the rule of nonliability, by reason of its dangerous character.

In the present case, it does not appear whether the defendant or Ellis located the right of way, nor do we think this material, because, if located by Ellis, it was done by him as agent of the defendant, as it was not within the terms of his contract with the defendant. As, by the terms of the conveyance, the right of way, when located, was to be held in fee, the presumption, perhaps, would be that its location was an act of the defendant,—the grantee. We have thus far considered the case upon the view that the fire causing the damage originated on the foul right of way, from sparks from the engine operated thereon. There are two other views suggested by the evidence: (1) That the fire did not originate on the right of way, but was caused by a spark emitted by a defectively equipped engine; (2) that it was not set out by a spark from the engine. If the jury should find this to be the fact, though the fire may have originated from some act of the employees of the independent contractor, Ellis, such act would be casual or collateral negligence, and the authorities

cited are decisive that the defendant would not be liable. The doctrine of *respondet superior* would not apply.

We will now consider the view based upon a finding that the fire was caused by a spark emitted by a defectively equipped engine, but not communicated from the right of way. Would the defendant be liable? If the defendant itself had been at the time operating the engine, its liability is governed by the third rule formulated in *Williams v. Atlantic Coast Line R. Co.* 140 N. C. 623, 53 S. E. 448, as follows: "(3) If fire escapes from a defective engine or defective spark arrester, or from a good engine not operated in a careful way or not by a skilful engineer, and the fire catches off the right of way, the defendant is liable." The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that those precautionary measures are adopted rests upon the employer, and he cannot escape liability by intrusting this duty to another, though he be employed as an "independent contractor" to perform it. In *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, the principle is thus stated: "The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. (Citing numerous authorities.) The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, Ch. J., in Bower v. Peate* (1875-76) L. R. 1 Q. B. Div. 321. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work." It cannot be denied that the operation of a defectively equipped engine, or the operation of a good engine not carefully managed or managed by an unskilful engineer, is a source of great danger to property adjacent to the road on which such an engine is operated. Such danger raises the duty which the employer cannot shift from himself to another. It is un-
32 L.R.A. (N.S.)

doubted, however, that if the engine was properly equipped and in good condition and properly managed, even though it emitted a spark which set out fire on the adjacent property of the plaintiff off the right of way, neither the defendant nor *Ellis* would be liable. *Rule 1, Williams v. Atlantic Coast Line R. Co. supra.*

It is suggested that the application of the principles we have approved in this decision abrogates the law of the independent contractor. The same suggestion was made to the court in *Covington & C. Bridge Co. v. Steinbrock, supra.* That court fully met the suggestion by saying: "It still leaves abundant room for its application."

We do not think the views of the law which we have expressed in this opinion were properly submitted to the jury for their guidance, and we therefore direct a new trial to be had.

New trial.

WASHINGTON SUPREME COURT.

BESSIE BARTLETT BEVAN, Resp.,
v.

R. L. MUIR et al., Appts.

(53 Wash. 54, 101 Pac. 485.)

Suit — notice — warranty.

1. A notice to one who has warranted title to personalty to appear and defend an adverse suit against the vendee for its possession is sufficiently definite as to the court in which the suit is pending, which states that the vendee has been ordered to appear before a specified judge at a specified time to show cause why the adverse claimant should not be let into possession.

Sale — warranty.

2. A sale of the property itself, and not merely of his interest, is effected by a conditional vendee of personalty who grants, bargains, sells, and conveys all his interest in the property, subject to the lien of the vendor and certain other claims, agreeing to

Note. — Scope and effect of covenants of title or seisin where the granting clause merely purports to convey the interest of the grantor in the property.

Where instrument purports to convey mere interest of the grantor.

The construction of a deed as to the property thereby conveyed is governed by the intention of the parties, generally ascertained from the language employed in the instrument as a whole. The instrument must, therefore, to a great extent, be its own interpreter, and few, if any, general rules can be established which will do more than aid in its interpretation in this re-

warrant and defend the sale, which will render him liable on his warranty in case his vendee is ousted by paramount title subordinate to that of the conditional vendor.

Same — breach — damages.

3. A purchaser from a conditional vendee of personalty, who has warranted title except as to the rights of the conditional vendor, whose debt the purchaser assumes and agrees to pay, is not entitled in case he is ousted by a paramount title subordinate to that of the conditional vendor, to a return by his vendor of payments which he had made to the conditional vendor.

(Rudkin, Ch. J., dissents from proposition 1.)

(May 3, 1909.)

A PPEAL by defendants from a judgment of the Superior Court for King County in plaintiff's favor in an action brought

spect. As applied to the question under consideration, it may be said that, by the weight of authority, where a deed purports merely to convey the grantor's interest in real estate as distinguished from the real estate itself, only his interest passes by the conveyance, and covenants of title or seisin, although general in character, will be construed to refer merely to the estate conveyed, and will be restricted in their application to such estate; the rule being that an estate cannot be enlarged by covenants of title, although such covenants may be considered, together with the other portions of the deed, in determining from the entire instrument the intention of the parties as to the estate thereby conveyed. *Henrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; *Lamb v. Wakefield*, 1 Sawy. 251, Fed. Cas. No. 8,024; *Reynolds v. Shaver*, 59 Ark. 299, 43 Am. St. Rep. 36, 27 S. W. 78; *Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 440; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *White v. Stewart*, 131 Ga. 460, 62 S. E. 590, 15 A. & E. Ann. Cas. 1198, distinguishing *Burk v. Burk*, 64 Ga. 632; *Shumaker v. Johnson*, 35 Ind. 33; *Locke v. White*, 89 Ind. 492; *Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557; *McNear v. McComber*, 18 Iowa, 12; *Young v. Clippinger*, 14 Kan. 148; *Coe v. Persons Unknown*, 43 Me. 436; *Ballard v. Child*, 46 Me. 152; *Hopper v. Smyser*, 90 Md. 363, 45 Atl. 206; *Hoxie v. Finney*, 16 Gray, 332; *Sweet v. Brown*, 12 Met. 175, 45 Am. Dec. 243; *Hurd v. Cushing*, 7 Pick. 169; *Blanchard v. Brooks*, 12 Pick. 47; *Allen v. Holton*, 20 Pick. 458; *Fountain Square Theatre Co. v. Pendery*, 27 Ohio C. C. 235; *White v. Brocaw*, 14 Ohio St. 339; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49.

Thus, in *Lamb v. Wakefield*, 1 Sawy. 251, Fed. Cas. No. 8,024, the court said that where, by the premises of the deed, only the right, title, and interest of the grantor is bargained and sold, general covenants of warranty contained in the deed are limited

to recover damages for breach of warranty of title of certain chattels sold. Modified.

The facts are stated in the opinion.

Messrs. Will H. Thompson, C. A. Riddle, and Trumbull & Trumbull for appellants.

Messrs. Shank & Smith, for respondent:

The defendants could not ignore the demand which had been made upon them to defend, since actual knowledge of the pendency of an action to try the warranted title, coupled with express demand upon the warrantor to defend, is sufficient notice.

Collins v. Baker, 6 Mo. App. 588; *Paul v. Witman*, 3 Watts & S. 407; *Clark v. Mumford*, 62 Tex. 532; *Spokane v. Costello*, 33 Wash. 101, 74 Pac. 58; *Patrick v. Laprelle*, — Tex. Civ. App. —, 40 S. W. 552; *Greenlaw v. Williams*, 2 Lea, 536.

in their application to the estate conveyed, since it is a settled rule of law that the premises or granting clause of a deed may limit and control the covenant, but the covenant can never enlarge the premises.

And, in *Allen v. Holton*, 20 Pick. 458, it is said that every deed is to be construed according to the intent of the parties as manifested by the entire instrument, although it may not comport with the language of a particular part of it. And hence general covenants of warranty in a deed of all the grantor's right, title, and interest in and to described land have reference to the grantor's interest, and are qualified and limited in their operation to such interest.

In *Henrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147, the court said that, in the absence of a recital in a deed as to the character and extent of interest thereby conveyed, the covenant of general warranty, where the estate granted was the grantor's interest and title, did not operate to create an estoppel to pass a subsequently acquired title.

And in *Coe v. Persons Unknown*, 43 Me. 436, the rule is asserted that a conveyance of all the right, title, and interest of the grantor in certain premises conveys only the right, title, and interest which he has in the property at the time of the conveyance, and general covenants of warranty will be limited to this estate.

And in *McNear v. McComber*, 18 Iowa, 12, the court said that where the grant in a deed was of all the right, title, and interest of the grantor, general and unlimited covenants of warranty are limited to the right and title of the grantor in the property conveyed, whatever that may be.

In *Gee v. Moore*, 14 Cal. 472, the rule is asserted that where a deed recites that the grantor bargained, sold, and quit-claimed all his right, title, and interest, estate, claim, and demand in property, followed by a covenant of warranty, in effect an ordinary covenant of warranty, it does not purport to convey the premises in fee

No particular form of notice is necessary, and verbal notice is sufficient.

8 Am. & Eng. Enc. Law, 2d ed. p. 205; 23 Cyc. Law & Proc. p. 1272.

A sale of "all our interest" does not necessarily mean merely a relinquishment or quitclaim, as those words in the bill of sale cannot be taken alone to the exclusion of everything else, as the intent of the parties must be gathered from the instrument as a whole.

Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756; Jackson ex dem. Ludlow v. Myers, 3 Johns. 395, 3 Am. Dec. 504; Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 91, 64 Pac. 1009; Strong v. Eldridge, 8 Wash. 601, 36 Pac. 696; 9 Cyc. Law & Proc. pp. 577, 579; 13 Cyc. Law & Proc. p. 620; Kelley v. Upton, 5 Duer, 336; Barrow v. Window, 71 Ill. 214.

In grants of personal property the question whether the property itself is transferred, rather than merely a relinquishment of possible interest, is determined by affirmations of ownership, unless it is shown by the facts and circumstances accompanying the sale that the vendor did not intend to assert ownership, but only to relinquish such interest as he might have.

Croly v. Pollard, 71 Mich. 612, 39 N. W. 853; Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64; 15 Am. & Eng. Enc. Law, 2d ed. p. 1215; Strong v. Barnes, 11 Vt. 221, 34 Am. Dec. 684.

Dunbar, J., delivered the opinion of the court:

This is an action for damages for breach of warranty on a sale of chattels and chattel interest in real estate evidenced by

simple absolute, but only purports to pass the right, title, and interest of the grantor in the land, and the covenant is restricted to the estate thereby conveyed. In such a deed the covenant attaches itself to the interest conveyed, and not to the land itself. Kimball v. Semple, 25 Cal. 440; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

Although the covenants of title are in terms general, yet, in the construction of the deed, regard is to be had to the entire instrument, and the covenants are to be construed so as to give effect to the intention of the parties so far as it can be done consistently with the rules of law. Hence, a warranty of the premises granted and conveyed, which were all the grantor's right, title, and interest in certain described lands, must be taken in a limited sense, and restricted to the grantor's title and interest as distinguished from the land itself. Sweet v. Brown, 12 Met. 175, 45 Am. Dec. 243.

Applying this doctrine, it is held in Ballard v. Child, 46 Me. 152, that covenants in a deed warranting the title of property conveyed against all persons claiming under the grantor are not breached by a previous deed of the grantor to the land embraced within the descriptive part of the deed, where, by the granting clause, the grantor purports to convey only his right, title, and interest in the land.

So, a covenant warranting "that said premises are free and clear from all encumbrances whatsoever, upon, from, to, or under the said grantor, and that she will forever warrant and defend same," etc., is limited by the granting clause in the deed which purports to convey only the right, title, and interest of the grantor in the property described, and the covenant applies only to such interest, and if the property is encumbered, the grantee takes it subject, thereto, and has no recourse to the warranty. Fountain Squire Theatre Co. v. Pendery, 27 Ohio C. C. 285.

Where the granting clause of a deed pur-

ports to convey the right, title, claim, and interest of the grantors in certain land, a general covenant to warrant and defend the same will be construed as intending to warrant only the interest conveyed, making the instrument in effect merely a quitclaim deed. Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36, 27 S. W. 78.

So, where the operative words in a deed of a leasehold interest in timber on certain lots clearly indicate the intention of the grantor to convey only the right, title, and interest which he then had in such leases, a general warranty of title will be limited to the right or interest which the grantor then had in such leasehold property. White v. Stewart, 131 Ga. 460, 62 S. E. 590, 15 A. & E. Ann. Cas. 1198.

Covenants of seisin and against encumbrances are limited by a deed of all the grantor's right and title to an undivided one third of land described by metes and bounds, to such interest. Hoxie v. Finney, 16 Gray, 332.

A conveyance of the grantor's right, title, and interest in certain land of which he is a life tenant is not enlarged by the language of a covenant of seisin in fee, so as to work a constructive disseisin of the land. Hurd v. Cushing, 7 Pick. 169.

A deed in the ordinary form of bargain, sale, and release, purporting to convey only the estate, right, title, and interest, claim, and demand, both in law and equity, of the grantors of, in, and to the premises described therein, and containing no recital or description of any particular interest owned or possessed by the grantors, and intended to be conveyed, limits the warranty clause warranting against all persons to claim by, from, or under the grantors therein, etc., to the interest of the grantors in the property, and binds only such interest, and does not extend to an after-acquired title. White v. Brocaw, 14 Ohio St. 339.

The general doctrine that covenants of title will be restricted to the grantor's interest in the land, as distinguished from

bill of sale. Frederick & Nelson, Inc., had conditionally sold and delivered certain household goods to one Cook upon an instalment contract, reserving title to itself until the goods should be entirely paid for. One J. M. Hale, by subsequent transfers, acquired the interest of Cook, entered into possession, and subsequently died while so in possession, leaving the goods in the possession of one known as Mrs. H. G. Hale, supposed to be his widow. Afterwards she sold her right, title, and interest in the goods to third parties, and thereafter through a number of transfers, the equity of the original vendee was vested in the appellants in this case. Afterwards, appellants sold to the respondent all their interest in the goods, and delivered to her the possession thereof, they being in the possession of the property at the time it

was sold. Afterwards, the estate of J. M. Hale, through one H. C. Gill, administrator thereof, brought an action against respondent, in which it was claimed that said goods were the property of the estate of J. M. Hale, deceased, and in that action the administrator recovered the goods, and the same were lost to respondent. While that action was pending and before trial, the respondent gave notice to the appellants of the pendency of said action, requiring the appellants to appear and defend the same, which notice was in writing. The appellants did not appear and defend said action, and it is claimed by the respondent, and found by the trial court, that said notice was sufficient to bind the appellants by that judgment.

The court, trying the case without a jury, made findings of fact, the first and

the title to the land, where the granting clause purports to convey only the grantor's interest, has been questioned in some jurisdictions, generally, however, in cases where the intention of the grantor to warrant the title of a definite estate in the land, rather than merely his interest therein, was reasonably clear.

In *Lull v. Stone*, 37 Ill. 228, in referring to this doctrine, the court remarked: "It is difficult to see, if this be the true construction of such deeds, with what view the covenants were inserted [in the deeds], unless to deceive the grantee with the idea that he was getting covenants upon which he could safely repose for the security of his title, which a narrow and technical construction would render utterly nugatory on the day of trial, keeping the word of promise to the ear, but breaking it to the hope."

The question was not involved in *Funk v. Cresswell*, 5 Iowa, 62, but the doctrine is asserted that where a party conveys all his right, title, and interest in lands described in the deed, with a covenant to warrant and defend the premises against all lawful claims arising under him, the covenant refers to the land described, and not to the rights and title of the grantor, and the case of *Loomis v. Bedel*, 11 N. H. 74, is cited in support of this proposition. Compare with *McNear v. McComber*, 18 Iowa, 12, *supra*.

Loomis v. Bedel, *supra*, is one of the early cases opposing the doctrine that a general covenant of warranty, following a grant or quitclaim of the grantor's right, title, and interest in certain real estate, cannot be construed to extend beyond that interest. On this point the court said that such a construction would render the covenant nearly nugatory; the title and interest of the grantor would necessarily pass by the deed, and as to that there could be no superior or paramount title; and added: "The covenant upon such a construction might perhaps avail to compel the heirs of

the grantor to warrant against the dower of his widow; but even that might admit of question. Such a construction of the covenant is not warranted by the language of it, or by the apparent intention of the parties. The grantor engages to warrant and defend 'the premises' against all lawful claims arising by, from, or under him, and the term 'premises' here refers to the land described in the deed. He conveys his rights to the lands, and agrees to warrant and defend them against his own acts, leaving the grantees to judge for themselves what title, if any, he formerly had in them."

But in *Hall v. Chaffee*, 14 N. H. 215, without referring to the *Loomis* Case, it was held that the grantors in a quitclaim deed of all their right, title, and claim to the land therein described, as received from a designated person, followed by covenants of warranty against all claims under the grantor, were not estopped to claim the premises under a title which vested in them after the execution of the deed, and which was only contingent at that time. On this point, the language of Chief Justice Shaw in *Blanchard v. Brooks*, 12 Pick. 47, is quoted from, to the effect that where "the grant in the deed is of all . . . [the grantor's] right, title, and interest in the land, and not of the land itself, or any particular estate in the land, the warranty is of the premises, that is, of the estate, granted, which was all his right, title, and interest. . . . The grant in legal effect operated only to pass the vested interest, and not the contingent interest, and the warranty, being coextensive with the grant, did not extend to the contingent interest, and, of course, did not operate upon it by way of estoppel."

In *Peck v. Hensley*, 20 Tex. 673, the court questioned the soundness of the doctrine that a deed of the grantor's interest in certain described land, followed by general covenants of warranty, would, in the absence of expressions showing a contrary

second of which are substantially as stated above, and set forth in the findings the bill of sale, which was as follows:

"Know all men by these presents: That B. L. Muir and Clyde W. Coit and Charles A. Cushing and Helen E. Cushing, the parties of the first part, for and in consideration of the sum of \$1 gold coin of the United States of America, to them in hand paid by Mrs. Bessie Bartlett Bevan, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto the said party of the second part, her executors, administrators, and assigns all our interest in the furniture, household goods, and fixtures in, or used in connection with, that certain sixty-room family

hotel known as the 'Burlington,' located on Madison street, in the city of Seattle, King county, Washington, and being number 612 Madison street. Said property is taken subject to a lien of six thousand six hundred and twenty-seven dollars and eleven cents (\$6,627.11), with interest from December 24th, 1906, in favor of Frederick & Nelson, Inc., and an indebtedness of one thousand dollars (\$1,000) to Mrs. H. G. Hale, which the purchasers assume and agree to pay. To have and to hold the same to the said party of the second part, her executors, administrators, and assigns, forever. And they do, for their heirs, executors, and administrators, covenant and agree to and with the said party of the second part, executors, administrators, and

intention, be construed to convey merely the grantor's interest in the premises, with warranty of such interest, as distinguished from a warranty of the title to the premises. The question, however, was not necessary to the decision.

In *Garrett v. Christopher*, 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67, the question arose whether one was a bona fide purchaser for value of certain real estate, and this depended upon the question whether or not the conveyance to him was a quitclaim deed or a warranty deed. It was held that a conveyance of the grantor's interest in certain premises, followed by a general warranty clause, was not a quitclaim deed, but was a warranty deed. In this case the habendum clause was "to have and to hold the above-described premises under the said . . . his heirs and assigns forever." The court said that whether the conveyance be a quitclaim or not is dependent upon the intent of the parties; that if the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of an innocent purchaser; but if it appears that it was the intention to convey the land itself, then it is not such a quitclaim deed, although it may possess characteristics peculiar to such a deed.

Kempner v. Beaumont Lumber Co. 20 Tex. Civ. App. 307, 49 S. W. 412, holds that a conveyance reciting that the grantors "have granted, sold, and conveyed . . . all that certain real estate as follows, to wit: 'all my right, title, and claim and interest, being an undivided one-half interest,' etc.," followed by a habendum clause "to have and to hold the above-described premises," etc., together with the general warranty of the premises, is a warranty deed, and for a defect in the title, the grantors are liable.

Compare with *Bumpass v. Anderson*, — Tex. Civ. App. —, 51 S. W. 1103, which holds that a general warranty clause in a deed conveying all the right, title, and 32 L.R.A. (N.S.)

claim and interest which the grantor has and received by and through a certain deed, and no greater, is limited to the title and interest conveyed. The court, in reaching this conclusion, and without referring to the foregoing Texas cases, quotes apparently with approval from 1 Devlin on Deeds, § 27, as follows: "Where a deed, instead of conveying the land generally, purports to convey only the right, title, claim, and interest of the grantor to the land, a general covenant of warranty contained in the deed is confined in its legal effect to such title, and the assertion or enforcement of a paramount title outstanding against the grantor at the time of the execution of the deed cannot operate as a breach of the covenant."

Where intention is to convey a specific interest in the land.

As already shown, the rule has been broadly stated that a conveyance of the grantor's right, title, and interest in certain land, although followed by general covenants of warranty, will operate merely to convey such interest, and the covenants of warranty will be limited to the interest thus conveyed. All or nearly all of the cases which support this general doctrine, however, recognize that there may be exceptions thereto where the intention of the parties clearly appears to be to convey some interest in the land itself, as distinguished from an intention merely to convey whatever interest the grantor may have therein, if any. In such case the general covenants of warranty will be held to apply to the title to the land. This construction is more readily placed upon a deed in which the covenants of title, the habendum, and the consideration paid, evidence the intention of the grantor to convey the land and warrant the title thereto either in fee simple or a lesser estate. *Baxter v. Camp*, 126 Ga. 354, 54 S. E. 1036; *Locke v. White*, 89 Ind. 492; *Hubbard v. Apthorp*, 3 Cush. 419; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Milot v. Reed*, 11 Mont. 568, 29 Pac. 343; *Bayley v. McCoy*, 8

assigns, to warrant and defend the sale of the said property, goods, and chattels hereby made unto the said party of the second part, her executors, administrators, and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same." (Duly signed and acknowledged.)

The bill of sale of the lease followed. The court found that the purchase price of the property was \$10,500, of which \$2,872.89 was cash paid by the plaintiff to the defendants on said January 7, 1907; that \$6,627.11 was the balance of the purchase price of the furniture and furnishings owing to Frederick & Nelson, Inc., and the remaining \$1,000 was a note given by a prior owner to the payee named as Mrs. H.

G. Hale, being the two obligations specified in the bill of sale, and the payment of which the plaintiff therein assumed as a part of the purchase price; that thereafter, and prior to May 1, 1907, the plaintiff made payments on said indebtedness to Frederick & Nelson, Inc., in accordance with her said contract of assumption, aggregating \$500, making a total of sums paid by her on the purchase price of \$3,272.89, as aforesaid; that the legal title to the furniture and furnishings was, on said January 7, 1907, and for some time thereafter, in Frederick & Nelson, Inc.; that on June 4, 1907, one H. C. Gill, the duly appointed, qualified, and acting administrator of the estate of J. M. Hale, deceased, brought suit, as set forth in the statement

Or. 259; *Kempner v. Beaumont Lumber Co.* 20 Tex. Civ. App. 307, 49 S. W. 412; *Mills v. Catlin*, 22 Vt. 98; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434; *May v. Platt* [1900] 1 Ch. 616, 69 L. J. Ch. N. S. 357, 83 L. T. N. S. 123, 48 Week. Rep. 617.

Thus, in *Holbrook v. Debo*, 99 Ill. 372, a deed releasing to the grantee "all such right, estate, title, and demand whatsoever as I have or ought to have in or to" certain described lots with the habendum, "to have and to hold the above-described premises," so that neither a certain designated person nor his heirs should claim any title to the premises or any part thereof, is held a release of such right as the grantor or releasor has in the present tense, and not to purport to convey the lots. The court said that, the habendum being of the "above-described premises, that is what the deed purports to convey."

Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434, also holds that, although the granting clause of a deed is merely of the grantor's right, title, and interest in certain premises, yet where it is followed by a warranty clause warranting the title against all claims whatsoever, except that of the United States, it will be construed to convey the real estate itself, and that the general warranty will cover the land itself, except as noted, to the extent at least of creating an estoppel against the vendor. In reaching this conclusion, the court said: "If the deed is not only quitclaim in form, but it appears that the consideration was merely nominal, it may ordinarily be inferred that the purpose of the deed was only to release the existing interest of the grantor for the purpose of clearing the title or the like. If, upon the other hand, though in the granting clause only the right, title, and interest of the grantor is purported to be conveyed, yet if an adequate consideration is recited, and if expressions occur elsewhere in the instrument indicating an intention to convey the land itself, such a construction cannot be so readily adopted. The rule in such cases is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situa-

tion of the parties, and then to give effect to such intention if practicable. . . . If, upon such consideration, it appears that the intention of the parties was to convey the fee simple or any definite estate in the land, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the grantee; and it is not material whether such intention appears by the granting clause in the covenants or elsewhere in the instrument. And this result may be produced even in the absence of any warranty whatever."

And in *Locke v. White*, 89 Ind. 492, the doctrine is asserted that whether a deed purports to convey the land described therein, or only the interest of the grantor in the land, is a question to be determined from the entire deed. And where the language in the granting part of the deed purports to convey the land itself, a later clause to the effect that it is the intention "hereby to convey the entire interest" of the grantor, but not purporting to limit the language employed in the granting part, does not bring the deed within the rule applying to conveyances of the grantor's interest in property, as distinguished from the property itself.

And in *Mills v. Catlin*, 22 Vt. 98, in construing a deed describing the property conveyed as the following-described land: "All the land which I own by virtue of a deed dated the 18th day of January, 1843, from . . . recorded," etc.,—"being all my right and title to the land comprising 50 acres off of the east end of lot No. 75 in said town," followed by a covenant that the vendor is seised of the premises in fee simple, that he has a good right to bargain and sell the same, and that they are clear and free of all encumbrances, and he would warrant and defend the same against the lawful claims of all persons whatever, it was held to convey the premises described in the deed, rather than the interest of the grantor therein, and the covenant therefore related to the title of the land rather than merely to the interest of the grantor in the

above; that under the institution of said suit on June 4, 1907, the said administrator obtained an order upon the plaintiff to show cause upon June 7, 1907, why the said furniture, furnishings, and leasehold should not be forthwith turned over to the said administrator, or else a receiver be appointed; that summons and complaint and the said order to show cause in said action were served upon said plaintiff on June 5, 1907; and that thereupon, on June 6, 1907, the following notice to defend was personally served upon each of the three defendants herein; that is to say:

Notice to Defend.

To Clyde W. Coit, Charles A. Cushing, Helen E. Cushing, and B. L. Muir:—

You and each of you are hereby notified that H. C. Gill, as administrator of the

estate of J. M. Hale, deceased, has filed his petition in said estate, and obtained an order upon Mrs. Bessie Bartlett Bevan, otherwise known as Mrs. S. E. Bevan, in said petition, claiming that the title to the property which you sold to Mrs. Bessie Bartlett Bevan under a contract of warranty on the 7th day of January, 1907, which property is known as the furniture, household goods, and fixtures in or used in connection with that certain sixty-room family hotel known as the "Burlington," located on Madison street, in the city of Seattle, King county, Washington, and being numbered 612 Madison street, is the property of the estate of J. M. Hale, deceased, and that the title to said property has never passed out of said estate, and that the transfer of said property from someone representing herself as the widow of said J. M. Hale, deceased, is fraudulent,

land. The court said that any other construction would be opposed to the obvious import of the covenants, and render them in a great degree ineffectual, and added: "Upon the principle, then, that the construction is to be upon the entire deed, and that one part is to help expound another, and that every word, if possible, is to have effect and none be rejected, and all the parts thereof agree and stand together, we think it must be held to have been the intention of the parties to grant the land, and that the habendum in the deed is to hold the land, and the covenants are as they import to be, unlimited, and relate to the land and insure title to it."

Hubbard v. Aphthorp, 3 Cush. 419, distinguishes between a mere conveyance of all the grantor's rights, title, and interest in certain land, and a deed purporting to convey a tract of land by a particular and definite boundary, to which there is added the statement "meaning and intending by this deed to convey all my right, title, and interest in and to," etc. The court said that the construction of a deed should, if possible, give effect to the intention of the parties, and therefore, as to a mere conveyance of all the grantor's interest in certain premises, it might well be held that general covenants of warranty have no application beyond the grant itself; but as to a description of real estate by definite boundaries, although followed by such a statement as that set forth, unless it clearly appeared that the explanatory words following the general grant were intended to restrain the general words, they would not be given that effect, but the grant would be treated as a general one, and the warranty as a general application to the land conveyed.

This doctrine was also recognized in *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464, wherein the court said that, although a deed was of the grantor's right, title, and interest in certain land, it would nevertheless be construed to be a deed of the land itself, and that the general covenants

of warranty contained in the deed would be construed as coextensive with the estate conveyed, it not appearing that the interest conveyed was limited to the right, title, and interest which the grantor had at the time of its execution, and it being expressly declared that he thereby intended to convey all the title or estate in the described premises which was conveyed or passed to the grantor by certain deeds.

A contract to warrant and defend the grantor's right, title, and interest in and to the premises conveyed is sufficient to compel the grantor to answer for taxes lawfully levied on such land, existing as a lien thereon at the time of the execution of the deed. *Milot v. Reed*, 11 Mont. 568, 29 Pac. 343.

A conveyance by a lessee of land of all of his estate, term, and interest therein under his lease, raises an implied covenant that the lessee has a title to all the land described in the lease, and if he has disposed of his interest under the lease in any of said lands, it amounts to a breach of his covenant. *May v. Platt* [1900] 1 Ch. 616, 69 L. J. Ch. N. S. 357, 83 L. T. N. S. 123, 48 Week. Rep. 617.

A covenant of warranty in a deed of all the grantor's interest in certain real estate by virtue of a sheriff's deed is limited to such interest, and an adverse paramount title *dehors* the deed does not constitute a breach of the covenant. *Drouin v. Morissette*, 31 Can. S. C. 563.

So, a conveyance of the grantor's interest in certain land under a designated deed, together with a covenant warranting his title to such interest, will be construed as intending to convey and warrant only the interest of the grantor under the deed mentioned. *Delmer v. M'Cabe*, 14 Ir. C. L. Rep. 377.

A general covenant of title against the claims of all persons includes in itself the covenants of right to sell and of quiet enjoyment and freedom from encumbrances; and although the granting clause of the

and that said person was not the widow of said J. M. Hale, deceased. The court has ordered Mrs. Bevan to appear before the Honorable R. B. Albertson to-morrow morning, June 7th, 1907, at 9:30 o'clock in the forenoon, to show cause, if any, why the administrator of said estate should not be let into possession of said property, or otherwise why a receiver should not be appointed to take charge of said hotel and property. Now, then, you are further notified that it is your duty to defend said action, and that the said Mrs. Bevan hereby demands that you do appear in said action and defend the same under your contract of warranty. Hereof take due notice.

R. S. Jones, Attorney for Bessie Bartlett Bevan.

—that all of the defendants failed to defend the said action, and that plaintiff defended the said action; in short, was dispossessed of the property, and that, by reason of said action, the whole thereof was lost to plaintiff. The conclusions of law were to the effect that the property was sold by warranty of title except only as

deed is a conveyance of the grantor's interest in the land therein described, an encumbrance upon the land which causes the grantee damage is a breach of the covenant, where the granting clause is followed by the statement: "Said interest containing 83½ acres," etc. *Burk v. Burk*, 64 Ga. 632.

A warranty by an executor as a grantor in a deed warranting the title "so far as the right and title of said premises are vested in him as executor" renders him personally liable for a breach of the covenant only as to such title as he had as executor, and if as such executor, he had no title, he is not personally bound to anything. *Baxter v. Camp*, 126 Ga. 354, 54 S. E. 1036.

While the question under consideration is not discussed in *Folk v. Graham*, 82 S. C. 66, 62 S. E. 1106, it is there held that a deed conveying the right, title, and interest of the grantor in certain land estimated to contain a certain number of acres, but warranted to contain a less number, was to be considered a deed of the less number of acres with warranty, and that a failure of title thereto constituted a breach of the warranty.

Intention as affected by general covenants of title.

While, as remarked by the court in *Lamb v. Wakefield*, 1 Sawy. 251, Fed. Cas. No. 8,024, the premises or granting clause of the deed may limit and control covenants of title, but such covenants can never enlarge the premises, yet it does not follow that, 32 L.R.A. (N.S.)

against the said two claims mentioned above; that the defendants were duly notified to defend the suit brought by the administrator of the estate of J. M. Hale; that they failed to do so; and that the plaintiff has been damaged by, and is entitled to judgment against, each of the defendants on their warranties of title in the sum of \$3,372.89, with interest on \$2,872.89 thereof from January 7, 1907, and on the remaining \$500 thereof from May 1, 1907.

The appellants excepted to said findings of fact and conclusions of law, and each of them, which exceptions were overruled, and judgment was entered, and appeal taken.

Several assignments of error are made; but it is conceded and stated by the appellants that the whole contest between the parties in this case is not upon any question of fact, but involves two legal propositions: (1) Was the notice to defend a sufficient notice to bind the defendants by a judgment in the case wherein the respondent was deprived of any interest she then had in the property then in her possession, the title to which remained in *Frederick & Nelson, Inc.*? (2) Was the sale by the appellants of all their interest

in determining the intention of the parties to a deed as to whether it was intended thereby merely to convey the grantor's interest, or some specific interest of the grantor, in the land described in the deed, the ordinary rule for obtaining the intention of the parties should not be adhered to and reference had to the entire instrument including the covenants of title, but the contrary is true and such covenants are frequently deemed of much significance in determining the intention of the parties as to the estate conveyed by the deed.

On this point, in *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434, the court remarked that the principle that the warranty cannot enlarge the estate conveyed does not prevent an examination of all the terms of the deed in order to ascertain the intention of the parties, so that if, from such examination, it appears that it was their intention that a greater estate should pass, and the grantor subsequently acquires such greater estate, he and his privies will be estopped by his deed from setting up such after-acquired title against his grantee, and it will in this way inure to the grantee.

And in *Mills v. Catlin*, 22 Vt. 98, on the same point, the court remarked: "Though it may be true that the covenants in a deed should not be so understood as to enlarge the estate granted in the premises of the deed, yet when it becomes a question of construction as to what is granted, they may well be resorted to, to help out the construction,—and this upon the principle that reference is to be had to the whole deed, that every part is to have an operation if possible."

A. G. S.

in the chattel property equivalent to a sale of the property itself? Or, in other words, was the sale of their interest in the property, the title to which was known at the time to be, and found by the court to be, in Frederick & Nelson, Inc., a third party, equivalent to a sale of the property itself; or was it only the passing of the appellants' interest, whatever it might be, to the respondent?

On the first proposition it is earnestly argued by the appellants that the notice was not sufficient, and many cases are cited to sustain the rule that the notice must be distinct and unequivocal, and must expressly require the party bound by the covenant to appear and defend the adverse suit. Conceding this to be the law, we think, without doubt, the notice was sufficient, for, after all is said and done, the plain, common-sense idea must not be lost sight of, that the object of the notice required is notice; and no matter what the form of the notice is or the expressions used, if the party bound by the covenant can understand from it that a suit has been commenced and that he is required to defend, the object of the notice is met. In this case, if a person of ordinary understanding was not able to find the court in which the case mentioned in the notice was pending, it must have been by reason of a want of inclination.

On the second proposition, it is contended by the appellants that a warranty cannot add to or increase the covenants; that a covenant to transfer all right, title, and interest in property is not added to or increased by a general warranty; that the warranty is coextensive with, and shall be applied only to, the question of the estate granted by the covenant. It may be conceded that the covenant does not affect anything more than the interest conveyed, but the question is always left as to what was conveyed. In support of the contention of appellants is cited Rawle on Covenants for Title, 4th ed. pp. 525-527, and the authorities there cited; and the appellants stated that the author, after quoting numerous authorities, closes in these words: "So, in a more recent case where the grant was of 'all my right, title, and interest in and to that parcel of real estate situate in Green street, and is bounded,' etc., followed by unlimited covenants for seisin, good right to convey, against encumbrances, and of warranty, it was held that these covenants were limited merely to the right and title of the grantor, whatever that might be, and the law has been so held in many similar cases." It is significant, however, that the author in the very next section continues as follows: "It may, however, be observed

of these cases that, inasmuch as all conveyances taking effect under the statute of uses transfer no more than the estate of the party, such a course of decision, if too strictly carried out, would [in such conveyances] restrain all general covenants for title . . . to the acts of the vendor, which would, of course, utterly change the nature of such covenants. It is conceived, therefore, that this class of cases should be limited in their application to those where the intention to convey and receive but a limited [estate] plainly appears on the face of the instrument. And in a case in Massachusetts where the conveyance was of 'the following described water lots,' and appended to the description by metes and bounds, the words 'meaning and intending by this deed to convey all my right, title, and interest in and to lots numbered 3 and 6, and my undivided portion of the afore-mentioned flats,' it was held that the general covenants for title which the deed contained were not restricted merely to the interest of the grantor. So, in a late case in Vermont, where the grant was of 'the following described land in Colchester, all the land which I own by virtue of a deed, being all my right and title to the land comprising 50 acres off of the east of lot No. 75 in said town,' it was held that the covenants were not qualified by the grantor's interest." Other cases are cited by the author to the same purport. So that it will be seen that the author, when he is fairly understood, does not lay down the hard and fast rule contended for by the appellants. The next case cited by the appellants, viz., *McNear v. McComber*, 18 Iowa, 12, lays down the unqualified rule contended for by appellants, and cites the same section of Rawle on Covenants cited by the appellants to sustain the decision. This case, we think, is not well considered, and was decided through a misapprehension of what was held by the authorities therein cited. To the same substantial effect are the other cases cited, excepting that it appears in most of them that the question of what was conveyed is to be determined from the whole instrument, instead of from any particular portion of the instrument. Thus, in *Sweet v. Brown*, 12 Met. 175, 45 Am. Dec. 243, after deciding that in that case the covenants would not control the grant, the court said: "The covenants are in terms general; but in the construction of a deed we are to look at the whole deed, and the covenants are to be construed so as to give effect to the intention of the parties so far as it can be done consistently with the rules of law." This must necessarily be the case, and is the rule in the construc-

tion of all instruments and contracts. The desire and aim of the court must be, if justice is to be done to litigants, to ascertain the intention of the parties to the contract; and it is a rule as broad as the law itself that all the different dependent portions of a contract must be construed together to ascertain such intention. "If the language used is susceptible of more than one construction, that one must be adopted which militates most strongly against the interests of the grantor." This was said by this court in *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756, citing *Devlin on Deeds*, § 848. In that case we cited with approval *Jackson ex dem. Ludlow v. Myers*, 3 Johns. 388, 3 Am. Dec. 504, where it was said by Chancellor Kent: "The intent, when apparent, and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." Applying this rule to the case at bar, it seems conclusive that the appellants intended to give the respondent in this case something more than a mere quitclaim to this personal property; and the covenants, while it may be conceded that they cannot control the premises, may appropriately be considered by the court when a question arises as to what is granted, for the purpose of aiding the construction to be given to the instrument. 13 Cyc. Law & Proc. p. 620. The language of this instrument: "Do by these presents grant, bargain, sell, and convey unto the said party of the second part . . . all our interest in the furniture, household goods, and fixtures in or used in connection with that certain sixty-room family hotel," etc., if construed by themselves, might possibly bear the construction contended for by the appellants; but, when the further language appears, "said property is taken subject to a lien of \$6,627.11 with interest," etc., "and an indebtedness of \$1,000 to Mrs. H. G. Hale, which purchasers assume and agree to pay," it must be concluded that the whole property was sold subject to these two encumbrances, just as property is sold subject to mortgages. Now, the covenant, *viz.*, "agree to and with the said party of the second part, executors, administrators, and assigns, to warrant and defend the sale of the said property," still further sustains this contention, for the said property named in the covenant must necessarily refer to the property mentioned in the contract of sale, *viz.*, the property that is taken subject to the liens expressed. There-

fore it is the property that is sold; and the warranty is to defend the title to said property, *viz.*, the property that is sold. If this construction cannot be placed upon this instrument, then all that part of the instrument after the first paragraph is absolutely without meaning; because, if it was nothing but a quitclaim to the property that was intended to be conveyed, there would not be any necessity for saying anything about what it was sold subject to. In fact, it would seem that a covenant of warranty has no place in a quitclaim contract. Besides, the words "bargain and sell" have a legal meaning importing a sale which vests the property in the buyer; and, while that might not be absolutely controlling, it is one of the expressions used in the instrument which help to construe it. This announcement is made in 43 Century Digest, 263, to the effect that the words "bargain and sale" have a settled legal meaning, and import a sale which vests the property in the buyer. The same announcement is made in *Barrow v. Window*, 71 Ill. 214, citing *Seckel v. Scott*, 66 Ill. 106, and 2 Bl. Com. 447. We think the court did not err in placing the construction upon this instrument which it did.

We are unable, however, to understand any theory upon which the court gave judgment for \$500 which was paid by the respondent to Frederick & Nelson subsequent to the sale to her by the appellants. In speaking of the criticism of the appellants on this proposition, it is said by the respondent in her reply brief: "The brief overlooks entirely that the contract of the parties put the subsequent payment of this \$500 by respondent to Frederick & Nelson in the exact position of a payment, to the appellants on the purchase price." But neither the findings of the court nor the contract of sale bears out this contention, for the property was sold subject to this claim of \$6,627.11 owing to Frederick & Nelson, Inc., and the \$1,000 indebtedness of Mrs. H. G. Hale; and if it was sold subject to that, of course, the appellants were released from any obligation to pay those charges against the property under any circumstances. The respondent was buying a property worth something over \$10,000, and paying therefor to the appellants the amount for which she had asked and obtained judgment, and must have understood from the contract that if the appellants' claim against the estate was to be paid off, it must be paid off by her. If she can pay to Frederick & Nelson \$500, and charge the same back to these appellants, on this sale contract, she could pay the whole amount of \$6,627.11, to-

gether with the \$1,000 indebtedness to Mrs. H. G. Hale, and charge the same back to the appellants, and recover therefor; the result being that she would obtain the whole property for the sum of \$2,872.89. This must have been the theory upon which the court made the following finding: "That thereafter and prior to May 1, 1907, the plaintiff made payments upon the said indebtedness to Frederick & Nelson, Inc., in accordance with her said contract of assumption, aggregating \$500, making a total of sums paid by her on the purchase price of \$3,272.89, as aforesaid." Surely, if the findings of the court are correct, and this payment of \$500 was made to Frederick & Nelson in accordance with respondent's contract of assumption, there is no theory upon which that payment could be charged back against the appellants in this case.

The judgment will therefore have to be modified to the extent of the \$500, and the appellants will recover their costs in this court.

Fullerton, Gose, Chadwick, Mount, and Crow, JJ., concur.

Rudkin, Ch. J., dissenting:

In my opinion the notice to appear and defend was misleading and utterly insufficient in law. I therefore dissent.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HURST HARDWARE COMPANY, Plff. in
Err.,
v.

A. GOODMAN.

(— W. Va. —, 69 S. E. 898.)

Statute of frauds — promise to pay another's debt.

1. If property be delivered or services rendered to one person upon an oral promise of payment by another, and charged only to the person to whom delivery was so made or for whom services were so rendered, and an effort made to collect the purchase money or compensation from the person against whom the charge was made, such promise is collateral, and, if not in writing, void.

Same — original promise.

2. If the main purpose of an oral promise by one person to pay a sum of money for which another is liable or may become liable is to secure a direct, personal, and pecuniary benefit to the promisor, the prom-

ise is original, and not within the statute of frauds, though such third person remain liable for the debt.

Same — collateral promise.

3. If the benefit derived by the promisor in return for such a promise is remote, indirect, and not personal, the promise is collateral and within the statute.

Same — corporate debt — promise by stockholder.

4. The oral promise of an officer and stockholder of a corporation, who is liable as an indorser on its paper and for debts or obligations assumed by the corporation, to pay for goods sold and delivered to it, is collateral and within the statute: the benefit accruing to him from such sale and delivery being remote and indirect.

(December 20, 1910.)

Note. — Contemporaneous promise of one person to pay where benefit inures to another as a promise to answer for the default of another within the statute of frauds.

The foregoing is the subject of a note appended to Mankin v. Jones, 15 L.R.A. (N.S.) 214. Only cases decided subsequently to said note are included herein.

For a discussion of the question whether a promise to pay a pre-existing debt of another is within the statute of frauds where the purpose is to obtain a benefit to the promisor, but the original debtor is not released, see note to Howell v. Harvey, 22 L.R.A. (N.S.) 1077.

As pointed out in the note in 15 L.R.A. (N.S.) 214, the decisive test in determining whether an oral promise to pay the debt of another created contemporaneously with the promise is within the statute of frauds is whether the promise is an original promise or a collateral one; if it is an original promise it is not within the statute of frauds, if a collateral promise, it is. Whether an oral promise to pay the debt of another is original or collateral is generally a question of fact for the jury, to be determined from the nature of the promise and the facts and surrounding circumstances under which it was made. As shown in the note mentioned, there is seldom, if ever, any particular fact which is decisive of that question. In this connection it is to be noted that in Mankin v. Jones, 63 W. Va. 373, 15 L.R.A. (N.S.) 214, 60 S. E. 248, the court apparently considered the decisive test to be whether or not the person for whose benefit the promise was made was liable for the debt, and the doctrine is asserted that "it is a rule of law that if the third person for whom money is promised remains still responsible to the person who supplies the articles, or from whom the consideration proceeds, the promise to pay for the third person is collateral, as it is called, not an original promise, and therefore is not actionable because of said statute." Applying this rule to the facts in the case, the court said that

ERROR to the Circuit Court for Mingo County to review a judgment in defendant's favor in an action brought to recover the price of goods sold and delivered. Affirmed.

The facts are stated in the opinion.

Messrs. Stokes & Bronson and Sheppard, Goodykoontz, & Scherr, for plaintiff in error:

These were original promises, and the goods were sold upon the strength of them.

Johnson v. Bank, 60 W. Va. 323, 55 S. E. 394, 9 A. & E. Ann. Cas. 893.

Assuming that the promise was not an original one in its terms, but in the nature of a collateral promise based upon a consideration,—a benefit moving to Goodman,—then the undoubted law makes him responsible.

8 Enc. Ev. p. 679; Westmoreland v. Porter, 75 Ala. 452; Chapline v. Atkinson, 45

Ark. 67, 55 Am. Rep. 531; Lerch v. Gallup, 67 Cal. 595, 8 Pac. 322; Gerow v. Riffe, 29 W. Va. 467, 2 S. E. 104; Emerson v. Slater, 22 How. 28, 16 L. ed. 360.

Where a consideration moves directly to the promisor, he can be held responsible after the fashion of holding a guarantor.

Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58; Howell v. Harvey, 64 W. Va. 310, 22 L.R.A.(N.S.) 1077, 64 S. E. 249.

Messrs. Campbell, Brown, & Davis, for defendant in error:

The ownership of stock in a corporation does not constitute a direct benefit moving to the promisor, so as to render valid his parol promise to pay its debts.

Mechanics' & T. Bank v. Stettheimer, 116 App. Div. 198, 101 N. Y. Supp. 513; Turner v. Lyles, 68 S. C. 392, 48 S. E. 301; 20 Cyc. Law & Proc. p. 172; Browne, Stat.

the person for whose benefit the promise was made, by plaintiff's showing, was still debtor to him, and therefore the promise of the defendant was simply collateral to that, and not an original, independent, unconditional promise to pay. After a retrial this case was again appealed (Mankin v. Jones, — W. Va. —, 69 S. E. 980), and as then presented to the court the liability of the promisor upon the promise was sustained on the theory that there was a new consideration upon the part of the promisor to support the promise, he agreeing with the debtor for a valuable consideration to pay the debt in question.

The distinction made in Mankin v. Jones on the second appeal, between a promise to a creditor to pay the debt of another and a promise based on a valuable consideration made directly to the debtor to pay such debt, is also made in Bursen v. Bogart, — Colo. —, 113 Pac. 516, wherein a promise of the latter character was held to be an original promise, and not within the statute of frauds.

The doctrine of Mankin v. Jones, as asserted when that case was first before the court, was also declared in Wood v. Dodge, 23 S. D. 95, 120 N. W. 774, wherein the court said: "An oral promise to pay for goods furnished at the promisor's request to a third person is not valid if the transaction is wholly or partly upon the credit of the third person, so as to create a debt against him to which the oral promise is merely collateral. If any credit whatever is given to the third person, so that he is in any degree liable, the oral promise of the other party is not valid, 29 Am. & Eng. Law, 2d ed. pp. 180, 181; 20 Cyc. Law & Proc. pp. 180, 181. In determining to whom, as between the promisor and the person for whose benefit the promise is made, the credit was actually given, an important consideration is the manner in which the creditor entered the transaction in his books. Evidence that the goods sold were charged to the person to whom they 32 L.R.A.(N.S.)

were delivered strongly tends to show that the vendor gave credit to him and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was, at most, a collateral undertaking. 20 Cyc. Law & Proc. p. 183; 29 Am. & Eng. Enc. Law, 2d ed. p. 924. It is well settled that the charges made upon a book may be explained, and thereby remove the presumption that would otherwise flow therefrom; but in this case there was neither explanation of this evidence, nor was there any evidence to the effect that plaintiffs relied upon defendant's promise."

A promise to see the seller of goods ordered by a third person paid, where the seller refuses to sell on the latter's credit, is within the statute of frauds although the goods were furnished contemporaneously with the promise in question, but charged to the person to whom furnished, rather than the promisor. Swabara v. Throgmorton-Bruce Co. 88 Ark. 592, 115 S. W. 380. In this case the doctrine was also asserted that where the party undertaken for is originally liable on the same contract, the promise to answer for that liability is a collateral promise, and must be in writing.

In Sherman v. Alberts, 153 Mich. 361, 126 Am. St. Rep. 486, 116 N. W. 1090, a promise to pay for any goods sold a designated person while he was working on the promisor's logs, when considered with reference to the construction placed upon it by the seller, who charged the goods to the person for whom furnished, settled with him for them, and obtained from him an order upon the promisor for their payment, was held to be a collateral promise and hence within the statute of frauds.

So, a contemporaneous promise to pay for goods if the seller would let a third person have them is collateral and within the statute of frauds, where the goods were delivered and charged to such third person. Shay v. Cruyton, 116 N. Y. Supp. 1123.

In Gainesville & A. County Hospital Asso.

Fr. 189; Wyman v. Gray, 7 Har. & J. 409; Free Schools v. Flint, 13 Met. 539; Searight v. Payne, 2 Tenn. Ch. 175, 13 Mor. Min. Rep. 401; Walther v. Merrell, 6 Mo. App. 370.

The "benefit" contemplated by the law necessary to render a promisor liable is one of fact, a tangible benefit of value directly moving to the promisor by reason of the promise.

White v. Rintoul, 108 N. Y. 222, 15 N. E. 318; Mallory v. Gillett, 21 N. Y. 412; Mankin v. Jones, 63 W. Va. 373, 15 L.R.A. (N.S.) 214, 60 S. E. 248; 20 Cyc. Law & Proc. p. 193; Clapp v. Webb, 52 Wis. 638,

v. Hobbs, 153 N. C. 188, 69 S. E. 79, the doctrine is asserted that the fact that a benefit primarily accrues to another is not sufficient to bring an original promise within the statute of frauds.

Thus a promise by a person ordering articles to be delivered to another, to pay for them, is an original promise, and not within the statute of frauds, although at the time the promise was made the promisor ordered the bill for the articles to be sent to the person for whom the order was given. Burns v. Bradford-Kennedy Lumber Co. — Wash. —, 112 Pac. 359.

So, a promise to pay for articles to be delivered to another is not, by reason of that fact, a collateral promise to pay the debt of another within the statute of frauds. American Brewing Asso. v. Gossett, — Tex. Civ. App. —, 107 S. W. 357.

To the same effect as to an original promise to pay for goods delivered to another at the time of the promise is Pulaski Stave Co. v. Sale, 32 Ky. L. Rep. 669, 106 S. W. 786.

In McGowan Commercial Co. v. Midland Coal & Lumber Co. 41 Mont. 211, 108 Pac. 655, where defendant, in reply to a statement by plaintiff that he would not let a third person have supplies on credit, said: "All right; you let . . . have what he requires—what he needs—and I will see that it is paid, and you keep our office notified from time to time what the amount is," it was held under all the circumstances to be a proper question for the jury to determine whether the promise was an original or a collateral one, although the goods were charged on the books of the seller to the buyer. In this case the testimony tended to show that the seller did not rely upon or look to the debtor for payment for the goods, but extended credit solely upon the promise referred to, and looked to the promisor alone for payment.

The mere interest of the promisor in the subject-matter of the promise is not of itself sufficient to take a promise to pay the debt of another out of the operation of the statute of frauds. Thus an agreement to guarantee a certain account, although made by the president of the corporation owing the account, is a collateral undertaking and within the statute of frauds. 32 L.R.A. (N.S.)

9 N. W. 796; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58.

Where there is no consideration accruing to the promisor by reason of the promise, the fact that the principal debtor is responsible is a test showing the promise to be collateral, and not enforceable unless in writing.

Ware v. Stephenson, 10 Leigh, 155; Cutler v. Hinton, 6 Rand. (Va.) 509; Radcliff v. Poundstone, 23 W. Va. 724; Gerow v. Riffe, 29 W. Va. 462, 2 S. E. 104; Barnett v. Boone Lumber Co. 43 W. Va. 441, 27 S. E. 209; Faulkner v. Thomas, 48 W. Va. 148, 35 S. E. 915.

Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618.

And in Snyder v. Monroe Eckstein Brewing Co. 107 App. Div. 328, 95 N. Y. Supp. 144, affirmed in 188 N. Y. 576, 80 N. E. 1120, an oral promise by the owner of a building in the course of construction, to a subcontractor, to pay him in the event of his going on and completing his contract with the original contractor for the construction of the building, was held to be a promise without consideration, and void under the statute of frauds, because not in writing. To the same effect under a very similar state of facts is Miles v. Driscoll, 201 Mass. 318, 87 N. E. 579. For reasons pointed out in the note in 22 L.R.A. (N.S.) 1077, the distinction between a promise to pay a pre-existing debt, and a debt created contemporaneously with the promise, is observed in the cases included in this note and those covered in Mankin v. Jones. The cases included in the former note are limited to those which deal with a promise to pay a pre-existing debt, while in the latter note only cases are included which deal with a contemporaneous promise. The same cases, however, will be found in both notes, where the promise to pay covered a pre-existing debt and also a promise to pay for goods subsequently to be furnished. This is the case in Synder v. Monroe Eckstein Brewing Co. and Miles v. Driscoll, in both of which the promise was apparently to pay both for goods already furnished and to be furnished. Both of these cases are referred to in the note in 22 L.R.A. (N.S.)

Stouffer v. Jackson, 42 Pa. Super. Ct. 450, holds to be collateral and within the statute of frauds a promise by the owner of a building, in the course of construction, to a materialman furnishing material therefor to the contractor building the same, that he would see such materialman paid. In this case the material was charged to the contractor, and a statement for the amount thereof made out against him.

An agreement by the owner of a building in the course of construction, to become surety to one furnishing material therefor to the contractor building it, is a collateral promise and within the statute of frauds. Vicksburg Mfg. & Supply Co. v. Jaffray Constr. Co. 94 Miss. 282, 49 So. 116.

A. G. S.

Poffenbarger, J., delivered the opinion of the court:

Alleged error in the rulings of the trial court on a demurrer to evidence constitutes the ground of complaint on this writ. The Hurst Hardware Company instituted the action to recover a sum due it for merchandise sold and delivered to a corporation, known as the Goodman Coal & Coke Company, amounting to \$900.85, and also a sum due it, as assignee of the Williamson Grocery Company, for goods sold and delivered to the same corporation, on the theory that the defendant, A. Goodman, had bound himself by verbal promises to pay said debts, not within the statute of frauds.

The facts disclosed by the uncontradicted testimony are substantially as follows: The defendant and one Sampson took a coal lease on a tract of land known as the Stepp land, providing for the payment of a heavy minimum annual royalty. The Goodman Coal & Coke Company was organized to develop the property, and said lease assigned to it. Goodman was a heavy stockholder in that corporation, and its president and treasurer. He was also obligated with others by indorsements for some of its debts. The plaintiff and its assignor had been furnishing it merchandise. As it failed to pay its bills promptly and seemed to be embarrassed, each of these companies declined to fill some of its orders for goods. Thereupon the defendant made to each of them the promises relied upon here as binding him personally. At that time the corporation owed the Williamson Grocery Company a considerable sum, which the defendant paid by a check of the corporation. He then talked to the manager of the grocery company, who says he told him he would be personally responsible for the amounts to become due on all future purchases by the company. Thereafter it delivered or furnished the corporation goods to the amount of \$1,542.50, charging them to it and rendering it statements for the same. At or about the same time the corporation was indebted to the hardware company to the extent of about \$600. Its manager called upon the defendant, who promised to make a substantial payment on the old account, and ordered shipment of such goods to the corporation as should be thereafter needed or wanted, and promised to pay for them himself. Afterwards he sent the corporation's check for \$100. Additional goods were furnished and charged to the corporation, until the balance due amounted to \$900.85. Later the corporation went into the hands of a receiver, and then into bankruptcy, and both the Hurst Hardware Company

and the Williamson Grocery Company filed their accounts against it in the bankruptcy proceeding, whence each received a portion of its debt.

If the situation of the defendant as an officer and stockholder of the corporation, indorser on its paper, and principal in the obligation for royalties, payment whereof was assumed by the corporation, did not make these debts for goods his own debts, founded upon consideration moving to him, and the promises original, the judgment is right. By charging the goods to the corporation and demanding payment thereof from it, the vendors disclosed manifest, positive, and unequivocal intent to hold it a debtor to them. In seeking now to hold Goodman also, they are attempting to make him pay the acknowledged debt of the corporation. In such cases the decisive test is to whom credit was given, and it must have been given to the promisor alone. If the creditor relies upon the person to whom the property is delivered or for whom the service is rendered to any extent whatever, the promise is collateral and void, if not in writing. *Johnson v. Bank*, 60 W. Va. 323, 55 S. E. 394, 9 A. & E. Ann. Cas. 893; *Mankin v. Jones*, 63 W. Va. 373, 15 L.R.A.(N.S.) 214, 60 S. E. 248; 20 Cyc. Law & Proc. pp. 180, 181. Here the charging of the goods to the corporation, rendition of statements to it, and assertion of claims therefor against it in the bankruptcy proceeding, all admitted by the plaintiff, effectually preclude a finding in its favor. A verdict for it, on this theory of the case, could not be sustained.

The decision must turn, therefore, upon the inquiry as to the effect of the relation existing between Goodman and the Goodman Coal & Coke Company. If, in substance, effect, and main purpose the oral agreements were for his benefit, the promises were original, and not collateral undertakings. It is not enough merely to say he was benefited by them. In ordinary contract law a benefit to the promisor or detriment to the promisee constitutes a sufficient consideration. The question we are called upon to determine goes beyond this. How far the policy which dictated the statute of frauds, and the terms in which the legislative will is expressed, must have weight in the solution thereof. In almost every instance of the assumption of one man's debt by another there is some reason for the promise, some benefit accruing to the promisor as well as the debtor. The acknowledged and expressly declared purpose of the statute is to preclude the establishment of rights by oral testimony, when the situation of the parties is such as to constitute a strong motive for perjury

and fraud in establishing a liability, or the false extension or amplification of conversations and transactions so as to make them impose obligations lying beyond their real scope and effect. To this end, it ordains and declares that no action shall lie to charge any person upon a promise to answer for the debt, default, or misdoings of another, unless the promise or some memorandum or note thereof be in writing signed by the party to be charged thereby or his agent. Tested by its letter, the statute inhibits proof of an oral promise to pay the debt of a third person. That some benefit accrues to the promisor for the service rendered, or the property sold and delivered, to such third person, does not necessarily make the debt that of the promisor or prevent it from being that of such third person. If the debt is that of another, and not of the promisor, the terms of the statute include it, and an incidental benefit accruing to the promisor cannot exclude it. If, on the other hand, the debt is that of the promisor, the promise is not within the statute, though a third person may be incidentally relieved of an obligation in consequence of payment. If, for a consideration, the promisor has assumed the debt of another and made it his own, the promise lies beyond the terms and policy of the statute. Neither its terms nor policy relate exclusively to the subject of benefit or detriment. The subject-matter is the mode of proof of the assumption by one man of another's debt. Therefore, whether the debt is that of another is the true test.

This question has been the subject of much discussion and somewhat varied judicial rulings. A divergence of opinion respecting it between Chief Justice Shaw, of Massachusetts, and Chancellor Kent, of New York, became manifest many years ago. In some states the views of one are adopted and in some the views of the other. New York has receded from the position taken by Chancellor Kent, and substantially adopted that of the Massachusetts court. In *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317, Chancellor Kent took the position that a promise to pay the debt of another, arising out of some new and original consideration of benefit or harm moving between the newly contracting parties, is not within the statute. As this practically eliminated all promises founded upon a consideration sufficient under the rules of common law, it relieved from the operation of the statute a vast number of promises, such in character as to bring them clearly within the policy which dictated the enactment of the statute. For this reason the New York court of appeals

has limited it very greatly. It now holds that mere detriment to the promisee is not enough to take a promise out of the statute. *Mallory v. Gillett*, 21 N. Y. 412. In that case it was held that the new consideration must move to the promisor and be beneficial to him. In *Brown v. Weber*, 38 N. Y. 187, it was observed that this did not sufficiently limit the exception from the statute, for the reason that a promise, made upon a new consideration, moving to the promisor and beneficial to him, may still be only collateral or conditional, and therefore within the statute. Accordingly the court said: "The test to be applied to every case is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor." These principles were reasserted and applied in *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. Rep. 693, and again in *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318, which decisions bring the rule in New York more nearly into harmony with the views of Chief Justice Shaw, who declared an original promise to be one in which the leading object of the promisor is not to become the surety or guarantor of another's debt, but to subserve or promote some interest of his own, although its effect may be to pay the debt of another. As has been stated, each of these views has been, respectively, adopted in some of the states, but the latter seems to prevail. *Colgin v. Henley*, 6 Leigh, 85, has been classed among those adhering to the former, but on this point the reasoning of the court in that case has not been fully set forth. All that was said on the subject is found in one short paragraph, and the promise was in writing. The question presented was not exactly the one we have here. The Massachusetts rule has been adopted by the Federal Supreme Court in two cases,—*Emerson v. Slater*, 22 How. 28, 16 L. ed. 360, and *Davis v. Patrick*, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58. In the former *Emerson* had a contract with a railway company to do certain bridge work by a certain date. The railway company became insolvent and unable to meet its engagements, in consequence whereof Emerson quit work and refused to continue it. Thereupon Slater, who was largely interested in the railway company, as a stockholder, and also as the holder of certain contracts made between him and the company, entered into a written contract with Emerson, whereby he bound himself to pay

to Emerson certain sums of money in consideration of the promise of the latter to resume the work and complete it by a certain date. As Emerson was unable to complete the work within the time specified in said last contract, Slater extended the time of completion by an oral agreement. The defense was that said oral agreement of extension was within the statute of frauds; Slater's promise having been one for the payment of the debt of the railway company. The court, however, excepted the transaction from the statute upon the ground that Slater's promise was original, and not collateral, because founded upon a consideration moving to him and beneficial. The language of Mr. Justice Clifford was as follows: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To sustain this proposition, he cited both the Massachusetts and New York cases. As it was held that the promise was made to subserve a pecuniary or business purpose of the promisor, it becomes necessary to ascertain upon what peculiar circumstances this conclusion was based, in order to understand the application of the principle or rule. Slater's interest extended beyond that of stockholder and officer of the railway company. It is stated in the opinion in the following clear and concise terms: "Prior to that date [the date of Slater's contract], the railroad company had failed, and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had leased to the company railroad iron for the use of the road, amounting in value to the sum of \$68,000, and, as a security for payment, held an assignment of the proceeds of the road to that amount, with interest, which was to be paid in monthly instalments of \$5,000. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds; and, as he had already taken into his possession all the available means of the company to secure himself for this new liabil-

ity, should the road not be completed, the company could not pay for the iron." The case of Davis v. Patrick was similar. Davis had promoted and organized an English company to develop a silver mine in Utah, and advanced to it £5,000, which was to be repaid by the delivery to him, at a place distant from the mines, of a certain number of tons of silver ore. The plaintiff, Patrick, had been employed to transport the ore. The expectations of the parties were not fully realized. The company became embarrassed. Thereupon Davis agreed to advance further sums of money, and the company executed a contract by which another man by the name of Patrick was put in absolute control of its business, so as to continue the work and get out the ores, which were to be applied to the satisfaction of Davis's original debt and repayment of moneys thereafter to be advanced by him. This instrument virtually put all of the assets and business of the corporation in the hands of Patrick as trustee for the benefit of Davis. The plaintiff continued the work of transportation. Davis furnished money from time to time, but not enough to pay the cost of transportation in addition to other expenses. As an inducement to the plaintiff to go on and continue his work, he made numerous oral promises to pay him. Upon this state of facts the court applied the doctrine and principles enunciated in Emerson v. Slater, and accordingly held the defendant's oral promises to have been original, and not collateral. It is to be observed that the defendants in these two cases sought by their contracts to promote interests of their own, other than such as were attendant upon their rights as stockholders in the corporations; that each had in his own hands and for his own benefit practically all of the assets and property of the corporations whose debts they assumed; and that each, by virtue of the services rendered, obtained direct and immediate personal benefit under their contracts with the insolvent corporations. They are not cases of remote and indirect benefit accruing to the promisor. That mere interest, as a stockholder of a corporation, receiving the direct and immediate benefit of the contract, is not sufficient, has been several times decided. *Mechanics' & T. Bank v. Stettheimer*, 116 App. Div. 198, 101 N. Y. Supp. 513; *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301; *Wyman v. Gray*, 7 Harr. & J. 409; *Free Schools v. Flint*, 13 Met. 539; *Searight v. Payne*, 2 Tenn. Ch. 175, 13 Mor. Min. Rep. 401; *Walther v. Merrell*, 6 Mo. App. 370. We repeat, also, that the benefit, accruing to the promisors in the two Federal cases above analyzed, was direct and immediate. Each held

a mortgage upon all the income of the corporation to secure the repayment of money advanced, and these special interests and rights were found to have been the moving cause of the promises made. The promisors were in a position to obtain the first fruits of the services rendered and to be rendered by the promisees. The doctrine of the Massachusetts court and the later doctrine of the New York court has been enunciated and applied by this court in *Mankin v. Jones*, in which Judge Brannon said, after reviewing the authorities: "In other words, the third party making the promise must derive benefit to be bound. . . . What else does the statute mean? For what made, if the mere promise, without benefit to the man making it, binds him? His protection against this was the very object of the statute. It is not a question of morality and justice, but public policy, to prevent perjury to sustain false demands. It means that he is not bound for a naked promise to pay a debt of another; but, if he himself gets property or other pecuniary benefit, he is not merely and only paying the debt of another, but his own." A late case decided by this court, holding a promise to have been original and beneficial to him, is *Howell v. Harvey*, 65 W. Va. 310, 22 L.R.A. (N.S.) 1077, 64 S. E. 249. There the work done for which the promisor bound himself to pay was an improvement put upon his own property. The benefit was direct, immediate, and personal. For clear statements of the foregoing principles, well sustained by adjudications, see 29 Am. & Eng. Enc. Law, 2d ed. pp. 922, 927, and 20 Cyc. Law & Proc. pp. 189, 190, 193.

In this case the goods the defendant promised to pay for contributed to the development of the company's mine and kept it a going concern for the time being. Defendant had no lien upon the property or assets of the company, nor any contract with it, by virtue of which the delivery to it of the goods, constituting consideration of the debts, could inure to his direct, immediate, and personal advantage. The benefit accrued directly to the corporation, and no one else. Incidentally and remotely the defendant and all other stockholders and creditors may be said to have been benefited, but not otherwise. We do not think this sufficient to bring the case within the rules and principles upon which promises of this kind are held to be original in consequence of benefit accruing to the promisor.

Seeing no error in the judgment, we affirm it.

32 L.R.A. (N.S.)

CALIFORNIA SUPREME COURT.

NAOMI E. DAVIS, Exrx., etc., of Henry S. Davis, Deceased, Resp.,
v.

CONNECTICUT FIRE INSURANCE COMPANY, Appt.

(158 Cal. 766, 112 Pac. 549.)

Trial — instruction — fall of building.

1. An instruction that, to render effective a clause in an insurance policy terminating it if the building or any part thereof falls except as a result of fire, such portion must fall as will destroy "its distinctive character as a building, is too vague to be a safe guide for the jury.

Evidence — origin of fire — sufficiency.

2. The jury may find that the contents of a building were set on fire between the beginning and ending of an earthquake which lasted forty-five seconds, from evidence that from four to five minutes after the shock the contents were burning with a good body of fire, and that there were live electric wires running into the building.

Insurance — fall of building — definition of loss.

3. An insurer is liable for the entire loss caused by the burning of goods in a building, the walls of which fell from an earthquake shock, where they began to burn before the walls fell, although after the shock had begun, and the walls fell before the fire had done any material damage, under a policy providing that if a building or any part thereof fall except as the result of fire, the insurance on the building or its contents shall immediately cease.

Witness — opinion — question to be settled by jury.

4. Upon the question of the liability of an insurance company upon a policy containing an exemption in case of the fall of a building except as a result of the fire, a witness cannot be permitted to give his opinion as to whether or not the building fell as the result of the fire.

(Melvin, J., dissents.)

(December 14, 1910.)

Note. — Fall of building clause in fire insurance policies.

As to liability of insurer for fire caused by earthquake, see note to *Williamsburgh City F. Ins. Co. v. Willard*, 21 L.R.A. (N.S.) 103.

In *Scottish Union Ins. Co. v. Tomkies*, 28 Tex. Civ. App. 157, 66 S. W. 1109, it was held that in an action on a policy which provided for its avoidance if the insured building or any part thereof should fall except from fire, a showing that a part of the building did fall, not from fire, but as the result of a storm, presented a meritorious defense, especially when it was considered that by statute in that state the

APPEAL by defendant from a judgment of the Superior Court for Sonoma County and from an order denying a motion for new trial after verdict in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. A. B. Ware and T. C. Van Ness for appellant.

Mr. Thomas J. Geary, for respondent:

The burden of establishing that a substantial and material portion of the building fell, and that such fall preceded the commencing of the fire which destroyed plaintiff's goods, was on defendant, and unless so established by a preponderance of evidence, plaintiff was entitled to recover.

Slocovich v. Orient Mut. Ins. Co. 108 N. Y. 56, 14 N. E. 802; Blasingame v. Home Ins. Co. 75 Cal. 633, 17 Pac. 925; Western Assur. Co. v. J. H. Mohlman Co. 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577,

full amount of the insurance upon the building as stated in the policy was collectable in case of its destruction, without regard to its actual value.

What amounts to fall—standard form of policy.

The standard form of fire insurance policies now in general use contains a clause identical with the one in the policy sued upon in *DAVIS v. CONNECTICUT F. INS. CO.*, namely: "If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." This provision has almost always been construed to mean that, in order to enable the insurer to escape liability by reason thereof, a substantial part of the building must have fallen, so as to impair its integrity as a building, thereby increasing the risk; but that it is not necessary that the building become a mass of ruins.

Thus, in *Clayburgh v. Agricultural Ins. Co.* 155 Cal. 708, 102 Pac. 812, 18 A. & E. Ann. Cas. 579, it was held that the meaning of this provision was that the building must have fallen in whole, or in part to such an extent that the integrity of the building was destroyed or substantially impaired, and that therefore the insurer would not be exempt from liability unless the falling exposed the interior of the building or its contents to the inclemency of the weather, or rendered the building or its contents more easily subject to ignition by fire, thereby materially impairing the building as a building.

And in *Nelson v. Traders' Ins. Co.* 181 N. Y. 472, 74 N. E. 421, affirming 86 App. Div. 66, 83 N. Y. Supp. 220, it was held that the meaning of the clause, reasonably interpreted, was that the insurer was excused

83 Fed. 811; *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140; *May, Ins.* 401; *Nelson v. Traders' Ins. Co.* 181 N. Y. 472, 74 N. E. 421.

A material and substantial part of the building must have fallen before the fire started, to excuse the defendant.

Los Angeles Cemetery Asso. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140; *Clayburgh v. Agricultural Ins. Co.* 155 Cal. 708, 102 Pac. 812, 18 A. & E. Ann. Cas. 579.

Shaw, J., delivered the opinion of the court:

This is an appeal from an order denying the defendant's motion for a new trial. The plaintiff sued to recover upon an insurance policy issued by the defendant to Henry S. Davis, in his lifetime, covering a stock of drugs belonging to Davis, contained in a storeroom on the ground floor of a two-story brick building situated in

from its obligation by either the fall of the building, or of such a substantial or important part thereof as impaired its usefulness as such and left the remaining part of the building subject to an increased risk of fire.

And in *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140, it was held that this clause was not to be literally understood so as to avoid the policy, if a fragmentary or minute portion of the material in the insured building should fall, but that it meant some functional portion of the structure, the falling of which would destroy its distinctive character.

And in *Home Mut. Ins. Co. v. Tomkies*, 96 Tex. 193, 71 S. W. 814, affirming 30 Tex. Civ. App. 404, 71 S. W. 812, it was declared that it would be unreasonable to contend that this clause would avoid the policy if some trivial or minute part of the material in the building should fall, but that the falling must be of some material or substantial part of the building, though it would not be necessary for the fall to be so great as to destroy the distinctive character of the structure, in which case, it could no longer be considered a building, but only *débris* or ruins.

In accordance with these principles of law, it was held that a policy containing this clause was avoided:

—where the partition wall gave way, and the upper floors came down, and the front part of the building fell for a distance of about one third of the length back toward the rear. *Foster v. Home Ins. Co.* 74 C. C. A. 445, 143 Fed. 307;

—where the insurer's evidence showed that the front wall of the building from the roof down to the second floor had fallen, leaving the roof unsupported in front, so that the front part of it dropped and rested upon the second floor, and the insured's

the city of Santa Rosa. The fire which occasioned the loss took place on the morning of April 18, 1906, immediately after the great earthquake of that day. The policy issued by the defendant contained the following clause: "If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." Upon the trial the defendant stated that its sole defense was based upon the aforesaid clause, and that, unless that defense was sustained by the evidence, the judgment should be given for the plaintiff.

In addition to the general verdict for the plaintiff, the jury returned answers to a number of interrogatories submitted to

them. Some of these were in respect to the question whether the fall of a part of the building was before or after the fire started. The answers of the jury stated, in substance, that no part of the building fell before the insured goods were attacked by fire. The several answers clearly imply, although they do not expressly say it, that a material part of the building fell, and that the falling thereof was caused by the earthquake and not by the fire.

The appellant complains of several instructions relating to the subject of the fall of a part of a building, and how much of it must have fallen in order to bring about a cessation of the insurance under the clause above quoted. One of them stated that the jury must find that such a portion had

evidence showed that the upper stories had great chunks out of them, and that the building could not be occupied until repaired. *Fountain v. Connecticut F. Ins. Co.* — Cal. —, 112 Pac. 546;

—where a girder in one half of an insured building which was equally divided by a brick partition fell, bringing down substantially the whole of that part, with the goods stored therein, leaving the other part standing uninjured. *Huck v. Globe Ins. Co.* 127 Mass. 306, 34 Am. Rep. 373;

—where a cyclone blew the building down, and the fire that destroyed the property broke out as a result of the fall. *Nichols v. Sun Mut. Ins. Co.* 71 Miss. 326, 42 Am. St. Rep. 465, 14 So. 263;

—where the insured goods were damaged in the efforts to subdue a fire occasioned by the fall of a wall of a building of which the store containing the insured goods was a part, though the fire did not reach the store. *Nelson v. Traders' Ins. Co.* 181 N. Y. 472, 74 N. E. 421, affirming 86 App. Div. 66, 83 N. Y. Supp. 220;

—where a cupola containing a part of the insured machinery, and mentioned in the description of the building in the policy, was blown down in a storm. *Home Mut. Ins. Co. v. Tomkies*, 96 Tex. 187, 71 S. W. 814, affirming 30 Tex. Civ. App. 404, 71 S. W. 812.

On the other hand, in the following cases, this clause in the policy was held not to avoid the same:

—where an earthquake shook down the upper part of the walls of the building to such an extent as to expose to view the uprights supporting a sort of deck above the roof, and to allow a view across the top of the building between these supports, but no part of any wall or of the roof was broken, and nothing fell except the cornice and a portion of the fire wall located above the roof beyond the deck, and no part of the building was exposed to the elements, and the interior of the building was intact, and the tenants could have gone right on with their business. *Clayburgh v. Agricultural Ins. Co.* 155 Cal. 708, 102 Pac. 812, 18 A. & E. Ann. Cas. 579; 32 L.R.A.(N.S.)

—where a well-constructed frame building was blown from the blocks on which it rested, and turned over on its side, but remained intact and retained its identity as the same building. *Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 231;

—where the roof was blown from a part of one of two buildings insured, and one of the upper rooms was uncovered, and the walls thereof partially blown away, but leaving more than three fourths of the building intact, and still suitable for a dwelling house. *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140.

—old form of policy.

An early form of fire insurance policies contained a provision a little differently worded from that which is now in standard policies, namely, that if a building fall except as the result of fire, all insurance on it or its contents shall immediately cease. The very language of this clause would seem to preclude any defense based upon the fact that part of the insured building fell.

Thus, in *Breuner v. Liverpool & L. & G. Ins. Co.* 51 Cal. 101, 21 Am. Rep. 703, a building of which less than three fourths had fallen was held not to be a fallen building within the meaning of such clause.

And in *Fireman's Fund Ins. Co. v. Rodeph Sholom*, 80 Ill. 558, it was held that so long as an insured building remained standing, there could be no exemption from liability under such a clause, no matter how much depreciation there might have been by the action of the wind or any other causes, and that therefore the insurer's liability was not defeated by the fact that shortly before the fire a storm had partly blown the insured building off the posts upon which it was rested, so that it leaned toward the street out of plumb, and was greatly damaged.

And in *Security Ins. Co. v. Mette*, 27 Ill. App. 324, it was held that the fall of two fifths of an insured building, leaving the other three fifths standing intact, was not a fall of the building within the terms of the condition. The court said: "Otherwise there

fallen as would destroy its distinctive character as a building; another that the fall must have had the effect of increasing the fire risk. We have considered the latter instruction in our decision in *Fountain v. Connecticut F. Ins. Co.* — Cal. —, 112 Pac. 546, and held it to be erroneous. The other instruction is too vague to be a safe guide for the jury. Reasonable men might reasonably differ upon the question of its meaning. To destroy a building's distinctive character as such might merely refer to a change in its appearance, or to a fall that would require a change of its use, or its practical destruction as a building. But in view of the clear, conclusive, and uncontradicted evidence that the entire upper story was shaken down by the earthquake

alone, so that the roof fell down upon the second floor, we cannot believe that the instructions on this branch of the subject could have prejudiced the defendant in the least. The proof showed conclusively that the earthquake alone caused the fall of a sufficient part of the building to destroy its distinctive character as a building and to increase the risk from fire. There was, in fact, no real controversy at the trial in regard to this point. The interrogatories and the answers thereto show that this fact was conceded, and, indeed, the jury could not have found otherwise upon the evidence, for there was absolutely none to the contrary. The whole defense turned upon the question whether or not the fire attacked the goods before a part of the building had fallen.

is no halting point, short of the proposition that the fall of any substantial part of the building puts the condition in operation, and terminates the risk."

When fire is deemed the cause of the fall.

In *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635, where it appeared that a building adjacent to one insured, the wall between them being a partition wall, caught fire and was partially consumed, and, as a direct result of such fire, fell, bearing down with it the partition wall and a part of the insured building, the fall of the insured building was held to be the result of fire, and a direct loss or damage by fire, within the terms of the policy, although no part of it ignited or was consumed by fire.

The Minnesota supreme court in the case just cited stated that in *Johnston v. West of Scotland Ins. Co.* 3 Sc. Sess. Cas. 1st series, 18, it was held that where an insured house was injured by the falling of part of the wall of an adjacent house in consequence of fire in the latter house, the fire was the proximate cause of the loss, and the insurers were liable, although the house insured had never been on fire.

So, in *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140, it was held that, if the fire commenced before the fall, the insurance company would be liable, though the entire insured building subsequently fell.

Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243, certiorari denied in 171 U. S. 688, 43 L. ed. 1179, 19 Sup. Ct. Rep. 885, another case involving the cause of the fall of the building, is sufficiently set forth in *DAVIS v. CONNECTICUT F. INS. CO.*

Explosion clause.

The provision that if a building or any part thereof fall except as the result of fire, 32 L.R.A. (N.S.)

all insurance on it or its contents shall cease, will not defeat a recovery for damage by fire to insured goods following an explosion, under policies containing also a specific stipulation exempting the insurer from liability for damage to the insured goods resulting from explosions of any kind unless fire ensues, and then for the damage by fire only, though the insured building or a part thereof fell as a result of the explosion. *Leonard v. Orient Ins. Co.* 54 L.R.A. 706, 48 C. C. A. 369, 109 Fed. 286; *Orient Ins. Co. v. Leonard*, 57 C. C. A. 176, 120 Fed. 808; writ of certiorari denied in 187 U. S. 645, 47 L. ed. 347, 23 Sup. Ct. Rep. 845; *Phenix Ins. Co. v. Leonard*, 57 C. C. A. 680, 121 Fed. 1021, writ of certiorari denied in 187 U. S. 645, 47 L. ed. 347, 23 Sup. Ct. Rep. 845; *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 348, 34 Am. Rep. 384; *John Davis & Co. v. Insurance Co. of N. A.* 115 Mich. 382, 73 N. W. 393. The reasoning upon which these cases proceed, though no one of them has so formulated it, would seem to be that, inasmuch as the only purpose of a fire insurance policy is to reimburse the insured for loss from fire, and this purpose is carried to such an extent as to make an exception to the insurer's exemption from loss following explosion, so that the insurer will be liable for damage by fire though caused by an explosion, the liability so carefully and concisely defined will not be allowed to be defeated by a strict application of the fall of building clause.

In *Eppens, S. & W. Co. v. Hartford F. Ins. Co.* 99 App. Div. 221, 90 N. Y. Supp. 1035, in which the policy in suit contained this explosion clause, it appeared that a wall of the building which contained the insured property fell by reason of an explosion, but the question of the effect of this clause upon the fall of building clause was not discussed, it being apparently assumed that if the wall fell before the destruction of the insured property by fire, the insurer was not liable. A judgment for the insurer, however, was reversed because the trial court gave the jury to understand that though the wall did not fall before the destruction of the insured property, but was

The jury answered that it did. It is claimed that this finding is not supported by sufficient evidence.

The strongest evidence in favor of the proposition that the fire attacked the goods before the walls fell is the testimony of the witnesses Duncan, Bailey, and Faught. Bailey testified that he was running a livery stable situated near the Davis building, and that from his stable, not more than three or four minutes after the earthquake, he saw fire in the rear of the Davis building. Faught testified that he was a fireman, and slept in the engine house which was situated on a lot fronting on Fifth street and running back toward Fourth street, the rear thereof being about 50 feet from the rear of the Davis store. He said: "It did not take very long that morning to get out of the engine house. I saw the rear of the buildings where the Davis drug store was about three or four minutes after I got out of the engine house. I saw the fire started. I saw a volume of smoke come

up right behind the Davis drug store. I saw quite a volume; enough to indicate to me the existence of a good fire there." Duncan was a fireman and lived in a cottage in the rear of the Davis drug store. At the time of the earthquake he was in the engine house, about 50 feet from his cottage. He got out of the engine house about five minutes after the earthquake, and went to the back door of his cottage from which he saw fire in the back end of the Davis building. The back end of it was then burning. The inside of the building was then on fire and the smoke and flames were coming out of the windows and through the roof. Muther, chief of the fire department, a witness for plaintiff, testified that ten minutes after the shock he climbed to the top of the Davis building, and found that the roof had fallen and rested upon the first story; that he saw at once that there was a fire coming fast "eating into" the building, and the little blue blazes climbed up all around the brick; and that the fire was of an absolutely un-

cracked and weakened in consequence of the explosion so that it fell the more readily, this would relieve the insurance company of liability.

Burden of proof.

The great weight of authority supports the proposition that these provisions as to the fall of a building are conditions subsequent, and not exceptions, and that the burden of showing that the policy was avoided by a breach thereof is upon the insurer. *Western Assur. Co. v. J. H. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811, writ of certiorari denied in 168 U. S. 710, 42 L. ed. 1213, 18 Sup. Ct. Rep. 949; *Phenix Ins. Co. v. Luce*, 60 C. C. A. 655, 123 Fed. 257; *Blasingame v. Home Ins. Co.* 75 Cal. 633, 17 Pac. 925; *Transatlantic Ins. Co. v. Bamberger*, 11 Ky. L. Rep. 101, 11 S. W. 595; *N. & M. Friedman Co. v. Atlas Assur. Co.* 133 Mich. 212, 94 N. W. 757; *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140.

The only cases to disagree with this rule are from Texas. In *Pelican Ins. Co. v. Troy Co-op. Asso.* 77 Tex. 225, 13 S. W. 980, it was held that this provision was an exception to the general liability assumed by the insurer, and that the burden was upon the insured to show that the fire did not occur therefrom. And that the supreme court of Texas was at an earlier time in favor of this rule would seem to be a justifiable inference from the opinion in *Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118, though the question was not discussed.

Absence of fall of building clause.

In the following cases no reference is made to any provision in the policy sued on 32 L.R.A. (N.S.)

regarding the fall of a building, but it is not possible to state with certainty that the policy contained no such provision:

In *Lewis v. Springfield F. & M. Ins. Co.* 10 Gray, 159, recovery was allowed on a policy of insurance on goods where one of the walls of the store in which the goods were stored gave way, and half of the store and the whole of the adjoining building fell, and fire broke out in the ruins of that building before there was time to remove the goods.

In *Farrell v. Farmers' Mut. F. Ins. Co.* 66 Mo. App. 163, 2 S. W. 1297, the insurer was held liable where the insured building was not blown down by a storm, but merely removed a few feet from its foundation, and left sufficiently intact to be still subject to identification as the building covered by the risk, by a reference to the description in the policy, and one or more of the agencies of the storm, wind, or electricity caused fire to be communicated to the building, either from that in a stove contained therein or in some other way, whereby such building and contents became a loss.

In *Nave v. Home Mut. Ins. Co.* 37 Mo. 430, 90 Am. Dec. 394, it was held that insurance upon a building was insurance upon the building as such, not upon the materials of which it was composed, and that therefore no recovery could be had for the loss of a building which fell into ruins from some defect in construction or from overloading, though the materials then caught fire. The court said: "The cause of the loss of the subject insured was not the fire, but the fall. That a fire sprang up afterwards in the rubbish, and destroyed the fallen materials, was wholly another matter. The materials were not insured. The building insured no longer existed as such, and it ceased to exist by reason of a peril not insured against."

J. A. C.

natural color, a kind of blue color all through the bricks. It was admitted that the building was lighted with electric lights, and, in effect that the wires were at the time charged with electricity.

It is not improbable that the first effect of the strain caused by the earthquake was to break some wire charged with electricity, thereby instantaneously starting a fierce fire, and that the falling of the wall did not occur until the last severe vibration and after the fire had begun. The earthquake continued for forty-five seconds. Even this brief period was long enough for the two events to occur consecutively, with an interval between them of more than half a minute. The evidence does not show the particular place in the building where the inflammable drugs were kept. The testimony of Muther that the flames were of an unnatural blue color inside the building ten minutes after the earthquake indicated that some inflammable substance different from the wooden part of the building was then burning. It is common knowledge that the breaking of a charged electric wire will instantly cause a very hot flame, and that if combustible materials are near by, such a fire will spread with great rapidity. Under all these circumstances, we cannot say that the finding of the jury on his point was not sustained by the evidence.

The appellant contends that it is immaterial whether the building was on fire or not at the time the wall fell, provided the fire did not cause the fall. The court charged the jury that if it found that a material part of the building fell from the cause other than fire, before the insured goods were attacked by fire, the plaintiff could not recover. The case appears to have been tried upon the theory that this was the extent of the burden of proof resting upon the defendant. The jury, as we have said, obviously found that the goods were on fire before any part of the building fell. It appears from the evidence, however, that, at the time the walls were thrown down by the earthquake, only a small part of the goods could have been consumed or injured by the fire. The claim is that if there was a falling of the wall not caused by fire, the above clause of the policy thereupon immediately became operative, the insurance immediately ceased, and that, although the fire began before the wall fell, the defendant is liable only for so much of the goods as were consumed or injured by fire before the wall fell, and for none that were consumed or injured afterward.

The case of *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243, is cited in support of this proposition. That was a loss of insured

goods in a building. Counsel quotes from the opinion in that case the following: "If [it] the building was on fire, . . . and if it would have fallen by the force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable. . . . The cause of the fall was the test of the liability." Wrenched from its context, this passage may seem to support appellant's claim. But a reading of the entire decision shows that the precise question here in issue—the liability where, after a fire has attacked insured goods, but before it has done much damage, a material part of the building containing them falls from a cause other than fire—was not under consideration in that case; that, as appears by stipulation in that case, the only questions for decision were whether or not the fire began before the building fell, and if it did, whether the fall was caused by the wind or the fire. The discussion shows that the court, in effect, held that the insurer was liable if the wind blew the wall down after the fire started, but before it reached the insured goods, and, by implication, at least, that it would not have been liable if the wall had been blown down before the goods were attacked by fire. The trial court in its instructions to the jury had said: "If this building, or any substantial part thereof, fell before the fire, or before any portion of the merchandise insured was injured by fire, and it so fell, not as the result of the fire, but as the result of something else, your verdict should be for the defendant." And further: "If that building fell, even after the fire had originated,—if the fall was not caused by the fire,—and if at the time it fell the goods had not caught fire, and had not been damaged by fire, the defendant would not be liable. . . . If, on the other hand, those goods had been damaged by fire, or had caught fire prior to the falling of the building, you will find for the plaintiff." This instruction was approved. The judgment in that case was for the company, and the plaintiff appealed, and, while the question whether or not the charge was too favorable to the plaintiff was not involved, the instruction shows, as also do the comments thereon, that the court did not mean to decide that it was immaterial whether the building was or was not burning at the time the wall fell from the wind, and that it did not hold that if a building fall, other than by fire, while goods therein are burning, the loss will be divided by that event, and the company held only for the goods consumed or injured before the fall.

Upon the question last stated, we think the most reasonable interpretation of the

fallen building clause is that it does not apply to the case of a building, or part thereof, falling after it has begun to burn, if the insurance is on the building, and perhaps even if it is only on goods therein, and that, where goods only are involved, it does not apply where the goods have begun to burn before, and are burning at the time, the fall occurs. When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the goods, and to exempt the insurer from liability for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been used. Other events which the policy declares shall avoid it, such as a change of interest, an assignment of the policy, or the execution of a mortgage thereon, might occur after the goods began to burn. Would it be contended, in such cases, that an account must be taken and the insurer held only for the goods burned and the injury caused before the event? The division would in most cases necessarily be a mere guess. It is obvious that the parties did not contemplate the application of the fallen building clause in this manner. The better rule is to hold that the liability of the insurer, so far as this clause is concerned, is fixed by the conditions existing at the time the fire and consequent loss begins, and is not affected or changed by the fall of the building, or a part thereof, subsequently, but before the destruction is complete.

The witness Muther was asked the question: "Was the falling of the Davis building the result of the fire?" An objection to the question was properly sustained. It called for a mere conclusion or opinion as to a fact which was not the subject of expert testimony. If the testimony he had previously given as to the facts was true, the conclusion that the fall was not the result of fire necessarily followed. Moreover, as we have stated before, the entire evidence showed conclusively that the earthquake

caused the fall, and there was not even an attempt to show the contrary. The refusal to allow the question was therefore not injurious to the defendant. This also applies to the refusal to allow the witness Wilson to answer a general question as to the condition of all the buildings on Fourth street after the earthquake. Furthermore, the evidence was properly confined to the Davis building, and, in addition to that, the witness was afterwards allowed to say that he could not tell one building from another, because they were all down, and thereby he did, in effect, answer the question.

We find no prejudicial error in the record.

The order is affirmed.

We concur: Angellotti, J.; Sloss, J.; Lorigan, J.; Henshaw, J.

Melvin, J.:

I dissent: I think the conclusion by the jury that the fire attacked the goods before a part of the building had fallen is not supported by sufficient evidence. To hold that the testimony of Duncan, Bailey, and Faught sustains such a finding is to ignore the rule that the plaintiff's case must be sustained by a preponderance of evidence. All of these men saw the fire some minutes after a material portion of the building had fallen. Their stories comport as well with the theory that combustion followed the greatest and most destructive movement of the earthquake as with the deduction that the first vibration broke the electric light wire and so caused the fire. Indeed, according to the doctrine of probabilities, it is very likely that the same force which destroyed the upper walls of the building broke the wire and liberated its current. Whether a mass of loosened brick can leave a wall sooner than a vagrant electric current can set fire to a stock of goods is a question too difficult for satisfactory solution, even by all the combined wisdom of the members of a trial jury. and unless we can ignore the necessity of plaintiff's establishing his case by preponderance of evidence, I cannot see how the proof sustained the jury's finding. I think it clear that, the destruction of a portion of the building having been shown, the burden was on the plaintiff to prove the occurrence of the fire in some manner other than from any of the excepted risks. *Beach, Ins. § 1329; Pelican Ins. Co. v. Troy Co-op. Asso. 77 Tex. 225, 13 S. W. 980; Phoenix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484.* In California this rule with reference to the burden of proof has, I think, long been established, although at least one learned judge has cited one of

our leading cases as announcing the opposite doctrine. In *Western Assur. Co. v. J. H. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 813, the court refers to *Blasingame v. Home Ins. Co.* 75 Cal. 635, 17 Pac. 925, as authority for the rule that the defendant must by a preponderance of evidence establish the performance on plaintiff's part of prohibited acts, or show in like manner that the loss occurred from an excepted risk. An examination of that case, however, shows that a rule of pleading, and not of evidence, was announced. Broadly speaking, the court in the *Blasingame* Case held that in an action on a policy of insurance a condition precedent may be generally pleaded under the provisions of § 457 of the Code of Civil Procedure, and that the complaint need not contain averments intended for the purpose of meeting or cutting off a defense. Yet in that case the learned commissioner wrote: "One seeking to recover on an insurance policy must aver the loss and show that it occurred by reason of a peril insured against." This doctrine was asserted with even greater emphasis in the case of *Rankin v. Amazon Ins. Co.* 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872, in which the policy under consideration provided that the plaintiffs should keep a watchman on the premises day and night when the mill was not in operation; this court holding that, after the defendant had shown that the mill was idle, the burden of proving compliance with the warranty rested upon plaintiffs. So, in this case, it seems to me, the fall of a material part of the building being shown, it is for the plaintiff to prove by a preponderance of the evidence that the fire was burning his property while the building was intact. This, I think, he utterly failed to do. I am aware that the opposite rule is adopted in some jurisdictions, and the burden of proof held to be on the defendant (see *Transatlantic Ins. Co. v. Bamberger*, 11 Ky. L. Rep. 101, 11 S. W. 595; *Western Assur. Co. v. J. H. Mohlman Co.* supra), but I think the other, which I believe has been the California rule, is based upon sounder reasoning.

The order should be reversed.

NORTH CAROLINA SUPREME COURT.

T. W. CARSWELL

v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(154 N. C. 112, 69 S. E. 782.)

Telegraph — delay in delivery — termination of office hours.

A telegraph company is liable for failure §2 L.R.A. (N.S.)

to deliver a message which it receives for transmission after regular office hours, unless the sender is notified that it cannot be promptly delivered, although when accepting it the operator agrees to send it "if there is nothing the matter at the other end of the line," and the receiving office is found to have no means for prompt delivery.

(Brown and Manning, JJ., dissent.)

(December 20, 1910.)

APPEAL by defendant from a judgment of the Superior Court for McDowell County in plaintiff's favor in an action brought to recover damages for alleged negligent failure promptly to transmit and deliver a telegram. Affirmed.

The facts are stated in the opinion.

Mr. Alfred S. Barnard, for appellant:

The plaintiff, having delivered the message at an unusual hour and outside of office hours, was presumed to have contracted with the defendant with reference to reasonable hours.

Jones, Teleg. & Teleph. Cos. § 351; *Western U. Teleg. Co. v. Georgia Cotton Co.* 94 Ga. 444, 21 S. E. 835; *Cates v. Western U. Teleg. Co.* 151 N. C. 504, 24 L.R.A. (N.S.) 1286, 66 S. E. 592; *Western U. Teleg. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15; *Western U. Teleg. Co. v. Gibson*, — Tex. Civ. App. —, 53 S. W. 712.

Messrs. Pless & Winborne, for appellee:

Failure to notify the sender of a telegram of the nondelivery thereof is evidence of negligence.

Cogdell v. Western U. Teleg. Co. 135 N. C. 431, 47 S. E. 490; *Carter v. Western U. Teleg. Co.* 141 N. C. 378, 54 S. E. 274.

Clark, Ch. J., delivered the opinion of the court:

On October 16, 1908, the plaintiff's wife, who had an infant six days old, was suddenly taken worse. The plaintiff asked the defendant's agent at Nebo to send a message to Dr. Brookshire at Bridgewater, 6 miles away. It was a little after 9 o'clock

Note. — As to liability of telegraph company accepting message after closing hour of terminal office, see notes to *Sweet v. Postal Teleg. Cable Co.* 53 L.R.A. 732, and *Cates v. Western U. Teleg. Co.* 24 L.R.A. (N.S.) 1286.

As to duty to inform sender of telegram that terminal office is closed, see notes to *Swan v. Western U. Teleg. Co.* 67 L.R.A. 153, and *Western U. Teleg. Co. v. Harris*, 24 L.R.A. (N.S.) 1283.

As to duty of telegraph company to deliver message by telephone, see note to *Western U. Teleg. Co. v. Price*, 29 L.R.A. (N.S.) 836.

at night. The agent said that he would send it "if there was nothing the matter at the other end of the line." The message read as follows:

Dr. Brookshire,
Bridgewater, N. C.
Come at once. My wife very sick.
T. W. Carswell.

The plaintiff paid for the message. The message was received by the operator at Bridgewater, but was not delivered till 12 o'clock at night, when the plaintiff passing the station at Bridgewater, the operator came out and handed him the message, and asked him to deliver it to Dr. Brookshire. The plaintiff, getting no response from Bridgewater, assumed that all was right at that end, and that the message had been received by the operator there (as in fact it had been), and waited for two hours, trusting that the message had been delivered and the doctor would come. But the doctor not arriving, and his wife getting worse, about 11 o'clock he left his wife, who was in such agony that he expected her to die before he returned, and in this great anxiety and mental suffering, he got on his mule, and rode down to Bridgewater, where he found the doctor, who immediately returned with him. Dr. Brookshire testified that he was in his office that night from 8 o'clock till 12, when the plaintiff arrived, and would have gone promptly to the plaintiff's wife if he had received the message.

The defendant's operator at Bridgewater testified that he received the message about 9 o'clock, which was after office hours, and that he wired back to the operator at Nebo that he could not deliver it before 11 o'clock. There is no evidence that this message was communicated to the plaintiff. Or the contrary, when the plaintiff offered to testify as to what the operator at Nebo told him, the evidence was excluded on the objection of the defendant. The reasonable inference is that he would have testified that the information he received was that the operator at Bridgewater had wired back that he would deliver the message. The plaintiff's conduct corroborates this, for he testifies that he remained for two hours waiting for Dr. Brookshire, expecting him to come.

This case is "on all fours" with *Carter v. Western U. Tele. Co.* 141 N. C. 374, 54 S. E. 274, which holds that, while the telegraph company can fix reasonable office hours, yet, when the operator at the sending office received this message, he waived this regulation, and, when the operator at the receiving office took the message, he

also waived the office hours' regulation, and, if he could not deliver the message, he should promptly have so wired back. It is true that the operator at Bridgewater did testify that he so wired, but the burden was on the defendant to show that such service message was delivered to the plaintiff, or that without its negligence this could not be done. It is not shown that this service message (if it was sent) was delivered to the plaintiff, and, on the contrary, the plaintiff was not allowed, by reason of defendant's objection, to testify what the agent at Nebo told him; and his conduct shows that he must have been told that the message would be promptly delivered. The undisputed facts are that the company, through its operator at Nebo, undertook to send the message and received the plaintiff's money, that the operator at Bridgewater took the message, and that the plaintiff received no notice that the message would not be delivered promptly, as he had a right to expect. The tenor of the message put the defendant on notice that mental anguish would likely result to plaintiff if the message was unreasonably delayed, and his testimony is, and the jury so find, that he suffered great mental agony by the delay. The receiving office at Bridgewater held the message from 9 o'clock till 12, and shows no excuse for the delay in the opinion of the jury.

In *Cogdell v. Western U. Tele. Co.* 135 N. C. 436, 47 S. E. 492, the court said that "it is the duty of the telegraph company to promptly inform the sender of the message when, for any reason, it cannot be delivered,"—citing *Hendricks v. Western U. Tele. Co.* 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Laudie v. Western U. Tele. Co.* 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Bright v. Western U. Tele. Co.* 132 N. C. 324, 43 S. E. 841; *Hinson v. Postal Tele. Cable Co.* 132 N. C. 467, 43 S. E. 945, and *Bryan v. Western U. Tele. Co.* 133 N. C. 603, 45 S. E. 938, in all of which it has been so held. The same ruling has been made since in *Green v. Western U. Tele. Co.* 136 N. C. 507, 49 S. E. 171, 1 A. & E. Ann. Cas. 358, in *Carter v. Western U. Tele. Co.* 141 N. C. 378, 54 S. E. 274, and in other cases. In *Suttle v. Western U. Tele. Co.* 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593, the same doctrine is laid down; the court citing many cases holding that the telegraph company may waive its office hours, and does so if it receives the message at the sending office, and also at the receiving office, if no objection is communicated back to the sender. In *Cates v. Western U. Tele. Co.* 151 N. C. 497, 24 L.R.A. (N.S.) 1286, 66 S. E. 592; *Walker, J., cites and*

approves *Carter v. Western U. Teleg. Co.* 141 N. C. 378, 54 S. E. 274, and *Suttle v. Western U. Teleg. Co.* 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593, and pertinently says of the operator at the receiving office in *Carter's Case*: "His silence was calculated to mislead the sender, who could have procured the early attendance of her physician at her bedside by other means if she had known of the true situation. That decision was right, and is in perfect accord with our conclusion in this case." In the present case, if the defendant company had communicated to the plaintiff that it could not promptly deliver this message, the plaintiff would have gone at once to Bridgewater, without waiting two hours as he did, witnessing the agonies of his wife, and in constant expectation of the appearance of the physician. He testifies that his wife was much worse when he left at 11 o'clock, and that he despaired then of ever seeing her alive again.

There was ample evidence to submit the issues of negligence to the jury. The other exceptions are covered by repeated decisions of this court, and need no discussion. No error.

Walker, J., concurring:

I would have nothing to say in this case were it not for the suggestion that the opinion of the court is in conflict with something that was said in *Cates v. Western U. Teleg. Co.* 151 N. C. 497, 24 L.R.A.(N.S.) 1286, 66 S. E. 592. The two cases are in no respect alike, either in their facts or in the law applicable to them. They are as unlike, it seems to me, as they could possibly be. The words taken from *Cates's Case* were quoted from the opinion of the Chief Justice in *Carter v. Western U. Teleg. Co.* 141 N. C. 374, 54 S. E. 274, for the purpose of showing the difference between those two cases, and of correcting an erroneous impression as to what had been decided in *Carter's Case*. In *Cates's Case* the message was received for transmission at 8:25 o'clock P. M. at Haw River, and was sent "subject to delay;" the sender having been told that it could not be delivered that night unless the telegraph company and the railroad company had joint offices at High Point, which was not the case. The message was not received at High Point until the next morning, as the office of the defendant at that place had been closed for the night, and no connection with it could be made until 8 o'clock the next morning, when the message was received by the operator and delivered. We held that there was no liability on the part of the telegraph company if the message was not received at Haw River in time to

be transmitted to High Point and received there by the operator within reasonable office hours. The evidence was that the office at High Point had closed at 8 o'clock P. M. In *Carter's Case* the message was sent from Spout Springs and received by the operator at Sanford, and the negligence consisted in the fact that the latter received the message for delivery without objection, and left the sender to understand that his message would be delivered that night. In *Cates's Case* we referred to *Carter's Case* and said: "The two cases differ essentially, in this: That in this case the operator at High Point did not receive the message until 8 o'clock the next morning." There was no negligence in delivering the message after it was received at High Point. It is clearly stated in *Carter's Case* that in order to relieve the company from liability, either the operator at the initial point must refuse to accept the message if it is tendered for transmission after office hours, or, if he sends it, it must appear that the office at the other end had closed, it being after office hours,—which are reasonable,—or that the operator refused to receive it unless upon condition that it would not be delivered at night, but the next morning, of which fact the sender is duly notified. The quotation in *Cates's Case* from *Carter's Case* is followed immediately, in the latter case, by this language: "Had he done so" (that is, had he notified the sender that the message could not be delivered that night), the latter could have resorted to other means of notifying the doctor. The operator can accept a message after office hours to be sent conditionally, but it is not fair to the sender to keep him in ignorance of the facts, and the law requires that if it cannot be delivered, and especially if it is of an urgent nature, the sender should be informed, so that he may take other steps to notify the physician to whom it is sent and whose services are wanted. In this case the operator agreed "to send it if there was nothing the matter at the other end of the line." This meant, if the office had not closed at that end, or there was nothing to prevent the operator there from receiving it. If there was anything which prevented the operator there from either receiving it or delivering it that night, the sender should have been notified, and certainly when the urgency of the message is considered. "It is the duty of the company in all cases where it is practicable to do so to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se*, it is clearly evidence of negligence. In many instances, by such a course, the

damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company." *Hendricks v. Western U. Teleg. Co.* 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543. Applying that principle to this case, if the sender had been notified that the message could not be delivered, he could have communicated with Dr. Brookshire in some other way, as he afterwards did, and prevented the mental anxiety he suffered from the delay caused by the defendant's negligence in failing to notify him. The plaintiff had the right to suppose that his message had been delivered, if the defendant performed its duty; and it was negligence not to inform him of the true situation. *Shaw v. Western U. Teleg. Co.* 151 N. C. 638, 66 S. E. 668. There is evidence in this case from which it can reasonably be inferred that the sending operator was notified that the message had been received and would be delivered, though what he said to the sender was excluded by the court. I think there was sufficient evidence for the jury upon the question of negligence. Whether the period of the plaintiff's mental suffering was long or short cannot affect his right to recover, but only the quantum of damages, and this was a question for the jury.

The opinion of Dr. Brookshire as to the condition of the plaintiff's wife when he arrived at their home was relevant, and competent as corroborative and substantive testimony. The objection was based on the ground, I presume, that the plaintiff could not recover damages merely because his wife was ill. That is true, but the testimony was not offered for that purpose. It was relevant to prove that her condition was serious, if not critical, in order that the jury might infer therefrom that the plaintiff suffered mental anguish. It was this fact, coupled with the failure of the physician to come, that produced the mental suffering, and the doctor's testimony was therefore but evidence of one of the substantive facts to be established. It was also corroborative of the plaintiff's testimony as to his wife's dangerous condition when he left her. It was just because she was so ill that he wanted the doctor as soon as he could come, and, believing that he had been duly notified and not knowing why he did not come, was what caused his mental suffering. There cannot, I think, be any doubt as to the character in which 32 L.R.A. (N.S.)

the defendant's operator received the message at Bridgewater. He was acting as agent or operator for the defendant and the railroad company. The message was transmitted by the defendant's operator at Nebo, and the testimony of C. B. Patton, the operator at Bridgewater, shows that he was acting for the defendant. The defendant, in its prayers for instruction, assumes that he was so acting, and we find none which disputes his authority so to act. Such a point cannot be made on a motion to nonsuit when the evidence as to it was introduced by the defendant. We can consider only the evidence introduced by the plaintiff and so much of the defendant's as is favorable to him. The charge was clear and forceful, and stated to the jury the real questions presented in the case.

The pivotal question was, Did the agent at Nebo notify the plaintiff that the message would not be delivered that night? And this they answered against the defendant's contention.

Brown, J., dissenting:

The facts in this case, as testified to by the plaintiff, are that, his wife being quite ill, he desired to summon a physician from Bridgewater, 6 miles distant. It was past 9 o'clock, and the defendant's offices at Nebo, where plaintiff resided, and at Bridgewater, were both closed to business for the night. Plaintiff sought the Nebo operator at his residence, and aroused him out of his bed, and requested him to send the message. The operator agreed to do so, "if there was nothing the matter at the other end of the line." The message, offered in evidence by plaintiff, is stamped, "Received at Bridgewater 9:30 P. M." As the Western Union wires were closed for the night it appears in evidence that the message was sent over the railroad block wire, and received by the operator at Bridgewater while working for the railroad. It appears that the operator at Bridgewater, a village of about 100 inhabitants, worked for the Western Union Telegraph Company and the railroad company jointly during the day office hours, which closed at 8 P. M. After that the same operator worked the railroad block wire at night which governed the running of the trains. It belonged to the railroad, and no business messages were ever received over it. Upon receipt of the telegram in question, the operator at Bridgewater immediately informed operator at Nebo that he could not deliver the message until 11 P. M., as he was blocking trains for the railroad (a matter of vital importance), and there was nobody awake in Bridgewater by whom he could send it. The plaintiff testifies

that he waited at his residence until near 11 o'clock, and rode to Bridgewater for the physician, who reached his wife's bedside before 1 o'clock A. M., the same night.

1. The ground upon which the court bases its opinion is that the operator at Nebo should have at once notified the plaintiff that the message could not be delivered at Bridgewater until after 11 o'clock, so plaintiff could have started at once across country. I agreed to the opinion of the court in Carter's Case, which holds that, if for any reason a telegram cannot be delivered, it becomes the duty of the company to inform the sender so he can have opportunity to supply the deficiency. But that doctrine ought not to be applied here, because it must be admitted that there was no waiver of office hours and no unconditional acceptance of the telegram as in Carter's Case. The operator at Nebo accepted the plaintiff's telegram, and got up out of his bed to send it, upon condition that it could be promptly delivered, for that is what the language used means. This is not a waiver of the defendant's rights. The operator could have refused to accept the telegram, and, when accepted upon condition, the plaintiff is bound by the condition.

In Cates v. Western U. Teleg. Co. 151 N. C. 501, 24 L.R.A.(N.S.) 1286, 66 S. E. 592 (which, I think, is direct authority barring a recovery in this), Mr. Justice Walker, quoting from Carter's Case, says: "We need not discuss that in this case, for, conceding that 7 P. M. was a reasonable hour for closing the defendant's office at Spout Springs, it waived it, so far as sending the message was concerned, by actually sending this message and receiving pay therefor. This was, it is true, not a waiver as to the receiving office, but that office waived the closing hour limitation by receiving the message without demur. Had the operator at Sanford immediately replied that he could not undertake to deliver the message until next morning, and would consider it as not received, except on that condition, there would have been no contract to deliver. But the operator at Sanford did not make any objection to the receipt of the message at that hour, and says he did not make any effort to let the sending office know it would not be delivered." The very thing that the operator at Sanford failed to do the operator at Bridgewater did do, *viz.*, notify the Nebo office at once that he could not make delivery. This was in effect a refusal of the Bridgewater operator to receive the mes-

sage. Thus, according to Carter's Case, there was no waiver of office hours at Bridgewater. Now, if the Nebo office received the telegram only on condition, and the Bridgewater operator refused to waive office hours, how can plaintiff recover under the authority of Cates's Case, as well as Carter's?

2. I think upon the admitted facts that the telegraph company is not liable for the acts of the operator at Bridgewater. He was not the agent of the telegraph company after 8 P. M., and not acting for it. After that hour he worked exclusively for the railroad company or its block wire, and received plaintiff's telegram over the railroad's wire, and not over the defendant's. I know of no principle of law by which the telegraph company can be held responsible for the unauthorized act of a person not pretending to act for it and actually operating the wire of a railroad in operating its trains. So we have it that plaintiff's message was not sent over defendant's wire, and not received by its agent. How can the defendant be liable?

3. The court permitted the following evidence to be introduced. The witness was then asked the following question: "What condition did you find Mrs. Carswell in when you arrived? State the extent of her suffering, and whether it appeared to be great or small?" To these questions and answers thereto, the defendant objected. Objection overruled and the defendant excepted. "A. She was suffering from clots. She was suffering considerably." This action is not brought by the wife, but by the husband to recover damages for his alleged mental anguish in a brief delay in procuring a physician. According to plaintiff's own evidence he was delayed only one hour in starting for the doctor, and for this supposed one hour's anxiety he has been awarded \$300. It must be admitted that the evidence introduced had no relation whatever to plaintiff's cause of action, and it was well calculated to prejudice and excite the minds of the jury, and tended inevitably to aggravate the damages.

The wife's condition was not brought about by the negligence of the defendant, and the condition the doctor found her in is irrelevant entirely to the issues in this case, and the evidence should have been excluded.

It is not a case of "harmless error," as it was highly prejudicial to defendant.

Manning, J., concurs in this opinion.

IOWA SUPREME COURT.

CARL LUEDECKE

v.

DES MOINES CABINET COMPANY et
al., Impleaded, etc., Appts.

(140 Iowa, 223, 118 N. W. 456.)

Corporation — sale of assets — liability of purchaser.

1. To entitle the creditor of a corporation to a personal judgment against another corporation which purchases all the assets of the former, it must have agreed to assume the seller's debts, there must have been a consolidation of the two corporations, the purchasing company must have been a mere continuation of the seller, or the transaction must have been fraudulent in fact.

Note. — Effect of consolidation, merger, or absorption of corporation, on its unsecured liabilities, in absence of statutory or contract provision relative thereto.

For cases on the liability of a corporation formed by a firm, partnership, or association, for debts of the old concern, in the absence of express assumption or fraud, see note to *Byrne Hammer Dry Goods Co. v. Willis-Dunn Co.* 29 L.R.A. (N.S.) 589.

As to what unsecured claims are covered by the express assumption by one corporation of the indebtedness of another, upon consolidation, merger, or absorption, see note to *Billmyer Lumber Co. v. Merchants' Coal Co.* 26 L.R.A. (N.S.) 1101.

The question of the right of creditors of a corporation which has transferred all, or substantially all, of its assets to another corporation, to subject the assets so transferred to an equitable lien or preference, is discussed in a note to *Ex parte Savings Bank*, 5 L.R.A. (N.S.) 520.

The right of creditors of an insolvent corporation to maintain an action at law against a new corporation to which the assets have been transferred is discussed in a note to *Sharples Co. v. Harding Creamery Co.* 11 L.R.A. (N.S.) 863.

The liability of a successor of a railroad company for damages to abutting property from construction of road in street is discussed in a note to *Hannegan v. Denver & S. F. R. Co.* 16 L.R.A. (N.S.) 874.

The question under annotation formed the subject of a note to *Atlantic & B. R. Co. v. Johnson*, 11 L.R.A. (N.S.) 1119, to which the reader is directed for a review of the earlier cases, and the principles by which they are governed.

It was said in that note that the transactions whereby the interests of two or more corporations become identified are susceptible of arrangement in four general groups. The first of such groups comprehending con-

Same — bona fide purchaser.

2. A corporation which purchases the entire assets of another corporation, and issues therefor its own stock to the president of the latter individually, thereby enabling him to use it for his private ends, is not a bona fide purchaser so as to be able to protect the assets from the claims of creditors of the selling corporation, which were in suit when the transfer was made.

Same — right of creditor — pursuing assets.

3. A creditor of a corporation which transfers all of its assets to another corporation, in consideration for stock issued to its president individually, is not bound to pursue the stock in the hands of the president, rather than the assets in the hands of the purchaser.

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solidations proper, where all the constituent companies cease to exist, and a new one comes into being; the second, cases of merger proper, in which one of the corporate parties ceases to exist, while the other continues; the third comprehending cases where a new corporation is, either in law or in point of fact, the reincarnation of an old one; while to the fourth group belong those transactions whereby a corporation, although continuing to exist *de jure*, is in fact merged in another, which, by acquiring its assets and business, has left of the other only its corporate shell.

As these four general groups form the main subdivisions of the earlier note, the following recent cases have also been arranged in accordance therewith:

Liability of consolidated corporation.

A consolidated corporation is liable for the torts or debts of the constituent companies. *Palmer v. Chicago & A. R. Co.* 142 Mo. App. 633, 121 S. W. 1087; *Green v. Michigan United R. Co.* 159 Mich. 58, 123 N. W. 607.

And see *Swing v. Empire Lumber Co.* 105 Minn. 356, 117 N. W. 467, *infra*.

Liability of corporation into which another is merged.

It was apparently held in *Palmer v. Chicago & A. R. Co.* 142 Mo. App. 633, 121 S. W. 1087, that the situation would not be changed if it should appear that one of the old companies absorbed the other.

In *Walker v. Rome*, 6 Ga. App. 59, 64 S. E. 310, where one municipality annexed or absorbed another, and property and cash of the latter was transferred to the former, the court, after saying that the rule as to public corporations was not different from that as to private corporations, held that the absorbing municipality became liable for the payment of a small debt of the absorbed corporation.

APPPEAL by defendants Des Moines Cabinet Company et al. from a decree of the District Court for Polk County in plaintiff's favor in an action brought to recover the amount of a certain judgment, and to establish a lien to the amount thereof against certain property. Modified.

Statement by Deemer, J.:

This is a proceeding whereby plaintiff, a judgment creditor of a corporation known as the "Des Moines Cabinet Company," seeks to recover the amount thereof from the Wells & Antes Undertaking Company, and to establish a lien to the amount thereof against certain property conveyed by the cabinet company to the undertaking company. The trial court granted the relief prayed, and the defendants Wells and Antes Company and Des Moines Cabinet Company appeal.

Liability of successor corporation for claims against predecessor.

In *Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.* 78 N. J. L. 309, 73 Atl. 254, it was said in effect that there was ample authority to support the proposition that a new corporation which has taken over the assets of a former corporation for the purpose of carrying on its business, without apparent change in the *personnel* of the concern, is liable for the payment of the debts of the former concern.

In *Cooper v. Utah Light & R. Co.* 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202, it was held that a transaction whereby one corporation sells and transfers all its property and franchises, except the franchise to be a corporation, to another corporation, and whereby the proceeds or consideration of the sale are distributed to the stockholders of the selling corporation, is fraudulent as to creditors of the selling corporation, especially where, as in this case, the purchasing corporation was organized to acquire all the property and franchises of the selling corporation, and took possession of them and continued to prosecute the business, and some of the principal officers of the selling corporation continued to be such officers of the purchasing corporation.

In *J. I. Kelley Co. v. Pollock & Bernheimer*, 57 Fla. 459, 131 Am. St. Rep. 1101, 49 So. 934, where in an effort to hold a succeeding company liable, a judgment creditor of a lumber company in effect alleged that such company had conveyed all its property to another company (which in fact had been but recently organized); that the buying company was not an innocent purchaser for value; that besides the assumption of a mortgage debt, no consideration was paid the selling company save the issuance of shares of stock in the buying company to individual stockholders and directors of the former; and that it was the express understanding and agreement at the time of the conveyance that all the indebtedness of the selling company would be paid

Mr. Clinton L. Nourse, for appellant:

A fraudulent purpose on the part of the grantor alone is not sufficient to avoid a conveyance,—a like fraudulent purpose must be shown upon the part of the grantee, and unless shown, the conveyance will be upheld.

Fifield v. Gaston, 12 Iowa, 218; *Steele v. Ward*, 25 Iowa, 535; *Kellogg v. Aherin*, 48 Iowa, 299; *Preston v. Turner*, 36 Iowa, 671; *Jones v. Hetherington*, 45 Iowa, 681; *Spaulding v. Adams*, 63 Iowa, 437, 19 N. W. 341.

A corporation organized under the law of Iowa, where there is no restriction to the contrary, has a right to sell all of its property to another corporation.

Traer v. Lucas Prospecting Co. 124 Iowa, 107, 99 N. W. 290; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407.

To render the purchaser corporation lia-

by the buying company,—the court said: "Even if the contention of the appellant be conceded that the allegations of the bill concerning the agreement by the appellant for the payment of the indebtedness of the appellees are so vaguely, ambiguously, and uncertainly stated, as not to sufficiently charge the appellant, we do not see that the situation is materially changed, or that the bill is rendered demurrable thereby."

But where the transaction is no more than a sale of the business and assets of the old corporation to a new corporation, the mere fact that the latter was organized with a view to succeeding to the business of the former will not render it liable. See cases in the following subdivision, especially *Swing v. Empire Lumber Co.* 105 Minn. 356, 117 N. W. 467, and *Ferguson & W. Land, Lumber & Handle Co. v. Good*, — Ark. —, 133 S. W. 183.

Liability of corporation purchasing assets and business of another.

As remarked in the earlier note before referred to, the transfer of the assets of one corporation to another may amount to a merger in fact, although the corporate existence of the transferrer corporation continues. In such case, equity looks past the form and at the real effect of the transaction, and, by an application of the trust-fund doctrine, holds the transferee liable to the extent of the assets received, as in such case it is not a bona fide purchaser for value. The cases of this group are therefore closely related to those of the third group, immediately preceding them, which should also be examined in this connection.

In *Spear Min. Co. v. T. J. Shinn & Co.* 93 Ark. 346, 124 S. W. 1045, it was said *obiter*: "The mere transfer of the assets of one corporation to another does not constitute a legal identity between them, and, if one corporation becomes the bona fide owner in a lawful mode of the assets or of any property of another corporation, it does not

ble for the debts of the seller corporation, there should be either: (a) An agreement to assume such debts; or (b) the circumstances attending the transaction must warrant the finding that there was a consolidation of the two corporations; or (c) that the purchaser corporation was a mere continuance of the seller corporation; or (d) that the transaction was fraudulent.

Baker Furniture Co. v. Hall, 76 Neb. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; *Sharples Co. v. Harding Creamery Co.* 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Warfield, H. & Co. v. Marshall County Canning Co.* 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *Chase v. Michigan Teleph. Co.* 121 Mich. 631, 80 N. W. 717; *Capital Traction Co. v. Offutt*, 17 App. D. C. 292, 53 L.R.A. 395.

Mr. J. D. Wallingford also for appellants.

Mr. George Wambach, for appellee:

Upon the dissolution of a corporation, all its property, both real and personal, is subject to the payment of its debts.

Cook, Stock & Stockholders, 3d ed. § 641; *Thomp. Corp.* § 6543; *State Trust Co. v. Turner*, 111 Iowa, 664, 53 L.R.A. 136, 82 N. W. 1029; *Beach, Corp.* § 116.

Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation.

Brum v. Merchants' Mut. Ins. Co. 4 Woods, 156, 16 Fed. 140; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* 4 McCrary, 432, 13 Fed. 516; *Thomp. Corp.* § 6547; *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413; *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Vance v. McNabb Coal & Coke Co.* 92 Tenn. 47, 20 S.

thereby become liable for the debts of the latter corporation."

In *Whiting v. Malden & M. R. Co.* 202 Mass. 298, 132 Am. St. Rep. 493, 88 N. E. 907, it was said: "It is very plain that, in the absence of a statutory provision on the subject, the acquisition of all the stock, property, and assets of a corporation, by an individual or by another corporation, does not of itself make the new holder liable to pay the debts of the corporation. A mere purchase of such capital stock and assets is a taking of a title, which leaves unsecured creditors with no claim against the purchaser, and with no means of collecting their debts except from the corporation itself."

So, in *E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.* 95 C. C. A. 436, 170 Fed. 240, where it was sought to hold a railroad company liable for breach of contract to deliver cars by a company whose interests the former had acquired, it was said: "No cases are cited, and we know of none, which support the proposition that a suit is maintainable at law against a successor corporation, through lease or purchase, for recovery of damages on account of a prior default of the original contracting corporation, without proof either of an express assumption of liability by the successor corporation, or that the possession of the assets of such corporation was obtained by virtue of some relation by which liability for the prior obligations of such corporation is imposed by statute. On the contrary, the authorities are express that neither a lessee nor a purchaser becomes liable for the prior debts or obligations of the lessor or vendor, in the absence of either express contract or statutory provision therefor."

In *Louisville & N. R. Co. v. Hughes*, 134 Ga. 75, 67 S. E. 542, it is said in the first headnote, written by the court: "Where 32 L.R.A.(N.S.)

one corporation conveys its property to another, this alone does not destroy the corporate existence of the grantor, or constitute a merger of the two corporations, or render the grantee subject to an action for damages for a tort previously committed by the grantor. The grantor is still subject to suit; and if liable, the question of seeking to subject property to such liability on a judgment rendered thereon is different from suing the grantee directly for the tort." To the same effect is *White v. Atlanta, B. & A. R. Co.* 5 Ga. App. 308, 63 S. E. 234, where it was sought to hold the buying company liable for a tort of the selling company.

In *Swing v. Empire Lumber Co.* 105 Minn. 356, 117 N. W. 467, it was held that allegations that a Minnesota corporation acquired the property and assets of a Wisconsin corporation, and paid for the same by the issuance of its stock, that after the sale of its assets the Wisconsin corporation ceased to transact business as a going concern, and that ever since such purchase the Minnesota corporation has been carrying on the same business formerly carried on by the Wisconsin corporation, failed to state a consolidation or merger of the two companies, and the purchasing company therefore could not be held liable for a certain amount claimed to be due as an assessment upon policies of insurance held by the retiring company, the court said: "We are of opinion that, if the facts stated in the complaint are treated as amounting to a sale of the assets, then the purchasing company did not become liable for the debts of the Wisconsin company. The fact that the selling company was in debt did not prevent it from selling its property, and to a corporation composed of the same stockholders. No such obligation followed from the mere fact of purchase. Nor are the facts sufficient to

W. 424; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

Deemer, J., delivered the opinion of the court:

Plaintiff recovered judgment against the Des Moines Cabinet Company December 31, 1900, in the sum of \$325 for breach of a contract of employment. The cabinet company was a corporation organized under the laws of this state, and at all times material to our inquiry the entire stock of the corporation was owned by defendant Hartung. On the 15th day of August, 1900, and after plaintiff had commenced his suit against the cabinet company, Hartung, as president of that company, sold and transferred to the Wells & Antes Undertaking Company, also an Iowa corporation, all the assets of the cabinet company, the consideration named being \$3,500. Instead of cash Hartung individually received thirty-five shares of the stock of the undertaking company, which he immediately hypothecated for his private account. Plaintiff,

after obtaining his judgment, caused execution to issue against the cabinet company, which was returned no property found. He thereupon brought this suit in equity, alleging that when the undertaking company purchased the property, it knew of plaintiff's claim, and with intent to hinder, delay, and defraud him, it took possession of all the assets of the cabinet company, and converted the same to its own use, without other consideration than the issuance of its own stock in payment therefor; that, by reason of the transfer, the undertaking company became possessed of all of the assets of the cabinet company, leaving nothing for the payment of its debts.

Upon the trial plaintiff withdrew all charges of fraud and deceit, "except such fraud as may arise from the transaction between the parties at law." As we understand it, plaintiff relies upon a single proposition in this case, and this is that, where one corporation transfers all its assets to another corporation, and thus practically

warrant the inference of fraud. Presumably, the stock of the Minnesota company was issued at its par value in consideration of property of full value, and fraud will not be presumed from the mere fact that the Minnesota company was composed of nearly the same stockholders. The facts pleaded, therefore, do not come within either one of the four heads referred to by the trial court: (1) There is no consolidation; (2) there is no promise, express or implied, by the purchasing corporation to assume the obligations of the old company; (3) it does not appear that the Minnesota corporation is a mere continuation of the Wisconsin corporation; and (4) there are no facts from which it may be inferred that the transfer was of a fraudulent character."

And in *Irvine v. New York Edison Co.* 128 N. Y. Supp. 297, it also seems to have been recognized that a corporation to which all the property, including the franchise, of another corporation, is assigned, is not, in the absence of proof that full value was not paid, or of an agreement to the contrary, liable for the debts or obligations of the selling corporation.

That a corporation evidently organized for the purpose of taking over the property and assets of another corporation, in the absence of a statute or a contract, cannot be held liable for a tort for which the original company was liable, seems to be recognized in *Ferguson & W. Land, Lumber & Handle Co. v. Good*, — Ark. —, 133 S. W. 183, where the court evidently considered the transaction merely one of purchase and sale.

Where a person performs services for two companies of the same name, one called by witnesses the "old company" and the other the "new company," the latter having in fact been incorporated under a different name prior to the date of the former, such 32 L.R.A. (N.S.)

new company, in the absence of the express assumption of the debts of the old company, is not liable for the services performed for it. *Herndon v. Germania Mut. Sav. Soc.* 146 Ill. App. 401.

But in *Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co.* 239 Ill. 600, 88 N. E. 236, it was held that where, by a series of shady transactions, a coal company, with assets to meet all its liabilities, was absorbed by another company, so that the former had no assets and had ceased to do business, a court of equity will not permit the absorbing company and its principal stockholders, who were its officers, and who negotiated the transactions, to evade payments of the obligations of the absorbed company, and thus escape liability for the failure of such company to deliver coal according to contract.

In *Altoona v. Richardson Gas & Oil Co.* 81 Kan. 717, 26 L.R.A. (N.S.) 651, 106 Pac. 1025, the court, in holding a succeeding gas company liable to a city for fees due it from the franchised company, based its decision upon the general ground that where one corporation becomes practically extinct, transferring all its assets to another, and receiving in return stock in the other corporation, which succeeds to its business, the new corporation is liable to the extent of the value of the property acquired, for the debts of the old one. The court in this case said: "Such arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

That a purchasing company is liable for debts of the selling company, when it so deals with the property and assets of the latter as to amount to a fraud upon the creditors, was also recognized in *Boyd v. Northern P. R. Co.* 170 Fed. 779, affirmed in 101 C. C. A. 18, 177 Fed. 804.

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ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and this without reference to the question of actual fraud. If the affirmative of this proposition be held, it must be upon the theory that the assets of a corporation are in the nature of a trust fund for the payment of its debts, and that a sale of the entire property works a dissolution of the selling corporation, and justifies an accounting at the suit of creditors. Plaintiff also claims that under the facts disclosed by this record, he became entitled to a judgment against the undertaking company and its successor in interest for the amount of the judgment he obtained against the cabinet company. The trial court was evidently of this opinion, for it rendered judgment against all the defendants personally, and also established a lien to the amount of the judgment against the property of the cabinet company sold by Hartung to the undertaking company, and directed its sale under special execution. Appellants challenge that part of the decree rendering personal judgment against the undertaking company, the successor to the assets of the cabinet company, and we are constrained to sustain them in this position. In order to render the purchasing company personally liable for the debts of the selling corporation, it must appear that (a) there be an agreement to assume such debt; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact. *Baker Furniture Co. v. Hall*, 76 Neb. 88, 107 N. W. 117, 111 N. W. 130, 113 N. W. 267; *Sharples Co. v. Harding Creamery Co.* 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; *Allen v. North Des Moines M. E. Church*, 127 Iowa, 96, 62 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 810, 4 A. & E. Ann. Cas. 257; *Chase v. Michigan Teleph. Co.* 121 Mich. 631, 80 N. W. 717; *Ewing v. Composite Brake Shoe Co.* 169 Mass. 72, 47 N. E. 241, and other like cases. None of these things appear in this case, and in our opinion the court was in error in rendering a personal judgment against the purchasing corporation.

Little is said specifically of that part of the decree which establishes plaintiff's judgment against the cabinet company as a lien upon the property purchased by the undertaking company, although we assume that appellants' counsel are adopting the same theories with reference thereto that

they urge against the personal judgment. The cases they cite do not go to this extent, however, although there are some which sustain the proposition that the purchasing corporation takes the property free from all debts or claims against the selling one. A great many authorities in this country hold to the doctrine that, if one corporation transfers all its assets to another, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. Some courts announce a modified doctrine declaring that the principle has no application to a sale made in the usual course of business, nor to a bona fide sale for a full consideration in cash or its equivalent. Although announcing in general terms the first proposition, we are probably committed to the modified one in *Warfield v. Marshall Canning Co.* 72 Iowa, 606, 2 Am. St. Rep. 263, 34 N. W. 467. It has been broadly asserted by courts of the highest standing that the capital stock of a corporation is a fund for the payment of its debts. "It is a trust fund of which the directors are the trustees. . . . The capital [stock] paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away." *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203. This modern or so-called American doctrine has never been recognized in England, nor does it exist at common law; and, while at one time quite generally adopted in this country, it is now believed to be unsupported to its full extent by any considerable number of courts. Indeed the court which first announced it has largely receded from its former position, and now says that no trust in its true sense exists; that all that was intended by the previous expressions was to announce the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, has taken possession of its assets. "It is never understood that there is a specific lien or a direct trust." See *Hollins v. Briarfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

We have recently gone over this matter in the case of *State Trust Co. v. Turner*, 111 Iowa, 664, 53 L.R.A. 136, 82 N. W. 1029, and have repudiated the trust-fund doctrine as broadly announced in some of the earlier cases in this country. The creditors of a corporation in a proper case have an equitable right or lien upon the assets of a corporation. But a corporation, like a partnership, may transfer its property in good faith to a bona fide purchaser, and such purchaser will hold it free from the

debts of the corporation. The statutes of this state, however, prohibit the diversion of corporate funds to other objects than those mentioned in its articles (Code, § 1621), and it is a well-settled rule of the common law that the stockholders of a corporation cannot divide its property or assets among themselves without first paying the corporate debts. The rules thus announced have been stated very clearly in *Melver v. Young Hardware Co.* 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L.R.A. 707, 54 Am. St. Rep. 31, 17 So. 525; *Hospes v. Northwestern Mfg. & Car. Co.* 48 Minn. 174, 15 L.R.A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; *Cole v. Millerton Iron Co.* 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; *Bartlett v. Drew*, 57 N. Y. 587; *Morawetz, Priv. Corp.* § 791. The instant case seems to call for a rather full discussion of the so-called "trust-fund" doctrine, and we have perhaps said enough to indicate our view of the matter. We may conclude this branch of the inquiry by quoting the following terse statement from Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 409, 19 L. ed. 120: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser." See also *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Vance v. McNabb Coal & Coke Co.* 92 Tenn. 47, 20 S. W. 424.

Going now to the facts of the case, it will be observed that the exact point for decision is a narrow one. Plaintiff was a creditor of the Des Moines Cabinet Company, holding an unliquidated demand against it, which was in suit when the cabinet company sold its assets to the undertaking company. The undertaking company acquired practically all of the assets of the cabinet company by purchase, and it issued in payment therefor certain of its shares of stock, not to the cabinet company for proper distribution, but to Hartung individually, who immediately pledged the same as security for his individual debts, leaving nothing from which plaintiff could collect his judgment, which he obtained in due course. The charge of actual fraud—that is, of intent to hinder, delay, and defraud plaintiff in the collection of his claim—has been withdrawn, and reliance is placed upon the general doctrine that plaintiff, under this brief recitation of the facts, is entitled in equity to enforce his judgment against the property of the cabinet company, which

was received, and is still held, by the undertaking company, on the theory that he has an equitable lien upon this property, or that the facts show a case of legal fraud entitling him to proceed against the property. We do not recognize the trust-fund doctrine to the extent that it has obtained in some of the courts; but are of opinion that corporate creditors are entitled in equity to the payment of their debts before any distribution of corporate property is made among the stockholders, and recognize the right of a creditor of a corporation to follow its assets or property into the hands of anyone who is not a good-faith holder in the ordinary course of business.

We must also enforce our statute which prohibits the diversion of corporate funds and the payment of dividends not earned. So that, in its last analysis, the question here is, Is the undertaking company and its successor in interest such a bona fide purchaser as that it may hold the assets of the cabinet company free from the debts of that corporation? The answer to this must be in the negative, and for these among other reasons: It issued to Hartung individually whatever of consideration it paid for the assets of the cabinet company, knowing before it finally issued its stock that it was being used by Hartung for his own private ends. It did not buy the property in the usual course of business. On the contrary, it took it over, and issued its own stock in payment therefor, which did not go to the corporation from which it purchased. That it did not take the property free from liability for corporate debts under such circumstances is held by practically all of the cases which we have been able to find, or which have been cited by counsel. In *Thompson on Corporations*, vol. 5, § 6547, it is said: "Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. . . . And while the right to follow a trust fund into the hands of a third party depends upon the answer to the inquiry whether such third party took it with knowledge of the trust, the case being one where the trustee who transferred it to him had a power of disposition, yet in such a case as we are supposing, where one corporation transfers all its assets to another, not in the ordinary course of business, the very circumstances of the case imply full knowledge, on the part of the transferee, of all the facts necessary to charge the property in his hands with the debts of the transferor, and the case is

still clearer where the corporation receiving the transfer agrees to assume and pay the debts of the corporation making it, in which case, under the principles of equity, and under the modern Codes of Procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the contract, as a contract made for their benefit." See also Cook, Corp. 3d ed. §§ 669, 670; Ex parte Savings Bank, 5 L.R.A. (N. S.) 520, and note (73 S. C. 393, 53 S. E. 614); Allen v. North Des Moines M. E. Church, 127 Iowa, 96, 62 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 810, 4 A. & E. Ann. Cas. 257; McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Couse v. Columbia Powder Mfg. Co. (N. J. Eq.) 33 Atl. 297; Owen v. Arvis, 26 N. J. L. 22; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.) 4 McCrary, 432, 13 Fed. 516; Hurd v. New York & C. Steam Laundry Co. 167 N. Y. 89, 60 N. E. 327; Cole v. Millerton Iron Co. 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; Grenell v. Detroit Gas Co. 112 Mich. 70, 70 N. W. 413; Berry v. Kansas City, Ft. S. & M. R. Co. 52 Kan. 774, 39 Am. St. Rep. 381, 36 Pac. 724; Vance v. McNabb Coal & Coke Co. 92 Tenn. 47, 20 S. W. 424. The theory under which these cases proceed is that the purchasing corporation is not a good-faith buyer for value, in that the transaction is an unusual one; and the purchasing company is held to acknowledge that the property it buys is subject to the payment of corporate debts, and the buyer is not a bona fide purchaser for value. See also Rogers v. New York & T. Land Co. 134 N. Y. 197, 32 N. E. 27. There are a very few cases which hold to a contrary doctrine, as, for example, O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 28 L.R.A. 707, 54 Am. St. Rep. 31, 17 So. 525.

For appellants it is argued that the plaintiff should have followed the stock received by Hartung. That proposition is very satisfactorily answered in Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 4 McCrary, 432, 13 Fed. 516, where it is said that a creditor in such cases is not required to run the chances of following and recovering the value of the shares of the stock after they are placed upon the market. In McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169, this proposition is fully considered and determined adversely to appellants' contention. On account of the importance of the questions presented, we have given the case careful consideration, and have come to the conclusion that, while there is no personal

liability on the part of the undertaking company as successor in interest, to the plaintiff, yet it holds the property received from the cabinet company subject to the payment of plaintiff's claim, and that the trial court was right in establishing a lien against it, and ordering a sale on special execution. The decree must be modified to the extent indicated; but, as this is of no material benefit to the defendant, as the property is worth very much more than plaintiff's claim, we think that the modification should be without cost to appellee.

The decree will be modified, and as so modified will stand.

Modified and affirmed.

NEBRASKA SUPREME COURT.

RE METZ BROTHERS BREWING COMPANY.

J. M. LEIDY, Appt.,
v.

METZ BROTHERS BREWING COMPANY.

(— Neb. —, 129 N. W. 443.)

Intoxicating liquors — retail by manufacturer.

1. A manufacturer of beer who sells his product to unlicensed consumers for their use "sells at retail" within the meaning of chapter 82, Neb. Laws 1907.

Same — refusal of license.

2. A manufacturer of beer who sells his product at retail is guilty of selling beer without a license, and, that fact being made to appear, an excise board should not issue a license to him in the year next succeeding the commission of that offense.

(Barnes, Fawcett, and Sedgwick, JJ., dissent.)

(January 9, 1911.)

Headnotes by REESE, Ch. J.

Note. — *Intoxicating liquors: what amounts to retail sale as distinguished from wholesale.*

The cases lay down four distinct rules for determining what, in the absence of express statutory definition, constitutes a wholesale, as distinguished from a retail, sale of liquor. Perhaps the most generally accepted rule is that the answer depends on the quantity sold, and that to retail is to sell in small quantities. Other courts have based the distinction upon the "usual course of trade" doctrine; others have accepted the "original package" theory; while still others make the purpose of the purchase, that is, whether the purchased liquor is for consumption or for resale, the criterion. In

APPEAL by remonstrant from a judgment of the District Court for Douglas County in applicant's favor in the matter of his application for a license to sell intoxicating liquor. Reversed.

The facts are stated in the opinion.

Mr. L. D. Holmes, for appellant:

Applicant was engaged in selling at retail.

Webb v. Baird, 11 Lea, 667; State v. Lowenhaught, 11 Lea, 13; Kaufmann v. Hillsboro, 45 Ohio St. 700, 17 N. E. 557; Gorsuth v. Butterfield, 2 Wis. 237; Rohrer v. Hastings Brewing Co. 83 Neb. 111, 19 N. W. 27, 17 A. & E. Ann. Cas. 998.

Where a brewing company under a wholesale license sells beer at retail, it is not entitled to have or receive a license for

the ensuing year, if protest is made against granting such license.

Rohrer v. Hastings Brewing Co. 83 Neb. 111, 19 N. W. 27, 17 A. & E. Ann. Cas. 998; People v. Greiser, 67 Mich. 490, 35 N. W. 87; Lewis's Sutherland, Stat. Constr. 2d ed. § 448; Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 55 L.R.A. 610, 82 N. W. 28.

Delivery of beer at a place different from that named in the license makes appellee guilty of selling without a license at the place where the delivery is made.

State v. Fullman, — Del. —, 74 Atl. 1; Dillman v. People, 4 N. Y. Week. Dig. 251; Banchor v. Warren, 33 N. H. 183; State v. Goss, 59 Vt. 266, 59 Am. Rep. 706, 9 Atl. 829; Com. v. Whalen, 16 Gray, 25;

many jurisdictions both "wholesale" and "retail," as those terms are applied to sales of intoxicating liquors, are defined by statute or ordinance; but as a compilation of such statutes or ordinances would be of little, if any, value, because of the fact that they are constantly being changed, and that they are of interest only in the locality in which they are in force, the pertinent adjudications only are discussed herein.

"Quantity sold" rule.

In Com. v. Greenwood, 205 Mass. 124, 91 N. E. 141, 18 A. & E. Ann. Cas. 185, in construing the word "wholesale" as used in a statute providing that the prohibition against the sale of intoxicating liquors shall not apply to "sales of cider at wholesale by the original makers thereof," and holding erroneous an instruction to the effect that a sale made to a purchaser for his own consumption, and not to sell again, is a sale at retail, whether it is made in quantity of 1 gallon or more, and that the sale at wholesale is a sale made to one who has the real, or at least the apparent, purpose to sell again to his own customers, the court said: "Nor do we consider that there is any peculiar sanctity in the quantity of 1 gallon.

... The jury should have been instructed that, in determining the question of fact whether the sales made by the defendant were sales at wholesale, besides considering the other points to which their attention was called by the trial judge, they should bear in mind that sales at retail are sales made in small quantities, such as are adapted to the wants of individual purchasers, while sales at wholesale are sales made in large quantities, such as ordinarily would be beyond the needs or desires of ordinary consumers. We do not mean to say that the apparent purpose with which purchases are made would not be an important circumstance in this connection. It might be the case that one who bought for the purpose of selling again would desire to buy a larger quantity than one who was purchasing for his own consumption; and the attention of the jury properly might be called to this, as 32 L.R.A. (N.S.)

well as to all the other circumstances of whatever sales might be in evidence; but the decisive point is the quantity sold rather than the purpose of the purchaser." It will be noted that the rule adopted in LEIDY v. METZ BROS. BREWING CO. is held not to be the true rule of distinction between wholesale and retail sales of liquor.

In Com. v. Poulin, 187 Mass. 568, 73 N. E. 655, the court, in discussing the word "wholesale" as used in the statute providing that certain provisions of the liquor law shall not apply to sales of wine at wholesale by the original makers, and not to be drunk on the premises, said: "The defendant contends that the sale of a quart of native wine is not prima facie a sale by retail, and that it was a question for the jury, under proper instructions, whether the sale was by wholesale or by retail. It seems to us, however, clear that the construction of the statute was a question of law for the court, and not one for the jury. . . . While the statute before us does not define the words 'at wholesale,' these words are used in opposition to the words 'at retail,' and mean in large quantities. A sale of a quart of native wine cannot be said to be a sale at wholesale."

And in the following cases, it has been remarked *obiter* that to retail is to sell in small quantities: Com. v. Kimball, 7 Met. 304; State v. Cassety, 1 Rich. L. 90; Koenig v. State, 33 Tex. Crim. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835; and in Markle v. Akron, 14 Ohio, 586, that "to retail is to dispose of in small quantities;" and in State v. Hawkins, 91 N. C. 626, that "to retail means, generally, to sell by small quantities, in broken parts, in small lots or parcels, not in bulk;" and in State v. Kirkham, 23 N. C. (1 Ired. L.) 384, that "to retail, in its ordinary sense, means to sell by small quantities or in several parts;" and in Bridges v. State, 37 Ark. 224, that "to sell by small parcels or quantities, and not in the gross, is to retail;" and in State v. Mooty, 3 Hill, L. 187, that "to retail spirituous liquor means to vend liquors in small quantity for gain."

And in Harris v. Livingston, 28 Ala. 577,

Harding v. State, 65 Neb. 238, 91 N. W. 194; Bescher v. State, 32 Ind. 480; Com. v. Abrams, 150 Mass. 393, 23 N. E. 53; Mason v. Lothrop, 7 Gray, 355; Paschal v. State, 84 Ga. 326, 10 S. E. 821; State v. Prettyman, 3 Harr. (Del.) 570; State v. Hughes, 24 Mo. 147; State v. Walker, 16 Me. 241; Zinner v. Com. 2 Monaghan (Pa.) 471, 14 Atl. 431; Wason v. Severance, 2 N. H. 501; State v. Fredericks, 16 Mo. 382.

Messrs. Elmer E. Thomas and W. R. Patrick also for appellant.

Mr. Myron L. Learned, for appellee:

The burden is upon the remonstrator to establish a violation within a year of any provisions of the liquor law.

Lambert v. Stevens, 29 Neb. 283, 45 N. W. 457.

Messrs. John C. Cowlin and John P. Breen, *amicæ curiæ*.

Reese, Ch. J., delivered the opinion of the court:

In December, 1909, Metz Brothers Brewing Company, a corporation, applied to the

in holding a municipal ordinance enacted pursuant to charter authority, to control the retailing of spirituous liquors, which prohibited under a penalty, the sale of spirituous liquors in less quantities than 20 gallons without a license, void, the court said: "Is every sale in quantity less than 20 gallons necessarily a sale by retail? Lexicographers place the word 'retail' as the opposite of wholesale; and if we should consult them alone, we would be left in much uncertainty on this point. Our own long-continued legislation on this subject furnishes the best exposition of the intention of the legislature. Thus defined, the business of retailing, and the keeping of a tipping house, are substantially one and the same occupation. To sell at retail is to sell in small quantities. The general prohibition against unlicensed vendors is that they shall not sell in quantities less than 1 quart. There are also qualified limitations on the right to sell in quantities of a quart and upwards. We hold that the legislature, in the act of incorporation, when they employed the terms 'retailer' and 'retailing,' must be presumed to have had reference to our general policy in relation to the sale of ardent spirits. The ordinance in question goes beyond that boundary, and is unauthorized and inoperative."

In Roberson v. Lambertville, 38 N. J. L. 69, in construing a municipal charter giving power "to license wholesale dealers," and to license inns and taverns, the court said: "It is argued on behalf of the prosecutor that a wholesale dealer is one who sells in large packages, and that therefore the city cannot exercise any restraint over those who sell by the quart. The word 'wholesale' is used in contradistinction to 32 L.R.A. (N.S.)

board of fire and police commissioners of the city of Omaha for license to sell at wholesale malt, spirituous, and vinous liquors during the license year commencing January 1, 1910. A remonstrance was filed alleging among other things that the applicant had sold malt liquors, to wit, beer, at retail during 1909. The board overruled the remonstrance and granted the license. An appeal was prosecuted forthwith to the district court of Douglas county, and the judge presiding held that the applicant had been guilty of selling beer at retail as charged by the remonstrant, but that the "Slocumb law" did not apply to such conduct, and the ruling of the board was confirmed. The remonstrant has appealed to this court.

The only witness produced before the board was Mr. Charles Metz, president of the corporation. His testimony is frank and unequivocal. It appears that in 1864, Metz & Brother, a partnership, were engaged in brewing beer in Omaha, and continued until the formation of the plaintiff corporation in 1894, and from the last-

the word 'retail.' The latter word has been used with a fixed and definite meaning in legislation upon this subject. In the 12th, the 24th, and 39th sections of the act concerning inns and taverns, the retail of spirituous liquors is the sale by less quantity than 1 quart, and it is nowhere used in this act in any other than this restricted sense. Giving it this meaning, it must be presumed that the legislature intended to include by the word 'wholesale' all sales which are not by retail,—that is, by less quantity than 1 quart."

"Usual course of trade" rule.

The question as to whether a given transaction is wholesale or retail has also been held to be a question of fact to be determined in each case by the qualification made by dealers themselves, or, in other words, it is the usual course of trade which determines the answer.

Thus, in Engle v. Com. 7 Ky. L. Rep. 830, where the proof was to the effect that the defendant, as agent for a brewery firm, sold a box of lager beer containing twelve quart bottles in an unbroken package, just as it was put up at the brewery, and that such sale was considered by the trade itself as a wholesale transaction in beer, it was held that the sale was at wholesale.

And in Pence v. Com. 5 Ky. L. Rep. 608, 6 Ky. L. Rep. 113, in laying down the rule that it is the usual course of trade which determines the question, the court said: "In the absence of a statute giving a legal definition to the word 'wholesale' with regard to a particular commodity, it is a question of fact whether, according to the usual course of trade in that commodity, a given transaction is to be regarded as at

named date until the present time said business had been conducted by the corporation. In 1909, the corporation was licensed to sell at wholesale intoxicating and malt liquors. During all of that year the licensee sold large quantities of beer to consumers; all of the liquor thus sold was placed in quart or pint bottles, which were sealed and thereafter packed in cases containing two dozen bottles. The boxes were securely fastened, and purchasers were not permitted to open a case or drink beer while upon the applicant's premises. The applicant and its predecessor in business sold beer to consumers in like manner for fifteen years last past. The applicant does not solicit orders, but fills them, whether received directly from purchasers or through the agency of the mail or telephone, and the greater part of case beer is sold direct to consumers. No discrimination is made in the price per case charged for beer between the smallest and largest order received. Before applicant's license was issued in 1909, the attorney for the board of fire and police commissioners prepared

a written opinion advising the board that a brewer could not lawfully sell beer according to the course of business pursued by the applicant, and Metz Brothers, Brewing Company were given, or procured, a copy of that opinion. Counsel for the respective parties present the case in a double aspect. The applicant's counsel contends that the learned district judge erred in holding that Metz Brothers Brewing Company sold any beer at retail within the meaning of the "Gibson law," but that in any event a violation of that act should not disqualify a manufacturer from receiving a license to manufacture beer and to sell it at wholesale. The remonstrant's counsel argue that the district judge's finding is correct, but his conclusion is unsound.

The traffic in intoxicating liquors is subject to such restraints and regulations as the legislature may prescribe. *State ex rel. Hahn v. Hardy*, 7 Neb. 377; *Hunzinger v. State*, 39 Neb. 653, 58 N. W. 194; *Re Phillips*, 82 Neb. 45, 17 L.R.A. (N.S.) 1001, 116 N. W. 950. Prior legislative enact-

wholesale or retail. These are relative terms. Etymologically considered, it might be said that the sale of a thing as prepared and put up by the manufacturer, to be sold as put up, without subtraction, is a wholesale transaction, but if only a part of the thing is sold, if there is (as the word "retail" implies) a cutting or severing of the thing as put up, the sale is a retail transaction. It is, however, a very hazardous rule to interpret legislative language by reference to the obscure etymology of words. In its active life, business loses sight of philological proprieties. It divides things by the rule of utility, and seizes on apt words to designate the divisions. But even if the meanings of the words 'wholesale' and 'retail' are taken from the dictionary, it is still a question of fact as to the minimum quantity of whisky, or of any other fluid, or of anything made entire, as nails, pins, and needles, which constitutes a whole package as originally put up. With respect to such matters, it seems clear that the condition in which the wholesale dealer chooses, for safety or convenience, to keep his stock, is unimportant. A dealer in grain may keep a hundred thousand bushels in an elevator; a dealer in liquors may keep them in casks of immense capacity, but it could not be said that the sale of 50,000 bushels of the grain out of one elevator, or the sale of 1,000 gallons of wine out of one cask, would therefore be a retail dealing. What constitutes a wholesale dealer in a given commodity, and what constitutes a wholesale transaction, if made by a wholesale dealer, are questions of fact to be proved by evidence and found by the jury. It is 'the usual course of trade' which determines the answers. It may be that only a minimum quantity is considered in deciding whether

a dealer is wholesale or retail, and it may be that the question as to the purpose of the purchaser, as whether buying for personal use or for resale, may be an element. But we do not think it can be assumed as matter of law . . . that the sale of no quantity, however great, is a wholesale transaction, unless the purchaser buys as a dealer to resell." Here, again, it should be noted that the foregoing cases are in direct conflict with *LEIDY v. METZ BROS. BREWING CO.* In the *LEIDY CASE* the sales in question were of bottled beer by the case as in the *Engle Case*, and for thirty years the business had been carried on by defendant and its predecessors and other brewers in the same manner and under wholesale licenses and with the authorities fully aware of the practice, from which it can be safely said that a course of trade was established. In fact, it is said in the dissenting opinion filed in the *LEIDY CASE*, that for the courts to undertake to suppress the brewers' business "for transacting it as they have done for thirty years, with the acquiescence of the public, and without any statute directly and plainly changing that custom . . . would be not only unjust and oppressive, but an invasion of the province of the legislature." And in the *Pence Case*, as reported in 6 Ky. L. Rep. 113, the rule announced in the *LEIDY CASE*, namely, that any sale except to a licensed retail dealer would be a retail sale, was expressly rejected, as is shown by the above quotation from *Pence v. Com.*

As to whether the question is one of law or of fact, see also *Com. v. Poulin*, 187 Mass. 568, 73 N. E. 655.

"Original package" rule.

In some jurisdictions, as before stated,

ments passed for the purpose of regulating and restricting that traffic were merged in the "Slocumb law" (Laws 1881, chap. 61; Cobbey's Anno. Stat. 1909, chap. 32, §§ 7150 et seq.). The "Gibson law" (Laws 1907, chap. 82) is supplemental to chapter 61, Laws 1881. The act of 1907 has no independent title, but when enacted became a part of the Slocumb law as fully as though it had been originally written in the text of the earlier act. *Rohrer v. Hastings Brewing Co.* 83 Neb. 111, 119 N. W. 27, 17 A. & E. Ann. Cas. 998. A corporation cannot qualify as a retail dealer in intoxicating or malt liquors. *Ibid.* By the terms of the Gibson act it is made unlawful for any person, natural or corpo-

rate, engaged in the manufacture of malt, spirituous, or vinous liquors, to become interested, directly or indirectly, in any retail license for the sale of intoxicating or malt liquors, or to in any manner assist any retail dealer to procure such a license, or to lease premises for the use of such a retail dealer. Section 3 of the act (Laws 1907, chap. 82) provides: "No liquor license issued to any person or corporation engaged as a manufacturer, wholesaler, or jobber of malt, spirituous, or vinous liquors, shall entitle the holder thereof to engage, or in any manner to become interested, under pretext or otherwise, in the retail traffic in such liquors in this state." Within seven days after the Gib-

the question of what amounts to a retail sale, as distinguished from a wholesale transaction, is governed by the "original package" theory, it being held that a wholesale transaction implies selling in unbroken pieces, and that a sale of retail implies the breaking up or dividing of goods held in larger packages, into smaller quantities, and selling to customers in such manner.

Thus, in *Gorsuth v. Butterfield*, 2 Wis. 237, the court said: "This term [wholesale] implies the selling in unbroken pieces or parcels, as by the barrel, pipe, cask, etc., or in a number of such pieces or parcels; while the word 'retail' implies the cutting or dividing up such pieces, parcels, or casks into small quantities, and selling to customers in such manner. The purchase of liquors from time to time, in 6 or 10 gallon kegs of various kinds, cannot, in a proper use of language, be called a wholesale purchase; nor can he be said to vend at wholesale, who divides his casks, barrels, or pipes into 10 gallon parcels, and sells them out in that manner."

And in *Tripp v. Hennessy*, 10 R. I. 129, it was held that a sale to one person of 10 gallons of whisky which were drawn from a cask containing a larger quantity was, according to the common and popular import of the terms "retail" and "wholesale," a sale at retail, the decision being based on *Gorsuth v. Butterfield*, supra. See also *Com. v. Greenwood*, 205 Mass. 124, 91 N. E. 141, 18 A. & E. Ann. Cas. 185, and *LEIDY v. METZ BROS BREWING CO.*

And in *Reg. v. Denham*, 35 U. C. Q. B. 503, the court, relying on the *Gorsuth* Case, said that selling a small bottle of brandy valued at \$1.25 constituted a retail sale.

And in *Reg. v. Strachan*, 20 U. C. C. P. 182, the court said that it would consider a sale of a bottle of gin, value 60 cents, a sale by retail.

In *Flournoy v. Grady*, 25 La. Ann. 591, where the question was whether defendants must pay a license as wholesale or as retail dealers, it was said that "retail dealers are those who keep an open shop, and who sell liquors in small quantities," and that a wholesale dealer is one who "sells by packages." The court gave as an illustration of a wholesaler one who sells ten barrels of 32 L.R.A. (N.S.)

whisky or whisky by the barrel or one or more barrels at the same time and to the same person; and of a retailer, one who sells whisky by the gallon or bottle.

In *State v. Morris*, 123 La. 545, 49 So. 170, it was held that a conviction under an ordinance prohibiting the retailing of intoxicating liquors was not sustained by proof that defendant solicited and received an order for the sale of an unbroken package of intoxicating liquor containing 5 gallons and over, the court saying that the defendant could not be condemned without regard to whether the soliciting and receiving was at retail or wholesale where there is no law prohibiting the sale of liquor by wholesale, and that the sale under consideration must be regarded as at wholesale.

But in *State v. Spence*, — La. —, 53 So. 596, a statutory provision that no person shall be deemed a wholesaler unless he sell by the original package or barrel, and unless he "sell to dealers for resale. If they sell in less quantities than original unbroken packages, they shall be considered retail dealers," was held to render every person a retailer who sold to individuals for consumption, although the sales were by original packages and in quantities exceeding 5 gallons. *State v. Morris*, supra, was said by the court to have no application, as the accused was there prosecuted for offering to sell at wholesale; but this distinction does not seem to affect the fundamental question involved.

"Purpose of sale" rule.

The distinction drawn in *LEIDY v. METZ BROS. BREWING CO.* accords with the well-settled rule in Tennessee, and in fact *State v. Lowenhaupt*, 11 Lea, 13; *State v. Tarver*, 11 Lea, 658; *Webb v. Baird*, 11 Lea, 667; and *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559, are the cases upon which the court in the *LEIDY* CASE principally relied.

In *State v. Lowenhaupt*, 11 Lea, 13, the court announced the following dictum: "What is meant by retailing is selling by small quantities to suit customers, articles which are bought in larger amounts generally. Now, one who sells in this way, or

son act became effective, this court, in an opinion filed in the case of *Re Reusch*, 70 Neb. 449, 113 N. W. 138, stated: "We think that the intention of the legislature in the passage of §§ 1, 2, 3, and 5 of the act assailed (*Laws 1907, chap. 82*), was to prevent manufacturers, wholesalers, or jobbers of intoxicating liquors, or their agents, from selling or being interested in the sale of intoxicating liquors at retail." With this settled construction of the law, it becomes necessary to ascertain whether the applicant did, within the meaning of the statute, sell beer at retail in 1909.

The liquor traffic has frequently been classified for revenue and license purposes

by acts of Parliament and congressional and legislative enactments, and quantity has generally been the factor differentiating a wholesale from a retail sale. The fact that no such standard was adopted in the *Gibson* act is good evidence that some other element controls, one so well known that neither the persons engaged in the traffic, nor the officers charged with the enforcement of the law, should have any difficulty in understanding the test and making the application. Wholesale dealers as a rule sell only to merchants who buy to sell to the consumer, whereas retail dealers sell direct to the consumer, and not to other retail merchants. The definition of the word "retail," as should be applied to sales,

whose business is so to sell, is a retail dealer; one who sells by the nature of his business in gross, and not by the small quantity or parcel to consumers, is a wholesale dealer. . . . It is not averred that the defendant is a wholesale dealer, or that he sells or did sell to this party by the wholesale, to be by him retailed, or as a retail dealer; nor in fact is there any fact averred from which the party's character as wholesale dealer can be made out, except that he "sold by the quart and in larger quantities, not drank or intended to be drank on the premises. It may have been a gallon sold in a jug on the order of a customer. It would be an abuse of language to hold this would constitute a wholesale dealer in liquors;" and it is upon this that the later Tennessee cases are based.

Thus, in *State v. Tarver*, 11 Lea, 658, where the point was directly involved, the court, in speaking of the *Lowenhaught* Case, said: "The distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer." The rule was again announced by way of argument in *Webb v. State*, 11 Lea, 662, and in *Webb v. Baird*, 11 Lea, 667, where a decision was rendered which fully supports the *Tarver* Case. The earlier cases were again reviewed and approved in *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559, where it was held that a sale and delivery of a barrel of whisky to a combination of persons for consumption constituted a retail transaction. In the latter case the court said: "Upon re-examining this question, we are entirely satisfied with this rule for distinguishing between a sale of liquor at wholesale and retail, resting, as it does, not upon the quantity sold at the distillery, but upon the purpose for which it is sold."

This distinction is supported to some extent by *State v. Scampini*, 77 Vt. 92, 50 Atl. 201, which is set out in *LEIDY v. METZ BROS. BREWING CO.* The decision in this case, however, was based on the ground 32 L.R.A. (N.S.)

that the seven classes of licenses, as construed by the court, were so worded by the legislature as to show that six of them applied to sales to consumers, and that the other, the fourth class, which provided for sales "by the wholesale only," being exclusive of the others, must apply to sales to licensed retailers only, and from this was derived the conclusion set out in the *LEIDY* CASE. In arriving at this conclusion, the court said: "The presumption is that the legislature had a definite purpose in making the classification, and has adopted and formulated the divisions and limitations in harmony with that intent, and that all classes of licenses which may be had under the law are necessary to accomplish it. The general rule is that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. . . . Construed according to this rule, it may well be said that a license to sell by wholesale grants privileges not within the legal scope of the other classes. It follows that sales by wholesale within the meaning of this act are such only as may be made to persons holding a license to sell direct to consumers for the purpose of consumption, and the liquor must be sold to such licensees for that purpose; and that all other sales, that is, such as may be made under a license of any class other than the fourth, are sales at retail. Under this construction of the law, the distinction between wholesale and retail depends not alone on the quantity sold, but also on the purpose of the sale and the character of the purchaser."

In *Walker v. Com.* 25 Ky. L. Rep. 401, 75 S. W. 242, it was held that under a local option law providing that its provisions shall not apply to any "wholesale dealer who, in good faith and in the usual course of trade, sells by the wholesale in quantities not less than 5 gallons, delivered at one time, and not to be drunk on the premises," the wholesaler cannot be limited to sell only to those who are licensed to engage in the retail trade, where the statute itself does not so limit the right.

G. J. C.

as given in Webster's New International Dictionary, is: "To sell in small quantities, as by the single yard, pound, gallon, etc.; to sell directly to the consumer;" and in the Standard Dictionary: "To sell in small quantities such as are immediately called for by consumers." If the contention of applicant is to prevail, the manufacturer can inclose 2 pints in a sealed package as easily as 24, and deliver to consumers, and thus practically nullify the provisions of our liquor laws, and peddle his product throughout the city and country.

In *State v. Scampini*, 77 Vt. 92, 59 Atl. 201, the court considered the proper construction to be given the words "wholesale" and "retail" as applied to the liquor traffic. In that case, as in the one at bar, the statute to be construed did not classify according to the amount of liquor sold at any one time. The court held in the Vermont case that sales by wholesale are only those sold to persons having a license to sell direct to the consumer for consumption. The opinion cites with approval the definition given by Bacon, V. C., in *Treacher v. Treacher* [1874] W. N. 4, which is as follows: "As a general rule, wholesale merchants deal only with persons who buy to sell again, whilst retail merchants deal with consumers." The same definition is given to the words in 3 Stroud's Judicial Dictionary, 2d ed. p. 2237, and in 12 Enc. Laws of Eng. 587. The same distinction is made in classifying the liquor traffic in *State v. Lowenhaupt*, 11 Lea, 13. Counsel for the applicant criticizes the case last cited, and correctly argues that the statement is *dictum* as applied to the record in that case. But the Tennessee court adopt the same classification in *State v. Tarver*, 11 Lea, 658, where the question is necessarily involved in the decision made, and the court say: "That the distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer." See also *Webb v. Baird*, 11 Lea, 667. The question is considered, and the question re-examined by the Tennessee court in *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559, and the same conclusion reached that was attained in *State v. Tarver*, supra. The rule announced in the Vermont case and in the Tennessee cases is practical and unerring in its application. The limit which nature has placed upon the consumption of strong drinks by an individual will practically limit all sales to unlicensed consumers 32 L.R.A. (N.S.)

to purchases of a retail character. The mere fact that the applicant was engaged in the retail traffic for years will not work a repeal of a law enacted three years since, to prevent it, in common with all other manufacturers, from engaging in that business. The "original package" theory, presented as a defense to sales of bottled beer by the case, does not apply. The legislature has not said that a sale by wholesalers of their commodity in original packages shall not constitute a sale at retail. Should the law be so construed, every manufacturer and wholesaler might engage in the retail traffic, subject only to their inability to sell by the drink. To adopt any standard other than the one we have suggested, in classifying the liquor traffic for the purposes of the liquor laws of this state, will involve the entire subject in doubt and uncertainty, and eventually will emasculate a highly remedial statute. The finding of the district judge that the sales were made at retail is sustained by the law and the evidence. See *State v. Spence*, — La. —, 53 So. 596.

The conclusion announced that such a violation of law presents no bar to the granting of a wholesaler's license cannot be upheld. If a wholesaler sells at retail, he is in the plight of one who sells without a license, because his license affords, no protection as against a prosecution. *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376; *Gersteman v. State*, 35 Tex. Crim. Rep. 318, 33 S. W. 357; *Pearson v. International Distillery*, 72 Iowa, 348, 34 N. W. 1; *Rohrer v. Hastings Brewing Co.* 83 Neb. 111, 119 N. W. 27, 17 A. & E. Ann. Cas. 998. The applicant, therefore, during the year 1909, violated § 11 of the Slocumb law (Laws 1881, chap. 61; *Cobbey's Anno. Stat.* 1909, chap. 32, § 7161), and license should not have been granted it for the current year.

The judgment of the District Court, therefore, is reversed, and the cause remanded, with instructions to cancel the license issued to the applicant.

Barnes, Fawcett, and Sedgwick, JJ., dissenting:

We are unable to concur in the majority opinion. The reasons for our dissent, briefly stated, are as follows: The opinion holds that the sale by a brewer of sealed cases containing 24 quart or pint bottles of beer, to one not a licensed retailer of intoxicating liquors is a sale at retail, and a violation of the statutes regulating the sale of intoxicating liquors, regardless of conditions or price. It defines the terms "wholesale" and "retail" in a manner quite at variance with the generally adopted

meaning of those words when applied to the sale of other commodities. The statement of facts contained in the majority opinion wholly eliminates the question of price, which ought to be stated and considered in order to correctly decide the main question presented for our determination. It is agreed by the parties to this controversy that the Metz Brewing Company is solely a manufacturer of beer, and that its business has been conducted by it and its predecessor in the city of Omaha for more than thirty years; that during all of that time it has been disposing of its product in the following manner: That in 1909 the defendant had a wholesale license, but no license to do a retail business. During that year, as in all preceding years, it sold beer directly to individuals for their own use or own consumption, delivering it at the homes of citizens of Omaha, and shipping it to parties outside of the city, in cases containing not less than two dozen bottles; some of the cases holding two dozen pint bottles and others two dozen quart bottles. The cases are made of wood with a hinged lid and catch. After a case is filled the lid is fastened down and sealed by putting a wire through the catch and fastening it so that no one can open the case except by breaking the seal or box. The defendant does not manufacture anything except beer, and does not handle liquors of any other description. It sold no beer in bottles to anyone, either at the brewery or elsewhere during 1909, except in cases containing the number of bottles above mentioned. No one can buy beer from the defendant by the glass, or any number of bottles less than a full case. The cases described are the original packages in which the beer is put up at the brewery, and the same kind of cases are sold to all, whether saloon keepers for resale or individuals for home consumption. The retail price of the pints is 15 cents a bottle, and the quarts 25 cents a bottle. The price charged by the defendant for a case of pints is only \$1.30, and for a case of quarts \$2.25. The price is the same to all, and the question is not asked whether the case is for resale or for home consumption. It appears that only about 2 per cent of the bottled beer sold for home consumption is sold by saloons. There is no personal solicitation of orders for beer. The orders for cases of beer come over the telephone and by mail, the former generally from citizens of Omaha, and the latter from persons outside of the city. Defendant keeps teams for the purpose of delivering its beer, but so far as the evidence shows saloon keepers do not so deliver the beer sold by them. No purchaser

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of a case of beer at the brewery is ever permitted to open it and drink any of the beer on the premises. Defendant has never sold beer by the glass or the single bottle, or in any other manner than in the original packages above described. During the thirty years defendant and its predecessor have been in business, its beer has been sold for home consumption in unbroken packages, the cases being of the same kind and size as sold to the saloon keepers either in or outside of Omaha. In many instances it is impossible to know whether an order is given by one who is a saloon keeper or not. The percentage of beer which the defendant sells in original cases for home consumption is about 10 per cent of its total output, the remaining 90 per cent being sold to retail dealers. Former police boards and the authorities of the city of Omaha have been aware of the practice of the defendant in selling its beer in such unbroken packages for home consumption, during all of the time it has been in business. Defendant's beer is made in Omaha, Nebraska, and the sales referred to in this case were made in that city to parties residing in the state, and in some instances to parties residing outside of the state. The beer is delivered either to residences or to saloons indiscriminately, and the same price is charged to all.

To our minds, the sales above described are sales at wholesale, and not at retail, as held by the majority opinion. The Century Dictionary defines the word "wholesale" as follows: "Sale of goods by the piece or in large quantity, as distinguished from retail; in the mass; in the gross; in great quantities; hence, without due discrimination or distinction;" and the word "retail" is defined as "a piece cut off; . . . a shred, remnant; . . . The sale of commodities in small quantities or parcels, at at secondhand; a dealing out in small portions; opposed to wholesale; . . . in small quantities; a little at a time; . . . to sell in small quantities or parcels. To sell at secondhand." And a "retailer" is defined as "one who sells or deals out goods in small parcels or at secondhand." In *State v. Hawkins*, 91 N. C. 626, 627, it was said: "To retail means, generally, to sell by small quantities; in broken parts; in small lots or parcels; not in bulk." In *Bridges v. State*, 37 Ark. 224, 226, the court said: "Alcohol is embraced in any one of the terms, 'goods, wares, or merchandise.' To sell by small parcels or quantities, and not in the gross, is to retail." In *Tripp v. Hennessy*, 10 R. I. 129, it appears that the police officers purchased from Hennessy 10 gallons of whisky, which

he drew from a cask containing a much larger quantity. The question presented was whether this was a sale at wholesale or retail. It was held that the word "wholesale" was used in the statutes in its common and popular sense. The court said: "The sale here involves the idea of breaking up and dividing and parceling out the goods which are held by the seller in larger parcels or packages in which he has purchased, and excludes the idea of selling a thing whole and unbroken." We think the court there announced the correct idea as to the distinction between wholesale and retail. Again, that question is not to be determined alone by the quantity, but by the quantity, the conditions, and the price. In that case there was a sale of 10 gallons of whisky, yet it was held that it was a sale at retail, because it was a sale of the broken portions of the original package. If the 10 gallons of whisky had been in H.'s place of business in the original package, and he had sold it to the police officers from the language of the court there could be no question but what it would have been held to be a sale at wholesale. For example, a manufacturer or a wholesale grocer sells a retailer a case containing two dozen cans of peaches at his wholesale price; no one will contend that such a sale is not at wholesale. The retailer opens the case and sells a customer one can or a half dozen cans; that is a sale at retail. The brewer sells a case or two dozen bottles of beer direct to the saloon keeper. That is conceded by the majority opinion to be a sale at wholesale. The saloon keeper breaks the seal, opens the case, and sells a single bottle or a half dozen bottles to the consumer; that must be conceded to be a sale at retail. The difference therefore is that, in the one case, it is sold as a whole or original package for a wholesale price, while in the other the original package is broken up and the contents sold in smaller quantities to suit the consumer at a retail price; yet, according to the majority opinion, if the defendant received from both A and B at the same hour, telephone orders for a case of beer each, the sale to A, if he were a saloon keeper, would be at wholesale, and the sale to B, if he were not a licensed retail dealer in intoxicating liquors, would be at retail. We are utterly unable to concur, either in the logic or the conclusion of this opinion.

In *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718, 60 N. W. 962, it appears that bottles of intoxicating liquors were each inclosed in a paper wrapper or box which was sealed with sealing wax, and a number of the paper boxes, each containing a flask of such liquor, were packed in a wooden

box by a party in St. Louis, Missouri, and shipped to his agent at Republican City, Nebraska, and the agent opened the wooden box, took the paper boxes in which the flasks of liquor were contained therefrom, and sold them separately. This court held that the wooden box, and not the sealed paper box or wrapper and the bottle therein inclosed, was the original package, and such sale was a violation of the law of this state regulating the license and sale of malt, spirituous, and vinous liquors. Under the reasoning in that case, the wooden cases in which the defendant is selling its beer are the original packages, and we do not think the selling of such original packages, considering that they are sold at a wholesale price, is a sale of intoxicating liquors at retail. In order to constitute a sale at retail, the original package must be broken up and its contents distributed or retailed to consumers. In our view of the matter, the word "retail" is very badly defined in the majority opinion. The tests by which to ascertain the meaning of that word, there set forth, are inadequate to explain the various meanings in which the word has been used in the different decisions of the courts and in various business transactions. Its meaning is always to be determined from the context, from the circumstances under which it is used, and from the general scope, purpose, and meaning of the article or provision in which it appears. It will not do to say that a sale to a consumer is a sale at retail, because consumers have the right to purchase at wholesale, and undoubtedly frequently do so. It will not do to say that a sale to one who has a license is a sale at wholesale, and to one who has no license is a sale at retail, because manifestly one who has a license may buy at retail, and one who has no license may purchase in wholesale lots. It will not do to say that the object of the Gibson law was to compel the manufacturer to deal with jobbers and retailers, because the spirit and intention of the Slocumb law, of which that law is a part, is to curb and restrict retailers, and allow communities to expel them altogether, without preventing those individuals who insist upon their personal right to buy liquor, from procuring it from the manufacturers and from using it themselves as they may see fit. It will not do to say that it is unlawful for the sellers of liquor who are duly licensed, to deliver the articles that they sell. The statute will not bear such construction. It contains no provision upon that subject, except that § 5 of the original Slocumb law states that the license shall state the place where the liquor is being sold, and the form of the

license prescribed leaves a blank for that purpose. This clearly is for the purpose of enabling the public to know where the business is located, and enable it to identify the responsible parties. It cannot be construed to mean that the sales in all cases must be complete by delivery and payment at the particular building that is named in the license. To determine, then, the meaning of the word "retail" as it is used in the 3d section of the Gibson law, we must consider the whole act,—the evil which existed at that time, which it was proposed to remedy, and the nature of the remedy adopted by the legislature. It is so notorious and so much a matter of public interest, that courts may take notice that good citizens throughout the state were complaining of the method used by manufacturers and wholesalers of liquors, through the instrumentalities of the public saloon. It is not necessary to enumerate the evils that were supposed to originate from this unholy combination. The 1st section of the act forbids manufacturers to become interested in any liquor license for the retail sale of liquors. The 2d section prohibits manufacturers to assist in procuring a license for sale at retail. Section 3 provides that the license to a wholesaler shall not entitle him to engage in retail traffic in liquors. Section 4 prohibits him from constructing or renting any buildings, etc., in which to conduct "the retail sale" of liquors; and § 5 forbids any person from soliciting or receiving from any person, trust, or association as aforesaid, any assistance in procuring any license for the retail sale of liquors, and also forbids any person from leasing any building, etc., owned by anyone engaged in the manufacture, or as a wholesaler, of liquors, in which to conduct the retail trade. The act does not define what the legislature meant by the retail sale, nor what was meant by manufacture and jobbing. There is no direct provision in the act from which it can be determined when a man is a jobber or when he is engaged in the retail trade. Considering the evil that the legislature was seeking to remedy, the purpose that it had in view, and the remedy that it proposed to provide, it was wholly unnecessary to define "retail" and "wholesale." The matter was thoroughly understood. The legislature was aiming at the manufacturer on the one side and the saloon on the other, and everybody knew what that meant. They did not say that the manufacturer shall sell only at wholesale, and shall not sell at retail, but they used invariably the expression, "retail sale," meaning the retail business, as it was then known, to wit, the saloon business. The

legislature followed up this purpose from every point. It forbade the manufacturer to assist the saloon keeper to get a license; it forbade him to have any interest in licenses; it forbade him to own any interest in the saloon business; it forbade anybody that had stock in his company to own any interest in the saloon business, and it forbade the saloon keeper to ask or receive the assistance of the manufacturer in getting a license, or to let or use any building for saloon purposes that the manufacturer was in any way interested in. Through it all is the manifest purpose to divorce the manufacturers from the saloon business, and it seems clear to us that the legislature never intended to prohibit the manufacture and sale of beer entirely. The policy of the law plainly is to require those who insist upon buying intoxicating liquor as a personal privilege, to take it directly from the manufacturer, without encouraging saloons or jobbers, and to interfere as little as possible with those citizens who disapprove of the whole business. The fact that the legislature failed to define the words "wholesale" and "retail," we are told in the majority opinion, should require us to construe those words in a special or limited sense, and they should not be given their ordinary and commonly understood meaning. To our minds that fact presents the strongest reason for giving the words their generally understood and commonly accepted definition, and it seems clear that the legislature intended that this should be done.

Finally, for the courts to undertake to suppress the brewers of this state by the indirect method of refusing a license to carry on their business, as a penalty for transacting it as they have done for thirty years with the acquiescence of the public, and without any statute directly and plainly changing that custom, and without giving them, with their enormous capital, an opportunity to adjust themselves, their property, and their business to new conditions, would be not only unjust and oppressive, but an invasion of the province of the legislature. We are of opinion that such an important change in the policy of the state should be made by direct and unequivocal legislation, and with reasonable opportunity to capital so invested to adjust itself to the changed conditions, and not by judicial declaration.

To our minds it seems clear that the District Court was wrong in holding that the sales in question were retail sales; that its judgment, although based upon other premises, was right, and should be affirmed.

WASHINGTON SUPREME COURT.

GEORGE E. HEWITT, Respt.,
v.

CITY OF SEATTLE, Appt.

(— Wash. —, 113 Pac. 1084.)

Municipal corporation — repairing streets — injury to pedestrian — liability.

1. The duty of a municipal corporation to keep its streets in safe condition extends to the use of the street by its employees engaged in the care of the streets, and therefore it is liable for injury to a pedestrian who is run down by the negligent operation of an automobile driven by its street superintendent while he is engaged in the performance of his duty as such superintendent.

Appeal — instruction to disregard denial in pleading — failure of evidence to support.

2. It is not reversible error as a comment on evidence, for the court to instruct the jury not to waste time upon a denial in the pleadings of proper presentation of claim in an action to hold a municipality liable for negligent injury, where proper presentation of the claim is not denied at the trial and a copy of the claim is in evidence before the jury.

Evidence — failure of plaintiff's — supply by defendant.

3. A judgment for plaintiff in an action against a municipal corporation to recover for negligent injuries inflicted by its agent will not be reversed because the only proof of the agency put in by plaintiff were inadmissible declarations of the agent himself, where defendant supplies the missing proof of agency.

(March 10, 1911.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's agent. Affirmed.

The facts are stated in the opinion.

Messrs. Scott Calhoun and James E. Bradford, for appellant:

Applied to city streets the implied liability of the municipality is limited to structural defects or obstructions thereon.

Barber v. Roxbury, 11 Allen, 318; Keith

Note.—For liability of municipal corporations for injuries inflicted by the negligence of employees engaged in the repair or construction of highways, see notes to Barree v. Cape Girardeau, 6 L.R.A. (N.S.) 1090, and Kippes v. Louisville, 30 L.R.A. (N.S.) 1161. See also on this question the cases of Danville v. Fox, post, 636, and Louisville v. Carter, post, 637 32 L.R.A. (N.S.)

v. Easton, 2 Allen, 552; Hixon v. Lowell, 13 Gray, 59; Macomber v. Taunton, 100 Mass. 255; Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883.

By defects is meant some lack of repair in the way itself.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; McArthur v. Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; Sikes v. Manchester, 59 Iowa, 65, 12 N. W. 755; Walker v. Chester County, 40 S. C. 342, 18 S. E. 936; 5 Thomp. Neg. §§ 5915, 5919, 5920, 5922-5925, 5953; Dill. Mun. Corp. 3d ed. §§ 963-965, 1001-1003, 1014; Davis v. Bangor, 42 Me. 522; Pratt v. Weymouth, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538.

Implied liability should not be further extended.

Wolff v. District of Columbia, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 A. & E. Ann. Cas. 967; Abbott, Mun. Corp. § 485; McCarroll v. Spokane, 34 Wash. 345, 75 Pac. 973.

Plaintiff was guilty of contributory negligence.

Helliesen v. Seattle Electric Co. 56 Wash. 278, 105 Pac. 458; Dimuria v. Seattle Transfer Co. 50 Wash. 633, 22 L.R.A. (N.S.) 471, 97 Pac. 657; Coats v. Seattle Electric Co. 39 Wash. 386, 81 Pac. 830; Criss v. Seattle Electric Co. 38 Wash. 320, 80 Pac. 525.

Messrs. Hughes, McMicken, Dovell, & Ramsey and Otto B. Rupp, for respondent:

The city is liable.

Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Shearm. & Redf. Neg. 5th ed. § 289; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; Saylor v. Montesano, 11 Wash. 330, 39 Pac. 653; Lorence v. Ellensburg, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; Mischke v. Seattle, 26 Wash. 618, 67 Pac. 357; Prather v. Spokane, 29 Wash. 554, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55; Brabon v. Seattle, 29 Wash. 9, 69 Pac. 365; Shearer v. Buckley, 31 Wash. 373, 72 Pac. 76; Missano v. New York, 160 N. Y. 123, 54 N. E. 744; Shaw v. New York, 83 App. Div. 212, 82 N. Y. Supp. 44; Barney Dumping-Boat Co. v. New York, 40 Fed. 50; Winona v. Botzet, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; Workman v. New York, 63 Fed. 298; Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565.

Dunbar, Ch. J., delivered the opinion of the court:

In the afternoon of October 2, 1908, while

the respondent was crossing Third avenue, one of the main prominent thoroughfares in the city of Seattle, near its intersection with James street, he was run over by an automobile driven by one Maloney, who was superintendent of the street department of the city of Seattle, and received the injuries of which he complains. At the time of the accident Maloney was in the performance of his duty as such superintendent. In his complaint, after stating the facts, respondent alleges negligence on the part of the city through its agent Maloney, and that the automobile was being driven at an unlawful rate of speed, and sues for damages. Verdict was rendered for \$1,500, judgment was entered thereon, and appeal followed.

We shall not undertake to discuss seriatim the assignments in this case. They are numerous. The first contention is that the city is not liable in any event for the negligence of the superintendent of streets. This is a much discussed question. It has been settled by a great weight of authority that the duties imposed upon municipal corporations are dual; that one is of that kind which arises from the grant of a special power in the exercise of which a municipality is as a legal individual, and the other is of that kind which arises or is implied from the use of political rights under the general law in the exercise of which it is as a sovereign. The appellant cites many cases to support its contention that the city should not respond to damages in any event, and that in the construction and keeping in order of its streets it was acting in a governmental capacity, and therefore not liable to a suit for damages. Speaking on this question, it is said on page 1280, vol. 2, of Dillon, *Mun. Corp.* 4th ed. in discussing the liability of cities concerning bridges, sidewalks, and streets, repairing the same, and keeping them in safe condition: "This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or to rest upon the municipal corporation, as such, and not upon it as an agency of the state, or upon its officers as independent public officers. This, however, in general appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways." And it is said by Shearman & Redfield, *Law of Negligence*, vol. 1, § 289: "With few exceptions, the courts of all the states agree that, as at common law, no civil liability rests upon counties and other

quasi corporations, for neglect to keep their highways in a reasonable state of repair, unless such liability is expressly imposed by statute. But that in respect of cities, towns, and villages incorporated either by special charter, or under a general statute, the principle is firmly established, by the decisions of the Federal courts, and by those of all the state courts where the question has been properly open for discussion, except those mentioned below, that such corporations, where the statute grants them the control of their streets, coupled with powers to raise means to maintain them, are bound to exercise ordinary care and diligence to see that they are reasonably safe for travel; that this duty is not a public duty owing to the public alone, but a private corporate duty, which (when not expressly imposed) is necessarily implied from such a grant of power; and, moreover, that the legislature is deemed to have intended by the grant to impose a liability, coextensive with the duty, in favor of any person specially injured by a wrongful omission to perform, or a negligent performance of, such duty." Outside of the overwhelming weight of authority to this effect, this court has uniformly maintained that doctrine. In *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 84, 39 Pac. 273, we decided that the duty of a city to keep streets in repair was not a governmental but a ministerial duty, and for a breach thereof an action will lie in favor of a person injured as a result of such negligence. In the course of the opinion it was said: "There is undoubtedly a want of harmony among the decisions of the courts upon this question; but we believe the decided weight of authority, as well as sound reason, is in favor of the view above expressed,"—citing many leading cases to sustain the announcement. This case was followed with approbation in *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Lorence v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Prather v. Spokane*, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; and the latest expression of this court on that subject announcing the same view is *Hayes v. Vancouver*, — Wash. —, — L.R.A. (N.S.) —, 112 Pac. 498. So that, in view of the uniform decisions of this court on that question, we do not feel called upon to again enter into a discussion of the principles involved.

It is, however, additionally contended by the appellant that, conceding the doctrine that cities are responsible for the safe con-

dition of the streets, such implied liability is limited to structural defects or obstructions thereon, and does not reach to damages that flow from operations of any kind upon the street; and many cases are cited to sustain this distinction. But we have been unable from a perusal of those cases to determine that they are in point. In note to *Dudley v. Flemingsburg*, 1 A. & E. Ann. Cas. 960, which is cited by the appellant, it is said: "The improper condition of a street or highway which gives rise to municipal liability therefor must be some inert matter encumbering the highway or some structural defect therein. An improper or unlawful use of the highways by persons, animals, vehicles, engines, or objects, while movable or actually being moved by human will or direction, and neither fixed nor stationary in one position within the highway, does not render a municipality liable." A superficial interpretation of this announcement might seem to bear out the appellant's contention. But an examination of the cases cited shows that the question presented in this case was not the question which was passed upon by the courts in the case cited in the note. In those cases the negligence alleged was not the negligence of the city in doing the thing which was the cause of the injury, but negligence of the city in permitting someone over whom the city had no control to act negligently. The first case cited by the author under the note mentioned is *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1. That was where an ordinance had been adopted by the city prohibiting coasting upon the streets, and a traveler was injured by coming in contact with someone who was indulging in the sport of coasting, but not anyone that was in any sense or manner an agent of the city or authorized to act for the city in any capacity whatever. The court, in passing upon the question raised, said: "Those who injured the appellant were in no way connected with the appellee; they acted upon their own volition, and carried on their sport for their own pleasure, not for the benefit of the appellee, nor at its instance." In this case, of course, if the contention of the respondent is correct,—and in fact there seems to be no denial of that fact,—the party who was driving the automobile was an agent of the city, and was driving the automobile as an agent of the city, and was driving it in the performance of his duty as an agent of the city. The next case cited is *Davis v. Bangor*, 42 Me. 522, where A was driving his horse harnessed to a chaise, over a bridge, the horse took fright at a tree on a wagon, which was standing there temporarily in

charge of the driver, ran away, overturned the chaise, and injured A, and it was held that the town was not liable therefor either civilly or criminally,—a case which does not involve in any way the question at issue, for the party who maintained the wagon and the tree was a stranger to the city. A reading of the whole case convinces us that the decision does not in any way militate against the doctrine of liability of the city, in such a case as the one under discussion. In *Hixon v. Lowell*, 13 Gray, 59, the court held that a city was not liable for an injury caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city. *Barber v. Roxbury*, 11 Allen, 318, is a case where a rope stretched across a highway above the ground, and attached at each end to objects which were outside of the limits of the highway and in temporary use, was held not to be a defect or want of repair in the highway for which a city would be liable to a traveler who received an injury by coming into collision with it while it was in motion from human agency. This case is somewhat obscure; but we think it is reasonably evident from the opinion that this human agency which is spoken of by the court was an agency entirely outside of the authority of the city. *Jones v. Williamsburg*, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883, is a case where the plaintiff was struck and injured by a bicycle, which was being ridden upon the sidewalk of one of the streets of the defendant corporation, and brought his action to recover damages against the city for his injury. In this case, as in the others, the party who was the cause of the injury was not claimed to be an agent of the municipality.

There are cases, though, holding that there is no distinction such as is sought to be applied by the appellant. *Barney Dumping-Boat Co. v. New York (C. C.)* 40 Fed. 50, was where an officer of the city had the custody of a tug, and in the negligent operation of the tug, in the performance of his duty of keeping the streets cleaned and removing refuse, injured the plaintiff. It was held that the officer was not an officer of the general public, but of the city; that his duties, unlike those of the departments of health, charities, fire, and police, which are held to be governmental employments, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself; and that the city was responsible. The same doctrine was laid down in *Missano v. New*

York, 160 N. Y. 123, 54 N. E. 744. This action was brought to recover damages for the death of a child who was run over and killed by a horse attached to an ash cart of the street-cleaning department of the defendant a case which cannot be distinguished in its facts from the case at bar; and it was held that the city was liable because acting, in relation to the care of the streets, in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual as distinguished from its governmental functions, where its acts were the acts of a sovereign. *Shaw v. New York*, 83 App. Div. 212, 82 N. Y. Supp. 44, was another case where the act of negligence charged was that the defendant's servants and employees in a street-cleaning department carelessly and negligently drove and managed a horse and wagon which was in the custody and control of defendant and in pursuance of the business of defendant; that, by reason thereof, he permitted the horse to remain on the street without being guarded or tied, whereby said horse ran away, and said horse and wagon struck plaintiff's wagon, etc., and the cause of action was sustained. To the same effect are: *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; *Workman v. New York* (D. C.) 63 Fed. 298; *Workman v. New York City*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. There is an attempt upon the part of the appellant in his reply brief to distinguish these cases, but we think not a successful one. They laid down the rule contended for by the respondent, and from our investigations we are unable to ascertain that any court has sustained the distinction which is urged by the appellant. This was an act of misfeasance done in the course of the servant's ordinary employment in the service of his master, and the doctrine of *respondeat superior* obtains.

In the course of its charge to the jury, the court instructed as follows: "(12) Then, in paragraph 5 of the complaint, it is alleged that they filed a certain claim which the ordinance and charter of the city of Seattle requires to be filed before a case can be prosecuted in our courts, but without objection, and I imagine there is no evidence to the contrary,—which has been admitted in here and before you and in your presence. There has been put a copy of a claim which shows that in regular and legal form the claim was in truth and in fact presented, but it was of course in the ordinary formal pleading papers denied, but you need not waste any time upon that." This instruction is assigned as 32 L.R.A.(N.S.)

error; the contention being that it constituted a comment upon the testimony in contravention of § 16, art. 4, of the Constitution, which is to the effect that judges shall not charge juries with respect to matters of facts, nor comment thereon, but shall declare the law. This instruction, while perhaps a little irregular, does not instruct the jury with reference to any real issue, for, while the question of the filing of the claim was made an issue under the pleadings, it was not an issue on the trial of the cause, and the testimony in relation to the filing of the claim was undisputed. A copy of the claim was introduced without objection, and appears in the record here, so that no prejudice could possibly have arisen from the instruction of the court in this regard.

It is also contended that the court erred in allowing respondent, over appellant's objection, to testify that the driver of the automobile told him, shortly after the accident occurred, that he was superintendent of streets; that the automobile belonged to the city; and that he was at the time going to repair the defect in the streets, for the reason, as alleged, that the declaration of the agent is not admissible to establish his agency; and it is said that no other evidence was introduced in support of such agency. This statement may be correct so far as the plaintiff's testimony is concerned, and that is probably what learned counsel means to state; but it is not necessary to discuss the legal point involved in counsel's objection to the admission of the testimony offered by it in defense, for when appellant's witness, the driver of the automobile above referred to, was asked in chief if he had seen the respondent at the time testified to by the respondent, he said he had; and, in answer to the following question, "What, if anything, did you say there at the time relative to the matter to which he testified?" he answered as follows: "I think what he said was about right; that I said I was street superintendent, and I was sorry the accident happened." Not having rested on his motion for a nonsuit, and having supplied the legal proof of agency, the error of the court, if any, in admitting the illegal proof of agency, was cured. *Dimuria v. Seattle Transfer Co.* 50 Wash. 633, 22 L.R.A.(N.S.) 471, 97 Pac. 657.

We are unable to find any reversible error in the admission or rejection of testimony, or in the giving or refusing to give instructions.

The questions of negligence and contributory negligence were legally submitted to

the jury, and, no error appearing, the judgment is affirmed.

Mount, Parker, Gosc, and Morris,
J.J. concur.

KENTUCKY COURT OF APPEALS.

BOARD OF COUNCIL OF CITY OF DANVILLE, Appt.,
v.

ROBERT FOX.

(— Ky. —, 134 S. W. 883.)

Municipal corporations — street repair — frightening horse — liability.

A municipal corporation is not liable for injuries caused by frightening a horse through the negligent handling of a steam roller while engaged in repairing its streets.

(February 28, 1911.)

A PPEAL by defendant from a judgment of the Circuit Court for Boyle County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Fox & Jackson, for appellant:
The city was not liable.

District of Columbia v. Moulton, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 841; Kippes v. Louisville, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184.

Messrs. Robert Harding and J. W. Rawlins for appellee.

Carroll, J., delivered the opinion of the court:

This appeal is prosecuted from a judgment of the Boyle circuit court in favor of the appellee against the appellant.

In his petition to recover damages for personal injuries sustained, the appellee averred that "he was driving along Lexington street, a public thoroughfare in the city of Danville, in a buggy drawn by a horse, when the defendant, the board of council of the city of Danville, by its gross carelessness and negligence in having at said time and place in operation, under the conditions then and there existing and without safeguards or warning, a large roller and steam engine, and by its gross carelessness and negligence in the handling, management, and operation of said engine and roller at said time and place, and by its gross carelessness and negligence in causing and permitting said engine to sud-

denly emit large quantities of steam, and throw and cause same to be emitted and thrown towards the horse plaintiff was driving, as this plaintiff was in the act of passing along said street, and by said engine and roller, caused the horse driven by him to be and become frightened and unmanageable, and to rear and plunge and kick, and to kick the plaintiff, and to break, fracture, and sprain his ankle and foot."

The evidence on behalf of the plaintiff conduced to show that, just as the horse appellee was driving came opposite the steam roller that was being used by agents or employees of the city in the repair of its streets, the employees in charge of it suddenly, and without giving notice or warning of their intention so to do, negligently or carelessly caused or permitted the engine to let off steam with a hissing noise, which struck the ground under and about the horse's feet; or, as said by counsel for appellee, "his injuries were due to and caused by the negligent act of the appellant's employees in throwing this steam under and about this horse, which was going gently by the roller, and would not have been frightened, except for this negligent act."

Conceding that the evidence introduced on behalf of appellee sustained the charge of negligence averred, we are nevertheless of the opinion that the appellee was not entitled to recover, and the court should have granted the request of the appellant to instruct the jury to return a verdict in its favor. We have held in a number of cases that a city, in the absence of a statute authorizing suit, is not liable in damages for the negligence or torts of its employees or agents while they are engaged for it in the performance of a governmental or public duty. *Schwalk v. Louisville* (Columbia Finance & T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A.(N.S.) 88, 122 S. W. 860; *Kippes v. Louisville*, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184; *Park Comrs. v. Prinz*, 127 Ky. 470, 105 S. W. 948; *Twyman v. Frankfort*, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 A. & E. Ann. Cas. 622; *Louisville v. Carter*, 142 Ky. —, 134 S. W. 468; *Hershberg v. Barbourville*, 142 Ky. 60, 133 S. W. 985.

The principle announced in these cases is sustained by practically all the authorities, and has been so fully considered in the cases cited, that it seems unnecessary that we should restate the reasons upon which the doctrine rests. In some of the cases it has been difficult to draw the distinction between services performed for the city in its governmental or public capacity and services performed for it in its private or corporate capacity. But we are not met

Note. — See *Hewitt v. Seattle*, ante, 632, and reference note appended thereto.
32 L.R.A.(N.S.)

with any difficulty of that sort in this case, because in the improvement and construction of its streets the city was acting in its governmental capacity, and performing a duty not only authorized, but imposed, by law.

Wherefore the judgment is reversed, with directions to dismiss the petition.

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,

v.

HARRY CARTER, by Next Friend.

(— Ky. —, 134 S. W. 468.)

Municipal corporation — use of government tools — injury — liability.

1. The mere fact that a cart owned and used by a municipal corporation for the purpose of sprinkling its streets is not in actual use for that purpose at the time it causes injury to a pedestrian, but is being taken through the streets for another purpose, does not render the municipality liable for the injury.

Same — unsafe method of work.

2. A municipal corporation is not liable for an injury to a pedestrian caused by a wagon used for removing refuse from the streets, by the fact that to move it from one place to another it was attached to the back of a sprinkling cart, although there might have been a safer or better way of doing the work.

(February 23, 1911.)

APPPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Mr. Clayton B. Blakey, with Mr. Huston Quinn, for appellant:

The flushing and sprinkling of city streets is a public necessity, and a duty pertaining to the public health, and within the exercise of a purely governmental function, and for the negligence of an employee in performing such services the municipality is not liable.

Kippes v. Louisville, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184; Maydwell v. Louisville, 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. Rep. 245, 76 S. W. 1091; Conelly v. Nashville, 100 Tenn. 262, 46 S.

Note. — See Hewitt v. Seattle, ante, 632. and reference note appended thereto. 32 L.R.A.(N.S.)

W. 565; Schwalk v. Louisville (Columbia Finance & T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A.(N.S.) 88, 122 S. W. 860; Park Comrs. v. Prinz, 127 Ky. 470, 105 S. W. 948; Ernst v. West Covington, 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089, 3 A. & E. Ann. Cas. 882; Greenwood v. Louisville, 13 Bush, 226, 26 Am. Rep. 203; Pollock v. Louisville, 13 Bush, 221, 26 Am. Rep. 260; Having v. Covington, 25 Ky. L. Rep. 1617, 78 S. W. 431; Twyman v. Frankfort, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 A. & E. Ann. Cas. 622.

Mr. H. O. Williams, with Messrs. Edwards, Ogden, & Peak, and J. L. Richardson, for appellee:

Although the sprinkling of a city's streets is an exercise of such governmental function as to relieve the city of liability for negligence of an employee, in performing such service the negligence, in order to relieve the city of such liability, must have occurred in the actual performance of such public duty, and the mere fact that the negligence was caused by a city's employee, whose regular duty is to sprinkle the streets, will not relieve the city of liability when such employee, when the negligence occurred, was engaged in the exercise of an act or function foreign to the sprinkling of the city streets.

15 Am. & Eng. Enc. Law, p. 1141; Maydwell v. Louisville, 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. Rep. 245, 76 S. W. 1091; Schwalk v. Louisville (Columbia Finance & T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A.(N.S.) 88, 122 S. W. 860.

Lassing, J., delivered the opinion of the court:

While playing in the street, Harry Carter, an eleven-year old boy, was run over by one of the wagons belonging to the city of Louisville and severely injured. Alleging that his injury was due to the negligence of the employee of the city in charge of the wagon, through his next friend, he sued to recover damages therefor. The city denied liability. A trial resulted in a verdict in plaintiff's favor for \$300. The city appeals.

A question is raised by the city as to the identity of the wagon which ran over the boy. It is urged that the evidence does not sustain the charge that the injury was inflicted by one of the city wagons. But, from the conclusion which we have reached, we will treat the case as though it were clearly established that the injury was done by a wagon belonging to the city.

Plaintiff charges, and we treat it as true, that one of the city's sprinkling carts was being driven through the streets, and

that it had another wagon, used by the street cleaning department, hitched onto it. This last wagon, it is claimed, injured the boy. It is conceded by the plaintiff's counsel that, if the injury had been inflicted by the sprinkler while being used in sprinkling the street, no recovery could be had. But it is urged that, inasmuch as the sprinkler was not being used for sprinkling purposes, but to haul another wagon, a different rule applies. In other words, that, as the sprinkler was not then being used for sprinkling the street, no governmental duty was being discharged, and hence liability attaches for the negligence of the driver.

We are unable to draw the distinction which appellee's counsel would make between an injury resulting from the negligent use of the sprinkler while actually sprinkling, and one while the sprinkler was being drawn through the city from one part thereof to another. In the numerous cases that have been decided by this and other courts, holding that a city is not liable for an injury that resulted through the negligence of its employees engaged in the discharge of any of those duties commonly called "governmental functions," the opinion in each is rested upon the idea that, as the city is a branch of the state government, an arm of the state, it is against public policy to permit it to be sued for the negligence of those of its servants engaged in the discharge of some duty which has for its aim the protection of the life, health, or property of the citizens. In none of these opinions, to which our attention has been called, has the distinction here contended for been made.

In *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263, it is held that no recovery can be had against a city for an injury resulting from the negligent operation of a fire engine, in responding to a fire call. The case has not been presented where a recovery was sought for an injury resulting from the negligent operation of a fire engine returning from a fire, though we can see no difference between the two. The fire engine must be kept in a place provided for it. After the fire has been extinguished, the engine must be returned to this place provided for its safety and keeping. The employees of the city are as much engaged in the discharge of a governmental duty in returning the fire engine to its proper place as they were in taking it from the engine house to the fire. It is all one duty.

And so, in case of an injury resulting from the negligent operation of a street sprinkler, in *Kippes v. Louisville*, 140 Ky. 423, 30 L.R.A. (N.S.) 1161, 131 S. W. 184, 32 L.R.A. (N.S.)

it is held that no recovery can be had. But it is argued that no recovery was allowed in that case because the injury resulted while the sprinkler was being used in sprinkling the streets. If this argument is sound, then, so long as the sprinkler is flushing or sprinkling the street, no recovery can be had for an injury resulting from the negligence of its driver; but when its tank is empty, and the wagon is being driven to the water plug, hydrant, or other place where the tank may be filled, the city is liable for any injury that may result on this trip. We are not disposed to adopt this view, but hold that, whether the sprinkler is being taken to the place where it is to be used, or back to the place where it is to be kept after it has been used, or hauled through the streets of the city for the purpose of filling the tank, is immaterial. These acts are all part and parcel of the necessary work which the employees in charge of the street sprinkling department have to do in order to efficiently carry on that work.

It is argued that, even conceding this to be true, still the men in charge of the sprinkler had no right to use the sprinkler to haul the garbage wagon, or city wagon, through the streets; that this was not a governmental work. Adopting this view, it would then come to a question as to the motive power that the city might use in removing its wagons from one part of the city to another. These carts, or wagons, used for the purpose of clearing the streets of the city and removing the waste and refuse matter therefrom, are certainly employed in a use that is for the general public good; and hence the function which the city exercises in their use is a governmental function. It becomes necessary at times to move these wagons from one point in the city to another. How shall this be done? By hitching a team to them or an engine? Or by hitching them to another wagon belonging to the city that happens to be there? It seems that the necessary answer to this is that the city shall be permitted, or left free, to adopt such means as it desires for their removal, and in the means employed the public can have no possible interest or concern. If no liability attaches for an injury resulting from negligence of employees of the city engaged in this governmental work, then it is immaterial by what means they are moved, for liability cannot attach in any event. It is true that possibly it would have been safer and better for the city to have required this wagon to be removed by hitching a horse or team of horses to it, rather than by attaching it to the rear of this sprinkler; but the city is not required to

use the safest or best or any particular means in the conduct of its governmental business. The manner in which they shall be moved from one part of the city to another is, and must of necessity be, left to the discretion of the city authorities, and no ground of complaint is afforded because one method of moving these wagons is adopted or used in preference to another.

We are clearly of opinion that, under the facts stated, about which there is no contrariety of opinion, plaintiff was not entitled to recover, and the motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

FLORIDA SUPREME COURT.

STATE OF FLORIDA, Plff. in Err.,

v.

ATLANTIC COAST LINE RAILWAY COMPANY.

(56 Fla. 617, 47 So. 969.)

Legislative power — delegation to administrative officers.

1. In order to justify the courts in declaring invalid, as a delegation of legisla-

Headnotes by WHITFIELD, J.

Note. — Delegation by legislature of power to regulate carriers.

This note is confined to matters affecting the relation between carriers and passengers or shippers of freight and does not include matters in relation to taxation, construction, fencing, etc.

It is further confined to cases involving delegation of power to public bodies or officials, excluding cases in which statutes are attacked upon the ground that they delegate legislative power to the carrier itself (*e. g.*, State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317, where an antiscaling law was attacked on that ground), or to a private individual (*e. g.*, United States v. Oregon R. & Nav. Co. 163 Fed. 640, where a statute prohibiting common carriers from confining stock while in transit more than twenty-eight consecutive hours, except that the time may be extended thirty-six hours "upon written request of the owner or person in custody of that particular shipment," was attacked as a delegation of legislative power to the owner of the stock).

The note deals only with questions relating distinctively to the delegation of the power, and not with questions which would apply equally to the exercise of the power directly by the legislature.

The questions whether the power has been delegated by the legislature, and, if so, 32 L.R.A. (N.S.)

tive power, a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution.

Carrier — regulation — powers.

2. The power accorded the legislature by the Constitution for the purpose of regulating intrastate transportation by common carriers is not confined to making rules and regulations. The legislature has authority to do or to cause to be done everything in any manner and by any means requisite to the complete and effectual exercise of the power possessed that is not an undoubted violation of some other provision of the Constitution.

Same — constitutional provision — instruction.

3. The Constitution should be interpreted so as not to render impotent or inoperative, but so as to preserve and make effective the sovereign power of the state in regulating intrastate transportation by common carriers; and the specific provision of the Constitution that the legislature has power to pass laws to correct abuses, and to prevent unjust discriminations and excessive charges by common carriers and others engaged in rendering service of a public nature, should be so applied as to accomplish the purposes expressed therein.

Legislative power — delegation.

4. The legislature may not delegate the

whether the power has been properly exercised, by the body to which it is delegated, are also beyond the scope of the note, and any reference to cases on these questions is made simply for the sake of their implication that the power may constitutionally be delegated.

It will be seen that the delegation of power to regulate carriers has been particularly attacked as unlawfully combining legislative, judicial, and executive powers, or some two of them, as conferring judicial powers upon nonjudicial bodies, as conferring legislative powers upon courts, and also as conferring strictly legislative functions upon nonlegislative bodies.

The reader is reminded that while, in construing the United States Constitution, the Congress of the United States must be held to have only those powers which are granted expressly or by necessary implication, the opposite rule applies in construing a state Constitution. "The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the state or national Constitution." Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375.

Combination of powers.

In considering whether a statute delegating the regulation of carriers has unlawfully attempted to combine in a single head

power to enact a law, or declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials, within definite valid limitations, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of the law is peculiarly applicable to the regulation of common carriers, since the complex and ever-changing conditions that attend and affect such a service make it impracticable for the legislature to prescribe all necessary rules and regulations.

Administrative officers — powers essential to.

5. Authority to make rules and regulations to carry out an expressed legislative

purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments.

Governmental powers — exercise — judicial review.

6. The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review, and it is not among the powers of government that the Constitution separates into departments.

Carrier — duties — regulation — railroad commission.

7. The common-law duties of common

executive, legislative, and judicial powers, or any two of them, it is to be remembered that the Constitution of the United States does not prohibit the states from such combinations of powers.

Thus, where a state Constitution united legislative and judicial functions in a commission, the Supreme Court of the United States, in *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67, declared: "We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; *Winchester & S. R. Co. v. Com.* 106 Va. 264, 268, 55 S. E. 692." See also to this effect, *Saratoga Springs v. Saratoga Gas, Electric Light & P. Co.* 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 A. & E. Ann. Cas. 606.

In *Winchester & S. R. Co. v. Com.* 106 Va. 264, 55 S. E. 692, the court said: "This court has recognized the validity of the state corporation commission as a legally constituted tribunal of the state, clothed with legislative, judicial and executive powers. *Atlantic Coast Line R. Co. v. Com.* 102 Va. 599, 46 S. E. 911; *Norfolk & P. Belt Line R. Co. v. Com.* 103 Va. 294, 49 S. E. 39. In the last-named case, at page 295, it is said: 'The state corporation commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental power for the regulation and control of public-service corporations. For that purpose it has been clothed with legislative, judicial, and executive powers.' The concentration of these three powers of government in the corporation commission is not in contravention of the Bill of Rights. That declaration is part of the Constitution, which expressly provides that 'except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct,'—thereby recognizing the well-accented view that the administra-

tion of the government would be wholly impracticable if that general maxim were strictly, literally, and unyieldingly applied in every possible situation." See also *infra*, under "Conferring judicial power on regulator."

In *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866, *Brewer, J.*, said: "The Constitution of the state of Iowa, as those in other states, divides the government into three departments,—the legislative, the executive, and the judicial; and in article 3, § 1, declares that 'no person charged with the exercise of powers properly belonging to one shall exercise any functions appertaining to either of the others.' By another section the legislative power is vested in a general assembly, consisting of two bodies,—the senate and the house. No provisions exist in the Constitution for a railroad commission. Hence, counsel conclude that the legislature is the only body which can fix rates, and that it may not abdicate its functions and delegate this legislative power to another body. . . . There is no inherent vice in such a delegation of power, nothing in the nature of things which would prevent the state, by constitutional enactment, at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the Federal Constitution. So that, after all, the question is one more of form than of substance. The vital question, with both shipper and carrier, is that the rates shall be just and reasonable, and not by what body they shall be put in force."

It is also to be borne in mind that an exact division of governmental powers is not possible. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179.

"The division of governmental powers into executive, legislative, and judicial, while of great importance in the creation or organization of a state, and from the viewpoint of institutional law and otherwise, is not an exact classification. No such exact delimitation of governmental

carriers are ascertained by the application of legal principles to particular facts. The statutes of the state do not define all the duties of common carriers, but expressly authorize the railroad commission to make reasonable and just rules and regulations to carry into effect the legislative purpose to regulate intrastate transportation by common carriers.

Legislative powers — delegation to railroad commission — penalties.

8. The legislature may not delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize the railroad commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. Where a penalty is imposed by law, it may be incurred for the penal violation

of a rule prescribed by the railroad commission within their express authority.

Statute — invalid in part — effect.

9. Even if the provisions contained in the railroad commission statute relate to the disposition of the proceeds of fines or penalties recovered, and for the suspension or remission of fines or penalties, be in conflict with the Constitution, such provisions may be eliminated without impairing the usefulness of the valid portions of the law for the purposes intended, and without causing results affecting the main purpose of the law in a manner contrary to the intention of the legislature, and it cannot be said the law-makers would not have enacted the statute without the invalid and unnecessary portions. The disposition of fines recovered is controlled by existing valid laws. The Con-

powers is possible." *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

For cases holding that powers were illegally combined, see next subdivision.

Conferring judicial power on regulator.

In general it is held that the powers of regulation usually delegated do not include judicial power, and are not to be so construed.

In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, it was held that the powers conferred upon the Interstate Commerce Commission by the act of 1887 were administrative, and not judicial, and that its findings were made prima facie evidence did not alter the case.

That Commission is not a court, but an administrative body, exercising powers which are quasi judicial. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 5 Inters. Com. Rep. 131, 64 Fed. 981.

The power to determine what rates public-service corporations may charge for their services is legislative, not judicial. *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171.

In *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67, the court said: "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (*Com v. Atlantic Coast Line R. Co.* 106 Va. 64, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 A. & E. Ann. Cas. 1124), and especially by its learned president in his pointed remarks in *Winchester & S. R. Co. v. Com.* 106 Va. 281, 55 S. E. 692. See further, *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 499, 500, 505, 42 L. ed. 243, 253, 255, 17 Sup. Ct. Rep. 896; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 440, 47 L. ed. 892, 893, 32 L.R.A.(N.S.)

23 Sup. Ct. Rep. 571." Followed in *Louisville & N. R. Co. v. Siler*, 186 Fed. 176.

In *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 683, 37 N. E. 247, the court said: "The constitutional provisions on this subject are as follows: 'And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.' Const. § 12, art. 11; 1 Starr & C. Anno. Stat. p. 163. 'The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises.' Const. § 15, art. 11; 1 Starr & C. Anno. Stat. p. 164. The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies, and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of Congress to regulate foreign and interstate commerce. . . . Under the constitutional provisions above quoted, the legislature of this state has the right, and it is its prerogative, if it chooses to exercise it, to pass a law establishing or fixing reasonable maximum rates of charges. When it passed the act of 1873, it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish such rates. When a board is authorized to make a schedule of rates, and their schedule is merely given the force and

stitution provides for the remission and disposition of fines, and affords a guaranty against excessive fines.

Jury — right to — railroad commission — fines.

10. In view of the organic provisions relating to common carriers, and to conferring judicial powers upon the railroad commission, the constitutional right to jury trial is not, beyond a reasonable doubt, violated by the imposition by the commission of a penalty or fine prescribed by law for the penal violation of rules provided for regulating a public service, when the fine or penalty is recoverable only by action at law in a jury trial, where any defense the carrier has may be interposed in the action to recover the penalty.

Intrastate commerce — carrier — regulation — property rights.

11. The regulation of intrastate trans-

effect of prima facie evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But 'when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable.' *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. p. 462, 33 L. ed. 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702."

In *State ex rel. Caldwell v. Wilson*, 121 N. C. 472, 28 S. E. 554, it was held that "the railroad commission does not stand upon the same footing as the criminal courts, inasmuch as it is an administrative, and not a judicial, court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers. It has been held to be a court of record in *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 474, 18 L.R.A. 393, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393, but in the opinion of the court, delivered by Chief Justice Shepherd, appears the significant qualification: 'Whether a court having no power to enforce its judgment fulfils the definition of a court of record and of general jurisdiction is unnecessary to be considered.'"

"The railroad commission is a court of record . . . but . . . it is an administrative court. . . . Its orders and regulations are merely the basis of judicial action in the superior court to enforce them 32 L.R.A. (N.S.)

portation by common carriers is the exercise of the inherent and reserved power of the state. While the Constitution expressly authorizes the regulation of common-carrier corporations, it also expressly provides for the protection of property rights against unlawful invasion, whether under the guise of regulation of a public service or otherwise.

Constitutional law — carrier — regulation — railroad commission.

12. An arbitrary and unreasonable regulation is not within the authority of the railroad commission. If the action of the state through the railroad commission is not a legally authorized regulation of a public service, or if the authorized regulation is arbitrary and unreasonable, and in effect deprives the beneficial owners of property used in rendering the public service of the property rights in a manner or

or to punish their violation." *State ex rel. Railroad Comrs. v. Wilmington & W. R. Co.* 122 N. C. 877, 29 S. E. 334.

In view of these later North Carolina Cases it is not necessary to refer more particularly to *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 463, 18 L.R.A. 393, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393, referred to in *State ex rel. Caldwell v. Wilson*, supra.

The railroad commission is "authorized to hear complaints, strike down existing rates, and create new ones. The power is in no sense judicial, but administrative or legislative in its nature, and the permission of the statute, permitting the aggrieved party to bring his action in the circuit court within thirty days, is but the legislative scheme to have the decisions of the commission judicially determined, if desired, before their enforcement; and evidently it was the legislative intent that the circuit court, reached in the statutory and regular way, is the forum where all defenses arising on the merits must be presented. . . . The decisions seem to hold that, as the state legislature possesses the power to regulate the business of railroads, it may delegate that power to a commission, or other administrative body, and what such administrative agent does, within the powers with which it is endowed, is as valid and conclusive as if done by the legislature itself." *Southern Indiana R. Co. v. Railroad Commission*, 172 Ind. 113, 87 N. E. 966.

In *State ex rel. Taylor v. Missouri P. R. Co.* 76 Kan. 467, 92 Pac. 606, the court said: "The particular objection to the statute is that § 5970 of the General Statutes of 1901, and §§ 4 and 9 of chapter 340, Laws of 1905, combine executive, legislative, and judicial power. The first clause of § 5970 reads as follows: 'Whenever in the judgment of the railroad commissioners it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state,' etc. In the same section it is pro-

to an extent not contemplated by law as a limitation upon the rights of those devoting their property to a public use, such action, though under the form of regulation, is in law a deprivation of property without due process of law, in violation of the state Constitution.

Carrier — regulation — commission — authority.

13. The railroad commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provision of law, or such as is, by fair implication and intentment, incident to and included in the authority expressly conferred, for the purpose of carrying out and accomplishing the purposes for which the offices were established.

Same — rules — construction.

14. When it can be fairly done, a rule

provided that 'said commissioners, shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing; . . . and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act, as in other cases.' It must be apparent that the use of the words 'judgment' and 'adjudge' in this section does not contemplate a judicial judgment. The commissioners do not exercise judicial power within the meaning of that word as used in the Constitution," the court pointing out that the commissioners' decision was subject to review. The case arose upon a decision of the commissioners, requiring a separate passenger-train service on a certain line.

The Oregon statute of 1907, providing for a railroad commission, which, on complaint or on its own initiative, may fix reasonable rates, subject to court review, the rates to be effective within twenty days after notice thereof, and to be *prima facie* lawful until judicially determined otherwise, does not contravene the provisions of the state Constitution, which permit no person charged with the official duties under the legislative, executive (including the administrative), or judicial department, to exercise any function of another department except as provided otherwise in the Constitution. *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957. The court said: "The legislature has delegated to the commission the duty of fixing rates, which it does in aid of legislative action, or as an auxiliary to the exercise of the legislative functions. This the authorities all sanction as falling within the legislative power. There can exist no valid objection to conferring such authority upon an administrative board. The board thereafter administers the law as devised. Certainly such a regulation does not clothe an officer or officers in one department with official duties appertaining to those of another. Nor does it commingle the appropriate func-

adopted by the railroad commissioners should be so construed and applied as to make it conform to the powers conferred upon the commissioners, rather than as being an assumption of power not conferred.

Same — detention of cars — fines.

15. Under the power given the railroad commissioners to require common carriers to furnish all necessary facilities for the convenient and prompt handling, transportation, and delivery of all freight offered for transportation, and to provide and prescribe all rules and regulations necessary to secure the furnishing of such facilities, and transportation and delivery of all freights offered, to direct and control all matters pertaining to railroads that shall be for the good of the public, and to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions of the railroad commission

tions of the several departments of government."

But in some cases it has been held that the regulator, while not a court, has judicial or quasi judicial powers.

In *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, affirming 106 Ky. 633, 90 Am. St. Rep. 236, 51 S. W. 164, 1012, the court said, in referring to the clause of the Kentucky Constitution giving to the railroad commission power to exonerate carriers from the long-and-short-haul rule: "We are not prepared to accept the view that the railroad commission, in acting under § 218, is merely an administrative body, and, as such, subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section."

In *Louisville & N. R. Co. v. Brown*, 123 Fed. 946, the court said: "An inspection of the act of the legislature of the state of Florida creating the railroad commission shows that, as is usual in such cases, the commission is vested with executive, legislative, and quasi judicial powers, but does not show that the commission is to any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property. Whatever may be the act, order, or proceeding of the commission, whether of an executive, legislative, or quasi judicial character, the commission's findings are only *prima facie* determined, and can only be enforced in the courts; and in every instance the rights of individuals or the rights of property concerned can be re-examined and determined in the regular course. But be that as it may, it is clear, from the act as a whole, that the judicial powers conferred by the act are *quoad* judicial acts, to be performed by the commission, and were not intended to extend to the performance of any

law, the commissioners are authorized to adopt a rule making all railroads liable to a shipper in a charge of \$1 per day per car for detaining cars properly loaded, with shipping instructions given, in violation of the commission rules. Such a charge is not a penalty, but is a monetary obligation incurred for breach of duty, that may be enforced by the shipper to which it is due.

Same — reasonableness.

16. The liability or charge prescribed by the rule of the railroad commissioners making the carrier liable to the shipper in the sum of \$1 per day per car for the unlawful detention of loaded cars does not appear to be excessive or unreasonable or unjustly discriminatory; but it may be considered to be, and may in fact be, a reasonable and salutary means to prevent or

to aid in preventing unjust discriminations and abuses in intrastate shipments, which is the purpose of the Constitution and the railroad commission law. The rule is general in its terms, and is applicable alike to all under similar conditions. Only railroads use cars in transporting freight.

Interstate commerce — regulation — railroad commission.

17. If a valid excuse exists for not obeying a rule of the railroad commission, there is no penal violation of it; and the rule cannot legally be so applied as to directly and materially burden interstate commerce, or so as to deprive the carrier or the shipper of any rights afforded by the law.

Carrier — regulation — commission — penalties.

18. Even if it be competent for the legislature to impose a penalty upon a carrier

of the legislative powers conferred upon the commission. It seems to be well settled that the power to fix future rates is legislative, and not judicial (*Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 107 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896); and therefore it may be assumed as beyond question that the Florida railroad commission, in regulating and reducing the future rates of passenger fares to be charged and collected by the Louisville & Nashville Railroad Company on its lines in the state of Florida, acted in a legislative capacity, and that with regard to enforcing the said reduction, the commission is given no judicial powers, being limited, under the statute creating the commission, to the institution of proceedings, or the direction of the same, in the regular courts."

In *People ex rel. Loughran v. Railroad Comrs.* 158 N. Y. 421, 53 N. E. 163, the court said, in referring to the orders of the board of railroad commissioners under the statute: "When the orders of the board relate to the giving of permission to do or refrain from doing certain acts, nothing further is required to make the order effective; but when the orders are affirmative requirements, directing certain things to be done, they are in the nature of recommendations, which may be enforced, if reasonable and expedient, in order to promote the convenience of the public, by the supreme court at special term, subject in such cases to the right of appeal in the usual way, expressly conferred." And it was held that the board, in consenting to the discontinuance of a station, acts judicially, and that its action may be reviewed by certiorari.

But where the attempted combination of powers is clearly in contravention of the state Constitution, the statute must fall.

In *State ex rel. Godard v. Johnson*, 61 Kan. 803, 49 L.R.A. 662, 60 Pac. 1068, involving a Kansas statute creating a court of visitation, the court summarized the powers authorized by the statute, stating in each case its view of the power conferred in substance as follows: (1) To try 32 L.R.A. (N.S.)

and determine all questions as to what were reasonable freight and other charges (judicial as to the past, legislative as to future charges); (2) to apportion charges between connecting roads, to determine all questions relating to charges for the use of cars and equipment, and to regulate charges for part carload and mixed carload lots of freight (legislative and judicial); (3) to classify freight (administrative); (4) to apportion transportation charges among connecting carriers (judicial and legislative); (5) to require construction of depot switches, cars, etc. (administrative and legislative); (6) to regulate crossings and passage of trains over them (administrative, and, in a sense, legislative); (7) to regulate movement of trains for safety of employees and public (legislative); (8) to require use of improved appliances and methods to avoid accidents and injuries (legislative and administrative); etc.; and to enter a decree fixing a schedule of freight rates (legislative). It was held that legislative, judicial, and administrative powers were so inextricably interwoven and bound up together as to render their separation impossible; and that said court of visitation had no power to fix rates, which was a legislative and administrative function, incompatible with judicial power, the state Constitution inhibiting the conferring of inconsistent legislative and judicial powers upon the same body.

In *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335, a similar decision was reached, the court holding that the Kansas court of visitation might not judicially and as a finality determine such question, as that belongs to courts of justice, and the act creating such "court," and attempting to give it judicial powers, contravenes the Kansas Constitution, which inhibits the conferring of inconsistent legislative and judicial powers upon the same body. The court said: "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or admin-

alone for a refusal to pay a pecuniary liability, in the absence of valid, explicit enactments, a penalty may not be incurred for merely refusing to pay an amount for which only a liability in the nature of a charge for failing to perform a legal duty is created by the rule, in the payment of which liability the public is not concerned. A penalty is not incurred under the statute for refusing to pay a penalty, or for refusing to pay a charge imposed under the commission rules.

Same — powers.

19. The particular powers and duties prescribed in other acts were not intended to affect, and do not affect, the powers and duties of the commission, as defined by the railroad commission statute and the amendments thereto. The Constitution and the statute contemplate cumulative reme-

dies to make effective the general purpose of regulating intrastate transportation by common carriers.

Same — penalties — liability.

20. Penalties may be incurred by a railroad company under the statute for the penal violation of prescribed duties peculiar to such companies, but the statute does not provide for incurring a penalty for mere refusal to pay a monetary liability imposed by a rule of the railroad commission.

(November 24, 1908.)

ERROR to the Circuit Court for Orange County to review a judgment sustaining a demurrer to the declaration in an action brought to recover certain penalties imposed by the state railroad commission

istrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. . . . In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree; for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction."

Conferring legislative power on courts.

In like manner statutes giving to the courts powers of review of the regulator, or to hear and determine facts in controversy, are construed as not conferring legislative powers upon the courts.

In *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905, the court observed: "Whether it is within the power of the legislature to confer upon courts authority to review the reasonableness of rules or orders of the railroad com-

mission depends upon the fundamental nature of these rules or orders. If such rules and orders are purely legislative, and violate no constitutional law or paramount Federal statute, it would be incorrect to say that their reasonableness could be the subject of judicial review, because that would give the judicial branch of government a supervisory control over legislation, largely discretionary, and limited only by the judicial opinion of what is reasonable.

There can be no objection if the legislature, instead of making the law wholly conditional and contingent upon the ascertainment and declaration of reasonable rates by the commission, add the further contingency that the investigation and order of the commission be subject to review by the courts, and the rates so fixed by the commission upheld as not unreasonable by judicial determination. But neither the commission nor the court can be vested with discretion to determine whether the precedent law declared by the legislature shall or shall not go into effect in particular cases."

In *Railroad Commission v. Weld*, 96 Tex. 403, 73 S. W. 529, the court said that the Texas statutes as to the review of the acts of the railroad commission as to rates, etc., "do not confer legislative power upon the courts, but by subjecting the rates to be made by the commission to examination, their reasonableness becomes a judicial question, and there is no conflict between those articles and the provision of the Constitution which provides that 'no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.' The making of rates by the commission is the exercise of legislative authority which the court cannot exercise; but whether the law under which it acts has been complied with is a question for the courts. It is unnecessary for us to inquire what the rule would be in the absence of our statutory provisions."

In this connection, while perhaps not strictly within the scope of this note, the

for alleged violations of a demurrage rule. Affirmed.

The facts are stated in the opinion.

Mr. L. C. Massey for plaintiff in error.

Messrs. W. E. Kay, George P. Raney, W. A. Carter, and Blount, & Blount & Carter, for defendant in error:

The commission is a body subordinate and with limited powers; and the legislature, while it might confide to it, in the absence of conflict with the Constitution, any powers which it saw fit, cannot have intended to give it the power to make unreasonable rules.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A. (N.S.) 364, 60 S. E. 71.

views of the court in Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750, may be read with interest. It was there said: "It is true that the courts have established the rule that the reasonableness and justice of rates fixed by the legislature, or by a commission empowered by it so to do, are ordinarily questions committed to the discretion of those bodies, and not subject to revision by the courts; but in such cases the law did not authorize any revision of such action by the judicial department. It has been generally held, especially by the Supreme Court of the United States, that the action of the legislature of a state or of a commission created by it, in fixing rates of transportation, would be revised and would be set aside and annulled, when it violates the constitutional right of the carrier to that degree that it amounts to a taking of property without proper compensation or without due process of law. But, in doing so, the courts have not revised the exercise of discretionary power on the part of the legislature or the commission, but it is an interference on the part of the judiciary to protect parties against a violation of the Constitution of the United States or of the state, whether it be in making or enforcing the law. It has not been held that every rate, rule, or regulation which does not violate the Constitution is reasonable, but that extreme degree of unreasonableness which confiscates property gives jurisdiction to the court. . . . In actions of this character, the courts will determine the question of the reasonableness and justice of any matter by the same rules as if it were an issue in other classes of suits, except as to the conclusive character of the evidence."

Upon a mandamus on the application of the Minnesota Railroad and Warehouse Commission to compel an express company, which was a partnership or joint stock association, to print, file, and exhibit its rates, it appeared that the statute provided "that whenever a common carrier refuses or neglects to obey any lawful order or requirement of the commission, made 32 L.R.A. (N.S.)

The power to create a crime or declare a penalty is legislative, and cannot be delegated to a commission.

United States v. Matthews, 146 Fed. 306; United States v. Keitel, 157 Fed. 396; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Ex parte Cox, 63 Cal. 21; Jones Bros. v. Southern R. Co. 76 S. C. 67, 56 S. E. 666; Hurst v. Warner, 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; Cigarmakers' International Union v. Goldberg, 72 N. J. L. 214, 70 L.R.A. 156, 111 Am. St. Rep. 662, 61 Atl. 457; Potts v. Breen, 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; State ex rel.

under the provisions of the statute under which it acts, an application may be made to the court, alleging such disobedience, and the court is given power to hear and determine the matter on short notice to the carrier; such notice to be served on the carrier, his or its officers, agents, or servants, in such manner as the court shall direct." It was urged "that when the legislature attempted to confer upon the courts the power to determine the manner, or upon whom, writs of mandamus shall be served (§ 5979), or the manner, or upon whom, the notice prescribed in § 399 shall be served, it delegated its powers to the judiciary; and that the latter branch of the government, when acting, assumes a power purely legislative, forbidden by the Constitution;" but it was held that the service directed by the court upon the express company's agent was sufficient. The court said: "We are not only confident that in authorizing the court to exercise the power of directing the manner in which service shall be made, as it has in both sections (399 and 5979), there has been no delegation of legislative powers, but that the courts, in the absence of a statute expressly regulating the subject, have always possessed the right and authority to direct the manner in which prerogative writs shall be served, and, in case of corporations, upon whom they should be served." State ex rel. Railroad & W. Commission v. Adams Exp. Co. 66 Minn. 271, 38 L.R.A. 225, 68 N. W. 1085.

—flagmen, gates.

A statute authorizing the court of chancery on the application of local authorities to hear and determine whether gates, a flagman, or other reasonable provisions for the safety of the public should be provided by a railroad company at a public crossing, does not confer legislative power on the court, but the court exercises simply judicial power in the matter. Palmyra Twp. v. Pennsylvania R. Co. 62 N. J. Eq. 601, 50 Atl. 369, affirmed in 63 N. J. Eq. 799, 52 Atl. 1132; Eckert v. Perth Amboy &

Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347.

The rule is void because it does not define the prohibited act with such certainty as to prevent the punishment *ex post facto* of any alleged crime.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; McChord v. Louisville & N. R. Co. 183 U. S. 498, 46 L. ed. 296, 22 Sup. Ct. Rep. 165; Ex parte Jackson, 45 Ark. 158; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Chicago, B. & Q. R. Co. v. People, 77 Ill. 443; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Tozer v. United

States, 4 Inters. Com. Rep. 245, 52 Fed. 917.

The proceeding to enforce the penalty is in violation of the right of defendant to a trial by jury.

Plimpton v. Somerset, 33 Vt. 283; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; Francis v. Baker, 11 R. I. 103, 23 Am. Rep. 424; Poullain v. Brown, 80 Ga. 30, 5 S. E. 107; Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627; McInerney v. Denver, 17 Colo. 302, 29 Pac. 516; State v. Hamey, 168 Mo. 167, 57 L.R.A. 846, 67 S. W. 620; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Garnhart v. United States, 16 Wall. 162, 21 L. ed. 275; United States v. The Queen, 4 Ben. 237, Fed. Cas. No. 16,107.

W. R. Co. 66 N. J. Eq. 437, 57 Atl. 438, affirming 65 N. J. Eq. 777, 60 Atl. 1134.

In People v. Long Island R. Co. 134 N. Y. 506, 31 N. E. 873, it appeared that the court, under the statute, upon the application of the local authorities, had directed the erection and operation of gates at a railroad crossing; the railroad company was indicted for failure to obey the court's order, in that it failed to operate the gates; and it was held that the statute did not give any legislative power to the court, and that the company was properly convicted under the statute providing that the wilful omission by a person holding a public employment to perform a duty enjoined by law, where a special punishment is not provided, is punishable as a misdemeanor, as the company was a "person" holding the public employment of a common carrier.

Conferring executive power.

When the Constitution of a state provided that "no other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this Constitution shall be performed by the officers herein created," the court, on being applied to by a branch of the legislature for its view upon the subject of the creation of a railroad commission, gave answer to the effect that such a commission might be created, provided it was formed of executive officers named in the Constitution, but not otherwise, as the duties of its members would be executive. Re Railroad Comra. 15 Neb. 679, 50 N. W. 276.

Administrative and legislative functions distinguished.

In some of the foregoing cases it will be observed that the delegation of legislative power upon the regulator is upheld. In these cases "legislative" is used as distinguished from "judicial" or "executive" power. Perhaps in most of the cases where the right to delegate has been in issue, the

question particularly considered has been whether the power attempted to be conferred upon the regulator of carriers by the statute was strictly a legislative power as distinguished from functions merely administrative or ministerial,—the general rule being that a strictly "legislative" power cannot be delegated.

"The legislature may delegate any power not legislative which it may itself rightfully exercise. Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253." Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

In Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549, the court, in upholding a statute authorizing a railroad commission to fix maximum rates, said: "Commissions of the character we are considering in this case are now as much an integral and indispensable part of our governmental system as any other of our administrative bodies, with the exception of the legislature itself. It is now quite uniformly held by the courts that the action of such a body in fixing a rate is not a legislative act upon its part, but is only administrative or ministerial in its function, in putting into effect the legislative will, which has been previously declared by the legislature. If the legislature were to attempt to delegate a purely legislative power to a commission, it would be unconstitutional, as in fact this court has repeatedly held. It is unnecessary to point out the cases. But the legislative will is declared when the law is passed, affirming that all rates shall be reasonable and just. This is done by the legislature itself. The work of the commission making the investigation upon the facts, and declaring what is a reasonable and what is an unreasonable rate is by the courts held to be simply administrative of the law as previously enacted by the legislature. It is held that the functions and duties of such commissions are administrative or ministerial, and neither legislative, executive, nor judicial." See also, to similar effect, Oregon R. & Nav. Co. v. Campbell,

The partial invalidity of the statute avoids the entire act.

Atchison, T. & S. F. R. Co. v. State, 22 Kan. 1; *Dutton v. Fowler*, 27 Wis. 427; *Ex parte McMahon*, 26 Nev. 243, 66 Pac. 294; *State ex rel. Rodes v. Warner*, 197 Mo. 650, 94 S. W. 964; *Atchison & N. R. Co. v. Baty*, 6 Neb. 45, 29 Am. Rep. 356; *Adams v. Sneed*, 41 Fla. 151, 25 So. 893.

Whitfield, J., delivered the opinion of the court:

This action was begun in the circuit court for Orange county, under § 2908 of the General Statutes of 1906, by the railroad commissioners, in the name of the state, to recover penalties fixed and imposed under the railroad commission law upon the rail-

road company for alleged violations of demurrage rule 8 of the commission rules in refusing to pay liabilities to a shipper incurred under the rule. In sustaining a demurrer to the declaration, the trial court held that demurrage rule 8 is unreasonable and denies the defendant due process of law. Final judgment for the defendant was entered on the demurrer. The state took writ of error, and assigns as errors the order sustaining the demurrer and the final judgment.

The questions presented for determination are: (1) Whether the railroad commission statute or demurrage rule 8 violates the provisions of the state Constitution relating to the exercise of legislative power, to penalties, to jury trials, and to

supra, under subdivision, "conferring judicial power on regulator."

"While, in a general sense, following the language of the supreme court, it must be conceded that the power to fix rates is legislative, yet the line of demarcation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially, at least, the mere administration of that law to the railroad commissioners." *Brewer, J.*, in *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866.

"Different states have found it necessary to constitute a body charged, as their representative, with the duty of guarding the public interests upon this particular subject, to which they have expressly given very broad authority and powers. That body in Louisiana is the defendant in this case, the railroad commission. It is an administrative board, created by the state for carrying into effect the will of the state as expressed by its legislation." *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission*, 109 La. 247, 33 So. 214.

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and strikingly great; and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not." *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, was brought to prevent the railroad commissioners of Mississippi from giving the Mississippi statute of 1884, creating a railroad commission, any effect 32 L.R.A. (N.S.)

as against a railroad company. The Supreme Court of the United States, in following the Mississippi court in holding that the statute was not repugnant to the Constitution of the state or the United States, in that it created a commission and charged it with the duty of supervising railroads, said: "The commissioners have power (1) to approve, and if need be to fix, the tariff of charges for transportation, both of persons and property, by which the company must be governed, and to exercise a watchful and careful supervision over such tariff; (2) to notify the company of the times and places when and where the propriety of a change in existing tariffs will be considered; (3) to entertain complaints made by any person against a tariff which has been approved, on the ground that the same is in any respect for more than a just compensation, or that the charges amount to or operate so as to effect unjust discrimination; and, after due notice to the company and proper inquiry had, to make any changes that may be deemed proper; (4) to repair to the scene of an accident within the state, attended with serious personal injury, and inquire into the facts and circumstances thereof, to be recorded in the minutes of their proceedings and embraced in the annual report they are required to make to the governor for transmission to the legislature; (5) to inspect the depots of all railroads operated in the state, and to see that comfortable and suitable reception rooms are provided; and (6) to institute all necessary suits for the recovery of the penalties prescribed by the statute for a violation of its provisions. The first three of these relate entirely to proceedings for fixing charges and supervising the tariff, and the rest, like the correlative requirements of the company, are mere police regulations which the commissioners are to enforce. All this comes clearly within the supervising power of the state in the administration of the affairs of its domestic corporations."

This case was followed in *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348, and in *Stone v. New*

taking property without compensation and without due process of law; (2) whether the statute or the rule, in violation of the Federal Constitution, deprives the carrier of property without due process of law, or denies to the carrier the equal protection of the laws or directly and materially burdens interstate commerce; (3) whether the legislature intended to authorize the adoption of demurrage rule 8, and to enforce it by penalties. The questions raised here as to the validity of the statute and the rule are similar to those presented in the case of *State v. Seaboard Air Line R. Co.* 56 Fla. 670, 47 So. 986, and this discussion of such similar points will suffice for both cases.

A direct exercise by the legislature of the

police power is in accordance with immemorial governmental usage. But the subject-matter may be such that only a general scheme or policy can with advantage be laid down by the legislature, and the working out in detail of the policy indicated may be left to the discretion of administrative or executive officials. *McGehee, Due Process of Law*, 366, and authorities cited.

The constitutionality of statutory provisions authorizing executive or administrative officers or boards to formulate rules and regulations to make the statute effective for the public purpose designed has generally been assumed or conceded without question. But in a number of well-considered cases it has been distinctly held

Orleans & N. E. R. Co. 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391, the cases being known as the "Railroad Commission Cases." See also cases cited *infra*, under subdivisions "Fixing Rates," etc.

Fixing rates.

The question whether rates to be charged by carriers is a proper subject of delegation by the legislature is treated in the note to *Saratoga Springs v. Saratoga Gas, Electric Light, & P. Co.* 18 L.R.A.(N.S.) 713. A few later cases on that point are added here.

Thus, following the rule sustained by the cases cited in that note, it is held by subsequent cases that the power to fix rates is a proper subject of delegation. *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957; *Southern Indiana R. Co. v. Railroad Commission*, 172 Ind. 113, 87 N. E. 966; *Michigan C. R. Co. v. Michigan R. Commission*, 160 Mich. 355, 125 N. W. 549.

So, in *Louisville & N. R. Co. v. Interstate Commerce Commission*, 184 Fed. 118, where the power of the commission to fix certain through and local freight rates was attacked, the court said: "In pursuing this inquiry it is of prime importance that we apprehend clearly the nature of the power on which the order rests; and for greater clearness it is well to emphasize the fact that the particular power in question is one which relates to the prescription or rules and regulations for future conduct, and it is not a power for affording remedies for past misconduct or other violations of legal rights. As has been pointed out in the opinions of the Supreme Court, the power thus defined is legislative in its nature; and it is well settled upon a long series of decisions by that court in the development of this subject that, when this legislative power concerns the administrative affairs of the government, it may be delegated to an officer, or a board already existing or created for the purpose, and, when so delegated, the power may be as 32 L.R.A.(N.S.)

fully exercised as the legislature might have exercised it, subject to any limitations imposed by the legislature itself. When a subject requires legislation for the regulation of future conduct, but the objects of it are so diffuse and variable that they cannot be distinctly apprehended and comprised in the ordinary terms of legislative classification, it is not unusual to prescribe general rules, if such do not already exist, and delegate the power to apply those rules to the varying circumstances which may arise and give occasion for control. The necessity of legislation in such form justifies its adoption; and it is not obnoxious to the Constitution, in that it delegates legislative power. *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 476, 48 L. ed. 527, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367."

Section 243 of the Alabama Constitution provides that "the legislative power of the state shall be vested in a legislature, which shall consist of a senate and a house of representatives." The Alabama act of Aug. 9, 1907, providing that rates fixed by statute may be changed by the railroad commission, is not void as conferring on the commission legislative power, in violation of the Alabama Constitution. *Railroad Commission v. Central R. Co.* 95 C. C. A. 117, 170 Fed. 225, reversing 161 Fed. 925, which is cited at the close of the note in 18 L.R.A.(N.S.) 713.

In *Chicago, B. & Q. R. Co. v. Winnett*, 89 C. C. A. 222, 162 Fed. 242, the court said, where the Constitution and laws of Nebraska gave the state railway commission power to regulate rates and service, and to exercise general supervision over railroads and other common carriers: "The legislature would have full power to delegate to the Nebraska State Railway Commission the authority to fix rates for the transportation of passengers and freight by common carriers within the state of Nebraska if the Constitution were silent

that, where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make, within designated limitations and subject to judicial review, rules and regulations, or to ascertain facts, upon which the statute by its own terms operates in carrying out the legislative purpose, such authority is not an unconstitutional delegation of legislative power. See *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, text 474, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; *Storrs v. Pensacola & A. R. Co.* 29 Fla. 617, 11 So. 226; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37

N. W. 782; *Chicago & N. W. R. Co. v. Dey* (C. C.) 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Georgia R. Co. v. Smith*, 70 Ga. 694, Id., 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Tilley v. Savannah, F. & W. R. Co.* 4 Woods, 427, 5 Fed. 641; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398, and cases cited. See also *Morgan's L. & T. R. & S. S. Co. v. Rail-*

upon that subject. It seems clear, therefore, that the power to act in the matter in controversy, so far as the laws of Nebraska are concerned, has been fully conferred. That the general power to fix rates for the transportation of passengers and freight by common carriers between points within a state belongs to the legislature of each state, that said power may be exercised by the legislature itself, or be delegated by it to a commission established for that purpose, and that courts of equity will not interfere by injunction to control the exercise of this power in advance, are propositions established beyond question."

The Washington Constitution empowers the delegation to the railroad commission of the power to fix rates in this provision: "The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads, and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law." In *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184, the court said: "If the legislature had power—which is now considered to be unquestionably the law—to establish reasonable maximum rates of charges for the transportation of passengers and freight without constitutional authority, the fact that the Constitution imposed the duty of so establishing such rates could not possibly be construed as taking away any right that the legislature had to delegate such power."

For other cases where the power of a railroad commission to fix rates has been sustained without discussing the question of the right of delegation, see *Piek v. Chicago & N. W. R. Co.* 6 Biss. 177, Fed. Cas. No. 11,138, affirmed in 94 U. S. 164, 24 L. ed. 97; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. ed. 174, 27 32 L.R.A. (N.S.)

Sup. Ct. Rep. 108, affirming 48 Fla. 146, 37 So. 657; *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109, affirming 48 Fla. 125, 150, 37 So. 652, 658; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 51 Fla. 578, 40 So. 875; *State ex rel. Ellis v. Altantic Coast Line R. Co.* 52 Fla. 646, 12 L.R.A. (N.S.) 506, 41 So. 705; *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 639, 60 N. W. 487; *State ex rel. Board of Transportation v. Fremont, E. & M. Valley R. Co.* 22 Neb. 313, 35 N. W. 118, demurrer, 23 Neb. 117, 36 N. W. 305, motion to dismiss; *Portland R. Light & P. Co. v. Railroad Commission*, — Or. —, 105 Pac. 709; *Corporation Commission v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. 266.

The power of transportation commissions under the statutes has also been sustained to make just and reasonable telegraph, telephone, and express rates. *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 213, 22 L.R.A. 570, 18 S. E. 389 (telegraph); *Leavell v. Western U. Teleg. Co.* 116 N. C. 211, 27 L.R.A. 843, 47 Am. St. Rep. 798, 21 S. E. 391 (telegraph); *Nebraska Teleph. Co. v. Cornell*, 59 Neb. 737, 82 N. W. 1, affirming on rehearing, 58 Neb. 823, 80 N. W. 43 (telephone); *Pacific Exp. Co. v. Cornell*, 59 Neb. 364, 81 N. W. 377 (express).

Providing stations and stopping at stations.

For cases on the general subject of the power to compel the establishment of railway stations or the stopping of trains at stations, see the note to *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 17 L.R.A. (N.S.) 821.

"It is hardly to be questioned but that it is entirely within legislative competency to empower the railroad commission to order the location of stations and the building of depots, and to apply to the courts for the enforcement of the order." *Nashville, C. & St. L. R. Co. v. State*, 137 Ala. 439, 34 So. 401 (*dictum*).

In *Railroad Comrs. v. Portland & O. C. R. Co.* 63 Me. 269, 18 Am. Rep. 218, the court, in sustaining an order of the com-

road Commission, 109 La. 247, 33 So. 214; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commissioner, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Atlantic Exp. Co. v. Wilmington & W. R. Co. 111 N. C. 463, 18 L.R.A. 393, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721; State ex rel. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 137 Wis. 80, 117 N. W. 846.

missioners directing the erection of a certain railway station, said: "The constitutional power of the legislature to confer such jurisdiction and authority over this subject upon the railroad commissioners is unquestionable, since the legislature, as we have seen, has the right to provide for the correction and prevention of all abuses of the franchises of the corporation."

In State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510, the court, in setting aside the order of the commission directing a railroad company to build and maintain a certain station, as not reasonable under the circumstances, said: "There is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary."

See also, as sustaining orders of this character, Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 87 Minn. 195, 91 N. W. 465, affirmed in 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; Railroad Comrs. v. Columbia, N. & L. R. Co. 82 S. C. 418, 64 S. E. 240.

In New York, the railroad commissioners may direct a station to be provided, and it is the duty of the company to comply; if not, the commissioners shall present the facts to the attorney general, and shall report them to the legislature; the supreme court can compel compliance if the recommendation is just and reasonable, which it is deemed to be prima facie. People v. Delaware & H. Canal R. Co. 165 N. Y. 362, 59 N. E. 138.

In People ex rel. Loughran v. Railroad Comrs. 158 N. Y. 421, 53 N. E. 163, it was held that the board of railroad commis-

If the regulation or action of an official or board authorized by statute does not in effect determine what the law shall be, or does not involve the exercise of primary and independent discretion, but only determines within defined limits, and subject to review, some fact upon which the law by its own terms operates, such regulation or action is administrative, and not legislative, executive, or judicial in its nature and effect. The effect and operation of a statute may be made conditional or contingent upon the ascertainment of particular facts, and may be made to depend upon a subsequent event. This principle has been applied in regulations relating to public service, occupations, schools, health, elections, safety, food, game, liquor, taxa-

sioners, in consenting to the discontinuance of a station, acted judicially, and that its action might be reviewed by certiorari.

Changing carrier into warehouseman.

In Jones Bros. v. Southern R. Co. 76 S. C. 67, 56 S. E. 666, it was held that a statute authorizing a railroad commission to fix the time after the reception of freight at place of destination at which charges of storage shall begin was legal, but that the legislature could not delegate to such commission the power to fix a time at which the liability of a carrier changed into that of a warehouseman.

Appliances.

Section 5 of the United States safety appliance law (act of March 2, 1893 [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3175]), authorizing the American Railway Association to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars for each of the several gauges of railroads in use in the United States, and also a maximum variation from such standard, to be allowed between the drawbars of empty and loaded cars, and, in default thereof, making it the duty of such commission to determine such standard, and providing that, after July 1, 1895, no cars, loaded or unloaded, shall be used in interstate commerce which do not comply with the standard above provided for, is not an unconstitutional delegation of legislative power to such railway association and to the Interstate Commerce Commission. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing on other grounds, 83 Ark. 591, 98 S. W. 958.

Cattle quarantine.

In United States v. Louisville & N. R. Co. 176 Fed. 942, where the defendant was indicted for a violation of the act of Congress of March 3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp.

tion, and other public purposes. See *Ormond v. Shaw*, 50 Fla. 445, 39 So. 108; *State ex rel. Moodie v. Bryan*, 50 Fla. 293, text 370, 39 So. 929; *Storrs v. Pensacola & A. R. Co.* 29 Fla. 617, 11 So. 226; *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, text 471, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; *Ex parte Wells*, 21 Fla. 280, text 323; *Jacksonville v. L'Engle*, 20 Fla. 344, text 351; *State ex rel. Drew v. State Canvassers*, 16 Fla. 17; *Cooley*, Const. Lim. 7th ed. 164; *State v. Briggs*, 2 A. & E. Ann. Cas. 424, and note (45 Or. 366, 77 Pac. 750, 78 Pac. 361); *State ex rel. Milhoof v. Board of Education*, 76 Ohio St. 297, 81 N. E. 568, 10 A. & E. Ann. Cas. 879; *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep.

681, 80 N. W. 633, 778, 1134; *Re Thompson*, 36 Wash. 377, 78 Pac. 899, 2 A. & E. Ann. Cas. 149; *Spokane v. Camp*, 56 Wash. 554, 128 Am. St. Rep. 913, 97 Pac. 770; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; *Pierce v. Doolittle*, 130 Iowa, 333, 6 L.R.A. (N.S.) 143, 106 N. W. 751; *Com. v. Kingsbury*, 199 Mass. 542, 127 Am. St. Rep. 513, 85, N. E. 848; *State ex rel. Port Royal Min. Co. v. Hagood*, 30 S. C. 519, 3 L.R.A. 841, 9 S. E. 686; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *People ex rel. Akin v. Kipley*, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; *United States v. Ormsbee* (D. C.) 74 Fed. 207; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *Locke's Appeal*, 72 Pa. 491, 13 Am.

1909, p. 1,185), providing for the establishment of stock quarantines by the Secretary of Agriculture, the court said: "The statute itself, as distinguished from departmental rules and regulations, defines the act made criminal by it; viz., the shipping of live stock from a quarantine territory in one state to another state, and also fixes the punishment to be administered. The statute, therefore, in and of itself, completely creates the offense; the effect of the subsequent provisions, authorizing the Secretary to permit shipments when the public safety permits, under certain conditions, constituting merely a suspensory power in specific instances, conditioned upon the observance by the shipper of certain safeguards to be prescribed by the rules of the Department. The statute, so construed, fully informs the public from its own provisions of the character of the act made criminal and of the punishment prescribed therefor, and does not vest in the executive discretion to determine what facts shall constitute a crime, or to make that unlawful and criminal which would otherwise be lawful. It merely permits the executive to determine the existence of a status, to which the act itself attaches the effect of suspending partially and temporarily its own operation, to declare the existence thereof, and to execute the law, as prescribed in the act, appropriate to the existence of the status so determined and declared by him. This is properly an executive, and not a legislative, function."

Compressing cotton.

In *Railroad Commission v. Houston & T. C. R. Co.* 90 Tex. 340, 38 S. W. 750, the court sustained the rules of the railroad commission as to the compression of cotton by railroads.

Inspection of grain.

The Constitution of Illinois provides that "the general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce." By statute, "the 32 L.R.A. (N.S.)

board of commissioners of railroads and warehouses are empowered 'to fix the rate of charges for the inspection of grain, and the manner in which the same shall be collected,' and also 'to fix the amount of compensation to be paid to the chief inspector, assistant inspector, and all other persons employed in the inspection service, and prescribe the manner and time of their payment.'" In *People v. Harper*, 91 Ill. 357, it was held that the power to fix the fees for inspection was properly given to the commission, the court saying: "The delegation of this legislative function may therefore well be regarded as a necessary incident to the exercise of this branch of the police power of the government; and the reasoning which sustains a like delegation to a city council must be of equal potency here."

In *Merchants Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565, the supreme court of Missouri followed the *Harper* Case in the construction of a statute similar so far as regards the fixing of fees, and held the power to fix fees was properly delegated, but that the Missouri statute was unconstitutional in that it gave to the commission absolute power to fix such places for the inspection of grain as it saw fit,—this, being a legislative power which could not be delegated.

Ordering lease of ground to grain elevator.

In *State ex rel. Board of Transportation v. Missouri P. R. Co.* 29 Neb. 550, 45 N. W. 785, the court sustained the action of the board in requiring a railroad which had allowed one party to build a grain elevator on its right of way to allow another party to do the same.

Reciprocal demurrage charges.

The power of a railroad commission to make reciprocal demurrage charges is sustained in *STATE v. ATLANTIC COAST LINE R. Co.*, and also in *Yazoo & M. Valley R. Co. v. Keystone Lumber Co.* 90 Miss. 391, 43 So. 605, 13 A. & E. Ann. Cas. 960, where the court sustained the rule made under the

Rep. 716; *Lothrop v. Stedman*, 42 Conn. 583, Fed. Cas. No. 8,519; *Guild v. Chicago*, 82 Ill. 472; *State v. Williams* (State v. Thompson) 160 Mo. 333, 54 L.R.A. 950, 83 Am. St. Rep. 468, 60 S. W. 1077; *St. Louis v. Liessing*, 190 Mo. 464, 1 L.R.A. (N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 A. & E. Ann. Cas. 112; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Bradley v. Board of State Canvassers*, 154 Mich. 274, 117 N. W. 649; 21 Harvard L. Rev. p. 205 (Jan. 1908); *Dastervignes v. United States*, 58 C. C. A. 346, 122 Fed. 30; *Coleman v. Newby*, 7 Kan. 82; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12

Sup. Ct. Rep. 495; *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 A. & E. Ann. Cas. 13; 8 Cyc. Law & Proc. pp. 830, 834, and authorities cited in notes; *State ex rel. McCleary v. Adcock*, 206 Mo. 550, 121 Am. St. Rep. 681, 105 S. W. 270; 6 Am. & Eng. Enc. Law, 2d ed. pp. 1021, 1029; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77, text 88; *Moers v. Reading*, 21 Pa. 188, text, 202; *State ex rel. Arpen v. Brown*, 19 Fla. 563; *State ex rel. Hubbard v. Holmes*, 53 Fla. 226, 44 So. 179; *Isehour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40.

The statute in this case does not deny the carrier equal protection of the laws by imposing unusual limitations and penalties, as in *Ex parte Young*, 209 U. S. 123, 52 L.

Mississippi statute by the state railroad commission, enforcing reciprocal demurrage charges, and affirmed a judgment in favor of a shipper against a railroad for such charges, the court pointing out that, under the express provisions of the statutes, the commission had the same authority over car-service associations as over common carriers. The question of the right of delegation of power, however, was not discussed.

In *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, the court's decision was in part as follows: "Rule 9 of the railroad commission of Georgia, adopted under authority of the act of 1905 (Acts of 1905, p. 120), is as follows: 'Railroad companies are required to furnish cars promptly on request therefor. When a shipper files with a railroad company written application for a car or cars, stating therein the character of the freight to be shipped, and its destination, such railroad company shall furnish same within four days (Sundays and legal holidays excepted) from 7 o'clock A. M. of the day following the receipt of such application. For a violation of this rule the railroad company at fault shall, within thirty days after demand in writing is made therefore, pay to the shipper so offended the sum of \$1 per car per day or fraction of a day, after the expiration of free time, during which such violation continues.' Held, that such rule of the commission, made under authority of the act of 1905, is not unconstitutional and void on the ground that its adoption by the commission was an attempt on the part of that body to legislate, and was the exercise of a power which the legislature could not delegate to the commission, and the commission could not exercise, under the constitutional provision that 'the legislative power of the state shall be vested in a general assembly, which shall consist of a senate and house of representatives.'"

It may be noted that in *Pennington v. Douglas, A. & G. R. Co.* 3 Ga. App. 665, 60 S. E. 485, it was held that the \$1 per day is not a penalty, but liquidated damages.

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Time of trains.

In *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398, affirming 137 N. C. 1, 115 Am. St. Rep. 636, 49 S. E. 191, holding that the regulation of a commission that certain railroads should make certain slight alterations in the time of some of their trains for the convenience of through passengers was not unreasonable, the court said: That railroads are subject, "as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

In *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55, the court said: "The business conducted by the Transit Company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character, and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. . . . We need not consider whether that legislative power may be conferred upon the courts of the territory, as it may be upon the courts of a state, so far as the Federal Constitution is concerned. *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67. In this case the legislative power of regulation was not intrusted to the courts. On the contrary, it was clearly vested, by § 843, in the governor and the superintendent of public works. By that section the Transit Company was itself given authority, in the first instance, with the approval of the governor, to make reasonable and just reg-

ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Central R. Co. v. Railroad Commission (C. C.) 161 Fed. 925; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885. Nor does it delegate the power to select the subjects upon which it operates, as in Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565, and United States v. Blasingame (D. C.) 116 Fed. 654; nor confer unlimited discretion, as in State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A.

112, 65 N. W. 738; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; O'Neil v. American F. Ins. Co. 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091; State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; and Fite v. State, 114 Tenn. 646, 1 L.R.A.(N.S.) 520, 88 S. W. 941, 4 A. & E. Ann. Cas. 1108; nor authorize the commission to change existing law or to determine what the law shall be, as in Central R. Co. v. Railroad Commission (C. C.) 161 Fed. 925, text 986; Mitchell v. State, 134 Ala. 392, 32 So. 687; and Gilhooly v. Elizabeth, 66 N. J. L. 484,

ulations regarding the maintenance and operation of the railway through the streets. . . . If the company itself complies with its duty by just and reasonable regulations of its own, it is enough. If the company fails in the performance of the duty, its performance is secured in the manner pointed out in the latter part of § 843. The superintendent of public works may make, with the approval of the governor, just and reasonable regulations, and they may be changed from time to time, as the public interests may demand, at the discretion of the governor. Moreover, by an amendment of the charter (act 78, Session Laws 1905), the superintendent of public works may prescribe the speed of cars. The precise function, therefore, which was exercised by the courts below, is by the statute confided primarily to the Transit Company, and ultimately to the discretion of the governor and superintendent of public works. The courts have no right to intrude upon this function, and subject the company to a species of regulation which the statute does not contemplate."

Increase of service.

In *Com. v. Louisville & N. R. Co.* 120 Ky. 91, 85 S. W. 712, the court sustained an order of a railroad commission requiring an increase of local freight and passenger service without discussing the right to delegate the power, except to say: "The power to regulate the relative rights and duties of the railroads and the public in this state has in large measure been delegated by the legislature to the railroad commission; and the provisions of the statute under which the commissioners acted in this case being reasonable," the court sustained their order.

Track connections and crossings.

In *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, the court sustained the decision of the state court in upholding the ruling of a railroad commission, directing two intersecting railroads to make track connections.

In *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179, it was held that a statute conferring 32 L.R.A.(N.S.)

power on the commission to compel the making by railroads of physical track connections with each other was not an improper delegation of legislative power, nor was it illegal, as a commingling of legislative, executive, and judicial power, as those powers cannot be kept entirely distinct.

In *Portland & O. Cent. R. Co. v. Grand Trunk R. Co.* 46 Me. 69, it was held that a statute empowering the court, by commissioners appointed therefor, to determine judicially what are the mutual rights and obligations of any two railroad companies authorized by their charters to connect their roads, is within the limits of legislative power.

In *Newport News & O. P. R. & Electric Co. v. Hampton Roads R. & Electric Co.* 102 Va. 847, 47 S. E. 858, the court upheld the decision of the state corporation commission, fixing the places of crossing of railway tracks, and the physical construction and arrangement of the crossing.

A statute authorizing a railroad commission to fix the place of crossings, and whether at, below, or above grade, also invested the commission with power to fix the proportion of expense; and it was held that this power of fixing the proportion of the expense was not a delegation of legislative power or of judicial power. *State ex rel. Northern P. R. Co. v. Railroad Commission*, 140 Wis. 145, 121 N. W. 919.

Entrance into terminals.

A statute giving a railroad commission power to require the admission into certain passenger terminals by the owner etc., thereof of any railroad company under certain circumstances was upheld in *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225, but the precise question as to whether this grant of power was a proper delegation of power by the legislature was not discussed.

Building spur tracks.

In *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, 129 N. W. 605, the court, in sustaining a statute authorizing the commission to order the building of spur tracks in certain cases, said that the legislature had delegated to the railroad commission the power to determine whether or not the

49 Atl. 1106; nor authorize the commission to prescribe penalties, as in *Harbor Comrs. v. Excelsior Redwood Co.* 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375. See, also, discussion in *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N. W. 294, 639, 10 A. & E. Ann. Cas. 425; *Caha v. United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; *South Carolina v. Georgia*, 93 U. S. 4, text 13, 23 L. ed. 782, 785.

Demurrage rule 8 is not an attempt to prescribe an offense or impose a penalty not authorized by law, as in *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *United States v. Mat-*

thews (D. C.) 146 Fed. 306, and *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; nor an attempt to change rules of law, as in *Jones Bros. v. Southern R. Co.* 76 S. C. 67, 56 S. E. 666, and *Tomlinson v. Armour & Co.* 74 N. J. L. 274, 65 Atl. 883; nor unwarranted and unreasonable, as in *Van Lear v. Eisele* (C. C.) 126 Fed. 823; nor is it an arbitrary regulation of matters exclusively legislative, as in *Ex parte Theisen*, 30 Fla. 529, 32 Am. St. Rep. 36, 11 So. 901.

Within the limitations of the state Constitution, the authority of the legislature

conditions prescribed by the statute coexist, and that the exercise of such power by the railroad commission is not the exercise of legislative power, and may therefore be delegated to it.

Suspending a law or exempting carrier from its operation.

In *Martin v. Oregon R. & Nav. Co.* — Or. —, 113 Pac. 16, it was held that the statute authorizing the state railroad commission to suspend for thirty days the requirement of the law as to furnishing cars for shippers, and as to the penalty for failure in furnishing cars, was a proper delegation of power under the provision of the state Constitution providing that "the operation of the laws shall never be suspended except by the authority of the legislative assembly,"—construing that provision as meaning that the legislative assembly might authorize an officer or tribunal to suspend the law. See also *United States v. Louisville & N. R. Co.* 176 Fed. 942, as to the Secretary of Agriculture suspending the cattle quarantine law.

In *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252, the court, in holding unconstitutional on other grounds a statute relating to the sale of mileage, which empowered the railroad commissioners in their discretion to exempt certain railroads from the act, said: "We are not satisfied that the statute is unconstitutional on the ground that it contains a delegation of legislative power to the board of railroad commissioners."

Miscellaneous.

Where a statute provided that the commissioners of pilots for the harbor of Boston might recommend to the governor and council changes or modifications of the pilotage regulations which, when approved and published, should have the force of law, it was held that a regulation requiring outward-bound vessels to pay pilotage was proper, and it was not a surrender of legislative power to the governor and council, but was in the nature of a police regulation, and properly delegated. *Martin v. Wither- spoon*, 135 Mass. 175.

In *People v. Ulster & D. R. Co.* 128 N. Y. 32 L.R.A. (N.S.)

240, 28 N. E. 635, the court said referring to the statute which it was considering: "By this enactment the state has indicated in the most imperative form its will in respect to such actions. It thereby declared that the certificate of the railroad commissioners to the effect that no public interests were involved should thereafter be a conclusive answer to any attempt to annul the existence of a reorganized railroad corporation for a failure to make an extension of its road. By this act the state devolved upon the railroad commissioners the duty, previously performed by its attorney general, of inquiring whether the public interests required it to enforce an alleged forfeiture against a reorganized railroad corporation; and necessarily thereby deprived other departments of the government of the power of determining the preliminary question upon which the action of the state, in instituting and prosecuting such actions, must be founded. By leaving to another department of the state the determination of a question upon which its own action was thereafter to be controlled, it neither delegated legislative power to, or conferred judicial functions upon, such department. It simply instituted an *ex parte* inquiry to determine its own future action, as had been the uniform practice of the state government for many previous years."

In *People ex rel. Stead v. Chicago, I. & L. R. Co.* 223 Ill. 581, 79 N. E. 144, 7 A. & E. Ann. Cas. 1, the court sustained the Illinois statute requiring railroads to make a full statement of their affairs annually to the railroad and warehouse commission, but the question of the delegation of power was not discussed.

The Constitution and laws of Kentucky confer upon the railroad commission the power to exonerate or not a common carrier in certain cases from the long-and-short-haul rule provided in such Constitution. *Louisville & N. R. Co. v. Com.* 106 Ky. 623, 90 Am. St. Rep. 236, 51 S. W. 164, 1012, affirmed in 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Louisville & N. R. Co. v. Com.* 104 Ky. 226, 43 L.R.A. 541, 46 S. W. 707, 47 S. W. 210, 598; *Illinois C. R. Co. v. Com.* 23 Ky. L. Rep. 1150, 64 S. R. 975.

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is supreme in the regulation of intrastate transportation by common carriers, unless the regulation in effect deprives a person or corporation of property without due process of law, or denies the equal protection of the laws, or directly and materially burdens interstate commerce, in violation of the Constitution of the United States, or violates some other provision of the Federal Constitution or laws. *Pensacola & A. R. Co. v. State*, 25 Fla. 310, text 323, 3 L.R.A. 661, text 666, 2 Inters. Com. Rep. 522, 5 So. 833, text 839; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, text 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; *Ratcliff v. Wichita Union Stock-Yards Co.* 74 Kan. 1, 6 L.R.A. (N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 A. & E. Ann. Cas. 1017.

The Constitution of the state declares that "the legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures." Section 30, art. 16.

The statute provides for the election of three railroad commissioners, makes the provisions of the act apply generally to intrastate transportation by common carriers, and enacts that "said commissioners shall make reasonable and just rates of freight and passenger tariffs to be observed by all railroads, railroad companies, and common carriers doing business in this state over their respective lines or connecting lines; shall make reasonable and just regulations for the observance of the same as to charges at any and all points for the necessary handling and delivery of all kinds of freight and transportation of passengers, and for the prevention of any unjust discrimination in connection therewith; shall make reasonable and just rates of charges for the use and transportation of all kinds of railroad cars, conveying all kinds of freight to and from any and all points in this state; shall have the power . . . to regulate the charges for storage, wharfage, and demurrage under such just and reasonable conditions as said commissioners may prescribe . . . and to direct and control all other matters pertaining to railroads that shall be for the good of the public." "Said commissioners shall have full power and authority to require any railroad, railroad company, or common carrier to properly operate its railroad or transportation line, and to furnish all the necessary facilities for the con-

venient and prompt handling, transportation, and delivery of all freights offered along its line for transportation, and shall provide and prescribe all such rules and regulations as may be necessary to secure such operation and the furnishing of such facilities and the prompt handling, transportation, and delivery of all freights offered." "And said commissioners are hereby given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of this chapter." "If any railroad, railroad company, or other common carrier doing business in this state, shall by any officer, agent, or employee, be guilty of a violation or disregard of any rate, schedule, rule, or regulation provided or prescribed by said commission, or shall fail to make any report required to be made under the provisions of this chapter, or shall otherwise violate any provision of this chapter, such company or common carrier shall thereby incur a penalty for each such offense of not more than \$5,000, to be fixed and imposed by said commissioners," after notice, hearing, etc. Fla. Gen. Stat. 1906, chap. 5, §§ 2882, 2890, 2893, 2896, 2898, 2908, 2921.

Demurrage rule 8, prescribed by the railroad commissioners, is as follows: "Cars detained or held for want of proper shipping instructions, or by reason of improper or excessive loading (where loading is done by shipper), shall be subject to a demurrage charge of one dollar (\$1) per car for each day or fraction of a day said car or cars are so detained or held. Likewise, when cars are promptly loaded and shipping instructions given, the railroad agent must immediately issue the bills of lading therefor; and if said car or cars are detained or held and not carried forward within forty-eight (48) hours, except perishable articles, which shall be moved within twenty-four (24) hours thereafter, said railroad company shall be liable to said shipper for the payment of one (\$1) dollar per car for each day or fraction of a day that said car or cars are thus detained or held."

The constitutional provision above quoted and the laws passed under it are intended for practical purposes, are remedial in their nature, and are designed to secure to the public from common carriers, and others engaged in rendering service of a public nature, a safe, prompt, and efficient service adequate to meet all the reasonable requirements of the public in the service undertaken, and to require the proper rendering of the service for only a reasonable compensation and without unjust discrimination of any character. See *State ex rel.*

Ellis v. Atlantic Coast Line R. Co. 53 Fla. 650, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 A. & E. Ann. Cas. 359. The accomplishment of this useful purpose is a governmental duty essential to the welfare of the public, and laws passed to effectuate the purpose should be construed and applied so as to carry out the legislative intent, as shown in valid acts. In construing legislative enactments, whether penal or remedial, the valid intention of the lawmakers, as gathered from the language and purpose of the acts, is the guiding star, and every portion of an act should be given its proper effect. *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Rogers v. Peck*, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929; *Jacksonville Electric Co. v. Bowden*, 54 Fla. 401, text 465, 15 L.R.A.(N.S.) 451, 45 So. 755.

Whether the statute or the rule violates the organic provisions separating the powers of government into departments should be determined by reference to the Constitution of the state. The Federal Constitution does not control the mere assignment of governmental power by the state, at least, when all the powers of one department are not conferred upon those exercising the powers of another department of the government, or the powers conferred do not in effect impair rights that are secured by the Federal Constitution. See *Dreyer v. Illinois*, 187 U. S. 71, text 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; *Winchester & S. R. Co. v. Com.* 106 Va. 266, 55 S. E. 692.

The Constitution provides that "the powers of the government of the state of Florida shall be divided into three departments,—legislative, executive, and judicial; and no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, except in cases expressly provided for by this Constitution." Article 2. "The legislative authority of this state shall be vested in a senate and a house of representatives." Section 1, art. 3. "The supreme executive power of the state shall be vested in a chief magistrate, who shall be styled the governor of Florida." Section 1, art. 4. "The judicial power of the state shall be vested in a supreme court, circuit courts, criminal courts, county courts, county judges, and justices of the peace." Section 1, art. 5. "No courts other than herein specified shall be established in this state, except that the legislature may clothe any railroad commission with judicial powers in all matters connected with the functions of their office." Section 35, art. 5; 32 L.R.A.(N.S.)

as amended. See *Laws Fla.* 1897, p. 308; *Gen. Stat.* 1906, pp. 40, 41. "The said railroad commissioners are hereby vested with judicial powers to do or enforce or perform any function, duty, or power conferred upon them by this chapter to the exercise of which judicial power is necessary." *Gen. Stat.* 1906, § 2922.

The meaning and effect of these provisions are that, except as otherwise expressly provided in the Constitution, all the purely legislative power of the state shall be exercised exclusively by the senate and house of representatives; that all the purely executive power of the state shall be exercised exclusively by the governor; and that all the purely judicial power of the state shall be exercised exclusively by the tribunals specified.

The governmental powers that are divided into the legislative, executive, and judicial departments, and the exercise of which is forbidden to persons not properly belonging to the particular department, are those so defined by the Constitution, or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the state and Federal Constitutions. The powers of all the departments are exercised by their proper officials through or by the aid of administrative officers. The Constitution provides for, and authorizes the legislature to provide for, administrative officers, who lawfully perform functions and duties and exercise more or less authority under the direction of officers who have real governmental powers, and who may properly belong to different departments of the government. This clearly indicates that all official duties, authority, and functions prescribed or contemplated by law are not necessarily governmental powers within the meaning of the constitutional provisions separating the powers of government into departments. The purpose of the Constitution is to secure efficient government by the harmonious co-operation of the separate, independent departments.

The exercise of powers that appertain exclusively to the legislature, the governor, and the courts, is not subject to limitations or to review except as provided by the organic law. As the authority given the commissioners is subject to the limitations imposed by the legislature, and as the exercise of the authority is reviewable by the courts, the authority cannot be really a governmental power that appertains exclusively to the legislative department.

Such authority may therefore be regarded as merely administrative.

State and county officers carry out the legislative will, assist the executive in executing the laws, and aid the courts in making their proceedings and judgments effective. The functions performed by such officers are administrative, and are not the governmental powers separated into departments by the Constitution. The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review, and is not among the powers of government that the Constitution separates into departments.

The provisions of the Constitution relate to the division and the exercise of the legislative, executive, and judicial powers of government, and not to the declaration of such powers. The mandate is in effect that, except as expressly provided for in the Constitution, the legislative or lawmaking power that is vested in the senate and house of representatives as the legislature shall not be exercised by the governor or by the courts; the executive power conferred upon the governor as chief magistrate shall not be exercised by the legislature or by the courts; and the judicial power that is vested in the courts shall not be exercised by the legislature or by the governor. The Constitution does not forbid the performance of administrative duties by the governor, the courts, or the legislature. Administrative duties are required to be performed in order to give full operation to and to make effective the respective powers of all the departments of government. An administrative officer may properly assist all the departments in making the exercise of the powers appertaining to each department complete in operation and effective in enforcement, if the constitutional provision is not violated which forbids one person to hold or perform the functions of more than one office under the government of the state at the same time, and no other provision of the organic law is violated.

By implication the powers of government conferred by the Constitution severally and exclusively upon the governor, the courts, and the legislature may not be delegated; but an implied exception as to municipal governments, based on immemorial usage or public necessity, has been conceded anterior to the constitutional provision that "the legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter

or amend the same at any time." [Art. 8, § 8.] There may be other exceptions. See 7 A. & E. Ann. Cas. 743.

The legislative, executive, and judicial powers of the government are co-ordinate, each is independent of the others, and each is limited only by the provisions and principles of the state and Federal Constitutions. In the exercise of the powers of government assigned to them severally, the legislature, the executive, and the judiciary operate harmoniously but independently each of the others, and the action of any one of them in the lawful exercise of its own powers is not subject to control by either of the others.

Under our dual system of Federal and state government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the state. The Constitution of the state was adopted for the purpose of securing the powers of sovereignty and the rights of individuals, and it should be so construed and applied as to accomplish this result. Every portion of the instrument should be given its proper effect for the public welfare. In construing, interpreting, and applying the Constitution of the state, the guiding star should be to effectuate its primary purpose, viz., the welfare of the people in the preservation and exercise of the rights of sovereignty and of individuals. The division of governmental powers into legislative, executive, and judicial is abstract and general, and is intended for practical purposes. There has been no complete and definite designation by a paramount authority of all the particular powers that appertain to each of the several departments. Perhaps there can be no absolute and complete separation of all the powers of a practical government. In order to justify the courts in declaring invalid, as a delegation of legislative power, a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted under the provisions of the Constitution.

A clear violation of the constitutional provisions dividing the powers of government into departments should be checked and remedied; but where a reasonable doubt exists as to the constitutionality of a statute conferring power, authority, and duties upon officers, the legislative will should be enforced by the courts to secure orderly government, and in deference to the legislature, whose action is presumed to be within its powers, and whose lawmaking

discretion within its powers is not reviewable by the courts. See *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929.

Where a duly enacted statute confers upon officials authority that is not in its nature exclusively and purely a legislative, executive, or judicial power, and it can fairly be done to accomplish a valid legislative purpose, such authority may be construed as an administrative duty rather than as a governmental power.

The Constitution expressly accords to the legislature full power to pass laws to correct abuses and to prevent unjust discrimination and excessive charges by common carriers and others engaged in rendering intrastate service of a public nature, and also requires the legislature to provide for enforcing such laws by adequate penalties or forfeitures. The power of the legislature is not confined to making rules and regulations for intrastate transportation. To give effect to the governmental power to regulate common carriers, the legislature necessarily has the power to do or cause to be done everything in any manner and by any means requisite to the complete and effectual exercise of the power thus possessed that is not an undoubted violation of some other provision of the Constitution.

The Constitution should be interpreted so as not to render impotent or inoperative, but to preserve and make effective, the sovereign power of the state to regulate intrastate transportation by common carriers; and the specific provision of the Constitution that the legislature has full power to pass laws to correct abuses, and to prevent unjust discriminations and excessive charges by common carriers and others engaged in rendering service of a public nature, should be so applied as to accomplish the purposes expressed therein.

The legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of law is peculiarly applicable in the regulation of common carriers. The complex and ever-changing conditions that attend or affect the performance of the useful public service rendered by common carriers make it impracticable for the legislature to prescribe all the necessary rules and regulations. If the details of the general legislative purpose, within 32 L.R.A. (N.S.)

definite limitations, as expressed in a complete law, cannot be committed to administrative officers, the sovereign power and duty to regulate would be impotent, to the great detriment of the public welfare. A denial to the legislature of the power to assign administrative duties within stated general limitations was not intended by the adoption of the Constitution, and such a denial would not accord with the letter or the spirit of the organic law. A statute may be complete when the subject, the manner, and the extent of its operation are stated in it.

Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments. See *Escambia County v. Pilot Comrs.* 52 Fla. 197, 120 Am. St. Rep. 196, 42 So. 697.

The making by the commissioners of just and reasonable administrative rules and regulations for intrastate transportation by common carriers is not a determination of what the law shall be, but such rules and regulations ascertain the facts upon which the previously declared law operates in accomplishing a public purpose. The principles of law fixing the reasonableness of rules and regulations had already been declared by the common law, the statutes, and the decisions of the courts; and the authority of the commissioners is, in administering the law, to ascertain, within definitely stated limits, and subject to judicial review, the facts upon which the law operates within the bounds stated in the statute. See *Coopersville Co-op. Creamery Co. v. Lemon*, 89 C. C. A. 595, 163 Fed. 145.

The common-law duties of common carriers are ascertained by the application of legal principles to particular facts. The statutes of the state do not define all the duties of common carriers, but expressly authorize the railroad commissioners to make reasonable and just rules and regulations to carry into effect the legislative purpose to regulate intrastate transportation by common carriers. This authority necessarily includes the power to make all rules and regulations needful or expedient to accomplish the general statutory purpose. The authority of the commissioners is not confined to the restatement of defined common-law or statutory duties, but it extends to the making of any just and reasonable rules or regulations appropriate to the sub-

ject of administration and regulation within the bounds already fixed by the law. Modern development of the service requires the application of old legal principles to new circumstances; hence, rules defining duties that have not been previously ascertained, but are determined by existing legal principles, are necessary for effective regulation, and these rules may be formulated by administrative officers within defined limits as an incident to the effective operation and enforcement of existing valid laws.

Under the Constitution the legislature may confer upon the railroad commission judicial powers, but not exclusively or purely legislative powers. The power to prescribe penalties to be incurred for breaches of public duty appertains to the legislative department, to be exercised by the enactment of laws. It may not be proper for the legislature to delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize the commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the statute. Where the penalty is imposed by law, it may be incurred for the penal violation of a rule prescribed by the commissioners. The authority to make the rule must be given by the statute within definite limitations. The adoption of rules within stated limitations upon which the statute by definite terms operates is not the exercise of purely legislative power, but it is a means for carrying out, within the prescribed limits, the legislative purpose expressed in the statute.

The statute, pursuant to the Constitution, outlined and defined the legislative purpose, and prescribed the penalty to be incurred in carrying out the purpose. The authority given the commission to make rules and regulations is general in terms, but definite in its limitations, and in its nature is administrative rather than legislative. Rules and regulations made by the commission to carry out in detail the expressed design of the statute must be prescribed as provided in the law, must be reasonable and just, must be in accord with the statute authorizing them, must relate to intrastate transportation, and must not violate any provision or principle of law. The authority thus conferred should be held to be administrative, rather than purely and exclusively legislative. Administrative authority may be exercised by a board or commission. The statute should be lawfully applied.

The authority to make rules and regulations is given, but no power is conferred or attempted to be conferred upon the commis-

sion to give the rules and regulations the force and effect of a law. Whatever force and effect the rule has is derived entirely from the statute. No authority is given to change the law in any way. Authority to make rules for the complete lawful operation of the statute is all that is given.

The statute does not attempt to give to the railroad commission power to prescribe a duty to be observed by a railroad company as a carrier, and also to provide a penalty as such for the breach of the duty. Such action, if taken, may be considered an attempt to authorize the commission to make substantive law, in violation of the Constitution, since prescribing a penalty to be incurred is a legislative function. But the statute may give and does give the commissioners the authority, and makes it their duty, to prescribe reasonable and just rules and regulations stating the duties of railroad companies as common carriers, for the breach of which duties the carrier may incur a penalty prescribed by the statute for such breach. See *Pierce v. Doolittle*, 130 Iowa, 333, 6 L.R.A. (N.S.) 143, 106 N. W. 751. The statute requires that the rules and regulations shall be reasonable and just, and that they shall relate to the duties of common carriers as to intrastate transportation. This is the prerequisite standard, and it is fixed and definitely limited in the law itself. The prescribing of rules upon which the statute operates is not the making of substantive law. The commission has no absolute power or discretion, but its power is definitely fixed by the law. The statute is complete in itself, and inflicts the penalty for the breach of rules and regulations prescribed by the commission. In prescribing the rules, the commission simply makes certain and definite, in advance of the violation, the particular acts, within designated limitations, upon which the statute, previously enacted and complete in itself, operates in carrying out its expressed general, but definite, purpose and design.

In recognition of the power and duty of the state, the Constitution expressly accords to the legislature full power and discretion to pass all laws necessary to prevent abuses, unjust discriminations, and excessive charges by common carriers and others engaged in rendering service of a public nature. To accomplish the purpose designed, the power thus conferred necessarily includes authority to do and provide for the doing of every needful act that is not clearly and plainly violative of some constitutional provision. Every doubt as to constitutionality should be resolved in favor of a legislative act designed to carry out the specific constitutional provision

relative to common carriers, where some other provision of the organic law is not plainly and clearly violated.

Taking these provisions and principles in connection with the salutary governmental purpose designed to be accomplished, and the duty of the court to sustain and enforce the legislative will as expressed, when it is not clearly unconstitutional, it cannot be said that, beyond a reasonable doubt, the authority given by the legislature to the railroad commission to make reasonable and just rules and regulations for intrastate transportation, for the violation of which rules and regulations a penalty prescribed by the statute may be incurred, is such a delegation of purely and exclusively legislative power, as distinguished from an administrative duty or function, as that the constitutional provisions separating the powers of government into departments and conferring the legislative power of the state upon the senate and house of representatives has been clearly violated, so as to render the act unconstitutional and nugatory. *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, text 474, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129.

Even if the provisions of the statute for the disposition of the proceeds of fines or penalties recovered, and for the suspension or remission of fines or penalties, be in conflict with the Constitution, such provisions may be eliminated without affecting the usefulness of the valid portions of the act for the purposes intended, and without causing results affecting the main purpose of the act in a manner contrary to the intention of the legislature; and it cannot be said the lawmakers would not have enacted the statute without the invalid and unnecessary portions. *State ex rel. Ellis v. Tampa Waterworks Co.* 56 Fla. 858, 19 L.R.A. (N.S.) 183, 47 So. 358; *Hayes v. Walker*, 54 Fla. 163, 44 So. 747; *State ex rel. Arpen v. Brown*, 19 Fla. 563. The disposition of fines recovered is controlled by existing valid laws. See *State ex rel. Coleman v. Rose*, 78 Kan. 600, 97 Pac. 788. The Constitution provides for the remission and disposition of fines, and affords a guaranty against the imposition of excessive fines.

In view of the organic provisions relating to common carriers and to conferring judicial powers upon the railroad commission, it cannot be said that the constitutional right to a jury trial is, beyond a reasonable doubt, violated by the imposition by the commission of a penalty or fine prescribed by law for the penal violation of rules provided for regulating a public service, when the fine or penalty prescribed by and incurred under the statute, and imposed by

the commission, is, if not voluntarily paid, recoverable only by action at law in a jury trial, where any defense the carrier has may be interposed in the action to recover the penalty fixed and imposed by the commission, including the amount and validity of the penalty, if it be excessive or illegal. See *Blanchard v. Raines*, 20 Fla. 467, text 479; *Cooley*, Const. Lim. 7th ed. 591, and cases cited. The principles announced in *Plimpton v. Somerset*, 33 Vt. 283, do not repel this conclusion.

The regulation of intrastate transportation by common carriers is the exercise of the inherent and reserved police power of the state. While the Constitution expressly authorizes the regulation of common-carrier corporations, it also expressly provides for the protection of property rights against unlawful invasion, whether under the guise of governmental regulation of a public service or otherwise. The provision of the state Constitution forbidding the deprivation or taking of property without due process of law and without compensation extends to property held by corporations, as natural persons are the beneficial owners of the property, though it be held and used by a legal corporate entity. That which is forbidden to be directly done to persons cannot lawfully be done by indirection through an agency or instrumentality, even though such medium be an entity authorized by law. An arbitrary and unreasonable regulation is not within the authority of the commission. If the action of the state through the commission is not a legally authorized regulation of a public service, or if the authorized regulation is arbitrary and unreasonable, and in effect deprives the beneficial owners of property used in rendering the public service of their property rights in a manner or to an extent not contemplated by law as a limitation upon the rights of those devoting their property to a public use, such action, though under the form of regulation, is in law a deprivation of property without due process of law, in violation of the state Constitution. No actual compensation for the burden of just regulation of common carriers is required, as in cases of the appropriation of property under the power of eminent domain. Private property cannot lawfully be devoted to a public use or service against the will of the owner without due process of law and just compensation to the owner for the property so taken. But where private property is by the act or consent of the owner used in rendering the public service required of a common carrier, such property is, under the law, thereby subjected by its owner to the burden of just and reasonable governmental regulation, in return for

the privileges accorded to the carrier by the state, and in the interest of the public welfare. The burden of reasonable governmental regulation being voluntarily assumed, it is not a taking or deprivation of property requiring compensation. The assumption of the public service imposes upon the carrier the burden of proper governmental supervision, and also the limitation that an adequate service shall be rendered without unjust discrimination and for only a reasonable compensation; therefore the result of such burden and limitation does not deprive the carrier of property without compensation or without due process of law. Common carriers engaged in rendering intrastate service in this state do so subject to the constitutional and statutory provisions regulating such service, including all the remedies provided for enforcing the proper performance of the public duties that are or may be lawfully imposed upon the carrier. See *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 52 Fla. 646, 12 L.R.A.(N.S.) 506, 41 So. 705.

If the rule is authorized by law and is reasonable, it does not deprive the carrier of property without due process of law.

While in the abstract the power to prescribe rules and regulations for common carriers appertains to the legislative department, it is settled that within proper limits such power may be exercised through administrative officers and boards, and that in general such officers and boards have authority to do anything proper and necessary for the complete lawful exercise of the duties imposed upon them.

Wherever a power is given by statute everything lawful and necessary to the effectual execution of the power is given by implication of law. *Mitchell v. Maxwell*, 2 Fla. 594; *Opinion of Chief Justice*, 8 Fla. 496, text 508; *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190, text 209; *Ex parte J. C. H.* 17 Fla. 362; *Ex parte Wells*, 21 Fla. 280; *State ex rel. Smith v. Burbridge*, 24 Fla. 112, text 126, 3 So. 869. See also *Markey v. State*, 47 Fla. 38, text 50, 37 So. 53, text 56.

The railroad commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is, by fair implication and intendment, incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purposes for which the offices were established. See *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 51 Fla. 578, 40 So. 875. Authority that is indispensable to the undoubted valid purposes and objects of remedial statutory provisions 32 L.R.A.(N.S.)

may be inferred or implied from powers expressly given. The difficulty of making specific enumeration of all such powers as the legislature may intend to confer upon railroad commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms, and general powers given are intended to confer other powers than those specially enumerated. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised by the commissioners, the further exercise of the power should be arrested; but where power is clearly conferred or fairly implied, and is consistent with the purposes for which the commissioners were established by law, the existence of the power should be resolved in favor of the commissioners, so as to enable them to perform their proper functions of government. When action is taken by the commissioners in the exercise of undoubted authority, their administrative discretion will not be controlled by the courts, and will not be interfered with where there is no abuse of power or discretion shown. All doubts as to the propriety of means or methods used in the exercise of a power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law. Where not expressly or impliedly restrained by law, the commissioners may exercise a wide administrative discretion in the use of the authority lawfully conferred upon them for governmental purposes, the usual limitations being good faith and reasonableness, not wisdom or perfection.

The Constitution and the statute contemplate the regulation of such new duties and obligations as may arise in the development of the service and in the increased and varying but reasonable demands of progress in the interest of the public welfare. See *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225.

Constitutions and statutes can at best only provide in general and comprehensive terms for the exigencies of the future, leaving the development and application of the general principles by administrative officers to new conditions as they arise in the course of human progress.

The purpose of the Constitution and of the railroad commission law enacted thereunder is, by practical and lawful means, to correct and prevent abuses by those engaged in rendering service of a public nature, and to secure to the public, collectively and individually, prompt and adequate service for only a reasonable compensation, and without unjust discrimination of any

character as to persons, localities, commodities, conditions, or otherwise.

A failure to promptly transport cars loaded for shipment may be an abuse or an unjust discrimination in rendering the public service. The power is given the commissioners to make just and reasonable rates, rules, and regulations for the transportation of intrastate freight, and to require the carrier to properly operate its road, and to furnish all necessary facilities for the convenient and prompt handling, transportation, and delivery of all freights offered, to provide and prescribe all such rules and regulations as to charges at all points and as may be necessary to secure proper operation and facilities and the prompt transportation of freight, to do everything necessary for the public good, and to carry out and enforce the objects of the law. This clearly gives the commissioners authority to prescribe charges, rates, rules, and regulations to facilitate the intrastate transportation of freight. This authority is not qualified or limited by the power to regulate demurrage charges expressly given by the statute.

The rules and regulations the commissioners are authorized to adopt may cover any and all duties of the carrier as to intrastate transportation, whether the duties were known to the common law or not. Such rules and regulations are by the statute made *prima facie* reasonable and just, and they must in fact be just and reasonable and within the authority conferred, and must not directly and materially burden interstate commerce or violate any provision or principle of law.

The rules and regulations must operate within the expressed limitations of the statute, and their reasonableness must be subject to judicial determination as other similar matters are determined, without undue restrictions or discriminations. To ascertain the reasonableness of a rule in its operation as a burden to the carrier, the just requirements of the public service, the classification and the extent and relation of the subject regulated, and the effect of the burden on the entire business of the carrier should be considered. *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* 137 N. C. 1, 115 Am. St. Rep. 636, 49 S. E. 191; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

In determining whether the adoption and enforcement of demurrage rule 8 is a valid exercise of a power lawfully conferred upon the railroad commissioners, the exist-

ence of the power cannot be presumed, but must appear in the laws of the state. If the power exists, the correctness of the action of the commissioners in making and enforcing the rule may be presumed until the contrary is made to appear. If it can fairly be done, the rule should be so construed and applied as to make it conform to the powers conferred upon the commissioners, rather than as being an assumption of power not conferred. Even if the rule was adopted with reference to the provision of the statute specially authorizing the commissioners to regulate the charges for demurrage, and if the rule cannot be sustained under that provision of the statute, yet if the adoption of the rule is a valid exercise of authority given by other provisions of the statute, the rule should not be annulled. It is clear the rule does not violate any positive provision for regulating the charges for demurrage.

As the commission has authority to prescribe rates, charges, rules, and regulations for intrastate transportation, and has no power to prescribe penalties as such, the provisions of demurrage rule 8 should be so construed as to conform to the powers of the commission, if it can be fairly done.

The charge allowed a carrier for cars unduly delayed by a shipper is technically called demurrage, is remedial in its nature, and is clearly not a penalty. So, likewise, the reciprocal charge allowed a shipper for freight unduly delayed on loaded cars by the carrier is in its nature remedial, and is not a penalty. The right of the shipper to have his goods promptly transported by a common carrier is a valuable right. See *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Moore, Carr*. 246. The shipper has as much right to relief from a delay in transporting his freight when it is properly offered as the carrier has to relief from a delay of a car unduly held for loading. There may be no injury or depreciation in the value of the car or the freight by a delay, but the right to promptness and convenience exists and may be enforced, and the public has an interest in the prompt movement of cars needed for other shipments. The purpose designed to be accomplished in allowing this reciprocal charge, or in imposing this reciprocal liability, is to afford the carrier and the shipper a limited cumulative remedy to prevent the delaying of cars and of freight, and to incidentally serve the public welfare by stimulating and facilitating the transportation of freight. The statute expressly provides for cumulative remedies as being peculiarly appropriate to this public serv-

ice, and specially authorizes the commission to do everything proper and necessary to facilitate intrastate transportation.

A statute may provide for remedial redress to an individual injury by the breach of a public duty, in addition to the penalty imposed to punish for the injury to the public. In determining whether a statute is penal in the strict and primary sense, a test is whether the injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal in its nature. See *Huntington v. Attrill*, 146 U. S. 657, text 668, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Gardner v. New York & N. E. R. Co.* 17 R. I. 790, 24 Atl. 831.

The same principle should apply to rules and regulations made pursuant to a statute. The duty prescribed by demurrage rule 8 affects the public, and the moral effect of the liability imposed in favor of the shipper indirectly tends to the good of the public in facilitating transportation; but the enforcement of the liability is of no direct public concern. The injury to the shipper in detaining cars may indirectly affect the public, and a penalty may be incurred under the statute for detaining the cars, but the nonpayment of the liability to the shipper for the detention does not affect the public. The liability imposed by the rule is a civil demand, and is not a penalty; and a penalty cannot lawfully be imposed for nonpayment of the liability under the provisions of the statute and rule as framed. The rule creates a liability that did not previously exist, and the rights under it should not be extended beyond the plain terms of the rule. The rule, if it could do so, does not make the failure to discharge the liability an act or omission for which a penalty may be incurred.

Penal laws, strictly and properly, are those imposing a pecuniary or personal punishment for an offense against the state, and which are subject to the pardon power. Where statutes or valid rules give one person a private right against another, neither the liability imposed nor the remedy is, in general, strictly or properly penal. See *Pennington v. Douglas, A. & G. R. Co.* 3 Ga. App. 665, 60 S. E. 485.

Demurrage rule 8 provides a regulation to secure the prompt transportation of freight, and prescribes a small uniform rate or charge to be paid to a carrier by a shipper for unduly detaining cars, and to a shipper by a carrier for unduly detaining freight loaded in cars. This rate or charge

is not a part of the compensation for the transportation of the freight, nor is it the sole compensation for loss in the value or use of the freight or for damage to the freight because of its detention. It is a reasonable provision intended to aid in securing the carrier against the undue detention of cars needed for other shippers, whether the car is injured by the delay or not; and to afford the shipper some speedy and practicable relief against loss or inconvenience from undue delay of freight loaded in cars, whether the value of the freight is affected by the delay or not. The interests of the carrier, of the shipper, and of the public require of a carrier prompt movement of cars loaded with freight, in order that the carrier may serve all properly offering. *Yazoo & M. Valley R. Co. v. Keystone Lumber Co.* 90 Miss. 391, 43 So. 605, 13 A. & E. Ann. Cas. 960. The usefulness of the rule for the purpose designed is for the commissioners to determine within their discretion, the power to make the rule being apparent. It is general in its application to all under like conditions.

If the \$1 a day per car liability or charge has the effect of reducing the transportation charges on freight delayed by the carrier, or of increasing the tariff if cars are delayed by the shipper, a useful purpose is served by the small liability or charge authorized as a regulation to stimulate transportation in the interest of the carrier, the shipper, and the public; and the parties may avoid the liability or charge by observing the rule, or by showing a valid excuse for not doing so. The damage caused by mere delay may not be easily or accurately ascertained, and the amount fixed by the rule is apparently not excessive in any case. See *Smith v. Newell*, 37 Fla. 147, 20 So. 249.

This regulation of the transportation of freight loaded in cars is not an arbitrary or unjust discrimination against freight not so loaded, since it is a natural, practical, just, and proper classification of subjects for regulation. The public as well as the carrier is interested in the movement of cars loaded for shipment, because the next shipper awaits the car. Shippers having freight awaiting cars, and the public, have more interest in the forwarding of loaded cars than the owner of the loaded freight and the public have in freight not loaded on cars needed for transportation. The rules properly make provisions for prompt movement of loaded cars and also of articles of freight. The regulation fixing a charge for unduly delaying cars or freight is a reasonable provision, duly authorized, in aid of proper service for the bene-

fit of the carrier, of the shipper, and of the public.

The amount allowed to the carrier from the shipper for delaying cars, and to the shipper from the carrier for delaying freight, is a fixed, uniform rate of charge prescribed as a speedy, cumulative remedy for undue delays affecting the rights of the parties in a public service, and is not a penalty within the meaning of the statute. A penalty is incurred under the statute for violating in a penal sense the statute or a prescribed rule, and not for failure to discharge a money liability to a shipper, imposed by the rule. The amount of the penalty, within a prescribed maximum, as stated in the statute, is to be fixed and imposed by the commissioners in each case after hearing, and to be recovered by action, and devoted to public purposes.

The obligation to pay the liability or charge prescribed by rule 8 may be adjusted in the payment of tariffs or enforced by the parties concerned by due course of law. The carrier may incur a penalty under the statute for failure to promptly move cars under the rule requiring the performance of the duty; but the refusal of the carrier to pay the charge allowed the shipper for delaying the shipment is not a penal violation of the rule, for which a penalty may be incurred under the statute. For a charge due the carrier for a breach of duty by the shipper in not properly loading or tendering the car, the carrier has its remedy by action, and through the freight, if it is on the car, and in removing the car, if it is not loaded.

There is no contention that the charge provided by the rule is unreasonable in amount, or that it does not in fact tend to benefit the parties and to facilitate transportation, as contemplated by the statute. The rule has no application to interstate commerce or transportation, and cannot legally be so applied as to directly and materially burden interstate commerce.

The liability imposed by the rule is not a fine to be suspended or remitted by the governor or pardon board. It is a cumulative remedy in the nature of a charge or recompense for the inconvenience or detriment resulting directly to the shipper for unduly detaining cars loaded with freight. The public has an interest because the tendency of the rule is to prevent and correct abuses and unjust discriminations and to afford prompt and adequate service to the public. While the imposition of the liability for the purpose of stimulating and facilitating transportation is of interest to the public, the nonpayment of the liability does not affect the public and is not a penal violation of the rule. The public is not

concerned in the payment of the liability or charge, any more than it is in the payment of other claims or charges in particular cases. The failure or refusal to discharge the liability imposed by the rule is not a violation of law, as the failure to move loaded cars or the charging of excessive rates would be; and the failure or refusal to pay the amounts or charges or rates fixed by the rule is not made a penal violation of the rule. The liability that may be incurred serves to facilitate transportation. The enforcement of the liability is by adjustment or by action at law between the parties, and not by the imposition of a penalty by the commission, as for the violation of a public duty.

The liability or charge prescribed by demurrage rule 8 does not appear to be excessive or unreasonable or unjustly discriminatory; but it may be considered to be, and may in fact be, a reasonable and salutary means to prevent abuses, unjust discriminations, and excessive charges in intrastate transportation, which is the very purpose of the Constitution and of the railroad commission law.

If a valid excuse exists for not observing the rule, there is no violation of it, and the rule cannot legally be so applied as to directly and materially burden interstate commerce, or so as to deprive the carrier or the shipper of any rights afforded by the law.

The right to regulate extends to every phase of the service and to every act of the carrier corporation that affects the service, either as to its promptness and adequacy and equality to all under like circumstances, or as to the compensation for the service. Whatever affects the public is subject to reasonable regulation by governmental authority in the interest of the public. The limit of the regulation is the reasonable requirements of the public service undertaken or engaged in to meet the just demands of the public to be served.

As the commissioners had the power to make a reasonable and just regulation and charge to facilitate transportation, the particular method or character of the regulation and charge is within the discretion of the commissioners, and it does not appear that their discretion has been abused, or that the regulation and charge and liability contained in rule 8 are unreasonable or unjust. See *Atlantic, S. River & G. R. Co. v. State*, 42 Fla. 358, 89 Am. St. Rep. 233, 29 So. 319.

If, in regulating intrastate transportation, any action of the commissioners in fact directly and unreasonably burdens interstate commerce, the carrier is not legally required to abide by it. State action

as to intrastate transportation that is reasonably designed and exerted for the public welfare, and does not directly and materially burden interstate commerce, although it may incidentally affect interstate commerce, is not obnoxious to the authority of Congress, and will not be interfered with when properly taken and reasonably enforced.

Even if the statute and rule are made absolute in terms, the existence of a valid excuse for not observing them may be shown in defense by the carrier, when charged with a violation of the statute or rule. Exceptions to the rule as prescribed may be implied by law. When some exceptions are expressed, others may be implied, if a contrary legislative intent does not appear, as was held in *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491. See *Allen v. Texas & P. R. Co.* 100 Tex. 525, 101 S. W. 792.

It is peculiarly within the province of the state commission to regulate the movement of railroad cars within the state, and this authority is not in conflict with the interstate commerce regulations; at least, where interstate commerce is not directly burdened.

The statute does not authorize a penalty to be imposed for failure to pay a penalty previously imposed, but only for the violation of the statute or a rule or regulation. The refusal to pay penalties is not a violation of the statute or of a rule or regulation. Penalties legally imposed may be recovered by action.

Even if it is competent for the legislature to impose a penalty upon a carrier alone for a refusal to pay a pecuniary liability, in the absence of valid, explicit enactments, a penalty may not be incurred for merely refusing to pay an amount for which only a liability is created by the rule, in the payment of which liability the public is not concerned.

The maximum penalty prescribed by the statute may not be excessive for extreme cases involving the duties of a common carrier, even if a small portion of the maximum penalty is proper in most cases. The Constitution affords a guaranty against excessive fines. Every act of the commissioners under the statute must be valid and reasonable, and is subject to review in appropriate proceedings.

The penalties are prescribed for acts and omissions of common carriers that tend to abuses, unjust discriminations, or excessive charges in the performance of the intrastate public duty pursuant to the constitutional policy; and the rules and regulations for the violation of which a penalty may be incurred under the statute must

be legally prescribed before the act, and must relate to those public duties, not to private claims, and must be reasonable, and not violative of any provision or principle of law. See *Efland v. Southern R. Co.* 146 N. C. 135, 59 S. E. 355.

The carrier is a foreign corporation, but, being permitted to do business in the state, is entitled to the benefits and is subject to the burdens of applicable laws, state and Federal. As the carrier is permitted to engage in interstate transportation, the state cannot interfere with the interstate business; yet the intrastate business of the carrier is subject to valid state regulation. The validity of state regulation of intrastate transportation by the carrier is determined finally by state tribunals, unless the Federal authority is transgressed. The policy of the law is to require of a carrier adequate service for a reasonable compensation and without unjust discrimination, and to conserve the rights of the carrier within the limitations imposed by law upon those engaged in a public service.

The provisions of the 14th Amendment to the Constitution of the United States, relating to due process of law and to the equal protection of the laws, are applicable to property of natural persons that is held by the corporation, not because the corporation is among the persons contemplated by the Amendment, but because the protection afforded to natural persons was intended to be complete, and, as natural persons are the beneficial owners of the property held by the corporation, such property is secured by the Amendment, though it is held indirectly, through the corporation, and not directly, by natural persons. Whatever the law forbids to be directly done is also forbidden to be indirectly done.

The word "person," in the clause of the 14th Amendment to the Constitution, "no state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person . . . the equal protection of the laws," includes the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation. The fact that the corporators, who are natural persons, are united into a legal corporate entity, does not prevent them from having a right of property in the assets of the corporation which is entitled to the protection of this clause of the Constitution. Nor does the intervention of this artificial being between the real beneficial owners and the state, for the simple purpose of convenient management of the business, enable the state, by acting directly upon the legal corporate entity, to deprive

the real parties beneficially interested of the protection of these important provisions. *County of San Mateo v. Southern Pac. R. Co.* (C. C.) 13 Fed. 722, text 757. See also *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, text 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Courts may inquire into the validity of state regulation of intrastate transportation by common carriers if a *prima facie* case of invalidity is clearly made, and when justice demands it, in cases reasonably free from doubt, the regulation may, upon proper terms, be enjoined pending full determination; but the regulation should not be ultimately interfered with unless it is beyond all doubt in effect a direct and material burden upon interstate commerce, or is a flagrant attack upon rights secured by the state or Federal Constitution. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. See also *San Diego Land & Town Co. v. National City*, 174 U. S. 739, text 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Ratcliff v. Wichita Union Stock-Yards Co.* 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 A. & E. Ann. Cas. 1016, and notes (74 Kan. 1, 86 Pac. 150).

The fundamental property rights and obligations of those whose property is used in the business of a common carrier are the same whether the carrier is a natural person or a legal corporate entity. An unreasonable regulation, whether favorable to the carrier or to the patron, in effect takes private property without due process of law, and denies to the real owner of property injuriously affected the equal protection of the laws. The owners of property lawfully used by a carrier in the public service cannot, under the guise of regulation, legally be deprived of the property or any portion of it by the enforcement of unreasonable small compensation or of unreasonable burdens by delays by the shipper of the means of transportation or otherwise. Likewise a shipper, under the guise of regulation, cannot lawfully be deprived of property, or of the use of it, by requiring an unreasonably large compensation for the service rendered, or by permitting unreasonable delays of property by the carrier in transportation.

While the legislature may by proper enactment exercise any power that is legislative in its nature, and is not forbidden expressly or impliedly by the state and Federal Constitutions, and while the prescribing of penalties to be incurred is a legislative function, yet a statute providing penalties should not make such an arbitrary 32 L.R.A.(N.S.)

or unreasonable classification of persons or subjects to which the penalties apply as to deny to any person or corporation the equal protection of the laws. Common carriers and their duties of a public nature are subject to just classification for legislative purposes; but mere monetary obligations and liabilities of common carriers may not be so different from others as to afford a just classification for legislative purposes, and unjust classifications may result in denying equal protection of the laws.

The statute provides for the collection by action at law of penalties lawfully imposed, and does not contemplate the collection of a pecuniary liability by imposing penalties. Equal rights are afforded to all in the enforcement of debts by action at law.

Where a statute and a rule made thereunder are in accord with the terms and purpose of the state Constitution, the ultimate test of their validity as affording due process of law and equal protection of the laws, as guaranteed by the Federal Constitution, is the reasonableness of the statute and rule with reference to their effect upon property rights.

Legislation relating exclusively to the duties of common carriers to the public is based upon a practical, salutary, and proper classification of subjects, and does not, by reason of such classification, deny to the carriers equal protection of the laws. See *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

All property is held subject to existing provisions of law, and, in devoting its property to the rendering of the public service, the common carrier thereby voluntarily subjects it to the burden of lawful governmental regulation under the common law and under the state Constitution. *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225. The regulation, properly construed and applied, is in accordance with the requirements of law, is reasonable and just, applies to all alike under similar circumstances, and is based on a just classification; therefore the burden of it does not deprive the carrier of property without due process of law, nor deny to it the equal protection of the laws, even though the burden results in the payment of money by the carrier to the state or to an injured individual solely because of the failure of the carrier to perform some duty it owes under the law to the public or to a member thereof.

Valid regulation, though burdensome, is not destructive of constitutional rights, but burdens imposed by unreasonable or unlawful regulations are within the reach of the guaranties afforded by the Constitution. See 8 Cyc. Law & Proc. p. 1066, and

authorities cited. See also *Raleigh Iron Works v. Southern R. Co.* 148 N. C. 460, 62 S. E. 595.

Transportation for others as an independent business is commerce, irrespective of the purpose of it. See *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214.

The fact that the railroad is also engaged in interstate transportation does not exempt it from state regulation as to its intrastate business. *People ex rel. Stead v. Chicago, I. & L. R. Co.* 7 A. & E. Ann. Cas. 1, and notes (223 Ill. 581, 79 N. E. 144).

If it be true, as contended, that the commission cannot be given power to regulate the movement of loaded cars, because such regulation might, in cases of emergency, as when cars are inadequate or not properly distributed, affect interstate commerce, such a result would eventually relieve the commission of much useful authority.

The rule is that state regulation of intrastate transportation is not in conflict with the authority of Congress, if such regulation only indirectly or incidentally affects, and does not in fact directly and materially burden, interstate commerce. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503 text, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95. The statute is limited to intrastate transportation, as to which the state has full authority. It does not in any way regulate interstate commerce, and should be so administered as not to conflict with congressional authority, and not to directly and materially burden interstate commerce. *Atlantic Coast Line R. Co. v. Com.* 102 Va. 599, 46 S. E. 911; *Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 279, 14 L.R.A. 596, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79; *People ex rel. Stead v. Chicago, I. & L. R. Co.* 223 Ill. 581, 79 N. E. 144, 7 A. & E. Ann. Cas. 1; *State v. Chicago, M. & St. P. R. Co.* 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 167, 15 L.R.A.(N.S.) 983, 59 S. E. 667.

Whatever may be the privilege of the state to aid interstate commerce in matters to which the authority of Congress has not been extended, the power of the railroad commissioners to make rules and regulations is by the statute expressly limited to intrastate transportation.

The act of Congress according to the states special rights in regulating interstate traffic in liquors is not applicable here. See *Wilson Act* Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, 3 Fed. Stat. Anno. 853, U. S. Comp. Stat. 1901, p. 3177; *Delamater v. South Dakota*, 10 A. & E. Ann. Cas. 733, and notes (205 U. S. 93, 51 L. 32 L.R.A.(N.S.)

ed. 724, 27 Sup. Ct. Rep. 447); *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130.

If, in regulating intrastate transportation, interstate commerce is indirectly or incidentally affected thereby, but no direct and material burden is thereby imposed on interstate commerce, the authority of Congress is not encroached upon, and the state regulation will be sustained, if otherwise proper. *Currie v. Raleigh & A. Air Line R. Co.* 135 N. C. 535, 47 S. E. 654.

The statute expressly requires notice to be given to all interested parties and an opportunity to be heard thereon before rules and regulations are adopted by the commissioners, and it must be presumed the statute was complied with in this regard.

Within its proper sphere the will of the lawmaking power of the state is supreme, where no provision or principle of the state or Federal organic law is violated. In construing and applying a duly enacted statute, the valid legislative intent is the guiding star. The design or intention of a statute is ascertained by a consideration of the language used, the subject-matter, the inducing circumstances, and the limitations contained in the Federal and state Constitutions.

Where a statute does not violate the Federal or state Constitution, the legislative will is supreme, and its policy is not subject to review by the courts. The courts recognize and enforce the policy of the law as expressed in valid statutes, but they do not assume to regulate it. See *Ratcliff v. Wichita Union Stock Yards Co.* 74 Kan. 1, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 A. & E. Ann. Cas. 1016, and cases cited.

The language of a statute should be so construed as to make it accord with organic law when it can be fairly done. A constitutional enactment is presumed to be the intent of the legislature. When a statute does not plainly and beyond a reasonable doubt violate some provision or principle of the state or Federal Constitution, its full meaning and effect should be regarded as within the legislative intent. Where a portion of a statute is clearly unconstitutional, but such portion may be eliminated without impairing the effectiveness of the valid portion for the purposes designed, and without causing results affecting the chief object of the act in a way contrary to the intention of the legislature, it may be assumed, where the contrary does not clearly appear, that the valid portion of the statute expresses the controlling legislative intent. *Tampa v. Salomon*

son, 35 Fla. 446, 17 So. 581. A statute or a portion of it may be repealed by implication, but the intent to repeal must appear. Several statutes relating to the same general subject, though enacted at different times, may be construed together, and each may stand, where there is no repugnancy and no contrary intent appears. It is within the power of the legislature to pass laws for the regulation of intrastate transportation by common carriers, and to provide for enforcing such laws by adequate penalties or forfeiture; and valid statutes relating to this subject must be held to express the legislative intent.

The express particular power the statute gives the commission to regulate demurrage was not intended to limit, and does not limit, the general but definite power given the commission in the statute to make just and reasonable rates, charges, rules, and regulations for intrastate transportation. Nor is the general power repugnant to, or inconsistent with, or affected by, the particular power given the commission to regulate demurrage, whether the particular power is or is not valid, practical, or effective. The general power given by the statute is in accord with the expressed legislative purpose, and within the purview of the constitutional provision.

The particular powers and duties prescribed in other acts were not intended to affect and do not affect the powers and duties of the commission, as defined in the railroad commission statute and the amendments thereto. The Constitution and the statutes contemplate cumulative remedies to make effective the general purpose of regulating intrastate transportation by common carriers. The multitudinous, complex, and ever-changing conditions require varying and effective remedies to enforce the public duty and to protect the property and privilege rights of the carrier. The policy and purpose of the law contemplate a rigid and effective enforcement of the duties due the public, and the conservation of the rights of the carrier, within the limitations imposed by law upon those devoting their property and labor to a public service.

The enactment of laws relating to particular duties of common carriers, and to remedies for enforcing the duties, does not indicate a legislative intent to modify the general statutory provisions for regulation where there is no repugnancy. There is no apparent repugnancy between the railroad commission law and the particular statutes regulating certain duties of common carriers. The apparent legislative intent is to make regulation effective by providing cumulative remedies.

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Demurrage rule 8 being a valid, reasonable, and just regulation of intrastate transportation, its adoption is within the power intended to be conferred upon the railroad commission. The public duty defined by the rule, if reasonable and just, may be enforced by the imposition of the penalty provided by the statute, even if the refusal to pay the pecuniary liability imposed by the rule for its breach is not a penal violation or disregard of the rule. Although a refusal to pay the sums for which the rule makes the carrier liable to the shipper may not be such a violation or disregard of the rule as that a penalty may be incurred therefor under the statute, and although the liability imposed by the rule, if valid, may be enforced only by action at law, the rule is not for such reasons necessarily beyond the legislative intent. It may contribute to making the intended regulation effective.

It must be assumed that the legislature intended the statute to operate constitutionally; and it should be so construed and applied as to be in accord with the organic law, if it can be done. If the constitutional provision guaranteeing equal protection of the laws would be violated by the imposition upon the carrier alone of a penalty for a refusal to discharge the liability to a shipper, as provided by the rule, there was presumably no legislative intent that the statutory penalty should be incurred for such refusal. The evident intent of the lawmakers was to provide a penalty to be incurred by the carrier alone for the breach of its duties in which the public has an interest, such as abuses of its peculiar privileges and powers by unlawfully failing or refusing to transport, by unjust discrimination, or by excessive charges, or otherwise. This is a just classification of subjects for purposes of legislation. But the public has no interest in the payment of a monetary liability imposed by the rule, and the liability of a carrier for money payments is not so different from that of a shipper or others, as that, for a refusal to pay the liability, a penalty may be incurred by the carrier alone without an apparent denial to the carrier of the equal protection of the laws. Such a classification of the subject of pecuniary liability for the purpose of imposing penalties is obviously not just or constitutional, and therefore was presumably not within the legislative intent. The liability of the carrier is a charge imposed for the purpose of facilitating transportation, it apparently is not unreasonable on its face, and it may be discharged by adjustment of freight charges or enforced by action at law; therefore it does

not now appear that the rule is not within the power intended to be conferred upon the commission.

A statute should be so construed and applied as to be in accord with the provisions of the Federal and state Constitutions that control its effect. This is taken to be the intention of the legislature, which presumably undertakes to act only within its powers, and does not purposely violate or disregard controlling provisions of the Constitution. Where a statute is absolute in its terms and does not expressly provide for exceptions or qualifications that under certain circumstances are necessary for the operation of the statute within constitutional bounds, the exceptions and qualifications may be implied by law, so as to give effect to the legislative intent, rather than to destroy the act, when it does not clearly appear that the lawmaking power designed to exceed its powers or to disregard controlling provisions of the organic law. See *Osborne v. State*, 33 Fla. 162, 25 L.R.A. 120, 4 Inters. Com. Rep. 731, 39 Am. St. Rep. 99, 14 So. 588; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

These principles are applicable to rules lawfully adopted for the complete operation of a statute enacted for a public purpose.

In view of these considerations, the absolute terms of demurrage rule 8 do not render the rule unreasonable or invalid, since it is not applicable under circumstances not within its legal purview. The rule cannot be enforced so as to materially burden interstate commerce, nor where there is a valid excuse for not complying with it, nor where the law provides or implies exceptions and qualifications to its operation, nor where its enforcement would violate any controlling provision or principle of law.

It cannot be said that the rule is void for uncertainty where the certainty of its meaning and effect is the matter complained of. The rule does not appear to be unlawful or unreasonable.

The statute and the rule have a just relation to the regulation of intrastate transportation by common carriers (a proper subject of legislative classification and action), they are authorized by the laws of the state, they are applicable alike to all under similar circumstances, they do not appear to be unreasonable in their terms or operation, they do not impose unusual or undue or excessive burdens or restrictions upon rights secured by the organic law, they do not directly or materially burden interstate commerce, and consequently, when properly construed and applied, 32 L.R.A. (N.S.)

they do not appear to deprive the carrier of property without due process of law, nor to deny to it the equal protection of the laws, nor to interfere with the authority of Congress as to interstate commerce, in violation of the Constitution or laws of the United States.

While the order imposing the penalty upon which the action is brought is by the statute made *prima facie* evidence of everything necessary to create the liability or to require the payment of the fine or penalty as imposed, yet, as the declaration shows affirmatively that the penalty was imposed for refusing to pay liabilities to the shipper incurred under the rule, which are acts of omission that are not penal violations of the rule, the penalty was not lawfully imposed, and consequently no cause of action is stated.

The statute and demurrage rule 8 are not invalid for the reasons urged against them; but as the declaration affirmatively shows the penalty was imposed for acts or omissions that are not penal violations of the statute or of the rule, the demurrer to the declaration was properly sustained, though not on the ground stated by the trial court, and the judgment for the defendant on the demurrer should be affirmed.

Shackleford, Ch. J., and Cockrell, Hocker, and Parkhill, JJ., concur.

Taylor, P. J., concurring in the judgment:

I concur in the final conclusion reached in the opinion prepared by Mr. Justice Whitfield as to the judgment to be entered here in said cause, but I do not concur in all that is said in such opinion in arriving at such conclusion. As I understand the holdings of the opinion, the state of Florida nor its railroad commission has any authority to sue for, penalize for, or recover any sum that may become due from a carrier to a shipper as demurrage for an infraction by such carrier of demurrage rule No. 8, but that, if any suit or action becomes necessary to enforce any such liability, it can properly be brought only by the aggrieved shipper against the offending carrier. This conclusion being reached (and I think it is sound and proper), the case of the plaintiff in error is at an end, and necessarily falls to the ground, and all else that is discussed and said in the opinion as to the constitutionality, reasonableness, and propriety of said rule 8, and as to the power of the railroad commission to adopt and prescribe it, becomes purely a moot question, and is *obiter dicta*, not binding upon anyone. If the state or the railroad commission have no right to go

into any court to collect, sue for, or recover any alleged demurrage becoming due to a private individual shipper for an infraction by a carrier of such rule 8, then neither the state nor the commission can, by any such unauthorized suit, properly raise or present or have adjudicated any of the questions so lengthily discussed in the opinion touching the constitutionality, legality, merits, or demerits of the rule which is the foundation for such suit, by whomsoever brought.

MAINE SUPREME JUDICIAL COURT.

DAVID D. STEWART

v.

ALBERT F. HURD.

(— Me. —, 78 Atl. 838.)

Executor — appointment of mortgagor — effect on mortgage.

The appointment by a mortgagee of his mortgagor, executor of his estate, and his qualification, and charging himself with the amount of the mortgage debt as assets, do not operate to discharge the mortgage, and make the debt a personal one of the executor and the sureties on his bond, so as to advance and give priority to a subsequent mortgage on the property.

(January 25, 1911.)

REPORT by the Supreme Judicial Court for Somerset County for the determination by the law court of an action brought to recover certain real estate. Judgment for defendant.

Defendant's plea is as follows:

And for brief statement of special matter of defense to be used under the general issue pleaded and filed in said court with said plea, the 5th day of October, 1909, being the thirteenth day of said term, the court, in the exercise of its discretion, permitting the same to be filed at said time, the said defendant further says that he was not, at the date of the writ in this case, tenant of the freehold in the premises described in said writ, but was, at the date of said writ, and long before and ever since, in possession of the whole of the premises described in said writ, under George A. Nelson, who, he avers, was, at the date of said writ, and long before and

Note. — The effect of the appointment of a mortgagor as executor of the mortgagee's estate, to discharge the indebtedness, is covered in the note to Wachmuth v. Pennsylvania Mut. L. Ins. Co. 26 L.R.A. (N.S.) 411, and a search has disclosed no subsequent decisions upon the point. 32 L.R.A. (N.S.)

ever since, the owner in fee of the same premises.

Mr. D. D. Stewart, *in propria persona*:

The sureties on an executor's bond are bound to see that his debts to the deceased are paid and discharged. And by such payment, all mortgages given to secure such debts are extinguished.

Leland v. Felton, 1 Allen, 534; Stevens v. Gaylord, 11 Mass. 269; Chenery v. Davis, 18 Gray, 90; Potter v. Titcomb, 10 Me. 53; Chapin v. Waters, 110 Mass. 197; Hudson v. Hudson, 1 Atk. 461; Hazelton v. Valentine, 113 Mass. 479; Fox v. Fox, 1 Atk. 463; Com. v. Gould, 118 Mass. 307; Wankford v. Wankford, 1 Salk. 299; Tarbell v. Parker, 101 Mass. 165; Berry v. Usher, 11 Ves. Jr. 89; Toller, Exrs. 347, 348, § 9; Nedham's Case, 8 Coke, 135a; Martin v. Smith, 124 Mass. 111; Tarbell v. Jewett, 129 Mass. 462; Ipswich Mfg. Co. v. Story, 5 Met. 310; Freakly v. Fox, 9 Barn. & C. 130, 4 Moody & R. 18, 7 L. J. K. B. 148.

Messrs. Daniel Lewis and Merrill & Merrill, for defendant:

Not only is the debt of a debtor executor made assets and a question of probate account, but, when necessary, the security is preserved for the benefit of creditors, heirs, and legatees, and to prevent injustice being done.

Kinney v. Ensign, 18 Pick. 232; Leland v. Felton, 1 Allen, 531; Pettee v. Peppard, 120 Mass. 522; Stetson v. Moulton, 140 Mass. 597, 5 N. E. 809; Soverhill v. Suydam, 59 N. Y. 140; 2 Woerner, Am. Law of Administration, 1140; 18 Cyc. Law & Proc. pp. 177, note 90, 179, note 97, 230, note 16; Eastham v. Landon, 17 Wash. 48, 48 Pac. 739.

This mortgage must be upheld for the benefit of Mary Jane Nelson and those claiming under her.

Miller v. Donaldson, 17 Ohio, 264; Crow v. Conant, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. W. 450; Finch v. Houghton, 19 Wis. 150; Lyon v. Osgood, 58 Vt. 709, 7 Atl. 5; Marvin v. Stone, 2 Cow. 781; Potter v. Titcomb, 7 Me. 302; Potter v. Titcomb, 10 Me. 53; Hodge v. Hodge, 90 Me. 505, 40 L.R.A. 33, 60 Am. St. Rep. 285, 38 Atl. 535.

Cornish, J., delivered the opinion of the court:

This is a real action brought to recover a farm in St. Albans occupied by the defendant, and is reported to the law court for final decision. The plea is the general issue, with a brief statement in which the defendant justifies as tenant "under George A. Nelson, the owner in fee of the premises."

The history of defendant's title is as follows: On December 2, 1875, George L. Nelson, the father of George A. Nelson, and the then owner, mortgaged the premises to his mother, Lois Rollins, to secure the payment of his note for \$600, which mortgage was duly recorded January 1, 1877. Lois Rollins died November 4, 1904, testate, and at the time of her decease she still held this note and mortgage, only \$37 having been paid thereon from time to time. Under this will Mary Jane Nelson, the wife of George L. Nelson, was made sole devisee and legatee of all the real estate and personal property, "including notes and mortgages." George L. Nelson, the son and mortgagor, was nominated by the testatrix, and duly appointed by the judge of probate, executor of the will of Lois Rollins, the mortgagee, on February 14, 1905, and entered upon the discharge of his duties.

On April 10, 1905, he filed an inventory of the estate comprising household furniture and furnishings at the appraisal value of \$32.75, and "note of George L. Nelson for \$600, dated December 2, 1875, secured by mortgage of same date, \$1,500," the appraisers certifying that the amount which could be realized from this item "exclusive of expenses and risks of collection was in their judgment \$1,000." On October 5, 1905, the executor made this indorsement upon the note: "Paid by George L. Nelson, Exr. of last will and testament of Lois Rollins, \$185.15, by services and disbursements as executor aforesaid," and on the same day duly assigned the mortgage and indorsed the note as executor to Mary J. Nelson, the legatee under the will, and delivered them to her. On the second Tuesday of October, 1905, the executor filed his first and final account, which was allowed on the second Tuesday of December, 1905. In this account the executor charged himself with the amount of the inventory \$1,532.75, and was allowed the same amount for payments and charges. His charges embraced various small bills paid, his commissions at 2 per cent on the \$1,532.75, and this item "Mary Jane Nelson, devisee and legatee under the last will and testament of said Lois Rollins, \$1,346.60," that being the balance of the note after deducting all expenses and charges. Mary Jane Nelson had possession of the premises from the time of the assignment to her, and began foreclosure proceedings on March 26, 1906, the right of redemption expiring on March 26, 1909. On April 27, 1907, she assigned the note and mortgage to her son, George A. Nelson, foreclosure not being waived, so that, as the defendant claims, the title became perfected in George A.

Nelson on March 26, 1909, under which title the defendant justifies as tenant. Such is the defendant's chain of title.

The plaintiff's claim is as follows: On July 29, 1889, George L. Nelson gave to the plaintiff a second mortgage on these premises to secure the sum of \$320.08, which was recorded July 30, 1889. No payments having been made, the plaintiff brought a writ of entry and recovered a conditional judgment at the September term of court, 1906, and was put in alleged technical possession by an officer under an alias execution on June 8, 1909. The defendant refusing to surrender actual possession, this real action was brought to recover such possession.

The plaintiff claims under a second mortgage; and, while he does not contend that the first mortgage was in fact paid either to Lois Rollins in her lifetime or to the legatee Mary J. Nelson, and was thereby discharged, he urges that when George L. Nelson, the original mortgagor, qualified as executor of the will of Lois Rollins, the mortgagee, and charged himself with the amount of the mortgage debt as assets in his hands as executor, that operated *ipso facto*, as a matter of law, as a payment of the debt and a discharge of the mortgage securing the same; that the mortgage thereby became extinguished and, although remaining undischarged of record, was in law discharged, and his second mortgage was then and there promoted to the first rank; that the only remedy of the legatee was then against the executor and his sureties on the executor's bond, one of whom was her tenant, the defendant, and the other was herself. This raises an interesting question of law which has never been decided in this state.

By the English common law the appointment of a debtor as executor seems to have been held in some cases to be an extinguishment of the debt, the appointment being regarded in the light of a specific legacy of the debt to the debtor. *Wankford v. Wankford*. 1 Salk. 305. In that case Lord Holt said that it operated as a payment and release, as the same hand was to pay and receive the debt, which was therefore considered as actually paid and extinguished. But the rigor of this common-law rule was relaxed in equity, and under some circumstances in actions at law.

Thus, it was held in *Caweth v. Philips*, 1 Ld. Raym. 605, that, where an obligor was appointed executor of the obligee during the minority of another who was to become executor when he attained majority, the debt was not discharged.

In *Dorchester v. Webb*, Cro. Car. 373,

the appointment was held not to release co-obligors on the bond.

In *Flud v. Rumcey*, Yelv. 160, it was held that the appointment of the debtor as executor did not discharge the debt as against creditors or legatees limited to be paid out of the debt. In *Byrn v. Godfrey*, 4 Ves. Jr. 6, 4 Revised Rep. 155, the debt was held not to be discharged when the assets were insufficient to pay creditors. The debt was held not to be discharged in equity, in *Carey v. Goodinge*, 3 Bro. Ch. 111, *Berry v. Usher*, 11 Ves. Jr. 88, and *Re Hyslop* [1894] 3 Ch. 522, 64 L. J. Ch. N. S. 168, 8 Reports, 680, 71 L. T. N. S. 373, 43 Week. Rep. 6.

The English doctrine was very carefully considered, and the cases analyzed and reconciled, in the early Massachusetts case of *Stevens v. Gaylord*, 11 Mass. 256, which is the leading case in this country, and the one most frequently cited by the courts when this subject is under consideration. The doctrine of that case is the more logical and equitable one, that neither in the case of testate nor intestate estates is the debt itself extinguished or released without payment, but the right of action is discharged or suspended because the executor or administrator cannot maintain an action against himself. Because of this impossibility of action, the rule was adopted that such indebtedness should be regarded as *prima facie* assets in the hands of such executor or administrator. The rule of *Stevens v. Gaylord* has become the Massachusetts doctrine as evidenced by a long line of decisions, many of which are cited by the learned plaintiff in his brief. *Winship v. Bass*, 12 Mass. 199; *Hobart v. Stone*, 10 Pick. 215; *Ipswich Mfg. Co. v. Story*, 5 Met. 310; *Chenery v. Davis*, 16 Gray, 90; *Leland v. Felton*, 1 Allen, 534; *Tarbell v. Parker*, 101 Mass. 165; *Bassett v. Fidelity & D. Co.* 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205. The same rule has been adopted in Maine. *Hodge v. Hodge*, 90 Me. 509, 40 L.R.A. 33, 60 Am. St. Rep. 285, 38 Atl. 535. To same effect are *Robinson v. Hodgkin*, 99 Wis. 327, 74 N. W. 791; *Griffith v. Chew*, 8 Serg. & R. 31, 11 Am. Dec. 556. It is true that in some cases language has been used to the effect that the debt itself has been extinguished by the appointment of the debtor as executor or administrator, but such is not a correct statement. As between the legal representative who is also the debtor, and the creditors or those interested in the estate, the representative will not be permitted to say that his obligations form no part of the assets of the estate. Having voluntarily accepted the duties pertaining to an executor or administrator, he is es-

topped from treating his own indebtedness other than as an asset of the estate. "To allow him to accept the office, and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office, but had allowed some disinterested person to be appointed to enforce these rights, would not be doing justice to those whose rights the law undertakes to preserve." *Bassett v. Fidelity & D. Co.* 184 Mass. supra, at page 212.

This last sentence suggests the reason for the rule, which is the preservation of the rights of those interested in the estate. Since there was no one having the legal capacity to sue a debt due from the executor or administrator, the rule was adopted from the very necessity of the case, in order to protect creditors, legatees, and next of kin. For their security this equitable rule has been established, which has sometimes been called a legal fiction. But it is an ancient legal maxim that *in fitione juris semper aequitas existit*. This fiction was created, if fiction it be, to protect the estate, not to injure it. It was designed to work justice, not injustice, and to serve as a shield, and not as a sword.

The question in the case at bar does not arise between the legal representative and the legatee. The executor is not attempting to avoid his liability either by failing to include his note and mortgage in the inventory, or by refusing to treat them as assets belonging to the estate. On the contrary, he embraced them in his inventory and account, and acknowledged their validity by indorsing on the note as a partial payment the debts and expenses that he paid in behalf of the estate, and his charges for administration, and then duly indorsed and transferred the note and assigned the mortgage as a subsisting asset of the estate, to the legatee to whom it was given under the will. The rule does not require that such indebtedness be treated as cash assets. To hold that would be to force a payment in money and to extinguish the note as a form of indebtedness. If the personal representative and those interested in the estate choose to treat the indebtedness as still existing in its original form, they have the power to so treat it. No one is injured thereby, and therefore no one can complain. Just here lies the fallacy of the plaintiff's position. He contends that the appointment worked a constructive payment *ipso facto*, and that therefore the note ceased to exist, the mortgage securing it was discharged, and his own second mortgage became the first. The plaintiff claims that, not only was the debt extinguished, but also the mortgage securing it. The rule

should not, and does not, go so far. It should not, because its effect would be inequitable and unjust. This case furnishes a good example of such injustice. If the note and mortgage have been constructively paid and discharged, the legatee has received, not a note secured by a first mortgage as the testatrix intended, and as the executor received to be transmitted, but an unsecured claim against a party who was adjudged insolvent some years ago, and who is financially worthless. But the plaintiff replies that the legatee's remedy is against the sureties on the executor's bond. In some cases the legatee may have and exercise that right, but she is not compelled to, to the exclusion of her original right. In this case the remedy on the bond would be entirely inadequate because the legatee is herself one of the sureties, and in cases where the executor is not required to give bond, the suggested remedy would fail utterly.

It is the opinion of the court that the note and mortgage, though assets in the estate, were not paid, either actually or constructively, and that their transfer by the executor to the legatee was valid, it being for the interest of the legatee to consider the indebtedness as existing in its original form. Authorities are not lacking to support this result.

In *Kinney v. Ensign*, 18 Pick. 232, land was twice mortgaged, the mortgagor was appointed administrator of the second mortgagee, and returned an inventory in which the debt from himself was included, and brought a bill in equity to redeem from the first mortgagee. It was contended in defense that, when the plaintiff mortgagor became administrator of the estate of his creditor, he became liable to account for this debt in the administration account, that the sureties on his bond would thereby become responsible for such debt, and therefore the debt was to be considered as absolutely paid and extinguished, and the mortgage thereby discharged.

The court sustained the bill, and in the course of the opinion Chief Justice Shaw said: "But in equity this ground cannot be maintained. It may be remarked, in passing, that, if these circumstances must be construed to amount to constructive payment, it would not necessarily follow that the mortgage would be thereby absolutely discharged. Payment after condition broken does not of itself revert the mortgaged estate in the mortgagor, but the true and substantial ground is that the taking of administration by the debtor is not, in fact or in law, to all purposes, payment of the debt. As between the administrator himself, and those beneficially

interested in the estate, he is held to account for it as a debt paid from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well-settled rule of strict law that, although a party is bound by an estoppel as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred.

. . . The holding the fact of a debtor taking administration upon the estate of his creditor to be a payment may be deemed a legal fiction, adopted for purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice; but such a legal fiction will never be allowed to go so far as to work wrong and injustice."

In *Pettee v. Peppard*, 120 Mass. 522, the grantee in a deed had assumed and agreed to pay as his own debt an outstanding mortgage to a third party, and afterwards was appointed executor of the mortgagee, included the mortgage among assets of the estate, and assigned it for valuable consideration to the defendant in this suit. The plaintiff contended that the mortgage was thereby discharged as a matter of law, but the court declined to so hold, on the ground that there was no privity between the executor and the mortgagee, and added: "The rule of constructive payment relied on, where it works substantial injustice, will not be applied, unless the case is brought strictly within it, as illustrated by the case of *Kinney v. Ensign*, supra, where this court refused to apply it in favor of the purchaser of an equity of redemption." In *Pettee v. Peppard* the attempt was made in order to let in a subsequent attaching creditor; in the case at bar, a subsequent mortgagee. Other cases to the effect that a lien given to secure a debt due from a personal representative to the testator or intestate is not discharged as against creditors, legatees, or next of kin, are *Chick v. Farr*, 31 S. C. 463, 10 S. E. 176, 390; *Murray v. Luna*, 86 Tenn. 326, 6 S. W. 603; *Utterback v. Cooper*, 28 Gratt. 233; *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. W. 450. For a general discussion of the subject, see note to *Wachsmuth v. Penn. Mut. L. Ins. Co.* 26 L.R.A. (N.S.) pages 411-416, and note to *United Brethren First Church v. Akin*, 2 A. & E. Ann. Cas. 353.

In many of the states, as in New Hamp-

shire, New York, and Pennsylvania, the doctrine that the mere appointment of a legal representative does not extinguish and discharge the debt itself, but makes it assets in his hands, has been phrased in statutory form, but it is still the Massachusetts doctrine, which was reached without a statute. *Probate Judge v. Sulloway*, 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720. Under similar statutes, it has been held that all liens by which the debt was secured remain in force until the executor or administrator, in the performance of his trust, has paid the amount of his debt and discharged it. *Soverhill v. Suydam*, 59 N. Y. 140; *Anderson v. Anderson*, 183 Pa. 480, 38 Atl. 1007. As the statutes were declaratory of the true equitable rule as generally accepted in this country, these decisions are directly in point.

It is unnecessary to multiply authorities further. The doctrine which we adopt commends itself by the force of its own logic and equity. It preserves the rights of all parties in interest, and brings hardship to none, and a rule that is followed by such results is usually a safe rule to follow.

Our attention has not been called to, nor have we been able to find, a direct authority for the plaintiff's claim in this case, the extinguishment of the mortgage security by operation of law. It is true that in some of the cases cited in the plaintiff's brief, broad and general expressions to that effect may here and there be found, but the cases themselves do not warrant them, and they are clearly distinguishable in their facts from the case at bar.

In *Ipswich Mfg. Co. v. Story*, 5 Met. 310, the executor entered the debt in his inventory, but not the mortgage, charged himself with it in his first account, and with the balance in a second account, and assented to a decree in which it was ordered to be distributed as money. "When thus actually treated as assets and distributed as such, it is, of course, a legal satisfaction and extinguishment of the debt, and, in legal effect, payment." But the court in that case was very careful to recognize and approve of the doctrine of *Kinney v. Ensign*, 18 Pick. 232, supra, and added (page 315): "We do not question the authority of an administrator, duly qualified, to assign and transfer a bond and mortgage; and we cannot perceive that it would make any difference that it happened to be his own debt."

In *Leland v. Felton*, 1 Allen, 531, the question of mortgage security was not involved, and again the doctrine of *Kinney v. Ensign* is affirmed as fully recognizing 32 L.R.A. (N.S.)

the principles of the earlier cases as to the right of those interested in the estate to charge the executor in his administration account for a debt due from him to his testator, while it further holds "that they would not, under the circumstances of that case, make it compulsory that the same should be charged in the account as payment, where the debt was secured by a mortgage which would thereby be discharged."

In *Tarbell v. Parker*, 101 Mass. 165, the court held that the note and mortgage had been so treated by the parties that they must be considered paid, but the right of the parties in interest to have treated them as a valid and subsisting security, and their transfer as such, was clearly recognized and stated in the opinion.

Martin v. Smith, 124 Mass. 111, simply decided that a bequest of a mortgagee's interest in land is a bequest of personal property, and does not pass such title to the mortgaged land as will enable one to defend against a writ of entry. The opinion states that, when the executor charged himself with the amount of the mortgage note as assets in his hands, "this operated as payment of the note, and discharged the mortgage." This statement was in the nature of *dictum*, and was broader than the authorities warrant.

In the other cases cited in the plaintiff's learned and exhaustive brief, the question of mortgage security was not involved.

Our conclusion, therefore, is that the transfer of the note and mortgage by the executor to the legatee was valid, and the plaintiff's title under the second mortgage is inferior to that of the defendant under the first.

Judgment for defendant.

MAINE SUPREME JUDICIAL COURT.

LYDIA M. B. ROBINSON et al., Exrs.,
etc., of Mary D. Biddle, Deceased,
v.

LYDIA M. B. ROBINSON et al.

(105 Me. 68, 72 Atl. 883.)

Will — power of sale.

1. A power of sale is implied from a provision of a will vesting real estate in trustees with power to "invest and manage the same," unless a contrary intent can be found in the will taken as a whole.

Trust — power of sale.

2. Unproductive real estate conveyed to trustees by a residuary clause of a will may be sold by them where express power is given for the sale of productive real estate, the proceeds of which shall go into

the residue, and no provision is made for the care of such unproductive estate, while the trustees are directed, upon death of one of the *cestuis que trustent*, to pay a portion of the principal of the residuary estate to his descendants.

(December 30, 1908.)

REPORT by the Supreme Judicial Court for Hancock County for the opinion of the full bench of a suit for the construction of the will of Mary D. Biddle, deceased. Will construed.

The facts are stated in the opinion.

Mr. Edward B. Mears for plaintiffs:

Mr. Henry M. Hall, with Messrs. Hale & Hamlin, for defendants.

Note. — Implied power of executor or trustee to sell real property.

I. General rules.

- a. Necessity for sale, 676.
- b. Lack of necessity for sale, 677.
- c. Contrary intention, 678.
- d. Effect of desirability of sale, 678.
- e. Executor as donee of power in which he is not named, 679.
- f. Miscellaneous, 680.

II. Particular words and phrases.

- a. "Divide."
 1. In general, 680.
 2. According to statute, 682.
- b. "Gathered" and "divided," 682.
- c. "Manage" and "divide equally," 683.
- d. "Divide" and "pay," 683.
- e. "Divide" and "invest," 683.
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 1. In general, 684.
 2. "Debts," 685.
- g. "Pay and distribute capital," 688.
- h. "Manage" and "pay over," 688.
- i. "Collect" and "pay over," 688.
- j. "Invest" and "pay," 688.
- k. "Invest" in "bonds" or "securities" and "pay," 688.
- l. "Invest" and "lend," 689.
- m. "Manage" and "invest," 690.
- n. "Hold" and "invest," 690.
- o. "Invest," "divide," and "pay," 690.
- p. "Funds," 690.
- q. "Sum," 691.
- r. "Proceeds," 691.
- s. "Avails," 691.
- t. Power to "dispose," 691.
- u. Direction to support, educate, etc., 691.
- v. "Loan" or "put at interest," 693.
- w. Subsequently acquired realty, 693.
- x. Miscellaneous cases, 694.

The purpose of this note is to show, as far as possible, what phraseology, not amounting to express authority, in a will or trust deed, will confer power upon an executor or trustee to sell real property, without first resorting to the courts for a license.

Bird, J., delivered the opinion of the court:

This bill in equity is brought by the executors and trustees under the will of Mary D. Biddle for the construction of the will.

The case comes before this court upon complainants' bill and an agreement of all the defendants wherein the allegations of fact in the bill of complainants are admitted to be true, and the respondents join in the prayer of the bill for the construction of the will. This agreement appears to be one which might properly be made by all parties respondent.

In brief, the bill sets out that Mary D. Biddle, late of Philadelphia, in the state of Pennsylvania, died on the 3d day of

Executors and strict trustees are of necessity both included in the note, for in many instances their rights and duties are the same. As to the necessity of obtaining a license to sell, the difference between a trustee to whom an estate has been conveyed in fee, and an executor, is that the latter, as such, executes a mere naked power which must be strictly conformed with, in order to give validity to his act. But whenever an executor has a power under a will to sell real estate, no license of any court is necessary to, or can give any additional validity to, a conveyance by him. In fact, it has been considered a good reason for refusing such license, that the power already existed.

It may be stated as a general rule that a trust will be implied in the executor of a will when the duties imposed are active, and render the possession of the legal estate in the executor convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purpose of the will, and when such implication would not defeat, but would sustain, the disposition made in the will.

The rules to be deduced from the cases will be dealt with in connection with the various subdivisions of the note. An attempt has been made to classify each case under that particular subdivision of the note dealing with the words, phrases, or grounds of distinction upon which the court seemingly laid the most stress. Of necessity, the classification is more or less arbitrary, because of the various salient words and phrases which may be combined in any one case, while a part only or all of such terms may be involved in connection with other and different terms in other cases, and for this reason the note should be considered as a whole, rather than in the light of a series of exhaustive treatments of the various subdivisions.

I. General rules.

a. Necessity for sale.

In general a power of sale is held to arise

December, A. D. 1900, testate; that her will was duly admitted to probate at said Philadelphia, setting forth particularly the clause of which construction is requested; that the will was duly admitted to probate by the probate court of Hancock county, in this state, on the 5th day of April, A. D. 1904, and that letters testamentary were duly issued to complainants on the 20th day of said April, and letters of trust on the 1st day of November, A. D. 1904; that the testatrix left her surviving four children, who are the complainants, no husband and three grandchildren, one of the latter being the daughter of Lydia M. B. Robinson, and the others children of Henry J. Biddle; that all the specific bequests made by the will have been paid in full, or

otherwise provided for in accordance with its terms; that the only persons having any interest now in the estate of the testatrix are the complainants and the three grandchildren; that there are no debts against the estate, and that no personal property of any great value was left by testatrix in the state of Maine; that she died seised of certain real estate in the county of Hancock, forming part of her residuary estate, and part of which is unimproved and unproductive of income, and now liable for taxes, for the payment of which no express provision is made under the will or afforded by the estate of the testatrix, except out of the income of said lands, whereby the interest of the present beneficiaries under the will are prejudiced;

where the duties under the trust cannot be performed without making a sale.

Thus, in the following cases among others, it is held that implied power to sell will arise where necessary in order that the terms of the will may be carried out. *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257; *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. 890; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056; *Putnam Free School v. Fisher*, 30 Me. 523; *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645; *Purdie v. Whitney*, 20 Pick. 25; *Gibbens v. Curtis*, 8 Gray, 392; *Wood v. Lembecke*, 72 N. J. Eq. 651, 66 Atl. 903; *Asch v. Asch*, 18 Abb. N. C. 82, affirmed in 47 Hun, 285, which is affirmed in 113 N. Y. 232, 21 N. E. 70; *Stewart v. Hamilton*, 37 Hun, 19; *Wood v. Nesbitt*, 62 Hun, 445, 42 N. Y. S. R. 778, 16 N. Y. Supp. 918, decision vacated in 47 N. Y. S. R. 34, 19 N. Y. Supp. 423, for irregular procedure; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57; *Reade v. Continental Trust Co.* 49 App. Div. 400, 63 N. Y. Supp. 395; *Meakings v. Cromwell*, 5 N. Y. 136; *Salisbury v. Slade*, 160 N. Y. 278, 54 N. E. 704; *Cowan v. Cowan*, — Tenn. —, 53 S. W. 1101; *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087; *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342; *Carlisle v. Cooke* [1905] 1 I. R. 269; *Wood v. White*, 4 Myl. & C. 460, 2 Keen, 664, 8 L. J. Ch. N. S. 209, 3 Jur. 117.

In *Murray v. Rodman*, 25 Ky. L. Rep. 978, 76 S. W. 854, however, where realty and personality were devised to "be held" in trust, with the provision that "the trustee in her discretion can invest this interest in real estate," the trustee was held not entitled to sell the real estate, the court saying that "in the absence of express testamentary authority, such power will not be inferred." As to the necessity for express authority, see also *Seeger v. Seeger*, and *Doe ex dem. Dunlap v. Pyle*, as set out *infra*, II. U.

b. Lack of necessity for sale.

In some instances the whole question has 32 L.R.A. (N.S.)

been made to turn upon the existence of a necessity for the sale.

Thus, the following cases hold that power to sell land will arise by implication only when the implication is clear, and when some duty has been imposed which necessarily carries with it a power of sale, in order to enable the duty to be performed: *Chandler v. Thompson*, 62 N. J. Eq. 723, 48 Atl. 583; *Skinner v. Wood*, 76 N. C. 109; *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516; *Cotton's Estate*, 21 Pa. Co. Ct. 451.

In *Clark v. Riddle*, 11 Serg. & R. 311, a will devising land to the testator's wife "after discharging all his lawful debts," and directing that after her death certain pecuniary legacies be paid, and the residue be equally divided between certain others, was held to give no implied power to sell the land, the court saying that the debts and legacies might be paid by the devisees, in which case no sale would be necessary, and that, if not so paid, the land could be sold by legal process.

And a deed which expressly declares on its back that the grantee holds the lands conveyed thereby for the joint benefit of himself and another, and that it is to stand as security for certain notes and the balance of the purchase money paid by such other person, and that the profits realized above these sums shall be equally divided between the grantee and such other person, although creating a trust for the latter, does not create a power of sale in the trustee, as it does not impose duties which cannot be performed without such power. *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516.

So, a mere direction to divide equally property consisting wholly or in part of real estate has been held not sufficient to show an intention of the testator that the executor shall sell the land; and in such case, if a division can be effected by actual partition, a power of sale will not be implied. *Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056.

And a direction that the remains of the estate, both real and personal, after the

and that it would be beneficial to all of them if the real estate referred to could be sold by the executors and trustees, who believe that, by the true construction of said will, the testatrix gave and granted unto them full power and authority to convey all real estate, wheresoever situated, comprising any part of her residuary estate so as aforesaid devised in trust; and that, in the event of the sale of any said real estate, purchasers are likely to refuse to accept a deed from the executors and trustees until their powers in the premises have been judicially determined.

The complainants particularly inquire whether or not the executors and trustees have power to sell and convey in fee simple or otherwise the real estate in this state.

The will of Mary D. Biddle, after providing for sundry specific bequests, provides for the sale immediately or after the termination of life estates, of certain improved property in Pennsylvania, with the instruction that the proceeds upon sale become part of her residuary estate. Then follows the clause of which construction is particularly required, and which, omitting immaterial portions, is as follows: "I give, devise, and bequeath all the residue of my estate to my executors hereinafter named, in trust, however, to invest and manage the same, and to pay over the interest and income annually arising therefrom to my four children during their lives, in equal shares, without anticipation, and free from any claims or demands of any

payment of debts, be "divided" into "equal" shares, does not of itself confer a power to sell the realty,—especially where, in other provisions of the will, the term "divide" is used to denote the shares as such, and a sale, although desirable, is not absolutely essential. *Murdock v. Kelly*, 62 App. Div. 562, 2 N. Y. Supp. 152.

And a will giving executors "discretionary powers to settle my estate as they judge best for the interest of my heirs" has been held to give the executors no power to sell the land of the testator, on the ground that no duties were imposed which could not have been performed except by a sale. *Skinner v. Wood*, 76 N. C. 109.

And a direction "to distribute" an estate upon the happening of a certain contingency, among the testator's heirs, according to the statutes of the state, does not authorize the trustee to sell the real estate, as in such case the title to the real estate reverts to the heirs upon the happening of the contingency, and no power to sell real estate can be implied, unless the duties imposed by the will make it necessary that a sale should be made in order to carry out the testator's intention. *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290.

c. Contrary intention.

A grant of a power of sale will not be implied where terms of the will or deed manifest an intent that the property be held or distributed in kind. *Walker v. Murphy*, 34 Ala. 591; *Hill v. Den*, 54 Cal. 6, approved on subsequent appeal in 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *ROBINSON v. ROBINSON*; *Potter v. Ranlett*, 116 Mich. 454, 74 N. W. 761; *Chandler v. Thompson*, 62 N. J. Eq. 723, 48 Atl. 583; *Bijur v. Bijur*, 49 Hun. 235, 1 N. Y. Supp. 630; *Hobson v. Hale*, 95 N. Y. 588; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

d. Effect of desirability of sale.

In a few cases, the question has been ap-
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proached from the point of the desirability of the sale, but even though a sale would be beneficial, that, in itself, is generally not considered a sufficient basis for inferring a power of sale.

Thus, in *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933, affirming 21 Abb. N. C. 404, 1 N. Y. Supp. 914, it was held that a devise of real and mixed property to executors in trust, with power to lease the real estate and to invest the income and accumulations in real estate, with a direction that at a certain time all the real estate of which the testatrix died seised, and such as the executors may have purchased, should be "equally divided between named heirs," did not give power to the executors to sell the trust real estate, however desirable such a sale might have been because the unimproved portion thereof was a drain upon the improved portions.

And a testamentary direction to executors to "retain in their hands and under their control" the residue, real and personal, of the estate, and to "manage the same to produce an income," until the happening of a certain contingency, and then to "divide the original property with its accumulations" between the children of a certain person, "share and share alike," does not confer upon the executors implied power to convey land, although to do so and reinvest the proceeds might be to the interest of the legatees. *Blanton v. Mayes*, 58 Tex. 422.

And a direction in a will that certain property should be "held, owned, and controlled" by trustees until the beneficiary arrived at a certain age, and that the income should be used for the purpose of educating and maintaining such beneficiary, and, if insufficient for that purpose, a portion of the principal be used, does not confer power upon the trustees to sell unproductive real estate merely because the sale would be advantageous, especially where it is evident from the terms of the will that complete dominion over the property was not intended to be given the trustees, and the duties to be performed and the authority to be exercised were pointed

of their creditors or of any other persons or person whosoever; . . . and on the death of any one of my children, I direct that the one fourth of the principal of said residuary estate . . . shall be paid to the children or other direct descendants of my said deceased child, such distribution being made *per stirpes*."

The complainants urge that the words "invest and manage" imply or import in and of themselves a power of sale. While it is true that, under the original theory of a trust, the powers and duties of the trustee were confined substantially to holding and caring for the property, it is equally true that the purposes of the modern trust are of a much broader character, requiring ordinarily much greater powers on

the part of the trustee, including a power of sale, which is generally expressly given.

The power of sale, where not expressly given, will be implied from the fact that the trustee is charged with a duty which cannot be performed without a power of sale. *Putnam Free School v. Fisher*, 30 Me. 523, 527; *Jones v. Atchison, T. & S. F. R. Co.* 150 Mass. 304, 5 L.R.A. 538, 23 N. E. 43. In both these cases no powers were given the trustee as to the investment or management of the property, yet in the latter case the court says: "The discretion which our laws give to trustees in making investments, when no specific directions are given by the creator of the trust, requires that a somewhat more liberal view be taken of the implied powers of trustees of per-

out in the language used. *Kennedy v. Pearson*, — Tex. Civ. App. —, 109 S. W. 280.

So, a deed of land in trust, to "possess, manage, and hold" the same during the trustee's life, and to invest the profits for the benefit of trustee's wife and children, with a provision that the trustee should be allowed a reasonable "support out of" the land, and at the trustee's death the land to pass to his widow and children, does not give, by implication, a power of sale, although the land is impoverished and unproductive. *Cotton's Estate*, 21 Pa. Co. Ct. 451.

But on the other hand, a will giving "full power and authority" to the executor "to invest, manage, and control" the estate, in such manner as may, in his judgment, be best calculated to combine safety with productiveness, was held in *Sargent v. Sibley*, 8 Ohio Dec. Reprint, 434, to imply a power to sell unproductive real estate.

c. Executor as donee of power in which he is not named.

An executor named in a will which either expressly or impliedly directs real property to be sold, and the proceeds distributed in a certain manner, by necessary implication, has power to sell and convey the real estate without express powers having been conferred. *Rathbone v. Hamilton*, 4 App. D. C. 475; *Rankin v. Rankin*, 36 Ill. 293, 87 Am. Dec. 205; *Lash v. Lash*, 209 Ill. 595, 70 N. E. 1049; *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468; *Anderson v. Turner*, 3 A. K. Marsh. 131; *Smith v. Courtney*, 27 Ky. L. Rep. 642, 85 S. W. 1101; *Magruder v. Peter*, 11 Gill & J. 217; *Chandler v. Rider*, 102 Mass. 268; *Hale v. Hale*, 137 Mass. 168; *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Seeger v. Seeger*, 21 N. J. Eq. 90 (*dictum*); *Louderbough v. Weart*, 25 N. J. Eq. 399; *Wood v. Lemcke*, 72 N. J. Eq. 651, 66 Atl. 903; *Dorland v. Dorland*, 2 Barb. 65; *Meakings v. Cromwell*, 2 Sandf. 512; *Foster v. Craige*, 22 N. C. (2 Dev. & B. Eq.) 209; *Vaughan v. Farmer*, 90 N. C. 607; *Jenkins v. Stouff*, 39 L.R.A. (N.S.)

er, 3 Yeates, 163; *Myer's Appeal*, 62 Pa. 104; *Lockart v. Northington*, 1 Sneed, 318; *Bedford v. Bedford*, 110 Tenn. 204, 75 S. W. 1017; *Hardin v. Hassell*, 118 Tenn. 143, 100 S. W. 720; *Blatch v. Wilder*, 1 Atk. 420; *Robinson v. Lowater*, 5 De G. M. & G. 272, 23 L. J. Ch. N. S. 641, 18 Jur. 363, 2 Week. Rep. 394, affirming 17 Beav. 601; *Davies to Jones and Evans*, L. R. 24 Ch. Div. 190, 52 L. J. Ch. N. S. 720, 42 L. T. N. S. 624; *Anonymous*, 3 Dyer, 371 b; *Curtis v. Fulbrook*, 8 Hare, 25, 19 L. J. Ch. N. S. 65, 13 Jur. 1044; *Forbes v. Peacock*, 11 Mees. & W. 630, 12 L. J. Exch. N. S. 460, affirming 11 Sim. 152, 9 L. J. Ch. N. S. 367, 6 Jur. 476; *Ward v. Devon*, as cited in *Forbes v. Peacock*, 11 Sim. 160; *Tylden v. Hyde*, 2 Sim. & Stu. 238, 25 Revised Rep. 194; *Elton v. Harrison*, 2 Swanst. 276, note.

But it has been held that this rule is applicable only in the absence of an express devise.

Thus, in *Patton v. Randall*, 1 Jac. & W. 189, it was held that a direction for the sale in a given event, of an estate devised by will to testator's children, without expressing by whom it was to be sold, did not give a power of sale to the executors by implication, the master of the rolls saying that "before an implication is raised, there must be an absence of express devise, and in opposition to a devise it can never be raised."

And in *Mapes v. Tyler*, 43 Barb. 421, it was held that where the testator gives and bequeaths the remainder of his estate, real and personal, to persons named, and then provides that at a designated time the "property shall be sold and the proceeds . . . equally divided" among certain children, the executors are not, by implication, vested with power to sell for the purpose of distribution, since before an implication can be raised there must be an absence of express devise.

And in the following cases, the decisions which were adverse to an implied power of sale were based on the fact that there was an express devise: *Williams v. Williams*, 49 Ala. 439; *Mapes v. Tyler*, 43 Barb. 421;

sonal property to change investments than has been taken in England and some other jurisdictions." *Id.* page 308 of 150 Mass.

In *Boston Safe Deposit & T. Co. v. Mixer*, 146 Mass. 100, 15 N. E. 141, a testator, after bequeathing to each of his four children the income of a specified sum to be held in trust, gave to them the residue of his estate, real and personal, to be divided equally between them, share and share alike, to them, their heirs, and assigns forever. After the marriage of a daughter, the testator by a codicil directed that all the property and estate so given the daughter in addition to said income in said will be paid to a corporation as trustee, to be invested for her benefit; that, after the death of his daughter, the estate

left in trust be divided among her children equally, and, if she leaves no children, the sum so left in trust with the corporation be paid one third to her husband and the balance divided among her brothers and sisters.

"In these provisions he is clearly dealing with the whole trust estate as a single fund, and they imply that the trustee is to make the division according to his directions. He must do this so far as the fund consisted of personal property, and there is nothing to indicate that he intended that there should be any difference as to that part of the fund which at his death was real estate. The whole estate held in trust was 'to be invested by said corporation as shall seem prudent and safe,' which implies

Clark v. Riddle, 11 Serg. & R. 311; *Colyer v. Finch*, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. N. S. 65; *Corser v. Cartwright*, L. R. 8 Ch. 971, affirmed in L. R. 7 H. L. 731, 45 L. J. Ch. N. S. 605; *Doe ex dem. Jones v. Hughes*, 6 Exch. 223, 20 L. J. Exch. N. S. 148.

f. Miscellaneous.

In *Bentham v. Wiltshire*, 4 Madd. Ch. 44, 20 Revised Rep. 271, it was said that power in the executors to sell real estate will be implied only when the produce must necessarily pass through their hands in the execution of their office, as in payment of debts and legacies.

In *Lyons v. Harris* [1907] 1 I. R. 32, it was held that a will which, after directing the payment of certain pecuniary legacies, devises the remainder of testator's property of every kind, both real and personal, to trustees, to pay a specified annuity, and directs the remainder of the income of the property or the investments representing the same to be paid her husband during his life, and after his decease to certain others in certain shares, and further directs that, upon the happening of a certain event, the annuity is to cease, and a large sum be raised and distributed as directed in the will, confers power upon the trustees to sell the real estate, since a power to convey will be implied where the language of the will does not clearly indicate that the testatrix intended that the property should be enjoyed *in specie*. The court said: "The general rule is that where there is a general residuary bequest of personal estate, including chattels real, to be enjoyed by persons in succession, the court puts upon the bequest the interpretation that the persons indicated are to enjoy the same thing in succession, and converts the property as the only means of giving effect to that intention."

II. Particular words and phrases.

a. "Divide."

1. In general.

Although an irreconcilable conflict exists 32 L.R.A. (N.S.)

ists as to the interpretation to be given a direction to "divide" the trust estate, the weight of authority seems to imply a power of sale from the use of such word, although a consideration of the phraseology of the entire will, together with the foregoing rules, necessarily enters into the question.

In *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. 890, it was held that a mere direction to an executor that the residuary estate, real and personal, shall "be divided," does not, by implication, authorize the executor to sell the trust realty, it being said that under such a direction the beneficiaries were entitled to their share in kind.

And in *Campbell v. Cole*, 71 N. J. Eq. 327, 64 Atl. 461, where testator gave and bequeathed all his property to his wife for life, and "at her death to be divided equally between my two children," the executors were held not to have an implied power to sell the real estate, on the ground that the will imposed no duty upon them to make the division.

And the fact that a will directs executors "to divide" the residue of an estate, real and personal, in "equal parts," each of which the testator "gives and bequeaths" to the heirs of certain relatives, to be equally divided among the heirs of the named relatives respectively, is not alone sufficient to invest the executors with authority to sell the realty, especially where it does not appear that it is impracticable readily to make an equal division of the real estate among the legatees. *Harris v. Ingalls*, 74 N. H. 35, 64 Atl. 727.

And see *Clark v. Riddle*, *Maxwell v. Barringer*, *Poulter v. Poulter*, and *Murdock v. Kelly*, as set out supra, I. b, and *Roe v. Vingut*, as set out supra, I. d.

But where, in addition to the facts set out in *Harris v. Ingalls*, supra, it appears that the legatees were numerous and widely scattered, and that the real property consisted of numerous parcels differing in character and located in different parts of the country, a power of sale will be implied, as in such case the instrument imposes duties which could not be performed

that the trustee may find it prudent to change the investments. The testator does not directly or by implication give any vested legal estate to those who under the codicil will be the distributees at his daughter's decease. He imposes upon the trustee the duty of dividing and transferring the fund after her death." *Id.* page 104 of 146 *Mass.*

The court then says: "Looking at the whole will, it seems to us reasonably clear that he intended, to give to the trustee the legal title to both the real and the personal estate, with the power to sell and convey the same, and that such a title in the trustee is necessary in order to enable it to carry out the purposes of the testator.

Sears v. Russell, 8 *Gray*, 86; *Packard v. Marshall*, 138 *Mass.* 301." Page 104.

In *Harvard College v. Weld*, 159 *Mass.* 114, 118, 34 *N. E.* 175, the court says: "The foregoing considerations seem to us sufficient to show that the testator did not intend or attempt to make the land in question inalienable when it reached Harvard College, and that the first words of the trust imposed upon it, 'to manage and invest the same to the best advantage,' carry a power to sell."

It would seem that the words "invest and manage" properly import and imply a power of sale, unless a contrary intention on the part of the testator can be found in the will taken as a whole.

There are other considerations, however,

without a sale, and therefore a sale must have been intended. *Harris v. Ingalls*, 74 *N. H.* 339, 68 *Atl.* 34.

So, a devise of improved and unimproved realty to executors in trust to "divide" into eight "equal" shares, and upon the happening of specified contingencies to make a further subdivision of one or more of such eight shares, implies power to sell the improved real estate for the purpose of making the division, where such improved real estate consists of thirteen parcels of varying value, although the testator in terms gave power to sell his unimproved and unproductive real estate. *Corse v. Chapman*, 153 *N. Y.* 466, 47 *N. E.* 812, affirming 91 *Hun*, 642, 36 *N. Y. Supp.* 1124.

So, a will which, after bequeathing a pecuniary legacy, bequeathes all the remainder of the estate, real and personal, to testator's brothers and sisters and their representatives, in equal shares, and appoints executors to "carry out the intention" of the will, gives the executors implied power of sale over the real estate, where the obvious intention of the testator cannot be carried out without a sale of the realty, and there are a great many beneficiaries, some of whom are infants. *Carlisle v. Cooke* [1905] 1 *I. R.* 269.

And a devise of land in trust for the use and benefit of testator's children, share and share alike, during their lives, so that they will receive, possess, and enjoy the income and profits of their respective shares, each one to his own separate use, and after their death to their heirs forever, carries a power of sale, where the real estate is incapable of division. *Parker v. Seeley*, 56 *N. J. Eq.* 110, 38 *Atl.* 280.

And a devise of an estate of both realty and personalty to an executor, for the purpose of having an equal division of all such estate among all of testator's relatives, implies a power to sell the realty where necessary in order that an equal division may be made. *Stoff v. McGinn*, 178 *Ill.* 46, 52 *N. E.* 1048. To the same effect is *Foster v. Craige*, 22 *N. C.* (2 *Dev. & B. Eq.*) 209.

And a will which plainly directs the executor "to divide" all the estate, real and

personal, among several devisees, in such proportions as to make it imperative that the real property be sold and the proceeds divided, creates an implied power to sell. *Re Manning*, 85 *Neb.* 60, 122 *N. W.* 711.

A direction to a trustee to set aside a certain sum out of the "proceeds arising from the sale of my estates," and after payment of debts, etc., to "divide" the residue "equally" among numerous beneficiaries, by necessary implication, confers power on the trustee to sell real estate. *Flux v. Best*, 31 *L. T. N. S.* 645, 23 *Week. Rep.* 228.

And a direction to executors to proceed with due diligence to the "winding up of my estate, consisting largely of real estate," and after the payment of debts and legacies, to "divide" the "interest and proceeds" equally among testator's children, vests a power, coupled with a trust, to sell the property, pay debts and legacies, and divide the remaining proceeds as directed. *May v. Brewster*, 187 *Mass.* 524, 73 *N. E.* 546.

And a devise by a testator of land in trust to be divided upon the happening of a certain contingency, and certain cash legacies paid, and the residue equally divided among certain charitable organizations, necessarily implies power to sell the real estate upon the happening of such contingency. *Gibbens v. Curtis*, 8 *Gray*, 392.

So, a direction that the residue of an estate, both real and personal, be divided into equal shares which testator "gives and bequeaths" to his children, has been held to raise the inference that the testator intended to confer upon the executor the power to sell the real property. *Vanness v. Jacobus*, 17 *N. J. Eq.* 153.

Authority to an executor to manage and settle testator's estate, where the will, after directing the payment of debts, blends the real and personal property, and provides for an equal division thereof into several parts, one of which, less a specified sum, is given a designated beneficiary and the others to be distributed as directed, confers implied power to convey the real estate, since in such case the division is necessary in order to carry out the testator's

which lead to the belief that a power of sale was intended by the testatrix. She directs the sale by her executors of sundry parcels of productive real estate, and that the proceeds shall become part of her residuary estate. It is hardly supposable that real estate, part of which was unproductive, should be retained by the trustee when it is not expressly or impliedly provided that it shall be enjoyed by the *cestui que trust in specie*. Moreover, she treats the whole trust estate as a single fund in the provision: "I direct that one fourth of the principal of said residuary estate . . . shall be paid to the children or direct descendants of my said deceased child." The term "shall be paid" is applicable exclu-

sively to personalty. *Cook v. Cook*, — N. J. Eq. —, 47 Atl. 732. See also *Putnam Free School v. Fisher*, *supra*.

The trustees could not ascertain the true amount of the estate, or pay over the fractional part directed to be paid to the children of a deceased child, until the whole estate had been converted into money. *Putnam Free School v. Fisher*, 30 Me. 523, 527.

Upon the whole will, therefore, we conclude that it was the intention of the testatrix that the trustees should have power to sell the real estate devised by the residuary clause, and give to the purchaser or purchasers good title in fee simple, and that her will so directs.

Decree in accordance.

directions. *Wood v. Lembecke*, 72 N. J. Eq. 651, 66 Atl. 903.

And where the testator blends the real estate with the personalty, and divides the total into shares, sets a price upon a specific piece of realty, and directs that the price be deducted from the share of the party to whom it is given, and speaks of the whole estate as the "sum," the executor is by implication directed to sell the realty. *Ramsey v. Ramsey*, 226 Pa. 249, 75 Atl. 420.

And where a testator by will gave the use of a house to a person so long as she should remain a widow, and provided that "if it is deemed best to have the house sold," she was "to have the interest for her use," and at her death the "avails" were to be equally divided between named persons, the executor was held to have power to sell the house if necessary in order to carry out the intent of the testator. *Chandler v. Rider*, 102 Mass. 268.

So, plenary power to sell real estate is given the executor under a will devising to him all the residue of testator's "estate, real and personal, not heretofore disposed of, to be collected, sold, or partitioned, and the proceeds to be divided, share and share alike," among certain persons, where the testator manifests an intention to give such power by other clauses in the will, and especially where the power to sell was necessary in order for the executor to carry out faithfully and effectually the imposed duty of making an equal distribution of the proceeds of the estate conveyed by the residuary clause. *Cowan v. Cowan*, — Tenn. —, 53 S. W. 1101.

So, a devise of real and personal property to executors in trust to erect a tombstone, pay legacies, and "divide" the residue "equally" among persons named, with the provision, "I enjoin my executors not to sell any of the real estate under three years, unless sold to advantage," confers upon the executors implied power to sell the real estate. *Stewart v. Hamilton*, 37 Hun, 19.

In addition to the foregoing cases, see subdivisions, II. a, 2; II. b; II. c; II. d; II. e; and II. o.
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2. According to statute.

In *McLaughlin v. Greene*, 198 Mass. 153, 83 N. E. 1112, it was held that a direction to executors, after providing for certain legacies, to "divide and distribute among my heirs and next of kin according to the laws of distribution and descent" an estate, real and personal, consisting, beside the personalty, of many parcels of real estate of widely varying values, gives, by necessary implication, a power and duty to sell and dispose of the property for the purpose of making the directed distribution.

But in *Hanson v. Hanson*, — Iowa, —, 127 N. W. 1032, it was held that a direction that the remainder of testator's estate, real and personal, after the payment of debts, "be divided among my heirs according to the laws of the state," did not imply power to sell the real estate, although it could not be equitably divided in kind, it being said that the direction to divide according to the laws of the state necessarily meant a division of the real estate in kind.

And in *Alexander v. Wallace*, 8 Lea, 569, a will which, after providing for the payment of debts and certain servants, directed that the remainder of the estate, real and personal, be "divided" among testator's "heirs according to the laws of the state," and appointed an executor "to take charge of my entire estate, and execute this, my last will and testament," was held not to give the executor any authority to sell the land. See also *Clark v. Fleischmann*, as set out *supra* I. b.

b. "Gathered" and "divided."

In *Smalley v. Smalley*, 54 N. J. Eq. 591, 35 Atl. 374, where testator gave, devised, and bequeathed all his property, real and personal, after the payment of his debts, to his children, "to be gathered into one general fund and divided into six equal parts," the court held that no implied power to sell the real property was thereby given, the will, as regards the testator's intent, being construed as follows: "By the direction that the residue of his estate, both real and personal, shall be

gathered into one general fund, I understand testator to mean that, after his debts and funeral expenses are paid, the amount and value of the real and personal property shall be ascertained, and, when ascertained, divided among the six children in shares of equal value. The division is, in terms, to be a division not only of personality, but of realty, and it is to take place 'after,'—that is, immediately after,—the settlement and payment of all the just debts. There is here no gift to the executors in trust; no direction to them to invest and ultimately pay over; no indication that the children are to take the proceeds of the sale of the real estate rather than the real estate itself. On the contrary, the testator uses language technically appropriate to carry his real estate to his children in *specie*. 'I give, devise, and bequeath all my property, real and personal,' is the language of the gift. There is absolutely no indication of an intention on testator's part to put it in the power of his executors to change the nature of his property before it reaches its destination. The fact that the testator directs his estate, after payment of debts, to be gathered into one general fund, is of no consequence, because in that so-called fund he himself puts the real estate as well as the personality, and not the proceeds of the sale of it. The so-called fund or mass which is to be divided is a fund or mass composed of both realty and personality. So far, therefore, as the will itself is concerned, I see no ground for supposing that a power of sale by implication is given."

c. "Manage" and "divide equally."

A direction that executors shall "have charge" of testator's property and "manage" the same and divide the income in a certain manner until a certain time, and then "divide" the property "equally" among testator's children, confers a power of sale of realty. *Gersen v. Rinteln*, 2 Dem. 243.

See also *Blanton v. Mayes*, supra, I. d., and *Robinson v. Ingram*, infra, II. u.

d. "Divide" and "pay."

In *Winston v. Jones*, 6 Ala. 550, a will which, after making certain devises, required the executors to "add to" the residue of testator's estate of every description a specified sum, and "to divide" the sum total into a certain number of equal parts, with a direction "to distribute and pay over the residue of my estate, both real and personal," in a certain manner, was held to authorize the executors to sell the land in order to make an equal distribution.

So, executors have power to sell lands given to them in trust to be equally "divided" among testator's children, with a direction to hold a part of the shares and to pay the income to designated beneficiaries until they successively reach a certain age, and on the happening of a certain contingency, to "pay" the respective

shares to certain heirs. *Belcher v. Belcher*, 38 N. J. Eq. 126.

And a devise of an estate consisting principally of two farms incapable of actual partition, with directions which require it to be divided into seven shares, three of which are to be paid over at once and four of which pass into as many distinct trusts for life, with the principal of each payable at different times, raises of necessity an implied trust to sell. *Salisbury v. Slade*, 160 N. Y. 278, 54 N. E. 704.

And a direction to divide an estate, real and personal, into eight "equal" shares, and upon each beneficiary reaching majority "to pay over" his or her equal share, with express power to partition the real estate, necessarily carries a power to sell, where the real estate is so situated that actual partition cannot be had. *O'Donoghue v. Smith*, 184 N. Y. 365, 77 N. E. 621.

And a will creating a trust, which uniformly uses the terms "pay over," "part or portion," "fund," "divide," and "sum" when disposing of the estate, by necessary implication, confers a power of sale upon the trustees. *Burnham v. White*, 117 App. Div. 515, 102 N. Y. Supp. 717.

But in *Curling v. Austin*, 2 Drew. & S. 129, 10 Week. Rep. 682, where the testator blended realty and personality in a devise in trust to pay the residue to his children, it was held that the trustee had no implied power to sell the real estate, although the personality was not sufficient to pay the charges, and it was necessary to raise money out of the estate, the vice chancellor saying: "The will does not contain any express power of sale; when a testator devises real estate alone, to raise money, in that case there is no doubt an implied power of sale. But it is otherwise where there is a mixed devise and bequest of realty and personality; here the testator gives all his realty and personality and *non constat* that there was not enough of personality to raise the sums required; so that an implied power to sell the real estate does not arise. Therefore, it is not shown that there is in the vendor a power of sale."

And in *Potter v. Ranlett*, 116 Mich. 454, 74 N. W. 661, where the testator gave real estate in trust to his executors to pay the income to certain persons for life, and provided that on their death "the said trust funds, property, and estate was to be paid over by said trustees" to the children of the life annuitants, "in equal shares and proportions, and so to their respective heirs," it was held that no power of sale of realty was conferred on the executors, the ground being that the testator's intent not to confer power to sell the realty was plainly manifest.

e. "Divide" and "invest."

A devise in trust to a testatrix which requires the estate to be divided into equal parts upon the happening of a designated contingency, and provides that the shares

be invested for certain purposes, necessarily implies a power of sale in the trustees. *Casselman v. McCoolley*, 73 N. J. Eq. 253, 67 Atl. 436. *Browning v. Stiles*, — N. J. Eq. —, 65 Atl. 457, is to the same effect.

And a direction in a will "to divide" equally the residue of an estate consisting of both real and personal property, between testator's children, to whom it was given and bequeathed, followed by the full direction that such portions should be "invested" at interest, and each child receive his share upon reaching a certain age, implies a power to sell the real property, as otherwise it would be impossible to carry out the terms of the will. *Chick v. Ives*, 2 Neb. (Unof.) 879, 9 N. W. 751.

So, a direction to pay debts and legacies and to divide the remainder of the estate, real and personal, equally between the testator's wife and his four daughters, and upon the wife's death her share to be equally divided among the children, the daughters' shares to be "invested" for their benefit, by necessary implication, confers power to sell the real estate. *Davies to Jones and Evans*, L. R. 24 Ch. Div. 190, 52 L. J. Ch. N. S. 720, 42 L. T. N. S. 624.

So, a direction to divide the rest and residue of an estate which included realty, and the accumulations and additions thereto, into a certain number of equal shares, and to make an unequal distribution of a portion thereof, together with a direction that the remaining portion of shares be retained by the trustees with power to "invest and reinvest" the same, implies a power to sell the real estate. *Casey v. Canavan*, 93 Ill. App. 538.

And a power of sale of real estate is vested in the executor by implication, where he is directed to "divide" the estate, both real and personal, into "equal" shares, and to "invest" certain of such shares for a time, especially where the condition of the estate is such that the personality is not sufficient to pay the debts and the testator has otherwise manifested an intention of giving power to sell the realty. *Haggerty v. Lanterman*, 30 N. J. Eq. 37.

But a direction that the residue of an estate consisting of personality and realty "be and remain" in the care and control of the executors and trustees, "well and safely invested," until the happening of a certain contingency, with a direction then to divide and distribute said residue and accumulative interest equally between certain relatives, was held in *Hale v. Hale*, 125 Ill. 399, 17 N. E. 470, not to imply a power to sell the realty, it being said that the words used indicated unmistakably an intention that the lands should "remain . . . well and safely invested," as they then were.

And in *Hobson v. Hale*, 95 N. Y. 588, it was held that a direction that the residue and remainder of an estate, real and personal, "be and remain . . . well and safely invested" until the death of the last survivor of the life annuitants, and that then the residue and the remainder be "di-

vided equally," does not imply a power of sale, it being said that the expression "be and remain . . . invested" must be regarded as showing an intention that the condition of the testator's estate should continue in the hands of the executors as he left it at the time of his death, and that the words "divided equally" could apply to realty as well as to personality.

f. "Pay."

1. In general.

Where the will, with the exception of a few specific devises and bequests, treats the entire estate as personal property, and directs the payment of all gifts in money, the executors, by necessary implication, have authority to sell all real estate not specifically devised. *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353.

So, where a testator masses his realty and personality in a common fund, and directs that the balance which may remain after payment of successive gifts of money shall also be "paid over," a power to sell the realty will be implied. *Re Mustin*, 194 Pa. 437, 75 Am. St. Rep. 702, 45 Atl. 313.

Likewise, a devise of property, real and personal, to executors in trust, with directions to pay certain persons specified "sums of money," and when the residue amounted to \$50,000 to pay the same to the trustees of a designated beneficiary, implies power to sell the realty, as the will could not be executed without so doing. *Putnam Free School v. Fisher*, 30 Me. 523.

And a deed conveying real estate to trustees, with a direction that upon certain contingencies they shall "pay over" the fund to specified persons, confers an implied power to sell. *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257.

A will vesting an estate, real and personal, in the executor in trust to distribute after a certain life estate and trust period, which provides, after directly ordering the personality to be sold for purposes of distribution, that the trustee "shall take such steps for the division of the real estate . . . exactly as I have heretofore provided with reference to distribution of the rents during the trust," which rents were directed to be "paid" over in portions varying from one-fifth to one-fortieth part, impliedly directs the trustee to sell the real estate. *Waddington's Estate*, 7 Pa. Dist. R. 697.

And a devise of real and personal property to an executor in trust to pay the income to testator's brother for life, and upon his decease, after payment of debts, to "pay" certain pecuniary legacies, which were to be increased ratably should there be a residue, or abated ratably "should the total net proceeds of the estate be not sufficient to pay the bequests in full," confers an implied power to sell upon the executor. *Leeds v. Sparks*, 8 Del. Ch. 280, 68 Atl. 239.

So, a bequest of an annuity out of lands

gives the executor power to sell the lands where necessary to a performance of the bequest. *Ex parte Elliott*, 5 Whart. 524, 34 Am. Dec. 572.

And a devise to an executor of an estate consisting largely of realty in trust "to invest and provide for the payment" of certain life annuities created by the will, with a direction to invest the money of the annuitants in personal securities, creates an implied power of sale, where the personal estate is not sufficient to provide for the payment of annuities. *Wood v. Nesbitt*, 62 Hun, 445, 42 N. Y. S. R. 778, 16 N. Y. Supp. 918.

But in *Cronan v. Adams*, 189 Mass. 190, 75 N. E. 101, the words "shall be paid," standing by themselves, were held not sufficient to authorize the administrator with the will annexed to sell real property merely for the purpose of distributing it equally among certain persons named in the will.

And a devise in trust, the trustee to "pay over" all the income, and upon the death of the life annuitants, to "transfer, convey, and pay over the property" of the trust estate to their heirs, and if there were none, after the payment of small sums to designated beneficiaries, two thirds of the "fund" to be "given" to a designated person and the other third to the heirs of another named person, was held in *State v. Thresher*, 77 Conn. 70, 58 Atl. 460, not impliedly to direct the trustee to convert the realty into cash.

In *McHugh v. McCole*, 96 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631, it was said that where legacies given by the will were clearly to be paid in personalty, and the personal property was insufficient, only so much of the realty could be sold by the executor as was necessary to meet such legacies.

And in *Rambo v. Rumer*, 4 Del. Ch. 9, a charge of legacies on land was held not impliedly to carry to the executor the power to raise them by sale of the land, it being said that in such case there is no ground of necessity out of which such a power must be implied, as the charge creates a right in the legatee which he can enforce in his own name by a direct proceeding in equity, without the intervention of the executor.

And it has been held that a power of sale of real estate will not be inferred from the fact that legacies are given which, in the aggregate, exceed the value of the testator's estate, unless it appears in the will that it was the intention of the testator to make them a charge upon the real estate. *Cahill v. Brennan*, 68 Hun, 540, 23 N. Y. Supp. 78, reversed on other grounds in *Cahill v. Russell*, 140 N. Y. 402, 35 N. E. 664. See also *Re Rebbeck*, as set out *infra* II. f, 2.

In addition to the foregoing cases, see the following subdivisions: II. d; II. f, 2; II. h; II. i; II. j; II. k; II. a.
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2. "Debts."

An irreconcilable conflict exists among authorities as to whether a direction in a trust deed or will, to pay debts, will authorize the trustee or executor to sell realty for the purpose of carrying out the trust. Under the early English law, the question was answered in the affirmative, but, a conflict arising, an attempt was made to regulate the matter by statute. American courts, although differing on the question, are inclined to adopt a rule negating any implied right to sell in such cases, and in some instances have severely criticized the English decisions. In some jurisdictions, implied power to sell realty for the payment of debts is withheld on the ground that such a course is unnecessary, as the creditor may resort to statutory proceedings to enforce the payment of his claim. Other elements also enter into the question, but they are sufficiently set out in connection with the cases.

In *Masteron v. Stevens*, — Tex. Civ. App. —, 37 S. W. 364, it is said that power of an executor to sell land belonging to the estate may be implied from the existence of debts, when the administration of the estate is withdrawn from the probate court by the terms of the will. The decision in this case was modified upon appeal to the supreme court (90 Tex. 417, 39 S. W. 292, 921), but the above *dictum* was not touched upon.

And in *Carlton v. Goebler*, 94 Tex. 93, 58 S. W. 829, where the administration of the estate was expressly withdrawn from the control of the court, a direction to the executor to "manage" testator's "estate to the best advantage for the benefit" of "creditors" was held impliedly to confer upon the executor a power to sell realty for the payment of debts.

And a testamentary direction to the executor to "take charge of the estate, and manage it to the best advantage for the benefit of my creditors," was held in *Carleton v. Hausler*, 20 Tex. Civ. App. 275, 49 S. W. 118, to confer implied power on the executor to sell the land.

So, a trust deed empowering the trustee to use the "avails" of the property conveyed in payment of the grantor's debts gives the trustee implied power to sell the trust realty. *Valette v. Bennett*, 69 Ill. 632.

Likewise, a direction that in case the personal estate and certain realty is not sufficient to pay testator's debts, then the executors "to raise" the sum out of testator's copyhold premises, gives the executors power to sell the copyhold lands, where necessary in order that the testator's intention of paying his debts may be complied with. *Bateman v. Bateman*, 1 Atk. 421.

And a will devising land and personality to one for life, the devisee, however, "first disposing of a sufficiency thereof to pay my just debts, and at her death all such

property or" so much thereof as may then remain unexpended, to others, empowers a sale of the fee by the devisee. *Smith v. McIntyre*, 38 C. C. A. 177, 95 Fed. 585.

A deed of real estate by a bank president to the bank, of which he was a debtor, executed "for the purpose of securing all the depositors," and containing a recital that it was "to be wholly and fully used" to pay the debts of the bank, impliedly created a power in the trustee bank to sell or mortgage the land. *Steinke v. Yetzer*, 108 Iowa, 512, 79 N. W. 286.

An absolute conveyance of real estate in trust to pay debts and evenly distribute the remainder among the grantor's children, it being the wish of the grantor to secure the "proceeds" of the property to his wife for life, creates a power in the trustee to sell. *Stall v. Cincinnati*, 16 Ohio St. 169.

And a devise of property, real and personal, to trustees, specifically charging the payment of testator's debts, and that the residue be held in trust for a town, with power to the trustees to "manage my estate in their discretion," implies a power to sell the real estate for the purpose of paying the debts. *Brown v. Brown*, 7 Or. 285.

And a conveyance of the fee of lands upon the condition that it be charged with one half the debts which the grantor might owe at his death, and upon trust to make a certain application of the lands and profits, and upon the happening of a certain contingency, "to convey" the land to specified heirs, was held in *Goodrich v. Proctor*, 1 Gray, 567, to authorize a conveyance for the purpose of paying the debts of the grantor, without license or order of court, on the ground that, as the trustee had an estate in fee, he had a prima facie right to pass that title to another.

So, a will which first directs the payment of testator's debts, and then devises all the rest, residue, and remainder of the estate to his executors in trust, confers an implied power of sale upon the executor for the purpose of paying the debts. *Coogan v. Ockershausen*, 23 Jones & S. 286, 18 N. Y. S. R. 366.

And a deed of trust which binds the property conveyed for the payment of beneficiary's debts, and directs their payment by the trustee out of the rents and profits of the trust lands, vests in the trustee the implied power to sell for that purpose, where the rents and profits are wholly insufficient. *Porter v. Schofield*, 55 Mo. 56.

And a devise of the residue of property (a mixed fund of personal and real estate), to be applied to the payment of testator's debts, and the surplus equally divided among the heirs of a designated person, carries a power, by implication, to sell the lands which form a part of such residue, for the payment of debts and for distribution. *Foster v. Craigie*, 22 N. C. (2 Dev. & B. Eq.) 209.

But in *Williams v. Williams*, 49 Ala. 439, a will appointing an executor "to sell and collect such property or debts as may fall 32 L.R.A.(N.S.)

into his hands, pay off such lawful claim or claims as may be justly presented, returning unto each heir their portion according to law," was held not to authorize the executor to sell, for the payment of debts, lands specifically devised by the will.

But a charge of all testator's debts and funeral expenses upon all his estate, real and personal, not otherwise specifically bequeathed, authorizes the executors to sell the real estate for the purposes designated. *Dewey v. Ruggles*, 25 N. J. Eq. 35.

So, a conveyance of land to trustees "to pay all" the "just debts" of the grantor has been held necessarily to imply a power to sell in the trustees. *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257. *Cronan v. Adams*, supra, 11, f, is to the same effect.

And even merely charging lands generally with the payment of debts and legacies has been held in the following English cases impliedly to authorize their sale by the executor for the purpose of fulfilling the terms of the trust: *Elliot v. Merryman*, Barnard, Ch. 78, 2 Atk. 41; *Robinson v. Lowater*, 5 De G. M. & G. 272, 18 Jur. 363, 23 L. J. Ch. N. S. 641, 2 Week. Rep. 394, affirming 17 Beav. 592; *Wrigley v. Sykes*, 21 Beav. 337, 25 L. J. Ch. N. S. 458, 2 Jur. N. S. 78, 4 Week. Rep. 228; *Gosling v. Carter*, 1 Colly, Ch. Cas. 644, 9 Jur. 324, 14 L. J. Ch. N. S. 218; *Hodkinson v. Quinn*, 1 Johns. & H. 303, 30 L. J. Ch. N. S. 118, 7 Jur. N. S. 65, 3 L. T. N. S. 804, 9 Week. Rep. 197; *Colyer v. Finch*, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. N. S. 65; *Eidsforth v. Armstead*, 2 Kay & J. 333, 25 L. J. Ch. N. S. 237, 4 Week. Rep. 279; *Shaw v. Borrer*, 1 Keen, 559, 5 L. J. Ch. N. S. 364; *Flux v. Best*, 31 L. T. N. S. 645, 23 Week. Rep. 228; *Dolton v. Hewen*, 6 Madd. Ch. 14; *Ball v. Harris*, 4 Myl. & C. 264, 8 Sim. 485, 8 L. J. Ch. N. S. 114, 3 Jur. 140; *Henvell v. Whittaker*, 3 Russ. Ch. 343, 5 L. J. Ch. 158; *Finch v. Hattersley*, 3 Russ. Ch. 345, note; *Barker v. Devonshire*, 3 Meriv. 310.

And this may be done without showing whether any debts existed which made a sale necessary. *Sabin v. Heape*, 27 Beav. 553, 29 L. J. Ch. N. S. 79, 5 Jur. N. S. 1146, 1 L. T. N. S. 51, 8 Week. Rep. 120; *Greetham v. Colton*, 34 Beav. 616, 11 Jur. N. S. 848, 13 L. T. N. S. 34, 13 Week. Rep. 1009; *Mather v. Norton*, 16 Jur. 309, 21 L. J. Ch. N. S. 15; *Forbes v. Peacock*, 11 Mees. & W. 630, 12 L. J. Exch. N. S. 460, affirming 11 Sim. 162, 9 L. J. Ch. N. S. 367, 6 Jur. 476.

But the rule that where there is a charge of debts, the executor may have implied authority to convey the legal estate in order to raise money to satisfy the charge, applies only where no legal estate is given, it being held that where there is a devise of the legal estate to a particular person, and the estate is charged with the payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and that he is the only person who can make a legal title. *Colyer v. Finch*, 5 H. L.

Cas. 905, 3 Jur. N. S. 24, 26 L. J. Ch. N. S. 65. This rule is approved in the subsequent case of Corser v. Cartwright, L. R. 8 Ch. 971, which is affirmed in L. R. 7 H. L. 731, 45 L. J. Ch. N. S. 605.

And a distinction seems to be drawn where lands are devised in fee charged with a specified legacy, it being held that in such case there is no power to sell to be implied in favor of the executors, but that, as the legacy is specific and the devisee can, by looking at the will, determine the sums to be paid, he is the only one who can make a good title. *Re Rebbeck*, 63 L. J. Ch. N. S. 596, 71 L. T. N. S. 74, 8 Reports, 376, 42 Week. Rep. 473.

The rule that a general charge of debts on real estate conferred power on the executor to sell the land for that purpose was recognized in *Cook v. Dawson*, 29 Beav. 123, 7 Jur. N. S. 130, 30 L. J. Ch. N. S. 311, 3 L. T. N. S. 801, 9 Week. Rep. 305, affirmed in 3 De G. F. & J. 127, 30 L. J. Ch. N. S. 359, 4 L. T. N. S. 226, 9 Week. Rep. 434; but it was held that an exception obtains where the direction that the debts shall be paid is coupled with a direction that they must be paid by the executor, it being said that in such case it must be assumed that the testator meant that the debts must be paid out of the property which, by law, passes to the executor.

In *Mather v. Norton*, 16 Jur. 309, 21 L. J. Ch. N. S. 15, however, the general rule was adhered to, although the will expressly directed that all the debts and funeral expenses "be discharged by my executors." And the same is true of *Henvell v. Whitaker*, supra, where the direction was "all my just debts and funeral expenses to be paid and satisfied by my executor."

But merely authorizing trustees "to adjust and pay all claims" made upon the testator's estate, and "to act generally in the premises" in their "discretion," does not work a charge which will authorize the trustees to sell the real estate in order to pay debts. *Re Head*, L. R. 45 Ch. Div. 310, 59 L. J. Ch. N. S. 604, 63 L. T. N. S. 21, 38 Week. Rep. 657.

In *Potter v. Brown*, 11 R. I. 232, it was held that a charge of debts and legacies on land by implication does not, of itself, give the executor implied power to sell the realty. The court, in referring to the early English cases which lay down a contrary doctrine, said: "The doctrine is practically objectionable not only because it exposes the testator's real estate to sale without giving his heirs or devisees an opportunity to contest the necessity of the sale, or to exonerate the estate from the necessity if it exists; but also because the power, especially when it is implied from a charge which is itself implied, is often uncertain, inasmuch as the language or provision of the will from which the implication is made may be qualified or controlled by other language or provisions of the same instrument. There is also a consideration growing out of our statutes in regard to sales of real estate by executors and adminis-

trators for the payment of debts. The statutes contain ample provisions which may be availed of for the protection of all persons interested; but if we say executors have an implied power to sell for the payment of debts, independently of the statutes, whenever the realty is charged by the will, either expressly or by implication, for their payment, the value of the protection secured by the statutes is considerably impaired, for, according to the English precedents, such testamentary charges are very freely implied. . . . It is true this latter consideration does not apply to a charge of legacies; but a charge of debts and a charge of legacies must, with reference to any power of sale to be inferred from either of them, stand upon the same footing."

Re Fox, 52 N. Y. 530, 11 Am. Rep. 751, *Mathewson's Petition*, 12 R. I. 145, and *Reynolds v. Reynolds*, 27 R. I. 520, 63 Atl. 804, are to the same effect.

So, a direction to executors to whom property has been devised in trust, to pay the testator's debts, does not give a power of sale for that purpose, or vest the executors with any authority for their payment other than the law itself creates, where an inspection of the devise clearly shows that the testator did not contemplate that the sale of any part of his real estate would be necessary, and made no provision therefor. *Hill v. Den*, 54 Cal. 6. This holding was approved on a subsequent appeal of the same case, which is entitled *Huse v. Den*, reported in 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790.

And in *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202, it was held that a provision in a will that "it is my will and desire that all my just debts and funeral expenses be paid" does not empower the executor to dispose of the *corpus* of the estate or charge it with debt.

And in *Worley v. Taylor*, 21 Or. 589, 28 Am. St. Rep. 771, 28 Pac. 903, a will devising land to a person named, "for payment of all my just debts," was held not to give the executor power to sell the land for the payment of debts, the court saying that a mere implied charge of debts was insufficient to create a power to sell therefor.

And a mere formal direction in a will to pay debts was held in *Re Liddle*, 35 Misc. 173, 71 N. W. Supp. 474, not *per se* to give an executor power upon his own motion to sell the real estate of his testator, the court saying that "in such a case the creditor must resort to the usual statutory proceeding to enforce the payment of his claim."

And in *Doe ex dem. Jones v. Hughes*, 6 Exch. 223, 20 L. J. Exch. N. S. 148, it was held that the executor had no implied power to sell land which descended to the heir charged *simpliciter* with the payment of debts, funeral and testamentary expenses, and a certain legacy, it being said that in such case the charge on the realty could be enforced only in equity. This case, how-

ever, has been severely criticized, and can hardly be considered as good authority.

In *Dunn v. Keeling*, 13 N. C. (2 Dev. L.) 283, it was said that at law the words, "after all my debts are paid," annexed to a devise of land, do not confer upon the executor a power to sell, where a statutory enactment avoids all devises for the payment of debts, since, as the law has made the land subject to debts in any event, the phrase quoted is nugatory.

In connection with the foregoing cases, it should be noted that in both England and Canada power to sell real estate which has not been vested in any trustee by the terms of the will, and which has been charged by the testator with the payment of debts, has been given the executor by statute. *Re Bradburn*, 3 Ont. L. Rep. 351, and *Re Ross*, 7 Ont. L. Rep. 433, construing Ont. Rev. Stat. 1897, chap. 129; and *Re Adams* [1899] 1 Ch. 554, 68 L. J. Ch. N. S. 259, 80 L. T. N. S. 149, 47 Week. Rep. 326; *Re Barrow-in-Furness Corp.* [1903] 1 Ch. 339, 51 Week. Rep. 248, 87 L. T. N. S. 724, 72 L. J. Ch. N. S. 233; *Re Wilson*, 54 L. T. N. S. 600, 34 Week. Rep. 512, 2 Times L. R. 443, and *Re Clay*, L. R. 16 Ch. Div. 3, 50 L. J. Ch. N. S. 164, 43 L. T. N. S. 402, 29 Week. Rep. 5, construing Lord St. Leonard's Act (22 and 23 Vict. chap. 35).

g. "Pay and distribute capital."

In *Orrick v. Boehm*, 49 Md. 72, it was said that no power to sell real estate vested by reason of an injunction to the trustees to "pay and distribute the capital" upon the occurrence of a specified contingency.

h. "Manage" and "pay over."

In *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681, a provision that the "trustees shall manage . . . and pay over and deliver" property to certain persons upon their attaining a certain age was held to require, in the absence of any other express or implied authority in the will, that the property be kept and delivered in kind, it being said that the provision "to pay over and deliver" required the trustees to pay over what was susceptible of payment, and to deliver that which was not so susceptible, and that the term "manage" not only implied that the trustees were to return the property, but was inconsistent with any idea of authority to sell or otherwise dispose of the property. The trustees were also authorized to receive payment of bonds and mortgages and to invest the proceeds, but it was held that this right was not inconsistent with the duty of the trustees to pay over and deliver the property in kind, and that their authority could not be extended to a right to sell or dispose of real estate without a court order.

i. "Collect" and "pay over."

A direction to an executor to "collect" the 32 L.R.A. (N.S.)

residue of an estate consisting of both real estate and personalty as soon as can be done consistently without sacrificing too much by forcing the sale thereof, and to "pay over" the same, gives the executor power to sell the real estate in conformity with the terms of the trust and the manifest intent of the testator, as the terms "collect" and "pay over" are not applicable to real estate. *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645.

j. "Invest" and "pay."

A will which, after directing the payment of debts and some specific legacies, devises and bequeaths the residue and remainder of the estate, real and personal, to the executors in trust, "to invest" the same, with a direction to "pay" the income to testator's wife during life, and at her death to "pay" the balance to certain heirs impliedly confers a power upon the executors to sell the real property. *Livingston v. Murray*, 39 How. Pr. 102.

And a conveyance of an estate, real and personal, to executors in trust "to invest the proceeds," and upon the happening of a certain contingency to pay over the share of each to the respective beneficiary, empowers the trustees to sell the real estate. *Wurts v. Page*, 19 N. J. Eq. 365.

So, a devise to a trustee "to invest and keep invested" a mixed estate, and at the life annuitant's death, the same to be "paid over" to her issue, confers upon the trustee, by implication, power to sell the land for the purpose of converting it into an income producing property. *Foil v. Newsome*, 138 N. C. 115, 50 S. E. 597, 3 A. & E. Ann. Cas. 417.

In *Flinn v. Frank*, 8 Del. Ch. 186, 68 Atl. 196, a devise of the residue of testator's estate, real and personal, to a trustee "to invest" the same, with power "to call in and reinvest" and to pay the income to testator's wife during her lifetime, and upon her death "to pay the principal sum" to certain others, which properties were subsequently referred to in the will as "the proceeds of sale and all other moneys," was held to confer upon the trustee an implied power to sell the real estate.

And a devise to trustees with power to "vary and change . . . investments" existing under the will, together with the use of the word "pay" to designate the mode of distribution in a certain contingency, was held in *Re Curtis*, 26 R. I. 580, 60 Atl. 240, to give the trustees implied power to sell the real estate.

k. "Invest" in "bonds" or "securities" and "pay."

A direction to invest in bonds or securities, and eventually to pay the trust property over, confers implied power to sell the real property, at least in the absence of other expressions in the will limiting the effect of such a direction.

Thus, a devise of the real, residue, and remainder of property, real, personal, or

mixed, in trust, "to invest and keep invested" in "bonds," the income, and upon the happening of designated contingencies, the principal, to be "divided" into "equal parts," and paid over, was held in *McCready v. Metropolitan L. Ins. Co.* 83 Hun, 526, 32 N. Y. Supp. 489, affirmed without opinion in 148 N. Y. 761, 43 N. E. 988, necessarily to imply power to sell the real estate, on the ground that otherwise the terms of the will could not be complied with.

So, a will which directs that all of testatrix's property, real and personal, be "kept invested" in "bond and mortgage," and that after the death of the life annuitant, the residue be "given" to a town to erect a library, and which makes the executrixes trustees with power to "hold, mortgage, invest, reinvest, and keep invested," and to "pay over" as directed, creates a power of sale, especially where, by other expressions, the testatrix shows that she regards her whole estate as money. *Wright v. Mercein*, 34 Misc. 414, 69 N. Y. Supp. 936.

And a devise of real estate in trust to invest and reinvest in stocks or other securities, and to pay the income thereof and a specific sum annually of the principal to a named person during her life, and after her death to pay the whole of the trust fund to her children, by necessary implication, confers power upon the trustee to sell the real estate discharged of the trust. *Purdie v. Whitney*, 20 Pick. 25.

And a power to "receive, hold, invest, and reinvest" an estate including lands, in "securities," and to "pay" the entire profit for a designated time, and a certain time to "pay" the entire principal, includes authority to sell the land, when such a course is consistent with the other terms of the will. *Powell v. Wood*, 149 N. C. 235, 62 S. E. 1071.

And a devise of real property, to executors in trust to invest the same in real securities, with directions to pay the income to the testator's widow for life, and after paying certain specific legacies to "pay" the balance to his heirs at law, by necessary implication confers a power to sell the realty. *Livingston v. Murray*, 39 How. Pr. 102.

And a specific direction to ascertain the money value of testator's estate, to set aside a certain sum as an annuity, and "to invest" the residue in "bonds," and upon the death of the beneficiary of the income therefrom "to pay the whole of his estate to his children, him surviving, share and share alike," by necessary implication, confers power to sell the real estate, as, without such power the purposes of the will would fail and the directions would remain unexecuted. *Asch v. Asch*, 18 Abb. N. C. 82, affirmed in 47 Hun, 285, which is affirmed in 113 N. Y. 232, 21 N. E. 70.

So, a devise of realty and personalty to be divided in equal shares between designated persons, with a direction that the executors "invest" the share of each in

"first-class securities," and that the share "be paid" only on the legatees reaching the age of twenty-five years, creates, by implication, an imperative power of sale. *Mendel v. Levis*, 40 Misc. 271, 81 N. Y. Supp. 965.

See also *Wood v. Nesbitt*, as set out *supra* II. f. 1.

So, a direction by the will to the trustee "to invest" a trust property consisting largely of unproductive real estate in "good bonds and mortgages," with a direction that the principal may be "paid over" under certain circumstances, confers implied power to sell such real estate. *Flanner v. Fellows*, 206 Ill. 136, 68 N. E. 1057.

And a mere direction to executors to "invest property" consisting of both real and personal estate, in "bond and mortgage," was held in *Byrnes v. Baer*, 86 N. Y. 210, to imply a power of sale in the executors.

But in *Chandler v. Thompson*, 62 N. J. Eq. 723, 48 Atl. 583, a direction that all the estate bequeathed to a named son of the testator "shall be held and managed, . . . and shall be kept safely invested" in "bonds," and the "whole estate, both principal and interest," to "be paid" over when such son becomes twenty one, was held restricted to personalty, where the testator in disposing of the property had used the terms "give, devise, and bequeath," it being said that full force must be given to the use of the term "devise," and that such term indicated that it was the testator's intent that his real estate should pass to the son as such.

And in *Bijur v. Bijur*, 49 Hun, 235, 1 N. Y. Supp. 630, a will directing the executors to "divide" testator's estate into three parts, two of which were to be held in trust, "to invest and keep the same invested in bonds" or "securities," and at the happening of certain events to "pay over" the whole portion with accumulations, was held not to confer an implied power of sale of the realty, on the ground that such a disposition would be contrary to the intent of the testator as manifested by directions in the will that, in making the division, an undivided one half of certain realty should be included in the trust funds at a specified valuation, and that in the portion devised and bequeathed to his wife, she should have the privilege of taking certain real property at a valuation specified, it being said that the provisions in regard to investments must be held to refer only to the testator's personal property,—at least where it does not appear that an action in partition is impracticable.

I. "Invest" and "lend."

In *Re Holloway*, 60 L. T. N. S. 46, 37 Week. Rep. 77, where the testator devised and bequeathed his residuary estate to trustees and empowered them, at their discretion, "to continue the whole or any part" of the estate in a certain business, or "to invest, reinvest, and lend any part of the estate" upon such terms as they

deem best. It was held that the will gave, by implication, no power to sell the real estate, the court saying that a mere power to invest or lend was not sufficient to create such a power.

m. "Manage" and "invest."

A conveyance in fee to a college of lands and personalty, to be held upon the trust and confidence that it would "manage and invest the same to the best advantage," was held in *Harvard College v. Weld*, 159 Mass. 114, 34 N. E. 175, to carry a power to sell the real property.

And see *ROBINSON v. ROBINSON*. See also *Penfield v. Tower*, infra, II. n, and *Varick v. Smith*, infra II. o, and *Sargent v. Sibley*, supra I. d, and *Chandler v. Thompson*, supra, II. k.

n. "Hold" and "invest."

In *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413, a devise to trustees of all the residue of an estate, real and personal, in trust to hold, manage, and appropriate the same, and to collect all rents, profits, income, dividends, and gains thereof, and "to invest and keep invested the same and every part of the capital," with full power to change any investments and to convert and reinvest the proceeds, and eventually to divide the capital equally among testator's lineal descendants, was held not to direct a sale of the realty by implication, where, by other provisions of the will, the words "capital" and "investment" as used were shown to relate to both personalty and realty, and other provisions manifested an intention that, at least, some of the realty should not be converted.

o. "Invest," "divide," and "pay."

A power of sale was held in *Cook v. Cook*, — N. J. Eq. —, 47 Atl. 732, to be given to the executors of a will by implication, where the duties imposed were to "invest," "pay," and "divide" all the property, on the ground that the execution of such duties is inconsistent with the existence of the property in the shape of real estate.

And a gift, devise, and bequest of the residue of an estate, both real and personal, to executors in trust "to divide" into equal shares, "to pay over" one of them, and "to hold, invest, and manage" the others, and, upon the happening of a specified event, to pay the principal of the personal estate and convey the real estate "if any," to certain heirs, impliedly confers power to sell the real estate, where the duty "to divide" requires the conversion of the real estate into money. *Varick v. Smith*, 69 N. J. Eq. 505, 61 Atl. 151, approving the *dictum* announced on a previous appeal (67 N. J. Eq. 1, 58 Atl. 168).

And the trustee takes the title to real estate, with power to convey, necessarily implied under a will bequeathing to testator's children the residue of his estate, real and personal, "to be divided equally

between them, share and share alike, to them, their heirs, and assigns forever" where, by codicil, the testator directed that all the property so given to one of the children, in addition to said income, "shall be paid" to a trustee "to be invested" for her benefit, and provided for the disposition of the trust "fund" upon the death of such child. *Boston Safe Deposit & T. Co. v. Mixter*, 146 Mass. 100, 15 N. E. 141.

But in *Alkus v. Goettmann*, 60 Hun, 470, 39 N. Y. S. R. 576, 15 N. Y. Supp. 183, a very grave doubt was expressed as to whether power to sell real property was conferred by implication upon the executor by a will giving and bequeathing property, real and personal, to him in trust to "pay" certain legacies, to "invest" a specified sum, to "pay" the principal over in certain proportions at designated times, and the balance to be "divided equally" and "paid" to designated persons, it being said that the phrase "to be paid" is not of controlling significance, inasmuch as there was personal property to which it could apply, although the personalty was insufficient to pay the debts and legacies, and the phrase "to be divided equally" might import a tenancy in common.

And in *Clarke's Appeal*, 70 Conn. 195, 39 Atl. 155, a will which, after directing the payment of debts and certain pecuniary legacies, gave, devised, and bequeathed the residue of the estate, real and personal, to the executors in trust, "to invest" portions sufficient to yield specified incomes, and the residue to be "divided equally," certain "shares" of which were to be held in trust until the beneficiary should attain a certain age, upon which event the trustee was "to pay the whole sum over," was held not to imply an intent sufficient to authorize the executor to sell the real estate, where it was uncertain whether it would be necessary to do so in order to meet the debts and legacies, the court saying that the use of the term "give, devise, and bequeath," both at the beginning and close of the residuary clause, negated an intention to authorize a sale; that the direction for an equal division was "naturally applicable to a division of the property left rather than of its proceeds," and that "it is much more natural to suppose that the word 'pay' was used for 'transfer,' and 'sum' as the equivalent of what in the same sentence is described as 'share.'" It should be noted, however, that this is the same will which was construed in *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. Rep. 675, 24 S. E. 202, wherein a contrary and seemingly less strained conclusion was reached, the latter decision being on the ground that the use of the words "pay over" and "sum," in referring to the comingling "rest, residue, and remainder" of the estate, showed a clear intention that the realty was to be converted.

p. "Funds."

A trust deed which directs the trustee to pay the income to the grantor, and up-

on his written request a sum not to exceed a specified amount out of the principal of the "fund," authorizes the trustee to sell trust real estate when necessary in order to fulfill the terms of the trust. *Reade v. Continental Trust Co.* 49 App. Div. 400, 63 N. Y. Supp. 395.

And a direction in a will that real property "be invested in a fund" for the support and maintenance of a designated charity authorizes a conversion of the property into personalty. *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546.

An appointment of several executors with joint and several powers in relation to the settlement and liquidation of the succession, with the direction to account to and place the "funds" of the estate in the possession of one of their number, implies authority to sell the property, as in such case a sale is indispensable in order to carry into effect the intention of the testator. *Hart v. Schmidt*, 6 La. 167.

For other cases involving the use of the word "fund," see *Smalley v. Smalley*, supra II. b; *Burnham v. White and Potter v. Ranlett*, supra II. d; *State v. Thresher*, supra II. f, 1; and *Boston Safe Deposit & T. Co. v. Mixer*, supra II. o.

q. "Sum."

For cases in which the trust estate has been referred to as a "sum," see *Ramsey v. Ramsey*, supra II. a, 1; *Winston v. Jones and Burnham v. White*, supra II. d; *Flinn v. Frank*, supra II. j; and *Clarke's Appeal*, supra II. o.

r. "Proceeds."

For cases in which the trust estate has been referred to as "proceeds," see *Flux v. Best and May v. Brewster*, supra II. a, 1; *Stall v. Cincinnati*, supra, II. f, 2; *Wurte v. Page and Flinn v. Frank*, supra, II. j; and *Dodd's Estate*; *Martin v. Moore*; *Herb v. Walther*; and *Meehan v. Brennan*, —infra, II. x.

s. "Avails."

For cases in which the trust estate has been referred to as "avails," see the following cases as set out herein: *Chandler v. Rider*, supra II. a, 1; and *Vallette v. Bennett*, supra II. f, 2.

t. Power to "dispose."

A devise to testator's wife "for her own, sole, and separate use, to dispose of as she should think proper, and out of my said real and personal estate to provide for my children in such manner as to her shall seem meet," was held in *Pratt v. Church*, 4 Beav. 177, note to confer power upon the widow to sell the real estate.

And in *Wood v. Richardson*, 4 Beav. 174, 5 Jur. 603, it was held that a devise of real and personal property to testator's wife "absolutely and at her own disposal, for the maintenance of herself and bringing up of his children," conferred power

upon the widow, as trustee, to sell the realty,—at least in the absence of proof that such a sale would be detrimental to the beneficiaries.

And a will which directs that the estate of the testator "be kept together" until certain stated conditions "be fulfilled," and for "this purpose" gives the executrix "full and unlimited power to manage, control, and dispose" of it in the same manner as he could were he alive, as in her discretion seems best for the estate and his children, and further directs her to keep and maintain and educate their children, and so to divide the estate that upon any child marrying or becoming of age, he or she should have his or her portion according to the laws of distribution and descent, with the residue to be kept intact until each child successively has had her legal portion, empowers the executrix to sell land of the estate for the purpose of keeping, maintaining, and educating the children. *Connely v. Putnam*, 51 Tex. Civ. App. 233, 111 S. W. 164.

But in *Sheffield v. Orrery*, 3 Atk. 287, it was said that a direction to trustees to "dispose" of all testator's real and personal estate did not import power to sell, but to manage to the best advantage, and that subsequent language directing the purchase of lands must be confined to money.

See also *Smith v. McIntyre*, supra II. f, 2.

u. Direction to support, educate, etc.,

A decided conflict of authority exists as to the effect of a direction in a trust for the support, education, etc., of the beneficiaries.

A will giving and bequeathing to the executor all the money to be received by testatrix under a specified will, "or all the right, title, and interest" to which she, as a child of the testator of such will, would be entitled thereunder, in trust for the purpose of clothing, educating, and maintaining designated beneficiaries, the balance eventually to be "equally divided," by implication gives the executor power to sell the realty. *Van Winkle v. Fowler*, 52 Hun, 355, 5 N. Y. Supp. 317.

So, a direction, after providing for payment of debts and funeral expenses, that the testator's widow "shall control my real and personal property to the best advantage to raise and educate our children, and to use what may be necessary for that purpose;" that the estate, real and personal, shall be equally divided among the children, and that when the children arrive at age they shall be "assisted" out of the testator's estate as the widow may think necessary, but not beyond what would be their part, with special authority to convey certain tracts of land, authorizes the widow to convey the entire realty, where necessary to comply with the terms of the will. *Maloney v. Hawkins*, 9 Lea, 663.

And a will which devised one third of

an estate in trust, and empowered the trustee "in his discretion" to apply and appropriate the whole or any portion of the body or capital "of such one third," to the "use and benefit" of a designated person, necessarily creates a power of sale in the trustee. *Ames v. Ames*, 15 R. I. 12, 22 Atl. 1117.

And a will disposing of an estate, real, personal, and mixed, upon a trust that the testator's widow should have the interest annually arising, and that, if it should not be sufficient to maintain her, she should have a sufficient amount of the principal, and further providing that upon her death the trustees purchase certain property for charitable purposes, with the provision that the balance of the money arising out of the estate be used for a specified purpose, carries, by necessary implication, a power of sale of the real property. *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L.R.A. 79, 7 Am. St. Rep. 802, 15 Atl. 379.

A devise of property to the executor in trust, with a direction to pay all debts, funeral expenses, a pecuniary legacy, and certain mortgages from the income, with the remainder thereof to be divided between testator's wife and children, confers power to sell such of the real estate as is necessary to comply with such provision, where it was the expressly declared intention of the testator to provide for his wife and children, and a literal compliance with the will, without selling any real estate, would have left them without any substantial provision. *Siefke v. Siefke*, 34 Misc. 77, 69 N. Y. Supp. 514.

And an authorization to trustees to devote such of the principal or income of the trust estate as may be necessary for the support of the grantor impliedly confers a power of sale when necessary. *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257.

And a devise in trust which authorizes and empowers the trustees "to use and manage" the trust estate "as to them seems best," and to "pay" the income to the beneficiary during his life, and in their discretion to "pay" to him such part of the trust estate as is proper for his comfort and support, confers power to sell the real estate where necessary in order to pay portions of the trust estate as directed. *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342.

So, power to sell real estate is conferred by implication, where a will imposes on the trustees an active duty to provide for the needs of the beneficiaries before the time for final payment to them of an estate consisting of both real and personal property. *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158.

But in *Brome v. Pembroke*, 66 Md. 193, 7 Atl. 47, where a testator devised real and personal property in trust "for the support and education" of his children, to be held until his youngest child should reach the age of sixteen, at which time "my property shall be equally divided" among certain

persons, express authority being given the devisees to sell such as might be necessary to pay testator's debts, the trustee was held not to have authority to sell any part of the real estate except to pay debts, and to be limited in his expenditures for the support and education of the children to the income arising from the estate, it being said that the requirement of the will that there should be a division at a particular time of the testator's estate necessarily excluded the idea that the trustee was given discretionary power to sell, and possibly leave nothing for distribution, and that, as power to sell was given for one purpose and one only, it must be confined to that object, to the exclusion of any other.

And in *Walker v. Murphy*, 34 Ala. 591, where a testator directed that his estate should "be kept together for the support, maintenance, and education of my children, and that no account or charge be made against any of them for necessary support and education," with a further direction that on the happening of a certain contingency a one-sixth part of the estate be converted into slaves, and that on the happening of certain other contingencies other portions be paid "in cash," it was held that the testator had no implied power under the will to sell the real estate at private sale, although two of the contingencies referred to had happened. The decision, however, was upon the ground that a sale would be contrary to the intention of the testator, the court saying: "Now, it is manifest that there is here not only no grant of a power to sell the entire estate, but a virtual denial of such power. The testator directs that his estate be kept together for the support, maintenance, and education of his children, and that no charge be made against any of them for necessary support and education. The testator's design to keep the estate together, as the means of maintaining and educating the children, and not to have it sold, is clearly manifested in this item of the will. The next item rather confirms than conflicts with that idea. It requires that one-sixth part of the estate should be converted into slaves, upon the marriage or attainment of majority by any one of the testator's daughters; and on the attainment of majority by the sons, that their respective portions should be paid in cash. The intention of this item of the will is too clear to be mistaken. Following up the design evidenced by the preceding clause, he intended that the estate should be kept together until the contingencies should arise in which his several daughters and sons should be entitled to their several and respective portions of one sixth; and that in each one of those several contingencies, one-sixth part of the estate should be set apart from the rest, and converted either into slaves or money, according as the daughters or sons were to receive portions. There could be from this clause no implied power to sell any

other than one-sixth part of the estate as the contingencies arose; and that would be a sixth part previously separated and distinguished for that purpose. If two of the children were at the same time in a condition to demand the payment of their shares, there could be no authority for the sale of more than two sixths of the estate."

And in *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612, a deed in trust of personal and real property to be managed for the support of grantor and wife and a child, and at their death to be equally divided among all grantor's children, was held not to confer upon the trustee the power to sell the realty, on the ground that he cannot be permitted to deprive himself of the means and power of executing the trust by conveying the legal estate to another.

And in *Rakestraw v. Rakestraw*, 70 Ga. 806, a will appointing the testator's wife as his executrix, and providing that "all the rest of my real property . . . be held and controlled by my wife during her lifetime. . . . In short, it is my will that my wife shall have full and entire control of all my effects, of whatever kind," with remainder to the children of the testator, was held not to confer a power of sale on the executrix, although the income from the estate was insufficient for the support of the widow and children, such a case being held a proper one for a sale upon a court order. See also *Cotton's Estate*, as set out supra.

A deed of trust conveying all of grantor's estate, real and personal, which provides that out of the rents, issues, and profits the trustees should pay all of grantor's debts, and decently and comfortably maintain the grantor and his wife during their life, and provide for the education and support of grantor's children, and at his death divide and convey the estate to designated beneficiaries, does not confer authority upon the trustees to sell trust lands for any purpose, however urgent the necessity therefor. *Mundy v. Vawter*, 3 Gratt. 518.

And in *Doe ex dem. Dunlap v. Pyle*, 6 McLean, 323, Fed. Cas. No. 4,163, it was held that a will bequeathing "every part of my estate of every kind whatsoever, to be equally divided (by sale or otherwise as may seem best) between my loving wife and my children, . . . having particular regard to the education of my children not as yet educated," did not impliedly authorize the executors to sell the real estate, where there were minor children, the court saying that in such case express power must be given by the will, and that even the necessity of a sale of the lands for education of the children and the support of the family could not influence the construction of the will, as in such case application could be made to the court and on a proper showing a sale directed.

And in *Seeger v. Seeger*, 21 N. J. Eq. 90, in holding that a direction to executors "to invest" property, and "use the in-

terest and such of the principal as is necessary for the education and maintenance" of testator's children, did not create a power of sale by implication, the court said: "There is no authority or decision, so far as my researches have extended, which holds that in a will which contains no power or direction to sell, such power is created by implication, because necessary or convenient to enable the executors to execute the directions of the will." In view of the numerous conflicting decisions, the above quotation would seem to be self-explanatory of the case.

See also *Lindley v. O'Reilly*, as set out supra; *Smalley v. Smalley*, 54 N. J. Eq. 591, 35 Atl. 374, where it is stated that the word "necessary" in the above quotation from the *Seeger Case* is "too strong;" and *Chandler v. Thompson*, 62 N. J. Eq. 723, 48 Atl. 583; *Varick v. Smith*, 69 N. J. Eq. 505, 61 Atl. 151; *Wood v. Lembcke*, 72 N. J. Eq. 651, 66 Atl. 903; and *Casselmann v. McCooley*, 73 N. J. Eq. 253, 67 Atl. 436, which are to the effect that a sale may be made when necessary to carry out the directions of the will.

In connection with the foregoing cases, see also cases under subdivision II. t.

v. "Loan" or "put at interest."

Power to sell real property is by necessity vested in an executor who has been directed to hold real and personal property in trust, to be by him "kept loaned at the highest rate of interest obtainable." *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304.

And a direction that after the payment of debts and funeral expenses, "all" of testator's estate, which consisted largely of realty, should be "put on interest" by the trustee, that "the interest" of the property should "be paid" annually to designated children during their lives, and that after their death "the principal should go to their children," confers implied power to sell the realty. *Benner v. Mauer*, 133 Wis. 325, 113 N. W. 663. See also *Chick v. Ives*, supra II. e, and *Herb v. Walther*, infra II. x.

w. Subsequently acquired realty.

The question under annotation has also arisen in connection with cases involving the application of specific directions to real property acquired after the execution of the trust instrument.

Thus, a conveyance in trust for grantor's children which directs the money "to be held, used, and invested" in the discretion of the trustees, has been held to confer power to sell lands purchased with the trust money and to reinvest the proceeds. *Scottish-American Mortg. Co. v. Massie*, 94 Tex. 339, 60 S. W. 544.

So, a trustee invested by the will creating the trust, with power "to invest" a certain sum "from time to time" as he may deem best, has implied power to sell trust realty which has been purchased by him

with the trust funds. *First Nat. Bank v. Lee*, 23 Ky. L. Rep. 1897, 66 S. W. 413.

And where the testator directs the executor to sell the real estate owned by him at the time he made his will, describing it, a power of sale as to after-acquired realty will be implied where the express purpose of the will could not be effectuated without a sale of all the real estate. *Dearing v. Selvey*, 60 W. Va. 4, 40 S. E. 478.

And under a trust directing that all the estate, which at the time consisted wholly of personalty, be turned to money, a power of sale of after-acquired realty will be implied. *Hamilton v. Buckmaster*, L. R. 3 Eq. 323, 36 L. J. Ch. N. S. 58, 12 Jur. N. S. 986, 15 L. T. N. S. 177, 15 Week. Rep. 149.

Where the trust settlement confers power on the trustee to "alter and vary the investments" of personalty, and a covenant to settle on similar trusts future acquired real estate, the power to sell real estate so acquired will be inferred. *Elton v. Elton*, 27 Beav. 634. *Re Tapp*, 74 L. J. Ch. N. S. 523, 92 L. T. N. S. 829, is to the same effect.

And the same is true where trustees are empowered to sell the personalty and invest the proceeds in realty. *Tait v. Lathbury*, L. R. 1 Eq. 174, 35 Beav. 112, 11 Jur. N. S. 991, 14 Week. Rep. 216.

c. Miscellaneous cases.

A sale on condition that the grantee would satisfy the arrears of interest on a mortgage and the unpaid taxes on the land conveyed gives the trustee implied power to sell the real estate. *Cook v. Young*, — Mass. —, 11 N. E. 752.

A direction to executors to continue testator's interest in certain firms, and to form such firms into a joint stock company, and to receive and hold stock in the place and stead of his interest therein, for the benefit of his estate, authorized the executors, in forming the stock company, to convey thereto real estate which formed a part of the testator's interest in the old firms. *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266.

So, a testamentary gift to an executor of the testator's interest in a partnership in trust to invest as fast as realized, together with full power to settle with his partners, confers on the executor power to sell real property. *Naar v. Naar*, 41 N. J. Eq. 88, 3 Atl. 94.

And a devise in trust for the purpose of continuing the testator's pawnbroking business was held in *Re O'Reilly*, 59 Misc. 136, 112 N. Y. Supp. 208, necessarily to create a power to sell real estate in order to fulfill the trust.

So, trustees have power to sell real estate under a provision of a will giving them "all requisite authority and power, including that of any alienation, necessary and convenient for the management of any estate and the distribution thereof," especially where the intention of the testator to confer such a right is manifested

by a further intention to convey on certain contingencies such portion as remains in their hands. *Dickson v. New York Biscuit Co.* 211 Ill. 468, 71 N. E. 1058.

But the words "then remaining" used in a will directing distribution at the death of the testator's widow, of the testator's estate, "both real and personal, then remaining," do not indicate a purpose of the testator to vest the trustee with a power of sale, where there are no other words in the will which create a doubtful power of sale to which the words "then remaining" might refer. *Thompson v. Adams*, 205 Ill. 552, 69 N. E. 1.

The expression of a "desire" and "intention" by the testator that his real estate be sold, followed by the direction that when the property is sold, the proceeds, less a designated sum, are to be placed in trust, etc., by necessary implication directs a sale. *Dodd's Estate*, 13 Montg. Co. L. Rep. 78.

In *Beatty v. Byers*, 18 Pa. 105, where a testator devised the use of realty to his wife "until it is sold," followed by numerous pecuniary legacies of various amounts, with the provision that if, when "sold," it shall amount to more than the legacies, an "equal distribution" be made, it was conceded that an implied direction to sell the land was given by the will.

And a will providing that a specific portion of the proceeds of certain realty unsold at the testator's death shall, "when sold," belong to a person named, and that the remaining share of the proceeds shall be invested to make a fund for another person named, sufficiently manifests an intention upon the part of the testator that the realty shall be sold, to confer power upon the trustee so to sell. *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087.

So, a direction giving and devising the use of certain real estate "until the sale and conveyance" thereof "by my executor, as hereinafter provided," together with an insufficiency of personal property to pay the legacies given, was held in *Cahill v. Russell*, 140 N. Y. 402, 35 N. E. 664, reversing *Cahill v. Brennan*, 68 Hun, 540, 23 N. Y. Supp. 78, to give an implied power of sale, although no other provision for the sale of realty was contained in the will, the court saying that the words "as hereinafter provided" could be rejected as redundant. In this case the lower court based its decision on the ground that no power of sale could be inferred from the words "until the sale and conveyance of said premises by my executor, as hereinafter provided," where no further provision for the sale or conveyance of the realty is contained in the will, saying that such words in themselves imply that a power of sale was intended to be given elsewhere in the instrument if at all. In connection with this case, see *Beatty v. Byers*, as set out supra.

And a will in which the testatrix expresses a "desire" that her executor "sell the house and lot," and "put the money at

interest" until her children become of age, "when they shall get an equal share of the proceeds of the sale," confers a discretionary power to sell the realty. *Herb v. Walther*, 6 Pa. Dist. R. 687.

So, an expressed wish in a will, as to the manner in which "the net proceeds of the sale" of real estate shall be "divided," necessarily implies a power to sell such real estate. *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57.

But in *Paget v. Melcher*, 42 App. Div. 76, 58 N. Y. Supp. 913, it was said, although not definitely decided, that the implication of a power of sale deducible from the words, "if the said real estate shall be turned into money," used in a will, was "somewhat shadowy." G. J. C.

RHODE ISLAND SUPREME COURT.

JOSEPH MARTIN

v.

RHODE ISLAND COMPANY.

(— R. I. —, 78 Atl. 548.)

Carrier — automatic fare collectors — duty of passenger to use.

1. A street railway company may require persons to insert the coin representing their fare into an automatic collector brought to them by the conductor, where it offers to furnish them with the proper coin in exchange for the money with which they may be provided.

Same — tender of pennies — legal tender.

2. Refusal to accept pennies in payment of street car fare, except on condition of taking from the conductor a 5-cent piece and depositing it in an automatic coin collector, is not a violation of the Federal legal tender law, which makes pennies a legal tender to the amount of 25 cents.

Same — charter limitation.

3. Charter limitation of a street car company to 5 cents, and no more, for a single fare, does not prevent its requiring a passenger to place the fare in an automatic collector brought to him by the conductor.

(January 13, 1911.)

Note. — Carriers: requiring passenger to put coin in box or automatic registering device.

The only case found upon this question in addition to those set out in *MARTIN v. RHODE ISLAND Co.* is *Lackman v. Union Pass. R. Co.* 1 W. N. C. 446, which was an action for the ejection of a passenger who refused to place his ticket in the box, but laid it upon it instead. It was there held that it was competent for the company to require passengers to place their fares in the box, if not too inconvenient or dangerous. R. L. S.

32 L.R.A. (N.S.)

CERTIFICATION by the Superior Court for Providence and Bristol Counties for the determination by the Supreme Court of questions of law arising in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's car. Affirmative answers returned.

The facts are stated in the opinion.

Messrs. C. M. Van Slyck and Frederick A. Jones for plaintiff.

Messrs. Joseph C. Sweeney and Clifford Whipple, for defendant:

The regulation is a reasonable one, and passengers failing to comply with it may be ejected from defendant's cars.

Vedder v. Fellows, 20 N. Y. 126; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 227; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *St. Louis, A. & T. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711; *Illinois C. R. Co. v. Allen*, 121 Ky. 138, 89 S. W. 150, 11 A. & E. Ann. Cas. 970; 1 *Elliott, Railroads*, §§ 199, 200, 202; 1 *Thomp. Trials*, § 1057; *Burge v. Georgia R. & Electric Co.* 133 Ga. 423, 65 S. E. 879, 18 A. & E. Ann. Cas. 42; *Knoxville Traction Co. v. Wilkerson*, 117 Tenn. 482, 9 L.R.A. (N.S.) 579, 99 S. W. 992, 10 A. & E. Ann. Cas. 641; *Funderburg v. Augusta & A. R. Co.* 81 S. C. 141, 21 L.R.A. (N.S.) 868, 61 S. E. 1075; *Corbett v. Twenty-Third Street R. Co.* 42 Hun, 587; *Perry v. Pittsburgh Union Pass. R. Co.* 153 Pa. 236, 25 Atl. 772; *Nye v. Marysville & Y. C. Street R. Co.* 97 Cal. 461, 32 Pac. 530; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; *Birmingham R. Light & P. Co. v. Yielding*, 155 Ala. 359, 46 So. 747; *Montgomery v. Buffalo R. Co.* 165 N. Y. 140, 58 N. E. 770; *Com. v. McGinn*, 29 Phila. Leg. Int. 124.

Messrs. Frank H. Swan and Francis B. Kenney, with Messrs. Edwards & Angell, for Rooke Automatic Register Company:

Defendant's regulation requiring the passenger to pay his fare into an automatic collector held by the conductor, instead of paying his fare directly into the conductor's hand, is a reasonable regulation.

28 Am. & Eng. Enc. Law, p. 166; *Reese v. Pennsylvania R. Co.* 131 Pa. 422, 6 L.R.A. 529, 17 Am. St. Rep. 818, 19 N. E. 72; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Birmingham R. Light & P. Co. v. McDonough*, 153 Ala. 122, 13 L.R.A. (N.S.) 445, 127 Am. St. Rep. 18, 44 So. 960; *Percy v. Metropolitan Street R. Co.* 58 Mo. App. 75; *Faber v. Chicago G. W. R. Co.* 62 Minn. 433, 64 N. W. 918; *Platt*

v. Lecocq, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 723; Morley v. Saginaw Circuit Judge (Morley v. Snow) 117 Mich. 246, 41 L.R.A. 817, 75 N. W. 466; Maynard v. W. S. & A. Traction Co. (County of Bradford, Pa.) (May 6, 1910); Elder v. International R. Co. 68 Misc. 22, 122 N. Y. Supp. 880; Nye v. Marysville & Y. C. Street R. Co. 97 Cal. 461, 32 Pac. 530; Curtis v. Louisville City R. Co. 94 Ky. 573, 21 L.R.A. 649, 23 S. W. 363; Com. v. McGinn, 29 Phila. Leg. Int. 124; Corbett v. Twenty-Third Street R. Co. 42 Hun, 587.

The regulation does not conflict with the legal tender statutes of the United States.

Trebilcock v. Wilson, 12 Wall. 687, 20 L. ed. 460; Walker v. Dry Dock, E. B. & B. R. Co. 33 How. Pr. 327; Com. v. McGinn, 29 Phila. Leg. Int. 124.

The regulation does not conflict with the law regulating the rate of fares.

Reese v. Pennsylvania R. Co. 131 Pa. 422, 6 L.R.A. 529, 17 Am. St. Rep. 818, 19 Atl. 72; Percy v. Metropolitan Street R. Co. 58 Mo. App. 75; Crandall v. International R. Co. 133 App. Div. 857, 117 N. Y. Supp. 1055.

Parkhurst, J., delivered the opinion of the court:

This case comes before the court for hearing upon questions of law of such doubt and importance, and so affecting the merits of the case, that, in the opinion of the superior court, they should be determined by the supreme court before further proceedings, and are certified in accordance with the provisions of chapter 298, § 5, of the General Laws of Rhode Island of 1909.

The action is trespass on the case, brought by Joseph Martin against the Rhode Island Company for damages resulting from being ejected from the defendant's cars. The declaration is in four counts. The first count sets out in general terms that the plaintiff boarded the defendant's car, and tendered the conductor in charge of the car a nickel in payment of his fare; that the conductor declined to accept said nickel, stopped the car, and wrongfully ejected the plaintiff therefrom. The second count covers the same ejection, but sets out with greater detail that the plaintiff boarded a certain car belonging to the defendant, and tendered the conductor in charge of the car a nickel in payment of his fare; that the conductor requested the plaintiff to insert said nickel into an automatic fare-registering device held in the conductor's hand; that the plaintiff declined to accede to the request of the conductor, whereupon the conductor stopped the car and wrongfully ejected the plain-

tiff therefrom. The third count covers an ejection on a different day, and sets out in general terms that the plaintiff boarded the defendant's car and tendered the conductor in charge of the car five pennies in payment of his fare; that the conductor declined to accept said five pennies, stopped the car, and wrongfully ejected the plaintiff therefrom. The fourth count covers the same ejection as the third, but sets out in detail that the plaintiff boarded a certain car belonging to the defendant, and tendered the conductor in charge of the car five pennies in payment of his fare; that the conductor took said pennies, tendered a nickel to the plaintiff, and requested him to insert said nickel into an automatic fare-registering device held in the conductor's hand; that the plaintiff declined to accept said nickel and insert it into the automatic fare-registering device; whereupon the conductor stopped the car and wrongfully ejected the plaintiff therefrom.

The defendant filed a plea of the general issue to each of the four counts of the declaration, and a special plea to each of the four counts. The special pleas to the first and second counts of the declaration are practically identical, and set up, in substance, that when the plaintiff entered the defendant's car, he failed to comply with the reasonable regulations of the defendant, known to the plaintiff, governing the manner of the payment of fares, and refused to insert his nickel into the automatic collector held in the hand of the conductor, although requested to do so by the conductor; that said plaintiff was informed by the conductor that, in accordance with the regulations of the defendant, he would have to insert his nickel into said automatic collector, or he would have to leave the car; that, upon the continued refusal of the plaintiff to insert his nickel into the automatic collector, the car was stopped and the plaintiff ejected, using no more force than was necessary. The special pleas to the third and fourth counts of the declaration are practically identical, and set up, in substance, that when the plaintiff entered the defendant's car and tendered to the conductor five pennies in payment of his fare, the conductor received said pennies for the sole purpose of providing the plaintiff with a nickel which the plaintiff might insert into the automatic collector, in accordance with the reasonable regulations of the defendant; that the conductor informed said plaintiff of the purpose for which said pennies were received, and tendered him a nickel and requested him to insert it into the automatic collector held in the hand of the conductor, in accordance with the regulations of the de-

fendant; that the plaintiff refused to accept said nickel and insert it into the said automatic collector; that thereupon the conductor informed the plaintiff that he must either receive said nickel and insert it into said automatic collector, in accordance with the defendant's regulations, or leave the car; that, upon the continued refusal of the defendant to accept said nickel and insert it into said automatic collector, the car was stopped and the plaintiff ejected, using no more force than was necessary.

The plaintiff demurred to each of the special pleas upon the following grounds: (1) That said pleas contain no allegations which constitute a defense to this action. (2) That, while said pleas purport to be pleas in confession and avoidance, said pleas confess the commission of the grievances complained of, but do not set forth sufficient matter in justification. (3) That the regulations of said defendant set forth in said pleas are not reasonable regulations, and therefore not a justification of the defendant's conduct complained of in the plaintiff's declaration.

The questions of law certified by the superior court to be determined by the supreme court are as follows:

(1) Is a rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare-registering device held in the hand of the conductor, consisting of a small nickel-plated box having a coin slot on one side through which the passenger inserts a nickel, a reasonable rule or regulation, justifying the ejectment of a passenger by the conductor in charge of the car, should the passenger, having notice of such rule or regulation, fail to observe said rule, no undue force being used?

(2) Is a rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare-registering device held in the hand of the conductor, consisting of a small nickel-plated box having a coin-slot on one side through which the passenger inserts a nickel, a reasonable rule or regulation, justifying the ejectment of a passenger by the conductor in charge of the car, no undue force being used, who, having notice of such rule or regulation, tenders five pennies in payment of his fare, and who refuses to receive in exchange therefor a nickel, and to insert said nickel into the automatic fare-registering device, the passenger being notified at the time said pennies are tendered that they will be received by the conductor only for the purpose of providing said passenger with a nickel?

We understand the word "nickel," used

in the first question, to mean the 5 cent piece now and long since in common use in the United States, made partly of nickel, and colloquially called a "nickel," and the word "pennies," used in the second question, to mean the single separate 1-cent pieces now in common use. Strictly speaking, we know of no coin now in use in the United States which is properly called a "penny." See U. S. Rev. Stat. § 3515, U. S. Comp. Stat. 1901, p. 2349.

The incidental power of a common carrier to establish reasonable rules regulating the time, place, and mode for payment of its reasonable charges is unquestioned on the plaintiff's brief, and is amply sustained by the authorities. 28 Am. & Eng. Enc. Law, p. 166; *Reese v. Pennsylvania R. Co.* (1890) 131 Pa. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L.R.A. 529. 1 Elliott, Railroads, § 199: "A railroad company has an implied authority (which is necessarily almost absolute) to make and enforce all reasonable rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employees, and to protect itself from imposition and wrong."

The power to make such regulations is essential to the maintenance of the undoubted right of the carrier to secure to itself, in return for services rendered, the compensation prescribed by law, and is in aid of a right as absolute in the carrier as is the right of the passenger himself to demand transportation. And the courts have repeatedly held that regulations of this character may, and should be, sustained upon the sole ground that they or similar rules are reasonably necessary to protect the carrier in the collection of his lawful charges even though the rule manifestly results in additional hardship to the passenger, but not interfering with his primary right to transportation. Thus, in the leading case of *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455, 458, it was held that a railroad company had a right to compel passengers to exhibit their tickets to the conductor as often as requested, because "this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free." And see other cases cited *infra*.

It is also well settled, and not disputed by either party, that the question of the reasonableness or unreasonableness of such a rule is one to be determined by the court, and is not to be submitted to the jury. See *Vedder v. Fellows*, 20 N. Y. 126; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Woley v. Lake Shore &*

M. S. R. Co. 33 Ohio St. 227; Hoffbauer v. Davenport & N. W. R. Co. 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; Louisville, N. & G. S. R. Co. v. Fleming, 14 La. 128; St. Louis, A. & T. R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; Central R. Co. v. Motes, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990; Burge v. Georgia R. & Electric Co. 133 Ga. 423, 65 S. E. 879, 18 A. & E. Ann. Cas. 42, and other cases, *infra*; 1 Elliott, Railroads, § 202; 1 Thomp. Trials, § 1057.

The plaintiff, in argument, contends that the rules set up by the defendant are unreasonable, because they cause great inconvenience and annoyance to passengers without benefit to the traveling public; because they are solely for the benefit of the defendant, in keeping a check upon dishonest conductors (admitting, however, that the device is effective for such purpose); because they are a reflection upon the honesty of every conductor in the defendant's employ, and do not serve the convenience of the conductor in keeping account of the fares collected; and because the adoption of the fare-registering device in question is unnecessary even to protect the defendant from dishonest conductors, suggesting that the defendant, like all carriers of passengers, has a right to demand that passengers procure tickets before entering the cars, and that a rule requiring the presentation of a ticket by the passenger would be a proper and effective check upon the dishonesty of conductors.

We are of the opinion that none of the objections urged by the plaintiff, as against the reasonableness of the rules in question, are tenable.

The plaintiff cites no authorities even tending to show that the rules here in question are unreasonable; he cites only the case of Kennedy v. Birmingham R. Light & P. Co. 138 Ala. 225, 230, 35 So. 108, 109, in which one question only was presented, *viz.*, "the reasonableness of a regulation of defendant company requiring the plaintiff as a passenger to pay in cash a greater sum than is charged by it for a ticket between the same points." The plaintiff had no ticket, and there was no ticket *once* where he could buy a ticket conveniently; and so it was held as to him that the enforcement of the rule was unreasonable, and that the rule furnished no defense to his ejection from the car. The court says: "All the cases agree that carriers of passengers may require persons to purchase tickets before taking passage on their cars, and to this end may adopt a rule or regulation establishing a higher rate to be paid to the conductor than the rate charged for a ticket. But, to justify a discrimination in the 32 L.R.A. (N.S.)

rates, the carrier must provide the proper facility and accommodation for so purchasing the ticket. If the carrier fails to give the passenger a convenient and accessible place and an opportunity to buy his ticket before entering the car, the regulation is unreasonable and void, and is no defense to an action brought by the passenger for his ejection by the conductor after he has paid the ticket rate,"—citing and discussing a number of cases. And the plaintiff also cites 2 Hutchinson on Carriers, § 1032, where the right of carriers of passengers to make reasonable rules requiring the purchase and exhibition of tickets is discussed and upheld.

It being conceded by the plaintiff, and being in accordance with his own citations of authority, as well as with the numerous other cases herein cited, that it is well settled to be a reasonable rule that a carrier of passengers may require the passenger to purchase a ticket before entering the cars, and to present the same to the conductor upon request, provided the carrier furnishes proper facility and accommodation for the passenger to purchase such ticket, we think the portion of the rule here under consideration, requiring the passenger to present a nickel (5-cent piece) to the conductor in payment of his fare, is quite closely analogous to the ticket requirement, and imposes no greater burden upon the passenger than the rule requiring the purchase of a ticket. In fact, the burden upon the passenger is much less under the nickel (5-cent piece) rule here in question, than under the ticket rule, inasmuch as under the ticket rule, as generally applied, the passenger must purchase his ticket at one or more specified stations of the carrier, and is not allowed to purchase it of the conductor; while, under the nickel rule here in question, every conductor becomes a ticket agent and every car a station, where the equivalent of the ticket may be purchased. So that in our opinion that portion of the rule which requires the passenger to present a nickel to the conductor, and to purchase one of the conductor, if the passenger has none, is a simplification of the ticket rule, in favor of the passenger, and favors the passenger to that extent, and is entirely reasonable.

The only portion of the rule that remains to be discussed, then, is the requirement that the passenger's nickel, either the one which he originally had or the one which he has purchased of the conductor, shall be inserted by the passenger in the fare-registering box held in the conductor's hand, instead of in the hand of the conductor himself. The device in use by the defendant corporation is called the "Rooke

Automatic Register," one of which was exhibited to the court and its workings explained, at the argument of this case. It consists of a small nickel-plated box of convenient size to be held in the hand, of neat appearance, with a coin slot conveniently placed; and the manner of paying fares required by the defendant's rule involves simply the partial insertion by the passenger of a nickel into the slot. As soon as the edge of the nickel touches certain fingers or levers within the slot, the coin is automatically drawn in by the mechanism, and at the same time the fare is registered, and the operation is complete. This involves no more labor or delay or trouble on the part of the passenger than the act of placing the coin in the conductor's hand, and the automatic grasp of the coin by the machine is positive and certain. Whatever of delay or trouble may be involved in the obedience to the rule comes from the necessity of making change in case the passenger is not provided with a nickel, and is obliged to obtain one from the conductor; and this, as we have already seen, is so far analogous to the principle of the rule regarding the purchase of tickets that we regard the settled law of the cases heretofore cited as amply supporting the principle contended for by the defendant in this case.

It is quite obvious that the rules in question in this case are far less burdensome to the passenger than many rules regarding the manner of payment of fares, purchase and showing of tickets, taking transfers, making change, and other matters incident to the passenger's right to carriage, which have been held to be reasonable by courts of undoubted authority. See cases cited *supra*. See also *Burge v. Georgia R. & Electric Co.* 133 Ga. 423, 65 S. E. 879, 18 A. & E. Ann. Cas. 42; *Knoxville Traction Co. v. Wilkerson*, 117 Tenn. 482, 9 L.R.A. (N.S.) 579, 99 S. W. 992, 10 A. & E. Ann. Cas. 641; *Funderburg v. Augusta & A. R. Co.* 81 S. C. 141, 21 L.R.A. (N.S.) 868, 61 S. E. 1075; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; *Birmingham R. Light & P. Co. v. Yielding*, 155 Ala. 359, 46 So. 747; *Birmingham R. Light & P. Co. v. McDonough*, 153 Ala. 122, 13 L.R.A. (N.S.) 445, 127 Am. St. Rep. 18, 44 So. 960; *Montgomery v. Buffalo R. Co.* 105 N. Y. 139, 58 N. E. 770; *Nye v. Marysville & Y. C. Street R. Co.* 97 Cal. 461, 32 Pac. 530; *Ketchum v. New York City R. Co.* 118 App. Div. 248, 103 N. Y. Supp. 486; *Sickles v. Brooklyn Heights R. Co.* 113 App. Div. 680, 99 N. Y. Supp. 953; *Percy v. Metropolitan Street R. Co.* 58 Mo. App. 32 L.R.A. (N.S.)

75; *Faber v. Chicago G. W. R. Co.* 62 Minn. 433, 36 L.R.A. 789, 64 N. W. 918.

None of these rules, sustained above as reasonable, contributed to the convenience of the passenger. All of them required affirmative action or restraint, involving some inconvenience on his part, and they were sustained on the ground that a carrier should be allowed to adopt rules which tend reasonably to insure to it the return allowed by law for services rendered. The difficulties incident to the collection of the moneys due the defendant are apparent to any observer, and are admitted by the plaintiff in his brief. Thousands of employees on comparatively small salaries must, from the nature of the conditions surrounding the street car business, be intrusted with the collection, from thousands of passengers during the day's run, of sums exceedingly small in amount in each transaction, but large in the aggregate. Assuming that 100,000,000 nickels are paid during the course of a year by passengers to the agents of the defendant company, it is clear that an automatic registering device of the character here under consideration, which imposes only slight, if any, inconvenience upon the passenger, and which is of such manifest aid both to the company and to its conductors in simplifying the accounting for and return of fares collected, securing accuracy, and tending to prevent fraud and mistake, should be approved rather than condemned. The plaintiff shows, at the most, nothing but that slight degree of annoyance incident to the enforcement of these rules, which will generally be found to exist on the part of a certain few passengers who are always likely to manifest impatience with the use of new devices, even when they are of obvious utility. But there are, in our opinion, several cases of such close analogy to the case at bar, involving a consideration of devices so nearly like that here in use, as related to the question of the convenience of the passenger, as well as to that of the advantage to the company and its conductors, that they are to be regarded as quite conclusive upon many of the objections urged by the plaintiff.

In the case of *Kitchen v. Saginaw Circuit Judge* (see *Morley v. Saginaw Circuit Judge* [Morley v. Snow] 117 Mich. 254, 41 L.R.A. 817, 75 N. W. 466), an unreported case in the circuit court for the county of Saginaw, in chancery, one Morris C. L. Kitchen filed an application for leave to bring an action at law against the receivers of the Union Railway Company, setting forth the facts that plaintiff boarded a car of the Union Street Railway Company, took his seat, "and when approached

by the conductor tendered to him 5 cents in payment of his fare; but the conductor refused to receive the same, and requested the petitioner to drop the same in a small metal box which he held in his hand. This he (the petitioner) declined to do. Whereupon the conductor advised him that a rule had been made for the government of the road, by the receivers, requiring passengers to put fares in boxes carried by the conductors." Upon a second refusal, petitioner was ejected without undue force. And the circuit court held that the rules prescribed by the receivers "are reasonable, that they do not impose any additional burdens or hardships upon the passengers, . . . and that the petition is therefore denied." This decree was sustained by the Michigan supreme court on April 19, 1898, and subsequently approved in the reported case of *Morley v. Saginaw Circuit Judge* (*Morley v. Snow*) 117 Mich. 246, 254, 41 L.R.A. 817, 75 N. W. 466. It is worthy of note that this box was also an automatic register, and the circuit judge comments on its advantages, both to the company and the conductors, in that "by the new system (cash register box in the hand as compared with the old registering system of ringing up fares by the conductor) there can be no shortage to be made up by the conductors, or losses to be borne by the company. The box properly registers every fare, and all the money and tickets received are in the box, and there is no chance for mistake or fraud, and no settlements are required at the end of the day with the conductors."

In *Morley v. Saginaw Circuit Judge* (*Morley v. Snow*) (1898) 117 Mich. 246, 249, 41 L.R.A. 817, 75 N. W. 466, the reasonableness of a regulation requiring payment into a cash register, rather than into the conductor's hand, is sustained; and in an able opinion which we think completely answers the objection that the use of a cash register reflects on the honesty of conductors as a class, the court says: "Conductors of street cars deal with a great number of persons, some of whom are entering and leaving the cars frequently. It often happens that change must be made, and there are opportunities for mistakes. It is not unreasonable to assume that, like persons in all callings, some of the employees of street car companies will yield to temptation, when presented. Everyone at all familiar with business upon a large scale knows that it is desirable to have it so systematized that mistakes or fraud in its conduct shall not occur. Officials, both of the state and nation, and officers charged with the management of banks, railroads, and other corporations, are surrounded by checks and safeguards calculated to do

away with the possibilities of frauds or mistakes. The cash register is to be found in most places of business. Upon the elevated roads in the large cities, the passenger pays his fare before he enters upon the platform over which he must pass to get admission to his train. Everyone recognizes these checks and safeguards as proper to be used, and no one has a right to regard them as an imputation upon the honesty of any individual using them. Their use is simply a recognition of what we all know to be a fact, with humanity constituted as it is,—that, in the conduct of a large business by many persons, there is a liability to make mistakes, and a possibility of the commission of fraud. The Great Teacher, in that prayer which is the model of all prayers, prayed, 'Lead us not into temptation, but deliver us from evil.' It can readily be seen how the unintelligent or dishonest might object to these checks and safeguards; but it is difficult to understand how the honest and intelligent should object to any practical method which would reduce the probability of mistakes, or the opportunities for the commission of fraud, to the minimum."

In *Elder v. International R. Co.* 68 Misc. 22, 122 N. Y. Supp. 880, Mr. Justice Wheeler, on May 3, 1910, held that a rule forbidding conductors to take fare from passengers, and requiring the passenger himself to deposit his fare in a box at the door on a pay as you enter car, was a perfectly valid and reasonable regulation.

In *Nye v. Marysville & Y. C. Street R. Co.* (1893) 97 Cal. 461, 32 Pac. 530, it was held that a rule requiring a passenger on a street car to deposit his fare in a box on entering the car was "reasonable and necessary to prevent fraud upon the company," noncompliance with which would justify ejection.

In *Curtis v. Louisville City R. Co.* (1893) 94 Ky. 573, 576, 21 L.R.A. 649, 23 S. W. 363, 364, the court said: "By the rules of the appellee, a passenger that gets on a street car must deposit his fare in the box within one block. The driver must not receive the fare, etc., . . . These rules are reasonable, and the appellant was aware of them."

In *Com. v. McGinn* (1872) 29 Phila. Leg. Int. 124, a case at nisi prius, the court charged the jury that a rule requiring payment into a box, and not to the driver, was a reasonable regulation, and says that the passenger by his contract obligates himself not only to pay the established fare, but to observe the reasonable regulations made by the defendant, among which "the mode and time of payment were of the first importance."

At the argument of this cause the question was raised whether the rules in question were in any wise in conflict with the legal tender statutes of the United States. No such question is raised by the pleadings in the case, nor suggested in the questions certified for our determination. But, as the parties have argued the question upon our own suggestion, we will proceed to consider it.

U. S. Rev. Stat. § 3587, U. S. Comp. Stat. 1901, p. 2401 (1873) provides that "the minor coins of the United States shall be a legal tender, at their nominal value, for any amount not exceeding twenty-five cents in any one payment." This statute undoubtedly makes the tender of five separate cent pieces legal tender for a debt of 5 cents. The question therefore arises whether the refusal to take the five separate cent pieces under the conditions described in the second question certified violates the legal tender statute quoted above, and whether the regulation as applied to the facts therein set forth is unreasonable as a violation of a statutory right given the plaintiff by the laws of the United States. This objection is not leveled at that part of the rule requiring a passenger to put money into a box in payment of fare, but to the fact that only one kind of a coin can be so placed by him, namely, a nickel, and that the tender of five separate cent pieces, the exact equivalent under the statute quoted above, is refused, except on the condition that the passenger exchange them for a nickel supplied by the conductor.

Upon careful consideration of this question, and in view of our finding above set forth that the rule requiring the presentation of a nickel by the passenger in payment of his fare is so closely analogous to the ticket rule (which has been so frequently upheld) as to be reasonable and valid upon similar grounds; and further in view of the fact that the conductor does not refuse the five separate cents on the ground that their purchasing power is not equivalent to a nickel, and not sufficient for full payment of a fare, but, on the contrary, is willing to and does in fact accept them, and tenders a nickel in exchange therefor,—we are satisfied that there is no such refusal to accept the money in payment of a fare on the part of the conductor as constitutes a violation of the legal tender statute. If the plaintiff offered the five separate cent pieces, and received a ticket, and was required to insert the ticket into the register, no one would contend that the legal tender statute was violated. The transaction as set forth in the plaintiff's declaration, however, is, in our view of it, essentially the same, with the ex-

ception that a nickel is given in exchange for the five separate cent pieces rather than a ticket. We hold therefore that the regulation adopted by the defendant is not a violation of the legal tender statute quoted above, and is not, because of that statute, to be deemed unreasonable.

It was also urged in the oral argument that a passenger has, under the charter of the defendant company, and under the transfer act, a right to demand transportation for 5 cents, and no more, and that the requirement that he pay his fare into a box is in effect demanding a greater amount of fare from him than is permitted by law. The fallacy in this position lies in assuming that the establishment of a maximum amount of fare abrogates the power of the carrier to make reasonable regulations. The establishment by law of a maximum rate of fare has never been construed as requiring transportation by the carrier of every passenger presenting the requisite fare, unless he also conforms to the reasonable regulations established by the carrier; otherwise, in the absence of express statutory authority, the carrier would be powerless to eject intoxicated or other unfit persons, or to make any of the numerous rules which it is under duty to make for the safety of the passenger and the expediting of its business.

In *Reese v. Pennsylvania R. Co.* 131 Pa. 422, 6 L.R.A. 529, 17 Am. St. Rep. 818, 19 Atl. 72, the contention stated above was squarely raised, and the question decided in favor of the carrier's power to make regulations as to mode of payment in spite of a maximum rate limit in the charter. There the defendant adopted a train charge in excess of the ticket charge, and also in excess of the maximum rate per mile allowed by its charter; the excess over ticket fare being refunded on the presentation of a rebate slip at defendant's ticket office at the end of the journey. And it was held that the carrier had a right "to make reasonable regulations, not only as to the amounts of fares, but as to time, place, and mode of payment," and that the charter provision was a restriction "of the amount of fares, not of the mode of collection, the protection of the traveler from excessive demands, not interference with the time, place, or mode of payment."

In *Percy v. Metropolitan Street R. Co.* 58 Mo. App. 75, it was held that a charter provision requiring that the defendant company give a continuous trip on parallel lines for one fare did not forbid a regulation requiring the passenger to ask for a transfer designating the particular place from which he wished to board the second car.

In *Crandall v. International R. Co.* 133 App. Div. 857, 117 N. Y. Supp. 1055, it was held that the defendant company might require a passenger not only to obtain a transfer, but to demand it at the time he paid his fare, and to give the destination line when asking for a transfer, although the company was compelled by law to carry a passenger on a continuous trip between any two points on its road by the most direct route for no more than a single fare.

In all of these cases something more was demanded of the passenger than the single act of payment, although in each case the full amount legally demandable had been given. The fixing of the amount of fare, therefore, in no way prevents the adoption of the mode of payment contended for in this case.

The plaintiff has wholly failed to show that the rules in question are in any wise so burdensome or inconvenient to the passenger that they should be deemed to be unreasonable. He admits the necessity of some regulation as to the method of payment and collection of fares to enable the defendant to receive its lawful compensation and to prevent fraud and mistake. The regulation in use tends to secure the end desired.

We are therefore of the opinion that, both upon principle and upon authority, the rules set forth in the two questions submitted to this court for its determination are reasonable, and we answer both of said questions in the affirmative.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOSHUA RHODES LLOYD et al., Appts.,
v.

JOHN MILLS, Jr., et al.

(— W. Va. —, 69 S. E. 1094.)

Cotenant—sale by one—ouster.

1. If one cotenant make an executory contract for sale to a stranger of the entire tract, not merely his interest, and the purchaser enter into actual possession, this is an ouster of the other cotenant, and such possession for the period of the statute of limitations will bar his rights, without other notice of adverse claim.

Adverse possession—quitclaim deed—color of title.

2. A quitclaim deed for land is good color of title on which to base adversary possession under the statute of limitations.

Same—possession by tenant—drilling for oil.

3. Actual possession in drilling and pro-

ducing oil and gas by a lessee of land under the usual lease for production of oil and gas is actual possession of the land by the lessor for adversary possession.

(November 22, 1910.)

PPEAL by plaintiffs from a decree of the Circuit Court for Wetzel County in defendants' favor in a suit to recover oil, gas, and timber taken from land in which plaintiffs assert title to a one-third undivided interest. Affirmed.

The facts are stated in the opinion.

Messrs. H. W. Russell and H. P. Camden, for appellants:

If one joint tenant convey his share of the estate to a stranger, the alienee and the other tenant become tenants in common.

1 Washb. Real Prop. 6th ed. p. 540; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; Bog-gess v. Meredith, 16 W. Va. 27.

The only way to destroy a cotenancy is either for part to buy out the other, or to exclude them from participation therein by such open and notorious acts of ouster as amount to a disseisin which has ripened

Note.—Effect of conveyance by one cotenant to third person to found adverse possession against others.

This note in confined to cases where a conveyance was made from a cotenant to a stranger, and does not include cases where one cotenant took a deed from another cotenant or from a stranger. The question as to the necessity of good faith on the part of a grantee of one cotenant to set the statute running in his favor is omitted, as the rule is not different from that obtaining when there is no cotenancy. Cotenancy in lands only is considered.

As to whether quitclaim deed is color of title for purpose of adverse possession, see note to *Waterman Hall v. Waterman*, 4 L.R.A.(N.S.) 776. As to whether there is a presumption of ouster of one tenant in common from long continued undisturbed possession of another, see note to *Dobbins v. Dobbins*, 10 L.R.A.(N.S.) 185.

A conveyance to a stranger to the title, by one cotenant, by an instrument purporting to pass the entire title in severalty, and not merely such cotenant's individual interest, followed by an entry into open and exclusive possession by such stranger under claim of ownership in severalty, amounts to a disseisin of the other cotenants; which if continued for the statutory period will ripen into good title by adverse possession. *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170; *Clymer v. Dawkins*, 3 How. 674, 11 L. ed. 778; *Prescott v. Nevers*, 4 Mason, 326, Fed. Cas. No. 11,390; *Elder v. McClaskey*, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529; *Abercrombie v. Baldwin*, 15 Ala. 363; *Riggs v. Fuller*, 54 Ala. 141; *Gulf Red Cedar Lumber Co. v. Crenshaw*, 148 Ala. 343, 42 So. 564; *Brown*

by adverse possession into perfect title under the statute of limitations.

Parker v. Brast, 45 W. Va. 309, 32 S. E. 269.

Possession by a purchaser under an executory contract of sale made by one of two cotenants of land owned jointly is not adverse to the other cotenant.

McNeeley v. South Penn Oil Co. 52 W. Va. 617, 62 L.R.A. 562, 44 S. E. 508; *Hudson v. Putney*, 14 W. Va. 561; *Core v. Faupel*, 24 W. Va. 238; *Maxwell v. Cunningham*, 50 W. Va. 298, 40 S. E. 499; *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426; *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409; *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241;

v. Bocquin, 57 Ark. 97, 20 S. W. 813; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Spect v. Hagar*, 65 Cal. 443, 4 Pac. 419; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439; *Clark v. Vaughan*, 3 Conn. 191; *White v. Beckwith*, 62 Conn. 79, 25 Atl. 400; *Horne v. Howell*, 46 Ga. 9 (deed recorded); *Cain v. Furlow*, 47 Ga. 674; *Norris v. Dunn*, 70 Ga. 800 (*dictum*); *McDowell v. Sutlive*, 78 Ga. 142, 2 S. E. 937; *Morgan v. Mitchell*, 104 Ga. 596, 30 S. E. 792; *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *Goewey v. Urig*, 18 Ill. 242; *Hinchman v. Whetstone*, 23 Ill. 188; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *Dawson v. Edwards*, 189 Ill. 60, 59 N. E. 590; *Waterman Hall v. Waterman*, 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142; *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232; *Nelson v. Davis*, 35 Ind. 474; *Barnes v. Born*, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833; *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; *Price v. Hall*, 140 Ind. 314, 49 Am. St. Rep. 196, 39 N. E. 941; *Kinney v. Slaterry*, 51 Iowa, 353, 1 N. W. 626; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241; *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; *Blankenhorn v. Lenox*, 123 Iowa, 67, 98 N. W. 566; *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Larman v. Huey*, 13 B. Mon. 436; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Adkins v. Whalin*, 87 Ky. 153, 9 Am. St. Rep. 470, 7 S. W. 912; *Miller v. McDowell*, 13 Ky. L. Rep. 535, 17 S. W. 482; *O'Mara v. Lilly*, 21 Ky. L. Rep. 951, 53 S. W. 516; *Pope v. Brassfield*, 110 Ky. 128, 61 S. W. 5; *Rose v. Ware*, 115 Ky. 420, 74 S. W. 188; *Wise v. Wolf*, 120 Ky. 263, 85 S. W. 1191; *Bloom v. Sawyer*, 121 Ky. 308, 89 S. W. 204; *Thomas v. Pickering*, 13 Me. 337; *Soper v. Lawrence Bros. Co.* 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 32 L.R.A. (N.S.)

Price v. Hall, 140 Ind. 314, 49 Am. St. Rep. 196, 39 N. E. 941.

The execution of a quitclaim deed by one tenant in common, and entry thereunder by the grantee, do not amount to a disseisin of the cotenant.

1 Cyc. Law & Proc. p. 1079; *Moore v. Antill*, 53 Iowa, 612, 6 N. W. 14; *Edwards v. Bishop*, 4 N. Y. 61.

Defendant has failed to show any ouster of the heirs of Stacy Lloyd, Jr., and adverse possession such as would bar their rights under the statute of limitations.

Cooley v. Porter, 22 W. Va. 120; *Bogges v. Meredith*, 16 W. Va. 1; *Russell v. Tennant*, 63 W. Va. 623, 129 Am. St. Rep. 1024, 60 S. E. 609; *Buchanan v. King*, 22 Gratt. 414; *Gilchrist v. Beawick*, 33 W. Va.

434, 11 Atl. 698; *Merryman v. Cumberland Paper Co.* 98 Md. 223, 56 Atl. 364; *Higbee v. Rice*, 5 Mass. 352, 4 Am. Dec. 63; *Bigelow v. Jones*, 10 Pick. 161; *Kittredge v. Locks & Canals*, 17 Pick. 246, 28 Am. Dec. 296; *Parker v. Locks & Canals*, 3 Met. 91, 37 Am. Dec. 121; *Marcy v. Marcy*, 6 Met. 360; *Hightstone v. Burdette*, 61 Mich. 54, 27 N. W. 852; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; *Brigham v. Reau*, 139 Mich. 256, 102 N. W. 845 (warranty deed); *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407 (recorded warranty deed); *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702 (recorded warranty deed); *Sanford v. Sanford*, 99 Minn. 380, 116 Am. St. Rep. 432, 109 N. W. 819 (recorded warranty deed); *Gardiner v. Hinton*, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779 (unrecorded warranty deed); *Long v. Stapp*, 49 Mo. 506 (*dictum*); *Miller v. Bledsoe*, 61 Mo. 96 (warranty deed); *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. 388 (semble); *Wiese v. Union P. R. Co.* 77 Neb. 40, 108 N. W. 175 (recorded warranty deed); *Abernathie v. Consolidated Virginia Min. Co.* 16 Nev. 260; *Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54 (warranty deed); *Hatch v. Partridge*, 35 N. H. 148; *Foulke v. Bond*, 41 N. J. L. 527 (recorded warranty deed); *Watson v. Jeffrey*, 39 N. J. Eq. 62 (recorded deed); *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236 (recorded warranty deed); *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12 (recorded warranty deed); *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246 (warranty deed); *Bogardus v. Trinity Church*, 4 Paige, 178; *Clapp v. Bromagham*, 9 Cow. 530; *Wright v. Saddler*, 20 N. Y. 320 (warranty deed); *Baker v. Oakwood*, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312 (warranty deed); *Sweetland v. Buell*, 89 Hun, 543, 35 N. Y. Supp. 346, affirmed in 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663 (warranty deed); *Hammerslag v. Duryea*, 38 App. Div. 130, 56 N. Y. Supp. 615 (semble); *Koch v. Ellwood*, 138 App. Div. 584, 123 N. Y. Supp. 502; *Law v. Patterson*, 1 Watts & S. 184 (*dictum*); *Culler v. Motzer*, 13 Serg. & R. 356, 15 Am. Dec. 604; *Union Sav. Bank v.*

168, 10 S. E. 371; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Noble v. Hill*, 8 Tex. Civ. App. 171, 27 S. W. 756; *Worthington v. Staunton*, 16 W. Va. 208; *Rust v. Rust*, 17 W. Va. 901; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Williamson v. Jones*, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508; *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924; *Rodgers v. Miller*, 55 W. Va. 576, 47 S. E. 354; *Clark v. Beard*, 59 W. Va.

669, 53 S. E. 597; *Reed v. Bachman*, 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769.

Messrs. S. Bruce Hall, Thomas P. Jacobs, Well & Thorp, Charles B. Prichard, and Van Winkle & Ambler for appellees.

Brannon, J., delivered the opinion of the court:

Stacy Lloyd died owning land in Wetzel county, leaving three heirs, Ephraim L. Lloyd, John S. Lloyd, and Stacy Lloyd, Jr. Two of these heirs, John S. Lloyd and Ephraim L. Lloyd, November 24, 1869, made an executory contract, selling and agreeing to convey by quitclaim deed to John Mills, Jared Maris, William H. Buell,

Taber, 13 R. I. 683; *Gray v. Bates*, 3 Strobb. L. 498; *Odum v. Weathersbee*, 26 S. C. 244, 1 S. E. 890; *Sudduth v. Sumeral*, 61 S. C. 276, 85 Am. St. Rep. 883, 39 S. E. 534; *Waterhouse v. Martin*, Peck (Tenn.) 393; *Morelock v. Bernard*, 15 Lea, 169; *Weisinger v. Murphy*, 2 Head, 674; *Burns v. Headerick*, 85 Tenn. 102, 2 S. W. 259; *Alexander v. Kennedy*, 19 Tex. 488, 70 Am. Dec. 358 (*dictum*); *Church v. Waggoner*, 78 Tex. 200, 14 S. W. 581; *DeLeon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (recorded deed); *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. 645 (recorded deed); *Lewis v. Terrell*, 7 Tex. Civ. App. 314, 26 S. W. 754; *Byers v. Carll*, 7 Tex. Civ. App. 423, 27 S. W. 190; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *Naylor v. Foster*, 44 Tex. Civ. App. 599, 99 S. W. 114; *Morgan v. White*, 50 Tex. Civ. App. 318, 110 S. W. 491; *Hardy Oil Co. v. Burnham*, — Tex. Civ. App. —, 124 S. W. 221; *Roberts v. Morgan*, 30 Vt. 319 (warranty deed); *Buchanan v. King*, 22 Gratt. 414; *Johnston v. Virginia Coal & I. Co.* 96 Va. 158, 31 S. E. 85; *Cecil v. Clark*, 44 W. Va. 698, 30 S. E. 216 (*dictum*); *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508; *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913 (by Brannon, J.); *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Wright v. Sperry*, 21 Wis. 332; *Sydnor v. Palmer*, 29 Wis. 226 (recorded deed); *Townsend's Case*, Leon. pt. 4, p. 52 (feoffment); *Doe ex dem. Reed v. Taylor*, 5 Barn. & Ad. 575, 2 Nev. & M. 508, 3 L. J. K. B. N. S. 67 (feoffment by one cotenant in sole possession).

Contra, *Seaton v. Son*, 32 Cal. 481 (where grantee believed at the time that his deed actually conveyed, as it purported to do, the entire title), criticized in *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; and overruled in *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724. See also *contra*, the North Carolina cases cited below.

In North Carolina, notwithstanding some 32 L.R.A. (N.S.)

intimations to the contrary in some early cases (*Ross v. Durham*, 20 N. C. 182, [4 Dev. & B. L. 54]; *Day v. Howard*, 73 N. C. 1), and notwithstanding the existence of a short statute of limitations of seven years in case of color of title, the later cases hold that the ouster of one tenant in common of land by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years; and that the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract, and the latter holds adversely for more than seven, but less than twenty, years. *Caldwell v. Neely*, 81 N. C. 114; *Ward v. Farmer*, 92 N. C. 93; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625; *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691; *Roscoe v. John L. Roper Lumber Co.* 124 N. C. 42, 32 S. E. 389; *Shannon v. Lamb*, 126 N. C. 38, 35 S. E. 232; *Hardee v. Weathington*, 130 N. C. 91, 40 S. E. 855 (notwithstanding registry of the deed); *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621.

A deed by one cotenant purporting to convey the entire estate in severalty is color of title on which to found adverse possession. *Fielder v. Childs*, 73 Ala. 567; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *Dawson v. Edwards*, 189 Ill. 60, 59 N. E. 590; *Waterman Hall v. Waterman*, 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142; *Ross v. Durham*, 20 N. C. 182 (4 Dev. & B. L. 54).

The distinction between adverse possession as against strangers and as against other tenants in common, and the effect of a conveyance of the whole estate by one tenant in common to overcome the presumption that possession is not adverse to cotenants, is clearly and fully set out in *Foulke v. Bond*, 41 N. J. L. 527. The court there said: "In the acquisition of title by adverse possession the distinction between strangers and tenants in common relates to the character of the evidence necessary to prove that

and Thomas W. Ewert the said land. The purchasers were strangers to the title. It seems that Ewert was to take a deed under this contract in his name to hold in trust for himself and copurchasers, and under the contract John S. Lloyd and Ephraim L. Lloyd executed to Ewert a quitclaim deed conveying the land, dated February 14, 1870. The said contract and the said deed did not sell and convey merely the undivided interests or shares of the Lloyd grantors, but the whole land in its entirety, thus ignoring the right of Stacy Lloyd, Jr., one of the said three heirs. It is sufficient to say, without detail of conveyances, that all title which vested in Ewert or his copurchasers by said executory contract and deed came to be owned and

claimed by John Mills, Jr. That is not denied. The said deed was sent by its makers to Ewert with the request for payment of the purchase money; but Ewert, having discovered that the heirs of Stacy Lloyd, Jr., claimed an interest and some other adverse claims, declined payment until titles should be settled with some adverse claimant, and wrote to John and Ephraim Lloyd that the deed was in "Ewert & (name not distinguishable) safe subject to yourselves." Thus this deed lay in the safe of Ewert some years. He did not return it to the grantors. They did not reclaim it. Ewert claimed the land all the while. John Mills, Jr., acquired possession of this deed, he being a claimant of the land under it, and put it on record

the possession was adverse. The relations between the joint owners are presumed to be amicable rather than hostile, and the acts of one affecting the common property are presumed to be done for the common benefit. Freeman, cotenancy, § 166. This presumption is liable to be overcome by the circumstances of the particular case. It is a rule of evidence merely, which enters into the question whether the possession is in fact adverse, and not a rule of law, which forbids the application of the statute of limitations to persons who occupy to each other the relation of tenants in common. It is with respect to those two essential qualities of the possession, on which title by lapse of time is founded,—hostility in fact to the title of the true owner, and notoriety of the adverse claim,—that the fact of a cotenancy between the parties becomes an important element. If the parties are strangers in title, possession and the exercise of rights of ownership are in themselves, in the absence of explanatory evidence, proof of an ouster of the true owner, whereas, in cases of privity of title such as subsists between tenants in common, the acts of possession of one tenant will, in the absence of satisfactory evidence to the contrary, be referred to the community of title, and there must be clearer and more decisive evidence of an ouster by one tenant in common of his associate than is necessary to prove that a person having no right to possession had ousted an owner in severalty. Doe ex dem. Reed v. Taylor, 5 Barn. & Ad. 575, 2 Nev. & M. 508, 3 L. J. K. B. N. S. 67; Prescott v. Nevers, 4 Mason, 330, Fed. Cas. No. 11,390; Freeman, Cotenancy, § 221. An ouster by a tenant in common does not differ in its nature from any other ouster, in any respect, except in the degree of evidence required; in other cases the assumption of ownership is more clearly adverse; in case of a tenant in common such assumption of ownership, and the acts which indicate it, may be consistent with an acknowledgment of the rights of the cotenant, and therefore, acts which are decisive in the one case are equivocal and insufficient in the other. . . . The pre-

sumption that the entry of one cotenant is for the benefit of all applies to a third person who acquires an undivided interest under a conveyance to that effect from one of the original cotenants. He has title to an undivided interest, and his entry is presumed to have been in accordance with his title. But where the grantee has obtained a conveyance of the whole estate by one of the cotenants, entry made under such a title is a disseisin of the other cotenants. . . . Entry by a grantee holding under a deed of conveyance for the entire estate, made by one of the cotenants and duly placed on record, has all the constituent elements of a disseisin at common law. The conveyance by one tenant of the estate in entirety is decisive of his purpose to appropriate the entire estate to his own use, especially if his deed contains full covenants of seisin and warranty. The entry of the grantee under such a conveyance is equally evincive of his intention to claim the whole to the exclusion of the other cotenants, and if the deed be duly recorded the transaction acquires that notoriety which is equivalent to the notoriety of livery of seisin. The disseisin thereupon becomes complete, and if possession be held continuously thereafter for the period of twenty years by open and notorious acts of ownership, without any interference on the part of the other cotenants, title to the whole estate may be acquired by adverse possession."

Where all the tenants in common save one conveyed their interest to a stranger to the title, who conveyed the whole title including that of the tenant in common, who had not conveyed his interest to him, to a second stranger to the title, who entered claiming title to the whole of the land, a subsequent deed by the nonjoining tenant in common to a third stranger to the title is champertous, since the land was held adversely to him. Adkins v. Whalin, 87 Ky. 153, 12 Am. St. Rep. 470, 7 S. W. 912.

The presumption that a grantee in possession under a conveyance of the whole title by one tenant in common holds adversely to the other cotenants may be over-

May 13, 1889. He claimed under it. Had a tenant on it. He had surveys of the land made, took timber off it, guarded it from squatters, paid taxes on it, and otherwise claimed under that deed. The land was on the tax books in his name from 1894. It had been charged from 1889 in Ewert's name under the 1870 deed, showing claim under that deed. Thus there can be no question of his claim under that deed. In January, 1876, Maris wrote a letter to Mrs. Hitchcock, a claimant as a child of Stacy Lloyd, Jr., in answer to inquiry by her as to the land, that "the heirs at law of Stacy Lloyd, Jr., have for anything I know, a legal interest in those lands to the amount of one third of all that may be held as determined by those

suits." Ewert and others had instituted a suit against Kyle, an adverse claimant for part of the land, in the name of John S. Lloyd and Ephraim L. Lloyd and the heirs of Stacy Lloyd, Jr., as plaintiffs, and Mrs. Hitchcock wrote asking why the names of Stacy Lloyd's heirs had been used as plaintiffs, and Maris wrote her that he had appeared as the next friend of the infant heirs of Stacy Lloyd, Jr., in order to save that interest from going to others by reason of the statute of limitations, and that it was necessary to sue in the names of John S. and Ephraim L. Lloyd. He stated that they had learned that the heirs of Stacy Lloyd, Jr., claimed an interest, and said the suit had been brought in the name of the Lloyds as the

come by words, acts, and circumstances showing that at the time or subsequent to his taking possession the grantee acknowledged the rights of his cotenants. *Price v. Hall*, 140 Ind. 314, 49 Am. St. Rep. 196, 39 N. E. 941.

Possession by a stranger under warranty deeds from four out of five tenants in common conveying the entire estate will not set the statute of limitations running against the fifth cotenant, when the others and the grantee always recognized his interest. *Van Omer v. Harley*, 102 Iowa, 150, 71 N. W. 241.

A conveyance by a tenant in common of the entire estate, without adverse possession taken by the purchaser, will not amount to an ouster. *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 206; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354.

And where the premises of which one cotenant gives a stranger a deed purporting to convey the entire estate is vacant and unoccupied, and remains in that condition during the whole of the statutory period, the grantee does not get title by adverse possession, even though he pays the taxes. *White v. Beckwith*, 62 Conn. 79, 25 Atl. 400.

In *Noble v. Hill*, 8 Tex. Civ. App. 171, 27 S. W. 756, it was held that entry under the deeds executed by three cotenants who did not own the entire interest, one purporting to convey an undivided one-half interest and two others purporting to convey an undivided one-quarter interest each, was not tantamount to an ouster of the other cotenants, although if added they would pass interests in the land equaling the entire tract, since one deed may convey the same undivided interest which was conveyed by another.

There is sufficient to show disseisin of his cotenants where one tenant in common in possession of the lands gives a warranty deed to a stranger who some years later reconveys it to him by a warranty deed, and these deeds are placed on record. 32 L.R.A. (N.S.)

Dawson v. Edwards, 189 Ill. 60, 59 N. E. 590.

Where land owned by three tenants in common is in the adverse possession of a stranger, the latter is not estopped to set up such adverse possession, and does not become a tenant in common with the other two, by accepting a deed purporting to convey to him the entire premises from the third tenant in common, who had brought ejectment against him, claiming ownership in severalty. *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439.

It is almost too plain to require the citation of authorities, that the mere purchase of the undivided interest of one cotenant, and entry under such conveyance, does not amount to a disseisin which can ripen into a good title, since the grantee thereby claims merely to succeed to the title of the granting cotenant. *McClaskey v. Barr*, 42 Fed. 609; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Busch v. Huston*, 75 Ill. 343; *Grand Tower Min. Mfg. & Transp. Co. v. Gill*, 111 Ill. 541; *Sharp v. Brandow*, 15 Wend. 597 (*dictum*); *Kathan v. Rockwell*, 16 Hun, 90.

Sale of specific portion.

If one cotenant, by a deed, purports to convey by metes and bounds the whole estate in a specific part of the premises held in cotenancy, an entry thereunder by the grantee under claim of absolute ownership thereof in severalty is adverse to the other cotenants, and will set the statute of limitations running in his favor. *Abercrombie v. Baldwin*, 15 Ala. 363; *Cain v. Furlow*, 47 Ga. 674; *Thomas v. Pickering*, 13 Me. 337; *Doe ex dem. Cloud v. Webb*, 15 N. C. (4 Dev. L.) 290, 25 Am. Dec. 711 (*semble*); *Weisinger v. Murphy*, 2 Head, 674; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360 (when cotenants knew of adverse holding or when deed recorded); *Toole v. Renfro*, 52 Tex. Civ. App. 482, 114 S. W. 450; *Johnston v. Virginia Coal & I. Co.* 96 Va. 153, 31 S. E. 85; *Bogges v. Meredith*, 16 W. Va. 27 (if purchaser be-

legal title was in John S. and Ephraim L. Lloyd, because the title was in them and the heirs of Stacy Lloyd, Jr. He said that the suit was for the benefit of the heirs of Stacy Lloyd, Jr., as much as for themselves. Maris at some time offered the heirs of Stacy Lloyd, Jr., \$300 for their interest, which was refused. In the suit against Kyle begun in 1870 there was a decree of recovery in 1883 in favor of the Lloyds, among them the heirs of Stacy Lloyd, Jr., and a writ of possession was awarded them. John Mills, Jr., October 24, 1895, having such title as above described, leased a tract of 659 acres to the Philadelphia Company for the production of oil and gas. This lease was recorded February 17, 1896. John Mills, Jr., made

another lease of 776 acres to the same company, October 29, 1895, for oil and gas, which was recorded February 5, 1896. The leases are for five years and as long thereafter as oil and gas should be produced in paying quantity, giving the lessee right to go on the land, drill in quest of oil and gas, and convey them over the surface using water for drilling and engines, putting machinery and any structures on the surface necessary for the object of the lease. These are the lands involved in this case. These leases were not for the undivided interests in the tracts, but of the entire tracts. The Philadelphia Company took possession of the lands under the said leases in January, 1896, and drilled three wells producing gas and oil more than ten years

believed and had good reason to believe that his grantor had good title).

But a conveyance by metes and bounds of a part of an estate held in common, though valid against the grantor, cannot prejudice the rights of the cotenant, unless followed by entry and adversary possession. *Buchanan v. King*, 22 Gratt. 414.

It was held in *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22, that where two tenants in common make a parol partition void because of the statute of frauds, and enter into a several occupancy of the same, and one of them, by metes and bounds, deeds a portion of the land occupied by him to a third person, who takes possession, the latter does not obtain the seisin as against either of the cotenants. Giving its reasons therefor, the court said: "The entry of the demandant [grantee] under Bradstreet's [grantor's] deed gave him no seisin, but he was a mere several occupant. Nor can he be considered as a disseisor of Bradstreet, as he entered by his consent; and he could not be a disseisor of Nason [other cotenant], for one joint tenant cannot be disseised by a stranger of any particular part, unless all the joint tenants are disseised.

... His remedy must be against Bradstreet on his covenants."

It is difficult to see, however, why the grantee's occupancy was not hostile to both tenants in common. The fact that he entered under a deed from one tenant in common, purporting to convey good title to that specific tract, does not prevent his occupancy from being adverse to his grantor any more than it would if no tenancy in common existed. The grantor would be estopped by his deed to claim any interest in the tract conveyed.

The general right of one cotenant to deed a part of the land held in common to a stranger by metes and bounds is beyond the scope of this note, except so far as adverse possession is attempted to be founded upon it.

Notice.

A conveyance to a stranger, by one co-
32 L.R.A. (N.S.)

tenant, of an estate in fee, and an entry and continued possession under such conveyance, are open and unequivocal acts of ownership of such nature as to give notice to the other cotenant that the entry and possession are adverse to him. *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100 (where deed recorded); *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698; *Merryman v. Cumberland Paper Co.* 98 Md. 223, 56 Atl. 364; *Gardiner v. Hinton*, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779; *Weisinger v. Murphy*, 2 Head, 674; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354. This would also seem to be involved in most, at least, of the cases above cited in support of the general rule stated at the beginning of the note, although the majority of them do not state it as a distinct point.

Where a purchaser from one tenant in common, by deed purporting to pass the entire title, holds and claims the land continuously for the statutory period in such manner as to apprise the other joint owners of the adverse character of the possession, actual notice to the other cotenants that the possession is claimed to be adverse to them is not necessary to bar recovery. *Gill v. Fauntleroy*, 8 B. Mon. 177; *Larman v. Huey*, 13 B. Mon. 436; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774.

It was held in *Packard v. Johnson*, 57 Cal. 180, that a finding that one tenant in common had by quitclaim deed purchased an outstanding claim, that he had conveyed by a quitclaim deed to a stranger, who had entered, made improvements, received all the profits, paid taxes, etc., and claimed to be sole owner, was not equivalent to a finding of an ouster, since these things are mere evidence tending to prove ouster, and do not constitute adverse possession, as a matter of law, since they all might have occurred without the cotenant being bound to know that the grantee claimed the whole title.

before the institution of this suit, and operated them. Altogether the company has drilled twenty-two wells under its leases, five gas, fifteen oil, and two dry, wells. Under these leases John Mills, Jr., has received the oil and gas royalty. On the 3d day of November, 1906, this suit was instituted against John Mills, Jr., and others by Joshua Lloyd and others, claiming as heirs under Stacy Lloyd, Jr., setting up their claim to one third of the land, not asking partition in kind, but demanding that John Mills, Jr., be held to account to them for one third of the money received by him from oil and gas royalty, and for timber sold from the land. Emma D. Lloyd, the widow of Stacy Lloyd, 3d, a son of Stacy Lloyd, Jr., and Sarah Lloyd

Prichard, his only heir, were made defendants in the suit, and filed a crossbill answer, uniting in the demands made by the plaintiffs, and asking that John Mills, Jr., be held to such account and for a decree for their interests in such moneys. The decree of the court dismissed the plaintiffs' bill without any relief to the plaintiffs, but decreed to Sarah Lloyd Prichard her proper share, and required Mills to account to her therefor, holding that the plaintiffs were barred of relief by the statute of limitations, but that the rights of Sarah Lloyd Prichard were saved because of her infancy.

No one questions that the heirs of Stacy Lloyd, Jr., once had a one-third interest in the land involved in this suit. Has that

—recording.

Registration of deed by one cotenant to stranger, conveying the entire property, or part of it by metes and bounds, is notice to cotenants of adverse claims. *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *Naylor v. Foster*, 44 Tex. Civ. App. 599, 99 S. W. 114; *Morgan v. White*, 50 Tex. Civ. App. 318, 111 S. W. 491.

But the mere recording of a mortgage deed given by one tenant in common, purporting to convey the entire interest, is not of itself notice to the cotenant that the land is being held adversely, where no possession was taken thereunder and the land was wild land; but such recording can affect only persons who take conveyance of the same lands subsequently thereto, and not those who already have title. *Leach v. Beattie*, 33 Vt. 195.

The mere fact that the deed under which the stranger claims, conveying the entire interest in the land, was not placed on record, does not prevent the statute of limitations from running, if the grantee takes open and exclusive possession. *Gardiner v. Hinton*, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779.

Quitclaim deed.

It has been held that possession under a quitclaim deed by one of several tenants in common, purporting to convey all the right, title, and interest of such cotenant, is not adverse to the other tenants in common so as to set the statute of limitations in motion. *Hume v. Long*, 53 Iowa, 299, 5 N. W. 193; *Moore v. Antill*, 53 Iowa, 612, 6 N. W. 14; *Curtis v. Barber*, 131 Iowa, 400, 117 Am. St. Rep. 425, 108 N. W. 755 (*dictum*).

In *Busch v. Huston*, 75 Ill. 343, it was held that a deed from one of four tenants in common purporting to remise, release, and forever quitclaim all "the right, title, interest, and estate of" such tenant in common, to the husband of another tenant in common in possession in right of his wife, is color of title only to the extent of the interest of the grantor, as it purports to

convey only his interest; and, when there are no other notorious acts of ouster, cannot ripen into good title to the whole. As the grantee was already in possession in right of his wife, his continuance in possession would not give notice to his cotenants that he was holding adversely, whether the deed under which he claimed title was a quitclaim or a warranty deed. The case would be somewhat different if possession were taken by a total stranger.

So, it was held in *Hume v. Long*, 53 Iowa, 299, 5 N. W. 193, that where one tenant in common gives a quitclaim deed of all his rights, title, and interest in the land held in common, to a stranger, who gives a similar quitclaim deed of his interest to a second tenant in common, who also receives a quitclaim deed of all the right, title, and interest of a third tenant in common, such deeds and possession do not amount to an ouster of a fourth tenant in common, since the conveyances purport to convey merely the right, title, and interest of the grantors.

Here again, as in the preceding case, possession by one of the original cotenants would not put the fourth cotenant on notice of a possible adverse claim, as would be the case if possession were taken by a total stranger.

In *Edwards v. Bishop*, 4 N. Y. 61, it was held that a grantee of one cotenant did not oust the other cotenants by receiving from his grantor a quitclaim deed by which the grantor remised, released, and forever quitclaimed unto his grantee the land in question by metes and bounds "to have and to hold the said released premises" unto the grantee, his heirs, and assigns, and by claiming the land as owner in fee by virtue of such deed; since the grantor purported to convey only his claim or title, and since the grantee, though not an exclusive owner, was an owner in fee, as each cotenant is an owner in fee of every part of the premises, and that such claim is not a denial of the rights of the other cotenants but consistent with it.

But in *Waterman Hall v. Waterman*, 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142,

interest been lost by the statute of limitations? Two of the heirs of Stacy Lloyd, Sr., assuming to have owned the whole of the land, claiming, it seems, that their brother, Stacy Lloyd, Jr., had received his share by advancement in their father's estate, did make an executory contract selling to Mills, Maris, Buell, and Ewert the tracts of land, not mere interests therein, but the whole tracts. I am of the opinion for myself that in ordinary cases an executory contract is color of title under the statute of limitations. In *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354, in an opinion filed by me, I discussed this subject, and cited authorities, and shall not renew the discussion here. I will only cite that excellent new work, *American & Eng-*

lish Encyclopedia of Law and Practice (vol. 2, p. 461), saying that, as against persons other than the vendor, "between whom and the vendee there is no privity, the possession of the vendee is deemed to be adverse; and it is well settled that the possession of a person who enters under an executory contract to purchase, and subsequently obtains his deed, in pursuance of the contract, is adverse from the time of his entry as to all the world except the vendor." I mean to say that that executory contract is color of title, and if followed by possession confers title under the statute. But in the *Pickens Case* it is held that, though an executory contract may not be color of title as between adverse claimants, yet where one cotenant makes an executory con-

it was held that a quitclaim deed given by the executors and trustees of a deceased cotenant in accordance with the terms of her will, and purporting to convey not merely the right, title, and interest of the testatrix, but all the interest in the tract, is good color of title on which to found a title by adverse possession.

And in *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463, it was held that a quitclaim deed from a tenant in common, purporting to convey the entire interest, and not merely all the grantor's right, title, and interest, is as sufficient as a warranty deed upon which to predicate an ouster of the cotenants.

In *Waterman Hall v. Waterman*, supra, the court said: "But counsel say that it was not color of title because it was a quitclaim deed. A warranty deed and a quitclaim deed both purport to accomplish the same thing and have the same effect in transferring title. The covenants of a warranty deed do not pass the title, but create a liability, and a quitclaim deed which purports to convey the property is as good color of title as a warranty deed."

In *Lewis v. Terrell*, 7 Tex. Civ. App. 314, 26 S. W. 754, it was held that a deed by which a portion of the tenants in common "have granted, bargained, sold, conveyed, and released" to a stranger "all our right, title, and interest," in a certain tract, wherein they bound themselves "to warrant and forever defend" the premises to their grantee "against every person whomsoever lawfully claiming or to claim the same or any part thereof," was more than a mere quitclaim but was an instrument sufficient to convey the land described, and not a mere change of title or actual interest of the grantor; and that possession thereunder would ripen into good title, by lapse of statutory period.

It was further held that the taking by the grantee of a subsequent conveyance of an undivided interest from another tenant in common, who conveyed at the instance of one of the grantors in the first deed on the latter's representation that the entire tract had been set aside to him by the other

coheirs, would not indicate a recognition that he held in subordination to the rights of the tenants in common or in concurrence with them.

It was held in *Laraway v. Larue*, 63 Iowa, 407, 19 N. W. 242, that although ordinarily one in possession of a portion of a larger tract owned by several cotenants, under a deed from one of them of "all the right, interest, and claim in and to my undivided interest" in such portion, "to have and to hold the said undivided interest" to the said grantee, will not be considered as holding adversely to the other cotenants; yet he will be considered as holding adversely the entire interest in such tract of land, where there had been talk among the cotenants of a partition, and he supposed that the tract granted was his grantor's portion, and went into possession, broke and fenced the land, and erected valuable houses and barns thereon to the knowledge of his cotenants, although actually owning but a one-twelfth interest.

In *Stevens v. Wait*, 112 Ill. 544, the owner of land gave a warranty deed of the same to his five children, excepting his homestead interest therein, and thereafter continued to occupy it and pay taxes. Thereafter one child gave the grantor a quitclaim deed purporting on its face to convey not an undivided one-fifth interest, but the entire tract. It was held that the continued occupancy of the original grantor would not amount to a disseisin of the other four children, as his deed reserved a homestead and his possession was consistent therewith.

In *Bath v. Valdez*, — Cal. —, 7 Pac. 487, a widow, after the death of her husband, who had held title to a certain lot as the common property of himself and his wife, conveyed the lot by a quitclaim deed, and the grantee and his successors took and remained in possession for a time sufficient for the statute of limitations to run if the holding was adverse to the heirs of the husband. In an action to quiet title brought by a successor of such grantee, the trial court found as a fact, and the finding was held by the court on appeal to be sus-

tract to a stranger for the whole tract, and it is followed by possession, that is an ouster of the other tenant and confers title under the statute. It is held that it is only necessary in such a case that there be an ouster by actual possession, and that this may be as well under an executory contract as under a deed passing legal title. That is the holding in that case. Therefore, if John Mills, Jr., deriving all the right conferred upon the purchasers under that contract, can show possession, he thereby ousts the cotenant and gets the land by time because that contract was a sale by two of the heirs of Stacy Lloyd, Sr., to strangers, and, when followed by possession, is a complete ouster of the cotenant, and confers title by the statute.

tained by the evidence, that neither the grantee nor any of his successors "ever gave any notice, actual or otherwise, to the defendants or any of them" that they were holding adversely, nor were "ever heard to make or assert any claim to the land in controversy adverse to the defendants." It was held that such a finding would not justify the giving of the relief asked, although some of the subsequent purchasers thought that they owned the entire title. But on a hearing in bank, the decision was changed (70 Cal. 350, 11 Pac. 724) on the ground that the finding of facts was not sustained by the evidence and that actual notice was not necessary to make the holding adverse. As possession had been held for a sufficient length of time under deeds other than the quitclaim deed, it was unnecessary to consider the effect of a quitclaim deed as color of title.

On the general question as to whether quitclaim deed is color of title, see note in 4 L.R.A. (N.S.) 776.

Sheriff's deed or execution sale.

A purchaser of lands at an execution sale who takes and holds possession thinking that he had thereby obtained perfect title of the entire interest in the land obtains title by adverse possession after the statutory period, although in fact the land was owned in common and there were other tenants in common in the land sold than the execution defendants. *Call v. Phelps*, 20 Ky. L. Rep. 507, 45 S. W. 1051.

One who purchases the interest of part of the tenants in common or coparceners, and obtains a sheriff's deed of the interest of the others, and holds possession for the statutory period under claim of title, thereby obtains good title by adverse possession whether the sheriff's deed was valid or not. *Riggs v. Dooley*, 7 B. Mon. 239.

Where one cotenant gives a deed to a stranger, purporting to convey the whole parcel, and a judgment creditor of the grantee levies on the whole parcel and enters under his levy claiming to be the sole owner, the cotenant of the maker of the deed

Talbott v. Woodford, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395. So, *Pickens v. Stout*, just cited, is full authority for the proposition that that executory contract, with possession under it, works an ouster, and constitutes adverse possession under the statute conferring title on John Mills, Jr. This renders it unimportant to refer to the deed made under that contract. But there is the quitclaim deed made under that contract by two of the heirs out of three to Ewert. Clearly that is color of title on which to base ouster and adversary possession. I was somewhat surprised at the statement in brief of counsel that a quitclaim deed, simply because quitclaim, is not good color of title. For this we are

is thereby disseised. *Bigelow v. Jones*, 10 Pick. 161.

A judgment creditor who receives a sheriff's deed purporting to convey the title to land owned by the judgment debtor, and remains in possession for the statutory period after the death of such judgment debtor, claiming absolute title, obtains good title by adverse possession although the widow and her heirs had a one-third interest after such judgment debtor's death. *Barnes v. Born*, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833.

Possession under an execution sale against the husband, of land formerly held by entireties by a couple who were divorced prior to the sale, is sufficient, if properly maintained, to bar all rights of the wife thereto, even before the husband's death. *Hopson v. Fowlkes*, 92 Tenn. 697, 23 L.R.A. 805, 36 Am. St. Rep. 120, 23 S. W. 55.

This is because the divorce had converted the tenancy by entireties into a tenancy in common before the sale. *Ibid*.

But a sheriff's deed conveying in terms simply all the right, title, and interest of the debtor, a tenant in common of the property, followed by entry and possession thereunder, will not alone amount to ouster of the other cotenant so that title by adverse possession may be obtained by lapse of time, even though the grantee was ignorant of such cotenant's rights. *Curtis v. Barber*, 131 Iowa, 400, 117 Am. St. Rep. 424, 108 N. W. 755.

Conveyance by administrator of cotenant.

Where a purchaser at an administrator's sale of the land of a deceased cotenant receives a deed purporting to convey the entire interest in the land, though it in reality gives title to only an undivided portion, and enters claiming to be the sole and exclusive proprietor, such entry is adverse and is a disseisin of the cotenants. *Fielder v. Childs*, 73 Ala. 567; *Lapeyre v. Paul*, 47 Mo. 590.

Executory contract to sell.

In *McNeeley v. South Penn Oil Co.* 52

cited to 1 Cyc. Law & Proc. p. 1079. The cases there cited do not sustain the text. The Iowa cases were not quitclaim deeds of an entire tract purporting to convey the total title, but only the right, title, and interest of the cotenant making them. The New York case was where one cotenant in possession had a quitclaim deed from another. The former brought ejectment against the latter, and it was held that ejectment would not lie, as there was no ouster of the plaintiff by silent possession of the defendant. He did not deny his fellow's right. The efficiency of a quitclaim was not the question. That was between original cotenants, not the case of a stranger claiming under a quitclaim deed from one cotenant for the whole

interest. John Mills, Jr., never was a cotenant. He was a stranger, as where these from whom he derived title, claiming all. Johnston v. Virginia Coal & I. Co. 96 Va. 158, 31 S. E. 85; 2 Enc. L. & P. 509, lays down, with very many authorities from many sources, that, "as a general rule, a quitclaim deed is sufficient to confer color of title." Waterman Hall v. Waterman, 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142, tells us that "a quitclaim deed which purports to convey the property is as good color of title as a warranty deed." But it is said that that deed was not accepted by Ewert, and therefore cannot be used for color of title. It was sent by its grantors to the grantee, and remained for years in his hands unreturned

W. Va. 616, 62 L.R.A. 562, 44 S. E. 508, it was held that possession by a purchaser under an executory contract of sale executed by the husband alone, of all the land owned in joint tenancy by husband and wife, is not adverse to the wife.

But in *Rose v. Ware*, 115 Ky. 420, 74 S. W. 188, it was held that where husband and wife are tenants in common, under a married woman's act giving the husband no vendible interest in his wife's property and allowing her to sue for its protection or recovery, and the husband sells the whole tract giving a bond for title, conditioned, upon final payment of the purchase money, to convey the land by a deed of general warranty, and the grantee enters into possession and sells portions of the land to different persons, the wife is thereby disseised and the statute begins to run against her.

Here, regardless of the effect of the bond for title, the subsequent selling of portions of the land by the grantee would amount to a disseisin, because clearly incompatible with the wife's rights.

Mortgage.

The mere giving by one tenant in common of a mortgage deed to wild land, not in the actual occupancy of either cotenant, though purporting to cover and convey the entire lot, does not of itself operate as an ouster of the other cotenant; but in order that the giving of such a deed should have efficacy toward constituting such ouster, it should, at least, be accompanied and followed by a claim of which such other cotenant had knowledge, and by acts of possession not only inconsistent with, but in exclusion of, his right. *Leach v. Beattie*, 33 Vt. 195.

Constructive possession.

Where the owner of certain land in severalty and of certain other land as tenant in common conveys both tracts by the same deed, and his grantee enters into possession of the tract owned by his grantor in sever-

alty, such occupancy will not give him constructive possession of the other tract so as to set the statute of limitation running in his favor. *McQuiddy v. Ware*, 67 Mo. 74.

And the act of the grantee in taking stone and timber off the land held in common, for building purposes, and paying taxes on such land, does not of itself give notice to the other tenant in common that title is held adversely, since the acts are consistent with the relation of tenant in common. *Ibid*.

Possession under a recorded deed, of a portion of the granted premises, by the grantee of a tenant in common who in his deed purported to convey the entire tract, constructively extends to the entire tract. *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. 645.

Effect of recitals in instrument showing interest of others.

Possession taken under a bond for a title, purporting to bind the several co-owners of a piece of land to convey, but executed by a part only of those named as grantors, is adverse, even as to those named in the body of the instrument who did not execute it. *Pope v. Brassfield*, 110 Ky. 128, 61 S. W. 5.

The fact that a deed executed by one tenant in common, but purporting to convey the entire interest, referred for a description of the land conveyed to previous deeds in the chain of title which did not purport to convey the entire interest in the land, does not diminish its effect as an act hostile to the title of any tenants in common there may have been. *Jacks v. Dillon*, *supra*.

A deed executed by part of the tenants in common, but purporting to pass the entire title, and warranting the title, is an ouster of the other cotenants although such deed contained a recital showing that there were other cotenants who had not joined. *Naylor v. Foster*, 44 Tex. Civ. App. 599, 99 S. W. 114. R. A. E.

and not reclaimed by the grantors. It seems quite technical to make that point. It will at once close this objection to say that the bill alleges, and so does the answer of Emma Lloyd and Sarah Lloyd Prichard allege, the "execution" of this deed. That means delivery and acceptance. No evidence can be considered to contradict this allegation of the pleadings. However, if we concede that the deed was not accepted by Ewert, I hold that that fact is immaterial. The fact remains that John Mills, Jr., claiming under Ewert and the executory contract, received that deed and claims under it. It is color of title no matter that it was not accepted by Ewert. Any paper writing purporting to give title, good or bad, right or wrong, is color of title under the statute. Why tell us that his possession of that deed is wrongful? That does not deprive it of its operation. There it is with claim under it. I think that as John Mills, Jr., owned the land derivatively from that executory contract, derivatively from Ewert and copurchasers, he had a right to accept that deed, though its grantees had not done so. He did accept it, and, no matter whether it was right or not, it goes for color of title under the statute.

Thus we have color of title. The next question is: Is there possession under it such as to give title under the statute? Now, John Mills, Jr., cannot show such acts of possession prior to the oil leases as to confer title. So Judge Willis thought; so we find. We need not detail evidence here. But we hold that those oil leases, followed by actual possession under them, is such possession under that executory contract and under that deed, each and both, as to constitute an ouster and give Mills title by the statute of limitations. It is urged upon us that those leases were not conveyances of the corpus of the land, its whole body, only conferred upon the lessee a right to explore for oil, and left the possession, the constructive possession, and the land itself, in Mills. What difference? We need hardly cite authority to show that when a man claiming land has a tenant in actual possession the possession of the tenant is the possession of his landlord under the statute of limitations. The Pickens-Stout Case so holds. By the possession of those lessees Mills was in possession of the whole land, surface, minerals, and all. What he can do himself he can do by another. If John Mills, Jr., had gone on that land and raised corn and wheat or drilled oil wells, you would not deny that his possession would count. Why can he not do that through a lessee? If the drilling for oil by John Mills, Jr.,

would be such possession, why not the same act by his tenant work the same result in law? These leases of the entire tract left the oil and gas in place in Mills; but gave the lessee company the right to go into actual physical possession of the surface anywhere on the tracts, and to use it for all purposes necessary for the production of oil and gas, occupy the surface, and penetrate the bowels of the earth, Why does not such a tenancy operate as effectually as the possession of Mills as in any ordinary case of lease for farming purposes? Where the difference? Is not the owner of land in possession when he has a permanent tenant mining coal for royalty? Is not the possession of the tenant open, notorious and visible? Is it not as much so as if the landlord were living on the land? If a man have oil leases on his land in actual operation, having bought the land from A, would not the possession of the lessees be notice to a second purchaser of the land of the rights of the first purchaser? In short, such occupancy by oil lessees is as real, actual, open, and notorious as if the owner were on the land himself or had a tenant raising grain thereon. The oil lessee is taking from the land its products, as well in the one case as in the other. A stranger has patent possession, and the other party must take notice.

The chief reliance of the plaintiffs is that Maris, Ewert, and other claimants under sale from the two Lloyd heirs once recognized the right of the heirs of Stacy Lloyd, Jr., by the letter mentioned above and the suit in their names. That was before John Mills, Jr., had interest. He never made such admission. But in every case of ouster by one cotenant his fellow was once recognized as a cotenant. Even Maris, Ewert, and others would not be precluded from ousting those heirs afterwards, and much less John Mills, Jr. After these admissions he took deeds from others owning derivatively from said executory contract and quitclaim deed to Ewert, had the land entered in his name for taxes, cut timber and had a tenant on the land, leased the entire tracts, received rents and profits without accounting to Stacy Lloyd's heirs, and in many ways claimed the land as his own.

A great deal of law is cited us to the effect that, where one cotenant is in possession, mere silent possession, it will not affect other cotenants, without notice of adverse claim. That is so where there is one cotenant in possession; his possession is that of all, until he bring home to his fellow notice of adverse claim. But that is not the case where one conveys the tract

as sole owner to a stranger and the grantee goes into possession. Other notice is not necessary.

As we hold there was no adverse possession until the leases for gas and oil, and as Sarah Lloyd Prichard did not become of age until June, 1903, and had five years thereafter in which to sue, her right is not barred, and we cannot sustain the cross assignment of error made by Mills against that part of the decree which requires him to account for her interest.

Decree affirmed.

Petition for rehearing denied January 31, 1911.

WASHINGTON SUPREME COURT.

WILLIAM W. GREENE, Appt.,
v.

SEATTLE ATHLETIC CLUB, Resp't.

(— Wash. —, 111 Pac. 157.)

Negligence — unsafe premises — theater.

One who, for the purpose of giving an exhibition for pay, rents a new state armory which had been erected under the supervision of a competent architect, is not answerable for latent defects in a balcony railing which appears to be sufficient; nor is he bound to have the railing inspected by

competent experts, so as to be liable, in the absence of such inspection, for injury to a patron who is injured by its giving way at a time when the balcony is not overcrowded, but patrons are leaning against the railing to get a better view of the performance.

(October 12, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for King County sustaining a motion for nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. E. B. Palmer, Thomas M. Askren, and Milo A. Root, for appellant:

When appellant purchased a ticket to respondent's entertainment, an implied contract was entered between the parties, by the terms of which respondent agreed to furnish appellant with a reasonably safe place in which to witness the exhibition for which he had paid his money.

Francis v. Cockrell, L. R. 5 Q. B. 184, 501, 10 Best & S. 850, 39 L. J. Q. B. N. S. 113, 291, 22 L. T. N. S. 203, 23 L. T. N. S. 486, 18 Week. Rep. 668, 1205; Scott v. University of Michigan Athletic Asso. 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 A. & E. Ann. Cas. 515; Weiner v. Scherer, 64 Misc. 82, 117

Note. — Liability of one maintaining place of amusement to which the public is invited, for the safety of persons visiting the premises.

This note is supplementary to notes appended to Williams v. Mineral Park Asso. 1 L.R.A.(N.S.) 427; Higgins v. Franklin County Agri. Soc. 3 L.R.A.(N.S.) 1132; Hollis v. Kansas City, Missouri Retail Merchants' Asso. 14 L.R.A.(N.S.) 284 and Blakeley v. White Star Line, 19 L.R.A.(N.S.) 772. It excludes cases involving the liability of the operator of scenic railroad or similar device to passengers, that question being discussed in note to O'Callaghan v. Dellwood Park Co. 26 L.R.A.(N.S.) 1054. And for municipal liability for personal injury on account of exhibition permitted in public street, see note to Wheeler v. Ft. Dodge, 9 L.R.A.(N.S.) 146.

As shown in the note in 3 L.R.A.(N.S.) 1132, the proprietor of a place of amusement is not an insurer of the safety of his patrons, but his duty is to exercise reasonable care to that end. That also is the criterion followed by the later cases.

In King v. Ringling, 145 Mo. App. 285, 130 S. W. 482, in holding that the evidence of negligence was insufficient to sustain a verdict for injuries sustained by a spectator in consequence of the collapse of part of a circus tent during a violent wind 32 L.R.A.(N.S.)

storm, the court said that a patron, in voluntarily keeping a seat in a circus tent, assumes all the risks inherent in structures of that character; and a tent, however well constructed and erected, is not so substantial as other structures for housing people, and proprietors of a circus, in inviting people to occupy their tent for their own profit, bind themselves to exercise reasonable care to protect their patrons against injury from other than natural or accidental causes, and must observe care commensurate to the circumstances to protect their patrons against injury; the degree of care which they must exercise being that which would be expected of an ordinarily careful and prudent person in their position. The court, also, after remarking that the gravamen of the plaintiff's action, if any, was negligence, said that the doctrine of *res ipsa loquitur* had no application, and that, even if it be assumed that alternate stakes to which certain guy ropes were fastened had been pulled before the advent of the storm, yet the burden would be on plaintiff to show a causal connection between that fact and the fall of the tent.

So, in Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453, the court, after remarking that defendant was not an insurer, but was bound only to exercise reasonable care, referred to the fact that no accident like that in question had ever happened in the

N. Y. Supp. 1008; *Schnizer v. Phillips*, 108 App. Div. 17, 95 N. Y. Supp. 478.

It was incumbent upon the respondent to make the place to be occupied by the spectators reasonably safe.

Schofield v. Wood, 170 Mass. 415, 49 N. E. 636; *Beale, Innkeepers, Hotels & Theatres*, § 322; *Brackett, Theatrical Law*, pp. 117-120; 29 Cyc. Law & Proc. pp. 472, 473; 1 *Thomp. Neg.* §§ 996, 1154, 1155, 1160.

The owner or occupier of the premises is liable to a person invited by him upon said premises, when such person is injured by reason of their defective condition.

Ward v. Hinkleman, 37 Wash. 378, 79 Pac. 956; *Baker v. Moeller*, 52 Wash. 605, 101 Pac. 231; *Smith v. Delaware River Amusement Co.* 76 N. J. L. 461, 69 Atl.

theater, as a circumstance tending to negative negligence on the part of the proprietor of a theater in failing to provide an additional guard rail over the parapet of the gallery, the floor of which sloped at an angle of 55 degrees from the horizontal, the parapet being 2 feet high, with a guard rail 1 foot and 2 inches above it. The conclusion was that a finding of negligence rendering the defendant liable for injuries to plaintiff, who slipped or stumbled, and, after falling over two front rows of people, was precipitated into the body of the house, was not justified. As an alternative ground for its decision, the court said, in effect, that, being familiar with the situation from previous attendance, plaintiff would in any event be guilty of contributory negligence.

In *Cousineau v. Muskegon Traction & Light Co.* 145 Mich. 314, 108 N. W. 720, it was held to be a question for the jury whether a street railway company was negligent in failing to provide a sufficient number of employees, or other means, to control a crowd waiting at an amusement park maintained by it, to board the cars, which were insufficient to accommodate the crowd, in consequence of which there was pushing and crowding resulting in plaintiff's being forced under a car. It was also held a question for the jury whether, in such circumstances, the plaintiff was guilty of negligence in taking a position in the front rank of those waiting for a car.

In *Weiner v. Scherer*, 64 Misc. 82, 117 N. Y. Supp. 1008, a complaint in an action against the proprietor of a moving picture show, by a spectator who was injured by the fall of people from the balcony in consequence of pressing against the balcony rail, was held improperly dismissed where it alleged, and the plaintiff offered to show, that the seating capacity of the balcony was but 50, and at the time of the accident about 200 people were standing therein, "every inch of space . . . being occupied."

In *Butcher v. Hyde*, 10 Misc. 275, 30 N. Y. Supp. 1073, it was held the duty of the 32 L.R.A. (N.S.)

970; *Shearm. & Redf. Neg.* 5th ed. p. 713; *Hart v. Washington Park Club*, 157 Ill. 9, 29 L.R.A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L.R.A. 199, 81 Am. St. Rep. 512, 46 Atl. 631; 24 Cyc. Law & Proc. p. 1125; 29 Cyc. Law & Proc. pp. 453, 472-476; 1 *Thomp. Neg.* §§ 996, 1154, 1155, 1160.

It was the duty of the respondent, before inviting the public to occupy said premises, to make any and all reasonable inspections and examinations that could have been readily and practicably made, which would have revealed such unsafe condition of this railing.

Lusk v. Peck, 132 App. Div. 426, 116 N. Y. Supp. 1051; *Smith v. Delaware River*

managers of a theater to be vigilant to see that the stairs therein are in such a condition that a theater goer, although an aged person, can with safety descend them, provided the care of a reasonably prudent person is exercised; and this case also held that a period of twenty-four hours is sufficient to charge the managers of a theater with constructive notice of a patent defect in the stairs. The judgment was reversed in 162 N. Y. 142, 46 N. E. 305, for refusal to instruct that if the plaintiff fell from the fourth or fifth step, there could be no recovery, since the only evidence of a defect was as to the sixth step.

The proprietor of a show owes, even to a trespasser whose presence is known, the duty of exercising reasonable care in exploding a giant firecracker, to prevent injury to spectators. *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

In *Epstein v. Gordon*, 114 N. Y. Supp. 438, it was held that, though lessees of a theater are not liable as original joint tortfeasors for wrongful acts of their usher in assaulting a patron, where neither personally participated in the misconduct, they are liable as the usher's employers.

In *Flanagan v. Goldberg*, 137 App. Div. 92, 122 N. Y. Supp. 205, it was held that, while the proprietors of a moving picture show would be liable for injury to one attending a show if caused by the falling of a board negligently placed by them, they would not be liable for the injury if caused by a board thrown into the room by persons on adjoining premises, unless the proprietors had knowledge that such persons were committing depredations, or had done so, and thereupon negligently failed to protect those invited to the entertainment.

In *Dyer v. Robinson*, 110 Fed. 99, where the patron of a theater was injured by the fall of the ceiling and dome owing to the rotting of a truss, the court said that the lessee was liable if he knew, or by the exercise of reasonable care could have known, of the condition, whether it arose before or after the making of the lease; but held that the evidence was insufficient to

Amusement Co. 76 N. J. L. 461, 69 Atl. 970; 29 Cyc. Law & Proc. p. 472; 1 Thomp. Neg. §§ 996, 1154, 1155, 1160.

Appellant made out a prima facie case of negligence, and thereby shifted the burden of proof to the respondent.

LaBee v. Sulton Logging Co. 47 Wash. 61, 20 L.R.A.(N.S.) 405, 91 Pac. 560; Anderson v. McCarthy Dry Goods Co. 49 Wash. 398, 16 L.R.A.(N.S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325; Schnizer v. Phillips, 108 App. Div. 17, 95 N. Y. Supp. 478; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Ward v. Hinkleman, 37 Wash. 378, 79 Pac. 956; Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Smith v. Delaware River Amusement Co. 76 N. J. L. 461, 69 Atl. 971; Scott v. Uni-

versity of Michigan Athletic Asso. 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 625, 15 A. & E. Ann. Cas. 515; Weiner v. Scherer, 64 Misc. 82, 117 N. Y. Supp. 1009; Lusk v. Peck, 132 App. Div. 426, 116 N. Y. Supp. 1054. Messrs. O. B. Thorgrimson, D. C. Conover, and Harold Preston for respondent.

Gose, J., delivered the opinion of the court:

The respondent, a Washington corporation, was organized, among other things, "to give for profit, and charge admission to, athletic exhibitions, football games, and baseball games, regattas, and running and sailing races." On the 6th day of May,

establish negligence, the only possible indications of any defect being the leaky condition of the roof.

The decision in *George v. University of Minnesota Athletic Asso.* 107 Minn. 424, 120 N. W. 750, reversing a judgment in favor of a person injured by the collapse of a stand while witnessing a football game, was not upon the merits, but upon the ground that the defendant, the University of Minnesota Athletic Association, was neither a partnership, a corporation, nor a voluntary association of individuals, but a branch of the university, and not a proper party defendant.

Bathing resorts.

As to duty and liability of owner of bathing resort, see *Larkin v. Saltair Beach Co.* 3 L.R.A.(N.S.) 982. A few later cases are added.

According to *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448, the proprietor of a bathing resort must make reasonable provision to guard against those accidents which common knowledge and experience teach are liable to befall those engaged in the sport in which he has invited the public to participate, and while a reasonable provision for the safety of his patrons would require attendants or guards to render assistance in time of need, it does not require the furnishing of a competent or experienced swimmer and diver.

So, in *Wickersham v. DuBois*, 34 App. D. C. 146, the proprietor of a bathing beach was held liable to a bather for injuries received by stepping upon the splintered end of a submerged stick.

And in *Heath v. Metropolitan Exhibition Co.* 11 N. Y. Supp. 357, the owner of premises leased to an athletic club was not liable to a bather who slipped on the walk leading to his dressing room, and was injured on a glass door which was leaning against a partition, but was no obstacle in the way of persons using the walk.

But in *Montreal v. Duplessis*, Rap. Jud. Quebec, 15 B. R. 548, it is held that, ill preparedness of a guardian and insufficiency of life-saving apparatus did not fur-

nish sufficient reasons for holding the city liable, in the absence of evidence that they were the cause of, or contributed to, the drowning of a bather at a city public bath.

Liability of lessor.

In *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, affirming 25 Hun, 634, where a gallery built to accommodate a limited number of people, in a building designed for public entertainments, fell and injured a patron during an exhibition, after the lessee, having the right to make alterations, so changed the gallery as to crowd it with people, it was held that the lessor was not liable, in the absence of proof that he knew or had reason to suppose that it was of insufficient strength to hold the number of people who could be contained therein, or that it would be used in such a way as to endanger its security. The principles of the above case control *Bard v. New York & H. R. Co.* 10 Daly, 520, which is based upon like facts.

In a dissenting opinion in *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, Ruger, Ch. J., says: "The theory now suggested, that the owner of a building designed to be let for the use of public entertainments has, upon letting the same to a temporary occupant, thereby imposed upon such occupant, and relieved himself from, all liability to persons lawfully attending an exhibition therein, and receiving injuries through defects in its original structure, is a startling one, and is so opposed to what I believe to be settled law that I am unable to assent to it."

My opinion of the case rests upon the undisputed facts that the defendants let *Gilmore's Garden* for a walking match, a purpose for which they admitted it was not designed, and, knowing its unsuitness for that purpose, took no precaution other than those derivable from its general appearance, to warn either their lessee or the public of its want of fitness for such a purpose. The building was used by the lessee only for the purpose for which it was specifically let, and, if there was any part of it not adapted to such a use, it was the

1909, it leased the armory in Seattle from the state for one evening only, and gave an exhibition, charging an admission fee. The entertainment consisted chiefly of foot races. The portion of the armory used consisted of the drill room, about 100 feet by 200 feet in dimensions, with a balcony about 14 feet in width extending around the interior walls at a height of about 12 feet from the floor. Three rows of seats arranged in amphitheater fashion extended around the building. Around the entire front of the balcony, about 20 inches from the first tier of seats, there was a railing about 3 feet in height, constructed of iron pipe about 2 inches in diameter, fastened to vertical bars 9 feet apart, made of like material, but somewhat larger, each of which was attached to the floor of the balcony by an iron plate containing four screws, each 2 inches in length. There were no lateral braces, and the screws did not extend into the heavier material upon

which the floor of the building rested. One of the features of the evening was a Marathon race. The final lap was closely contested, and the interest in the result became so great in the finish of the last lap that the spectators on the east side of the balcony, where the appellant was sitting, arose, pushed forward in great numbers, and leaned upon the railing so that they might get a better view, the contestants then being under the balcony, causing the railing to break its connections and precipitate the appellant and others to the floor below, and injuring the appellant. There were several races preceding the accident. The appellant testified that the spectators leaned upon the rail "every time the contestants came underneath the gallery, several times" prior to the accident, and that the railing seemed "perfectly safe," and that it appeared to be solid and substantial. The expert testimony discloses that a careful inspection by a competent builder

duty of the lessor to adopt effectual means to permit only such a use as was consistent with the safety of those attending the entertainment. It cannot be held, I think, as matter of law, upon the proof in the case, that the defendants discharged the duty which they owed to the people who visited it to the lessors' profit and by their consent, authority, and invitation."

In *McCain v. Majestic Bldg. Co.* 120 La. 306, 45 So. 258, it is held that the owner of a building in which the lessee, before its completion, was operating a theater, is not liable where a patron fell to the sidewalk and was injured by walking through an unfastened door without connecting steps, and which was marked "exit" and furnished with red lights. In this case the court said: "Thus, in alleging that the theater is leased and is operated by the lessee, plaintiff in effect alleges that defendant had no right to enter it, and no authority to regulate its internal police, and, as the power to determine whether the patrons should enter and depart through one door or both was vested exclusively in the lessee, so the responsibility devolved upon it of making proper provisions for the carrying into effect of such regulations as it saw fit to adopt upon that subject."

In *Dyer v. Robinson*, 110 Fed. 99, the lessor was exonerated for the reason that he did not know of the defective truss which caused the accident, even assuming that the defect existed at the time of the lease.

The decision in *Mirsky v. Adler*, 123 N. Y. Supp. 816, reversing a judgment in favor of plaintiff for injury from a piece of iron which fell from the balcony while he was seated in the theater on Sunday, was upon the ground that the inference that the theater at the time of the accident was in control of the defendant was not justified by the fact that the defendant had leased the property to a

third person, reserving the right to use the same on Sunday, the defendant having proved that he leased to another company the right to hold Sunday performances, and offered evidence to show that that company had possession and control of the theater on the day of the accident.

In *Cunningham v. Rogers*, 225 Pa. 132, 73 Atl. 1094, the lessor of a baseball park was held not liable for personal injuries resulting from the fall of a grand stand which was erected by the lessees, who were in uninterrupted possession of the premises from the time the stand was erected until it fell.

But in *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92, holding the owner of a building who leased it for the purpose of giving entertainments liable for injuries occasioned to a person by the falling of the platform in front of the entrance upon which he was standing with others while waiting for the doors to open before the entertainment, the court said: "If the jury found that the use actually made of the platform was something which the defendant was bound to have contemplated, he was liable for any neglect of proper precautions to make it safe, whether . . . [licensee] also was to blame or not, just as in the case of premises let with a nuisance upon them."

And in *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051, affirmed in 199 N. Y. 546, 93 N. E. 377, the owner of lands leased for exhibition ball games was held liable for injuries received by a spectator by the collapse of a structure used to seat spectators, where the structure, at the time of the lease, was unsafe, and its condition could have been discovered by inspection. The general rule as taken from the opinion is that a lessor is not liable to the lessee or to anyone for the condition of the premises, nor does he impliedly war-

or architect would have disclosed the defective connection between the rail posts and the floor, but that it would not have been noticed by such experts from a casual examination.

The following interrogatory propounded to the respondent, with the answer thereto, is the only evidence touching the question of an inspection:

Q. Did the Seattle Athletic Club or its agents make any inspection of the Seattle Armory prior to May 6, 1909?

A. It is impossible to answer interrogatory 4 by 'yes' or 'no.' The superintendent and physical director of the Seattle Athletic Club were in the Armory Building on the afternoon of the day on which the exhibition was given, and observed in a general way the arrangement of the room in which the exhibition was given. It would not, however, be correct to say that they made an inspection of it in the way of examining the details of its construction.

rant that they may be used for the purpose of which they are apparently designed. But if the premises when leased are in a defective condition, constituting a nuisance, the liability of the lessor for the results of the nuisance continues, even though the lessee may be liable. And this case also holds that, although the structure became defective during the period of the first lease, if the owner thereafter made another lease to the same parties without inspecting the structure, he is liable, as at the expiration of the first lease he had a right to enter and make an examination.

Liability for negligence of *concessionnaire* or independent contractors.

See also note to *Hollis v. Kansas City, Missouri, Retail Merchants' Asso.* 14 L.R.A. (N.S.) 284.

In *Rayfield v. Sans Souci Park*, 147 Ill. App. 493, it was held that a minor about fourteen years of age, injured by falling glass while using a maze located in a public park, as a playground; i. e., playing tag, a purpose for which it was not designed, was guilty of such contributory negligence as barred a recovery, and the doctrine of *res ipsa loquitur* did not apply. It was also held that the owner of an amusement park is not liable for the negligent acts of a concessioner who is in the exclusive possession and control of the particular portion of the park rented.

In *Smith v. Benick*, 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56, the proprietor of a public resort which had employed an independent contractor to make a balloon ascension, to attract visitors, is not liable for injury to a visitor by a pole which fell through the negligence of the balloonist while he was endeavoring to raise the pole for use in inflating the balloon.

So, in *Burns v. Herman*, 48 Colo. 359, 113 Pac. 310, an association which had en-

They observed the railing around the gallery, and observed that it was very solid and substantial in appearance.

The only negligence claimed is that the posts or stanchions to which the railing was attached were not securely fastened. It is not claimed that the balcony was overcrowded. At the close of the appellant's evidence, a judgment of nonsuit was entered, from which the appeal is prosecuted.

The appellant contends that, when he purchased a ticket and entered the building, an implied contract arose between the parties which made it obligatory upon the respondent to furnish him a reasonably safe place in which to witness the exhibition. This is undoubtedly the general rule applicable to the owner of such a building, or a lessee for a considerable period of time. It is, however, limited in its application by another rule equally well settled, that reasonable care only is exacted

gaged a competent aeronaut to make a balloon ascension on the fair grounds was held not liable where, after the manager had forbidden an ascension and left the grounds, a boy was killed by a pole which fell while the aeronaut, solely at the request of spectators, was preparing to make a flight.

And in *Canney v. Rochester Agri. & Mechanical Asso.* — N. H. —, 79 Atl. 517, such an association, under contract with an independent contractor for a daily balloon ascension, is held liable to a traveler on the highway injured by the balloon in its descent after it was abandoned by the operator.

In *Murrell v. Smith*, — Mo. App. —, 133 S. W. 76, a street fair association was held liable where a child was killed by the collapse of a negligently constructed and unguarded performers' stand.

In *Plaskot v. Benton-Warren Agri. Soc.* — Ind. App. —, 89 N. E. 968, an action for loss of services of a son killed by a shot from a rifle used at a shooting gallery, it was held that a boy at a fair, at the invitation of a company conducting the fair, is entitled to the exercise of ordinary care on the part of the company to protect him against dangerous agencies known by it to exist, and permitted on its grounds set apart for the use of the public.

In *Thomas v. Springer*, 118 N. Y. Supp. 475, it was held that the owner and manager of a theater was liable to a patron injured by a spot light negligently handled, which fell and struck him, though the operator was not employed by manager, but by the performing company. This case was reversed in 134 App. Div. 640, 119 N. Y. Supp. 460, on the ground that the relation of master and servant did not exist, so as to render the owner liable for the operator's negligence. J. D. C.

by the law. This is a relative question, depending upon the character of the business in which the party sought to be charged is engaged. *Phillips v. Wisconsin Agri. Soc.* 60 Wis. 401, 19 N. W. 377; *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 A. & E. Ann. Cas. 924; *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408; *Thornton v. Maine State Agri. Soc.* 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979; *Currier v. Boston Music Hall Asso.* 135 Mass. 414; *Barrett v. Lake Ontario Beach Improv. Co.* 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 988; 29 Cyc. Law & Proc. p. 453; 1 *Thomp. Neg.* §§ 994, 995; *Beale Innkeepers & Hotels*, § 324; *Graves v. Baltimore & N. Y. R. Co.* 76 N. J. L. 362, 69 Atl. 971; *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636. The standard of due care is measured in all cases by the conduct of the average prudent man. The pivotal question in the case is: Did such standard require the respondent to have the building inspected by an architect or structural engineer or other competent person?

The answer to this question requires a brief reference to the history of the construction of the armory. The armory was erected by the state, under the provisions of Laws 1907, chap. 55, pp. 83 et seq.; the sum of \$130,000 being appropriated from the military fund for its construction. It required the governor to appoint a board or commission of six members, comprised of the adjutant general of the National Guard of Washington, the ranking officer of the active list of the National Guard stationed at Seattle, the state board of control, and the chairman of the board of county commissioners of King county, all of whom were *ex officio* members of the board. The members of the board were required to act as such until the completion of the armory and acceptance thereof by the state, and to give a bond to the state, to be approved by the governor, in the sum of \$5,000, conditioned for the faithful performance of the duties imposed upon them by the act. Section 6 of the act required the board "to select the most desirable site, plan and design, and to obtain proper architectural designs, plans, and specifications and details in conformity with such plan and design; to secure the erection and completion of such armory building, conforming faithfully to such plan and design." Section 7 of the act provides that "all material contracted for shall be of the best quality and to the satisfaction of the board, and the directions, plans, and specifications of the work executed and carried out by skilled and reputable architects, artists, mechanics, and laborers, likewise to the

satisfaction of the board." Section 8 provides that "the architect chosen by each of these boards shall receive such compensation for his plan and design as the board shall deem reasonable. He shall be supervising architect of said building and for all contracts for construction or material therefor. He shall see that all material furnished and work done shall be of the best quality, and all contracts with said board are faithfully performed by the parties so contracting with said board. He shall perform all other duties devolving upon him as such architect and the supervising architect of said building, and may be removed at the pleasure of said board." And that he should furnish a surety company bond to the state in the sum of \$10,000, conditioned for the faithful performance of his duties, by said architect, his assistants, and his subordinates. Section 10 makes the attorney general the legal adviser of the board. Section 11 provides that the commander in chief (the governor) (shall make such rules and regulations as he may deem expedient to govern the armory. Section 97, chap. 134, p. 494, Laws of 1909, provides that the commander in chief (the governor) shall promulgate in general orders such regulations for the use of armories as may be proper, that no armory shall be used for other than strictly military purposes without the recommendation of the officer in charge thereof, and that all revenues derived from rentals of the armory shall be turned into the state treasury. The armory was completed in 1909, and rented to the respondent by the adjutant general of the state. The respondent had no right to make any changes in the building.

If fair and reasonable minds might differ as to whether the respondent was negligent, the court was in error in withdrawing the case from the jury. Viewing the case from the standpoint of the conduct of the average prudent man, we cannot escape the conclusion that there was no duty of further inspection upon the respondent. The defect was not patent. It took the building for one night only, and it had a right to rely upon its apparent safety. The building was new, and, as we have seen, had been constructed by the state under a law which provides for the most careful and rigid supervision by the highest officers of the state and the superintendent and architect selected by them. An inspection by experts under such circumstances would have been the exercise of extraordinary care, an act which we are persuaded would not have occurred to any reasonable man. A different degree of care might apply to the builder and owner, and no doubt would

apply if he were a private individual; but as to whether it applies to the state we express no opinion. "Failure to make certain tests is not negligence, where it does not appear that such tests were common or prudent, or where the owner had no reason to think an inspection was necessary." 29 Cyc. Law & Proc. p. 472. See also *Hall v. Murdock*, 119 Mich. 389, 78 N. W. 329; *Baddeley v. Shea*, 114 Cal. 1, 33 L.R.A. 747, 55 Am. St. Rep. 56, 45 Pac. 990.

In *Baddeley v. Shea*, the plaintiff, who was in the employ of a transfer company, while carrying a trunk from the defendant's house, was injured by the breaking of a step upon a platform which formed a part of a continuous walk from the defendant's house to the street. It appeared that the platform had been properly built, and that the defendant had no knowledge that it was unsound or unsafe. An examination after the accident disclosed a dry rot on the underside of the plank that broke, and of the stringer on which it rested, which was not apparent from the outside, and which was discoverable only by making an opening through or under the vertical side of the steps sufficient to admit a person under the platform, which was about 1 foot above the ground. Applying the law to the facts stated, the court said: "It should be borne in mind, however, that the ultimate question of law to be decided is whether it was the duty of the defendant under the circumstances proved, to examine his platform for the purpose of ascertaining whether there were latent defects in it; for, if such was not his duty, his omission to make such examination was not negligence in any degree, and the defendant was entitled to a verdict (*Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529); and whether or not such was his duty depends entirely upon whether or not he had notice of facts which would induce a man of ordinary prudence to suspect the existence of a latent defect in consequence of which danger of injury to person or property might be reasonably apprehended; and when, in such a case, the facts of which one charged with negligence had notice are known and undisputed, the question of duty to examine for latent defects is a pure question of law, though it may involve a question as to the degree of care required, which is also a question of law when the facts are given (*Stratton v. Central City Horse R. Co.* 95 Ill. 25; *Sackett, Instructions to Juries*, 15). In accordance with these principles, courts grant nonsuits and direct verdicts in actions for negligence, whether the negligence in question be that of the defendant or contributory negligence of the plaintiff." In *Ryder v. Kinsey*, 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 32 L.R.A. (N.S.)

623, 64 N. W. 94, the plaintiff's minor son was injured by the fall of a brick-veneered wall. The evidence showed that the brick wall was not anchored to the studding or sheeting or to the frame of the building in the customary way, or attached to them in any way, or otherwise supported. There was no evidence that the defect could have been discovered by the exercise of ordinary care on the part of the owner. The defendant had purchased the building after its completion. The court said that the defendant did not build the wall, that its external appearance did not disclose its defective condition, that the defect could not have been discovered by the exercise of ordinary care in the inspection of the building, and that the jury were correctly instructed to return a verdict for the defense. "Where the landlord has provided apparatus which is obviously defective, the tenant must either abstain from using it, or must use it with a degree of caution which would be wholly unnecessary if proper works had been put up. But where the defect is not obvious, and is not in fact known to the tenant (which is in such a case to be presumed), he is not bound to use more care than the external appearance of the works seems to demand." 2 Shearm. & Redf. Neg. § 724. "The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things." *Pollock, Torts*, 36.

In *Eckman v. Atlantic Lodge No. 276*, B. P. O. E. 68 N. J. L. 10, 52 Atl. 293, the court, in speaking of the duty of a temporary lessee to inspect the building, said: "Whether such a duty rests upon the temporary lessee of a building constructed and used for public purposes may be doubted, and the determination of this case does not require a decision of that question." The lessee of the building was exonerated from liability, on the ground that the defect which caused the injury was a latent one. In *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, a grand stand owned and constructed by the defendant fell, and the plaintiff was injured. Speaking to the liability of the defendant, the court said that such structures were constructed for the accommodation of a great number of people, who at times would be moved to excitement, activity, and demonstration, thereby subjecting the structure to great weight and strain; that such conditions must be regarded as within the contemplation of the builders of such structures when they were erected. The defendant had leased the

grand stand to a cycling club for the day on which the accident occurred, and the club was giving cycling races. Answering defendant's contention that the cycling club alone was liable, the court said: "If the plaintiff had brought an action against the cycling company, it would have been incumbent upon her to have shown that, as the lessee of the defendant, it had notice of the defective condition of the stand, or should with reasonable care have known of its condition." The last two cases are the only ones called to our attention which discuss the duty or obligation of a temporary lessee.

The drill room was constructed by the state for public exhibitions. The seating capacity of the gallery was not wholly taken. The gallery was not overcrowded. The railing gave way on account of a latent structural defect, and not because too many people had been admitted. The railing had the appearance of being safe. The respondent, upon the facts stated, was warranted in relying upon its appearance. It had a right to assume that it was structurally sound. Upon the whole record, we are constrained to hold that there is no cause of action against the respondent.

The judgment is affirmed.

Rudkin, Ch. J., and Mount and Chadwick, JJ., concur. Morris, J., holding a membership in the respondent, was disqualified, and took no part.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL. CITY
OF TACOMA, Resp't.,

v.

TACOMA RAILWAY & POWER COM-
PANY, Appt.

(— Wash. —, 112 Pac. 506.)

Street railways — transfers — contract — lines operated.

That an independent corporation has acquired control of two competing street railway companies, and operates both by one set of officers, having formed a physical connection between the two, and uses the cars of each upon the tracks of the other, and that it keeps the accounts in one office, and does all repairing at one shop, does not, while the accounts are kept separate, require the owner of one of the roads to issue transfers over the other, under its contract with the city to grant such transfers over any line which shall be operated or controlled by it.

(Dunbar, J., dissents.)

(January 6, 1911.)

32 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in a mandamus proceeding for the establishment of a transfer system. Reversed.

The facts are stated in the opinion.

Messrs. B. S. Grosscup and W. C. Morrow for appellant.

Messrs. T. L. Stiles and F. R. Baker for respondent.

Chadwick, J., delivered the opinion of the court:

The Tacoma Railway & Power Company, having, prior to April 1, 1903, acquired a number of separate franchises and detached pieces of street railroads in the city of Tacoma, upon which separate fares had been charged and only a partial transfer system inaugurated, entered into a contract with the city, which was designed to settle existing disputes and differences, provide a single fare over all lines controlled by the railway, and to establish a transfer system covering all the lines controlled by it. Thereafter, by ordinance 1809, a franchise was granted to the Pa-

Note. — Transfer between lines of different street railway companies.

A city ordinance that seeks to compel a street railroad company to accept from, and issue to, its passengers, transfers of another and entirely independent company, is in violation of the constitutional prohibition against depriving persons of their property without due process of law. *Chicago City R. Co. v. Chicago*, 142 Fed. 844.

But the right to require the exchange of transfer checks between different street railway companies is recognized in *Cronin v. Highland Street R. Co.* 144 Mass. 249, 10 N. E. 833, where the question decided was that the holder of a transfer check was not entitled to ride on the car of another company which substantially paralleled the route of the car from which the check was issued. The statute prohibited the use of a transfer on a parallel line, so that the contention was simply as to whether the route in question was a parallel route.

In *Virginia Pass. & Power Co. v. Com.* 103 Va. 644, 49 S. E. 995, it was held that the word "line" in an ordinance granting a street railway franchise, and requiring the issuance of a transfer at the point where the "said line" intersects with the line to which the passenger desires to be transferred, such transfer to be good to the end of the latter line, was to be construed in its popular significance and with reference to the fact that, at the time of the ordinance, the terminus of that line was at the same point within the city limits as the apparent city terminus of a road extending several miles into the country; and that the duty to issue transfers between those lines was not affected by the fact

cific Traction Company to build and operate a line of street railway in the city of Tacoma. Section 12 of the ordinance is, in part, as follows: ". . . and the payment of a fare shall entitle the passenger to a transfer to any other line within the city of Tacoma which may give and receive transfers to and from the lines operated under this franchise, and the presentation of a transfer from any other lines which may give and receive transfers shall entitle the holder thereof to passage on the cars operated under this franchise to any point within the city limits." The railway company had at all times a line in operation upon Pacific avenue, thence up Ninth street to C street. This line was known as the "Old Town" line. Several

of its lines ran up and down C street, so that the intersection of Ninth and C streets was a sort of common center for passenger traffic. The city terminus of the traction company's line was on Commerce street,—a street lying between Pacific avenue and C street. The traction company was owned and controlled as an opposition company, each line running to, and serving the population residing in, what is known as "South Tacoma." The traction line crossed the railway line at several places, but there was no physical connection between the roads. Nor did the one transfer passengers to the other. Each maintained different offices and employees, and each owned and operated shops and terminals where cars were kept and repaired. A ma-

that subsequently the first company acquired the portion of the interurban line between that point and the city line and that the remainder of the interurban line was acquired by a third company, which, however, operated its cars with the same conductors and motormen through to that point.

It was held in *Interurban R. & Terminal Co. v. Cincinnati*, 75 Ohio St. 196, 79 N. E. 240, that, in the absence of an ordinance requiring street railways generally to exchange transfers, a statute empowering urban and interurban street railroad companies to agree as to the use by the latter of so much of the tracks and other property of the former as may be necessary or desirable to enable the interurban cars to enter and pass through the streets of a city "upon the same terms and conditions applicable to other street railroads" did not make such an agreement conditional upon an exchange of transfers, although the urban company, by the conditions of its grant, was obliged to issue transfers, since the terms and conditions contemplated by the statute are those applicable to street railroads generally, and not those in the grant of the company owning the tracks.

A proviso in a statute allowing interurban and urban railway companies to make arrangements for the passage of the latter's cars over the city streets, that "the fare charged by street railway companies for transporting passengers within the municipal corporation or municipal corporations shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies," is not to be construed as requiring transfers between the cars of the two companies. *Interurban R. & Terminal Co. v. Cincinnati*, supra. "The provision is," the court said, "that the fare charged for transporting passengers in the municipality shall not be greater than that fixed in the franchise of the street railway company. This is a limitation upon the fare the interurban company may charge for the service it is authorized to render, and not a 32 L.R.A. (N.S.)

requirement that it shall provide or pay for additional transportation."

In *Montpelier v. Barre & M. Traction & Power Co.* 76 Vt. 66, 56 Atl. 278, the defendant had acquired a street railway franchise in a city upon condition that it should give transfer tickets to all its own lines; subsequently it acquired by assignment a similar franchise, with a similar condition, in another city, and a franchise through an adjoining town, and thereafter operated a continuous line from one city through the town to the other city. It was held that it was not bound to give transfers to its lines in the first city to patrons taking cars in the other city.

An ordinance of the city of Chicago, requiring transfers between street railway lines owned, operated, or leased by the same company, which "now or shall hereafter" join, connect with, cross, intersect, or come within a distance of 200 feet from each other, was upheld in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451, under the charter authority of the city to fix the compensation of such companies; and such ordinance was held applicable to lines now leased by one company, although, at the time of the passage of the ordinance, they were operated by separate companies.

In applying a city ordinance requiring issuance of transfers between street railway lines owned, operated, or leased by the same company, the real beneficial, and not the mere technical, ownership, is to be considered. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470, holding that while the Chicago Consolidated Traction Company may, as a legal entity, have a separate corporate existence, yet, being guided, dominated, and controlled by the Chicago Union Traction Company, it was, for the purposes of the ordinance, to be regarded as the "same" company as the latter, so as to make the ordinance applicable to lines of two companies which, in other respects, came within its terms. The opinion in this case should be consulted to ascertain the exact relations between these

jority of the stock of the railway company is owned by the Puget Sound Electric Railway. In the summer of 1909, the Puget Sound Electric Railway acquired a majority of the stock of the traction company, since which time, as it is said, for convenience and economy of administration and for the mutual benefit of both roads, and especially for the advantage of the traction company, a physical connection between the two lines has been made at the intersection of C and Commerce streets, and also at Fifty-Fourth street. Freight is transferred from one line to the other. The cars of one line, to some extent, at least, have been used on the other line. The offices of the traction company have been closed, and all its office work has been put

upon the officers and employees of the railway company. The shops of the traction company have been closed and its machinery dismantled; the repairing being all done at the shops of the railway company. The testimony shows that the accounts and books of the two companies are separately kept; that the freight earnings on transferred freight are apportioned between the two companies by a traffic manager who acts in the same capacity for both lines; that all repairing chargeable to the traction line is done at actual cost by the railway company, with 10 per cent added. Since the Puget Sound Electric Railway acquired control of the stock of the traction company, that company and the railway company have been managed by the

two companies, which are very complicated. In general it may be stated here that the Union Traction Company controlled the stock and the stockholders of the other company.

Under New York statutes.

The provisions of the New York statutes controlling most of the decisions in that state upon the question in hand are §§ 78 and 104 of the railroad law (Laws 1890, chap. 565, as amended by Laws 1892, chap. 676), now re-enacted in the Consolidated Statutes, Laws 1909. Section 78 authorizes any railroad corporation, or any corporation owning or operating a railroad in the state, to contract with any other corporation for the use of their respective roads or any part thereof. Section 104 provides that every such corporation entering into such contract shall carry between any two points on the railroads, or the portions thereof embraced in such contract, any person desiring to make one continuous trip between such points, for one single fare, and shall, upon demand, and without extra charge, give such person a transfer.

These two sections must be read together, and require transfers between leased lines of street railways. *Griffin v. Interurban Street R. Co.* 179 N. Y. 438, 72 N. E. 513. The court said in that case: "It is quite manifest from this review of the legislation bearing on the controversy that present § 104 of the railroad laws covers leases duly executed between street surface railroad companies, and particularly the leases now under review. It is obvious that the language of present § 104, 'Every such corporation entering into such contract,' etc., that the word 'such' in that connection refers to 'any railroad corporation, or any corporation owning or operating any railroad or railroad route within this state,'—which is the language of § 78, as amended."

It was held in *O'Reilly v. Brooklyn Heights R. Co.* 95 App. Div. 253, 89 N. Y. Supp. 41, that §§ 78 and 104 of the railroad law must be construed to require the issue and acceptance of transfers between inter-

secting lines of different companies leased by the defendant, although the leases were acquired at different times. In view of the holding in the *Topham Case*, *infra*, it is desirable to set out the reasoning of the court in this decision somewhat at length; for while the two cases are not necessarily in conflict, there is apparent some divergence of opinion. The defendant here, the Brooklyn Heights R. Co., was operating a line of street railway, and by the authority of the statute, leased in 1893 the lines of the Brooklyn City Company. Several years later the Nassau Electric Railroad was also leased by the Brooklyn Heights Company. This action arose over the refusal of the defendant to give a transfer from a line of one of the leased companies to a line of the other, and the decision of the court was against the company, as indicated. The court said: "As the privilege was granted only in connection with the obligation to furnish transfers over all of the lines embraced in the contract, as the Brooklyn City Railroad Company was under contract and in effect a part of the Brooklyn Heights Railroad Company's system at the time that the Nassau Electric Railroad Company entered into its contract with the Brooklyn Heights Railroad Company, it is difficult to understand why the latter should be relieved from responsibility in the present case. As the operating company, the Brooklyn Heights Railroad Company had received the benefits of the privilege conferred by the statute, and no good reason is suggested why it should not have discharged the obligations imposed by the statute as a condition of that privilege. The language of § 104 of the railroad law as it now appears is that 'every such corporation entering into such contract shall carry,' etc. It is the entering into the contract which carries with it the obligation to transfer, and the mere fact that the Brooklyn City Railroad Company and the Nassau Electric Railroad Company were not leased to the defendant under the same lease is of no importance; it is the intent of the legislature which is the law, and it cannot be doubted that the intent of this statute was

same person, and the same person has been superintendent of both companies. The manager of the railway and of the traction company is not paid by either of them, but by a concern known as the Stone-Webster Company. It is pertinent to add that the railway company is a New Jersey corporation, having at the time of the trial the following officers and board of directors: President, Russell Robb; first vice president, Guy E. Tripp; treasurer, Henry B. Sawyer; secretary, Alvah K. Todd; directors, T. Nelson Perkins, John S. Bartlett, Henry B. Sawyer, Chandler Hovey, Russell Robb, A. S. Michener, John R. Turner, Sidney Z. Mitchell, and Guy E. Tripp. The traction company is a Maine corporation, with the following officers and board

of directors: President, Guy E. Tripp; first vice president, Fred S. Pratt; treasurer, Henry B. Sawyer; secretary, Alvah K. Todd; directors, A. S. Michener, E. Howard George, Fred S. Pratt, Alvah K. Todd, and Guy E. Tripp. It is not shown, nor is any attempt made to show, that the appellant railway company owns any stock in the traction company, or in any way directs and controls its policy. Nor is the traction company or the Puget Sound Electric Railway the owner of a majority of the stock of both the local companies made parties to the suit; the relator's whole claim being that the appellant should bring the traction company within the terms of its settlement agreement with the city, and issue transfers, "because every external cir-

that, if the Brooklyn Heights Railroad Company contracted with the Brooklyn City Railroad for the use of its lines, the operating company became liable to carry passengers over both lines the same as though it was a single line of railroad. When this same company, controlling the Brooklyn City lines, likewise leased the Nassau Electric lines, it assumed the obligation of transferring passengers so that they might make a continuous trip between any two points upon the lines under the control of the Brooklyn Heights Railroad Company; for the purpose of permitting these contracts was 'to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad, with a single rate of fare.'" In affirming this decision, the court of appeals said, in a *per curiam* opinion: "It will be observed that the language of the statute is that 'every such corporation entering into such contract shall carry,' etc. The obligation to carry, therefore, arises from the entering into the contract. The defendant company was the lessee and entered into the contract with the lessor, thereby undertaking to operate the road of the lessor company. . . . In other words, the roads leased by the defendant company in effect became the roads of that company, operated by it; and when it leased other roads and commenced their operation, the obligation was to transfer passengers over all of the roads operated by it for a single fare." 179 N. Y. 450, 72 N. E. 517.

Section 104 of the New York law was held applicable to the defendant in the case of *Blume v. Interurban Street R. Co.* 41 Misc. 171, 83 N. Y. Supp. 989, although, at the time of making the contract bringing all the lines of what had been the Metropolitan system under the management of the Interurban Company, the latter owned no line connected in any way with the Metropolitan system, as to which a contract could be made in the words of the statute, "for the use of their respective roads."

But it was held in *Topham v. Interurban Street R. Co.* 96 App. Div. 324, 89 N. Y. 32 L.R.A. (N.S.)

Supp. 298, that the express exception from § 78 of leases made prior to May, 1891, was applicable to a lease, made prior to that date, of a street railroad, although the lessee had subsequently and since such date consolidated with still other roads, so as to exclude the road in question from the transfer requirement of § 104. Note the language of the court: "The obligation to give a transfer is not imposed upon two roads which made contracts in relation to each other, but where a contract is made between two railroad companies, the statute imposes an obligation upon both companies to give to a passenger a transfer from one road to the other between two points on the railroads or portions thereof which are embraced in such contract. If it had been intended by this provision to include all railroads operated by the contracting parties, it certainly would have been easy to say so; but that is not the obligation that is imposed. It is the right of a passenger to be carried between any two points on the railroads or portions thereof embraced in such a contract, and this language negatives the intention of requiring each contracting railroad to give to passengers transfers to all portions of the lines operated by each contracting company, for the right is expressly limited to the 'railroads or portions thereof' that are embraced in the contract."

Again, it was held in *Mendoza v. Metropolitan Street R. Co.* 51 App. Div. 430, 84 N. Y. Supp. 745, that the railroads to which the provisions of the act were applicable were those which were embraced in the contract; that is, the roads operated or leased by the two contracting roads at the time the contract was made; and that the requirement for transfer did not apply if either of the companies afterwards secured from still another company the use of its road, by lease or otherwise. Here again is conflict, for while this decision is in accord with the *O'Reilly Case*, *supra*, as to roads already held under lease by either of two other roads subsequently contracting, the court says: "But the roads embraced within the contract can only be those operated

cumstance pointed toward the conclusion that it was at least operating the traction line of street railway, if it did not in fact own and control it."

The following clause of the contract is relied on: "Fifth: On and after the 1st day of April, 1903, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated, or controlled by said party of the first part, to the terminus of its line in Point Defiance park, for a single fare not exceeding five cents, and the party of the first part agrees that it will, from and after the date of this agreement, extend its present transfer system for a continuous trip one

way to and from all lines within the city of Tacoma (and including that portion of the Point Defiance line outside of the city of Tacoma), but nothing in this section shall be so construed as to require the issuance of transfers which can be so used on parallel or other lines as to make it possible for a passenger to make a round trip for one fare, nor to prevent the party of the first part from making and enforcing all reasonable rules and regulations necessary, in its judgment, to prevent fraud."

We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community, but denying the right

by the contracting companies at the time the contract is made. . . . Clearly, if either of the companies afterwards secures from another company the use of its road, that road cannot be said to be embraced within a contract theretofore made by the leasing company with another company which is not a party to the second contract."

It was held in *Roosa v. Brooklyn Heights R. Co.* 28 Misc. 387, 59 N. Y. Supp. 664, that § 104 of the railroad law is applicable not where one street railway company is leased by another, but only where there is a traffic agreement or contract for the use of a railroad or a part thereof.

Section 104 of the New York railroad law has been held inapplicable where the leasing company was the lessee of two separate lines within the city of New York, but one of such lines was a steam railroad running over a private right of way, and only converted into a trolley road after it was acquired by the defendant company as lessee. *Barnett v. Brooklyn Heights R. Co.* infra; *People v. Brooklyn Heights R. Co.* 187 N. Y. 48, 79 N. E. 838.

The provision of § 104 of the New York railroad law was held not to require a transfer between two lines controlled by one company under contract with the original operating companies, where such lines were not physically connected, and were not operated as intersecting lines, even though the distance between the termini was not more than 30 feet. *Ketcham v. New York City R. Co.* 48 Misc. 367, 95 N. Y. Supp. 553.

The U. S. circuit court of New York, directing the receivers of certain street railway companies in New York city, took the view in *Re Receiverships of Street R. Cos.*, 161 Fed. 879, that there was no obligation under the statute to continue the use of transfers between independent lines which did not use the route or road of other lines, or any portion thereof, and that the use of the tracks of one company by another for a distance of less than 1,000 feet did not require the exchange of transfers, such use being permissible under § 102, allowing a street railway company to use the track of

another company for a distance not exceeding 1,000 feet. The court advised, however, the continued issuing of transfers between those lines whose use of another company's road is such as to make applicable § 104 of the statute, in order to avoid possible litigation. The fact that a single receiver operated three independent roads, thus subjecting them to a single control, apparently was not considered any reason for exchanging transfers between the lines of those companies.

And see in *Re Dry Dock R. Co.* 165 Fed. 487, where the court gave orders to these receivers, allowing the discontinuance of transfers except at certain designated points between the lines of one of the companies and the Drydock Railroad, the former obstacles to discontinuing transfers having been removed by rearrangement of routes and car movements.

In *Central Trust Co. v. Third Ave. R. Co.* 165 Fed. 494, the United States circuit court of New York, likewise instructing the receiver of certain street railways in New York city, expressed the opinion that a company which constructed a line of street railway with the consent of abutting owners while a transfer agreement was in operation between then-existing roads in New York, and which included the new company when its road was constructed, was not under obligation to continue the transfer privilege on the ground that the consent of abutting owners was given in reliance upon such continuance, if there was no such stipulation in the consent given.

Section 101 of the New York railroad law (Laws 1892, chap. 676), prohibiting any corporation constructing and operating a railroad under that statute from charging any passenger more than 5 cents for one continuous ride "from any point on its road, or on any road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof" within the limits of any city or village; and providing further that "not more than one fare shall be charged within the limits of any such city or village for passage over the main line of road and any branch or

of transfer. But the legal effect of such ruling would be to make a judicial decree consolidating two companies which, under their franchises, were designed to be competing lines,—a result generally held to be void on the ground of public policy, or to work a dissolution of the corporate franchise. Not only would the majority stockholders of the traction company have a right to be heard, but the minority stockholder must have his day in court as well. The right of transfer from one system to another is a matter of contract or right reserved in the franchise, and there is nothing in the railway company's franchise that would compel it to transfer passengers to another, if it be independent in law. The remedy is legislative, and not judicial.

extension thereof, if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article."—was construed in *Bull v. New York City R. Co.* 192 N. Y. 361, 19 L.R.A. (N.S.) 778, 85 N. E. 385, and it was held that distinct lines of street railway originally constructed and operated by different companies, and brought into physical relation with each other by a third line connecting them, do not, although the three lines have by leases and contracts come into the control of one company which is operating them as a single system, constitute a road and connecting branches thereof, or a main line of road and any branch or extension thereof, within the meaning of such provisions.

Construing the same section of the New York law it was held in *Senior v. New York City R. Co.* 111 App. Div. 39, 97 N. Y. Supp. 645, affirmed in 187 N. Y. 559, 80 N. E. 1120, that ownership by one street railway corporation of a majority of the stock of another street railway company, where the two companies are managed by different officers and directors, and the lines operated as distinct and independent lines, does not constitute operation or control of such railway so as to make such section applicable. The view of the court as to the meaning of the statute is thus stated: "A person owning a majority of stock in a corporation cannot be said to be in control of the management of the property of the corporation. He has a control over the corporation so far as he has power to elect its directors, but the corporation is itself a person, and such corporation actually owns and controls its property. The provision here does not relate to the control of the corporation by its stockholders, but to the control of the operation of a railroad by those charged with that duty, as distinguished from the control of a person who operates the railroad. It would be quite absurd to speak of a person owning a majority of the stock of a corporation as being the owner of the property, or as controlling the use to which the property should be put. He may be said in a sense to control the corporation," 32 L.R.A. (N.S.)

The decisions of the Supreme Court of the United States and other authorities which we shall cite sustain appellant in the legal position it has assumed. In *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194, the Pullman Company sought to compel the Missouri Pacific Railway Company to haul its cars over certain lines owned, operated, or controlled by lease; the fact further appearing that the Missouri Pacific owned a majority of the stock of the other lines. The Supreme Court of the United States held that the contract of the Pullman Company was inoperative, except on the line originally contracted with, the court saying: "The Missouri Pacific Company has bought the stock of the St. Louis,

but the corporation itself owns its property, and controls and manages it; and it seems to me that the word 'control,' as used in § 101 of the railroad law, in connection with the word 'operated,' as applying to a corporation which operates and controls another road, applies to the direct operation or control of the operation of the specific railroad sought to be brought within the provisions of the act, and not to the indirect control over a corporation which owns the road by its stockholders."

Study of these two decisions discloses wholly different views of the meaning of this § 101 of the New York law, the *Bull Case* in effect construing the provision of the statute as applicable only to prohibit more than a 5-cent fare between any two points on any one road, either the defendant's or one operated or controlled by the defendant; note the language of the statute,—“from any point on its road . . . to any other point thereof;” on the other hand, the appellate division of the supreme court in the *Senior Case* assumes without apparent consideration of a contrary view that the statute would have prohibited the companies in question from charging more than 5-cent fare over their connecting lines had there been a physical control of the road in its operation, instead of control of the stock of the corporation.

Still another interpretation of § 101 is found in *O'Connor v. Brooklyn Heights R. Co.* 123 App. Div. 784, 108 N. Y. Supp. 471, where it was held that the section was intended to establish the fare for one "continuous ride" from any point on the road of the carrying company, or on any of the roads operated or controlled by it (i. e., by lease or other contract), to any other point on any of said roads; but that it did not provide for transfers even between the lines of one company, because it contemplated and provided in terms for a continuous "ride." This view of the statute is criticized as too narrow in the *Bull Case*, supra.

This § 101 of the New York law, because of a provision exempting such roads as were theretofore constructed, was held in *Barrett v. Brooklyn Heights R. Co.* 53 App.

Iron Mountain, & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain, & Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

In *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667, it was said: "From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation, and have pecuniary interests in it, in which all its

property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation: its members, as natural persons, are merged in the corporate identity."

In *Exchange Bank v. Macon Constr. Co.* (*McTighe v. Macon Constr. Co.*) 97 Ga. 5, 33 L.R.A. 802, 25 S. E. 328, the rule is stated: "Every corporation is a person,—artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corporation, he is not himself the corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."

The case of *Missouri P. R. Co. v. Bolling* (Ark.) 48 S. W. 806, furnishes a concise statement of the rule. Speaking of "evidence tending to prove that the St. Louis, Iron Mountain, & Southern Railway Company acquired a greater part of the stock of the Little Rock & Forth Smith Railway Company, and that the Missouri

Div. 432, 65 N. Y. Supp. 1068, inapplicable to a steam railroad running over a private right of way leased by the defendant and converted into an electric road, first, because the statute had reference to street surface roads only, and not to steam roads; and second, because the road in question was actually in operation prior to the enactment of the statute. The court assumed in this case, without deciding, "that the language of this section is broad enough to limit a railroad company to the collection of a single fare for a continuous ride over two or more separate and distinct railroads constructed by separate companies, and subsequently united in operation by lease or purchase into a single connected system." The case is thus brought into line with the *Senior Case*, supra. 32 L.R.A. (N.S.)

The refusal of the court to apply § 101 of the railroad law in the *Barnett Case*, supra, because of the fact that the leased road was a steam road, was followed in *McNulty v. Brooklyn Heights R. Co.* 36 Misc. 402, 73 N. Y. Supp. 698.

The extension of a city's limits so as to include the lines of a railway company which had been operating outside such limits, and connecting with the lines of a company operating in the city up to the time of the extension, does not require the company whose lines are within the former city limits to carry passengers for one fare, as provided by said § 101, over the line of the outside company, even though such lines are leased by the first company. *Enton v. Nassau Electric R. Co.* 68 Misc. 385, 124 N. Y. Supp. 555. W. A. S.

Pacific Railway Company acquired a great part of the stock of the St. Louis, Iron Mountain, & Southern Railway Company, and that several of the officers of the last-mentioned companies were the same persons," the court said: "But the evidence shows that the two companies remained separate corporations, and that they, by consent, appointed or selected the same persons officers in each company to reduce their expenses. The facts stated do not show that the existence of one was merged in that of the other. The corporations, and their officers and stockholders, are separate persons. The stockholders and officers might be the same and the corporations different." To the same effect: *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 670, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; *Jessup v. Illinois C. R. Co. (C. C.)* 36 Fed. 741; *White v. Pecos Land & Water Co.* 18 Tex. Civ. App. 634, 45 S. W. 209; *Atchison, T. & S. F. R. Co. v. Cochran*, 43 Kan. 225, 7 L.R.A. 414, 19 Am. St. Rep. 129, 23 Pac. 151; *Reg. v. Arnaud*, 16 L. J. Q. B. N. S. 50, 9 Q. B. 806, 11 Jur. 279.

The general law is laid down in *Cook on Stocks and Stockholders and Corporation Law*, vol. 1, § 6: "A corporation is an entity and existence separate from its officers and stockholders. And the inclination of some writers to assimilate a corporation as nearly as possible to a partnership, and to apply to the former the rules applicable to the latter, leads only to confusion and is contrary to the law. The difference between a corporation and a partnership, and the advantages of a corporation over a partnership as a means of doing business, are very marked, and should not be limited by construction. A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person. Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues and they are not thereby merged."

No authority is cited by the city to meet these cases. But we are asked to find as a fact that the traction company is controlled by the railway company, when the testimony shows that an independent company controls both of them. The underlying principle in all these cases, whether so stated or not, is the contract clause of the Federal Constitution. Courts are powerless to compel one company, holding its own franchise, to contract with another, although a majority of the stock be held by the same persons, for the very obvious reason that courts cannot abrogate contracts

formally entered into by competent parties. It may be a grave question whether mergers of corporate interests are to be more favored than the preservation of independence between corporations. In the absence of legislative direction, the courts have generally resolved against the policy of merging independent corporations, although in some cases hardship has followed the rule.

The city council of the city of Tacoma having failed to reserve the right to compel the two companies to transfer passengers, the courts are powerless to compel such transfers, so long as they are legally independent of each other. Courts cannot make contracts or supply omissions in contracts, or bind one company by the contract of the other. It may be that at the time the franchise was granted to the traction company, the city purposely waived the right it might have retained to compel transfers with other lines, but whether the omission comes through design or oversight, the law is the same. The franchise and contract is binding upon both parties as it was written.

Reversed and remanded, with instructions to deny the writ.

Rudkin, Ch. J., and Crow and Morris, JJ., concur.

Dunbar, J., dissenting:

I have no fault to find with the principles of law which are enunciated by the majority opinion, or the rule laid down by the authorities therein cited, but think they have no application to this particular case. They apply to bona fide transactions and actual conditions. But from an examination of the record in this case, I am convinced that appellant is attempting to evade its obligations by a denial of the truth; certainly, so far as the operation of the different tracks is concerned; probably, so far as ownership is concerned. The contractual obligation was with reference to lines owned, operated, or controlled; and, interpreting the actions of the appellant, rather than its assertions, if the proof in this case does not sustain the city's contention that the appellant is at least operating and controlling the traction line, then in my opinion no proof which will satisfy the law can ever be made, where a bare denial is offered by the defendant. These were two lines built and operated as competing lines. The competition was intense, to the extent that ordinary courtesies were refused. There was no track-age connection, and, of course, no exchange of cars. The traction company managed its affairs in every particular. But in 1909 the Puget Sound Electric Railway pur-

chased a majority of the stock of the traction line; it already owning the stock of the railway company. They are managed largely by the same directors. Physical connections were then made. The traction company gave up its business office in Tacoma. Cars of each company are used on the lines of the other indiscriminately; a general superintendent was appointed to take charge of both, and in this appointment the traction company had no voice. The repair shops of the traction line were discontinued and machinery removed to the appellant's shops. All of the managing officers of the traction company quit its service, and it passed absolutely and wholly into the hands of appellant, and its identity was lost. I am assuming, of course, that the Puget Sound Electric Railway, the Tacoma Railway & Power Company, and Stone & Webster are all the same concern. This assumption is justified by the testimony. After this merger, there was nothing left of the traction company as an entity but the flimsy system of bookkeeping, where the traction company is credited and charged as though it really enjoyed a separate existence. I am satisfied from the testimony that this is simply a subterfuge, and that the expense of the bookkeeping is many times repaid by the fees which are saved to the company through its agency. The majority say: "We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community, but denying the right of transfer. But the legal effect of such ruling would be to make a judicial decree consolidating two companies which, under their franchises, were designed to be competing lines,—a result generally held to be void on the ground of public policy." This would be sound doctrine applied to two actually competing lines; but the legal effect of the majority opinion, as I read the testimony, is to permit the inconvenience and hardship which is regretted by the majority, in a case where the public is even deprived of the benefit of competition.

The judgment should be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE H. TWISS

v.

BOSTON ELEVATED RAILWAY COMPANY.

(— Mass. —, 94 N. E. 253.)

Carriers — street car — fireman on running board — negligence.

A fireman riding free on a street car, who, 32 L.R.A. (N.S.)

contrary to known rules of the company requiring him to ride on the rear platform, and forbidding persons to ride on the running boards of cars which are next to the parallel track, takes his position on such running board, is a mere licensee, and cannot hold the company liable for injuries negligently inflicted upon him while there; and it is immaterial that the conductor assented to his remaining there, since he had no authority to waive the rules of the company.

(March 1, 1911.)

A REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court, after verdict in defendant's favor, of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment for defendant.

The facts are stated in the opinion.

Messrs. Coakley & Sherman and William Flaherty for plaintiff.

Messrs. Fletcher Ranney and Everett B. Horn, for defendant:

Any reasonable rule of a street railway company regulating the conduct of its passengers is valid.

McDonough v. Boston Elev. R. Co. 191 Mass. 509, 78 N. E. 141; Pike v. Boston Elev. R. Co. 192 Mass. 426, 78 N. E. 497; Tompkins v. Boston Elev. R. Co. 201 Mass. 114, 20 L.R.A. (N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488.

In order to constitute a waiver of the rules, the plaintiff must show a general, habitual, long-continued practice or custom to violate the rules.

McDonough v. Boston Elev. R. Co. 191 Mass. 509, 78 N. E. 141; Pike v. Boston Elev. R. Co. 192 Mass. 426, 78 N. E. 497; McNee v. Coburn Trolley Track Co. 170 Mass. 283, 49 N. E. 437; Sweetland v. Lynn & B. R. Co. 177 Mass. 574, 51 L.R.A. 783, 59 N. E. 443.

A passenger on the left-hand running board assumes the risk of dangers incident to the position.

Moody v. Springfield Street R. Co. 182 Mass. 158, 65 N. E. 29.

Note. — As to duty of street car company to passenger on running board, see note to Gregory v. Elmira Water Light & R. Co. 18 L.R.A. (N.S.) 160.

Riding on platform or running board of street car as negligence, see notes to Harding v. Philadelphia Rapid Transit Co. 10 L.R.A. (N.S.) 353; Capital Traction Co. v. Brown, 12 L.R.A. (N.S.) 831; and Lobner v. Metropolitan Street R. Co. 21 L.R.A. (N.S.) 972.

Riding on platform as affecting right to recover for injury through accident to train or car, see note to Miller v. Chicago, St. P. M. & O. R. Co. 17 L.R.A. (N.S.) 152.

Morton, J., delivered the opinion of the court:

This is an action of tort for personal injuries received by the plaintiff at or near the corner of Hampden and Northampton streets in Boston, while riding on one of the defendant's open cars. The accident occurred July 31, 1907, at about 11:30 A. M. The plaintiff was a lieutenant in the Boston fire department, and was returning to his station on Northampton street when the accident happened. He was in uniform, and boarded the car about an eighth of a mile from the scene of the accident. When he got onto the car he took a position on the left-hand running board outside the side bar, which was down and properly adjusted, and he remained in that position until the accident. Certain rules of the defendant company were introduced in evidence, as follows:

"43. Side Bar and Chains.

"(a) Side bars on all cars so equipped must, when in service, be properly adjusted and secured in place, and must be raised and lowered at places *en route* when required by special regulations; never while car is in motion. . . .

"(d) Passengers must not be permitted to board and leave the car by getting over or under the bar, and when bar is in use on left side, no person must be allowed to ride on left-hand running board."

"113. Free Riders.—The following persons, when in full uniform and wearing official badge, are entitled, under special considerations and restrictions, to free transportation on cars of the company:

"(b) Firemen.—Members of the fire department and protective fire department.

"(e) The above specified shall ride only on the front platform of box and rear platform of open cars, and not more than two of either class at any one time."

The plaintiff testified that he knew of these rules and knew that the bar was down on the left-hand side for the purpose of preventing persons from entering or leaving the car by the left-hand side. He further testified that the car was comfortably filled; that he did not pay or tender any fare, but intended to ride free; that some persons were standing on the back platform, and that he had ridden on the left-hand running board of other cars in the same vicinity at about the same time of day before, and had seen other firemen doing the same. On cross-examination he testified that "he had never received any permission from any superintendent, inspector, or other officer to ride on the left-hand side when the bar was down, and 32 L.R.A. (N.S.)

knew of no order or rule changing the aforesaid two rules." There was other evidence tending to show the circumstances under which the collision took place; that the conductor nodded to the plaintiff as he got onto the car; that there was no one on the right-hand running board; that there were some spare seats; that the plaintiff was the only one on the left-hand running board and the only one who was injured. At the close of the evidence the court ordered a verdict for the defendant, and reported the case to this court; judgment to be entered for the defendant if the ruling was correct, otherwise, by agreement of parties, for the plaintiff in the sum of \$500.

The defendant concedes that there was evidence of negligence on its part, but contends that it is not liable to the plaintiff, and we think that it is right in so contending. The fact that a person is injured through the negligence of the company while riding upon the running board of a car is not of itself conclusive under any and all circumstances against his right to recover. *Olund v. Worcester Consol. Street R. Co.* 206 Mass. 544, 92 N. E. 720. But in the present case the plaintiff was being transported free, under a rule which required, as a condition of such transportation, that he should ride on the rear platform. Instead of doing that, he rode upon the left-hand running board with the bar down, in direct violation of a rule which he well knew and understood, and which was a reasonable rule, that provided that no one should be allowed to ride there when the bar was down. While he would have been a passenger with the rights of one if riding upon the rear platform (*Dickinson v. West End Street R. Co.* 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60), we think that he must be regarded under the circumstances as at most a licensee, to whom the defendant owed no duty except to refrain from intentional wrongdoing towards him. See *Bowler v. Pacific Mills*, 200 Mass. 364, 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767.

Even if the plaintiff could be regarded as a passenger, we think that his act in taking a position on the left-hand running board in violation of the rule would have to be regarded under the circumstances as a negligent act which contributed directly to the injury which he received. *Moody v. Springfield Street R. Co.* 182 Mass. 158, 65 N. E. 29. Whether the nod given by the conductor was intended merely as a sign of recognition, or whether it was intended as an acquiescence in the plaintiff's taking his position on the running board, is

immaterial. If it was intended as the latter, it was not in the power of the conductor to waive the rules, and the evidence fell far short of showing a custom on the part of firemen to ride on the running board so general and so long continued that it could be found that it was known to the officers having the right to make or change the rules. *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Crowley v. Fitchburg & L. Street R. Co.* 185 Mass. 279, 70 N. E. 56. The result is that, in accordance with the terms of the report, judgment must be entered for the defendant.

So ordered.

IDAHO SUPREME COURT.

JAMES B. McGRANE, Appt.,
v.
COUNTY OF NEZ PERCE, Respnt.
(18 Idaho, 714, 112 Pac. 312.)

Voter — ballot — constitutional provision.

1. Section 1, art. 6, of the Constitution, provides that "all elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall

Headnotes by AILSHIE, J.

Note. — Effect of officers numbering or otherwise supplying means of identifying ballots.

This note is supplementary to the note to *Hope v. Flentge*, 47 L.R.A. 806, where the early cases as to the effect of official marks on ballots is covered.

In the absence of a statute expressly providing that the numbering or otherwise placing of distinguishing marks upon ballots by election officers shall render them invalid, it is generally held that such marks, made by election officers, will not have the effect of invalidating them, since so to hold would place the disfranchisement of voters in the hands of the election officials.

Thus, where a statute provides that "no word or mark written or made, or omitted to be written or made, by the deputy returning officer, on a ballot paper, shall avoid the same," the fact that such officer places a number on the back of each ballot will not invalidate them. *Re South Perth*, 2 Ont. Elect. Rep. 47; *Baker v. Morgan*, *Hodg.* Ont. Elect. Rep. 519.

And the fact that election judges wrote the word "challenged" and the name of the voter on certain ballots does not avoid them, under a statute providing that ballots having on the outside any impression, device, color, or thing shall be rejected, 32 L.R.A. (N.S.)

be the duty of the legislature to enact such laws as shall carry this section into effect."

Same — numbering ballots.

2. Under the provisions of § 1, art. 6, of the state Constitution, it would not be within the power of the legislature to authorize and direct the numbering of ballots to be used at an election.

Same — statutory ballot.

3. Under the provisions of § 408, Rev. Codes, "no ballot must be used or counted at any election, except the legal ballot printed by the county auditor . . . and distributed according to law by the distributing clerk within the polling place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof, whereby it might be distinguished from any other ballot legally used on the same day."

Same — numbered ballots — effect on election.

4. Where an auditor of a county furnished ballots to the election officers of the several precincts of his county, and the ballots so furnished had been numbered consecutively from 1 to 15,000, and the number contained on each ballot corresponded with the number on the stub to that ballot, and the error, mistake, or wrongful act in numbering the ballots was not known to the electors, and the same was done without their knowledge or consent, and no opportunity was presented to the electors for having the error corrected, and the election

since the law was made to protect the voter, and not to disfranchise him. *Wigginton v. Pacheco*, *Rowell*, Cong. Elect. Cas. 322.

And in *McKenzie v. Braxton*, *Smith*, Cong. Elect. Cas. 19, it was held that the numbering of ballots by the judges to correspond with the names of the voters on the poll books, in the absence of a statute expressly so declaring, did not invalidate an election, where no injury was shown to have resulted to the party complaining, on account thereof.

And to the same effect is *Giddings v. Clark*, *Smith*, Cong. Elect. Cas. 91.

And ballots upon the back of which the full name of the judge of the election appears, instead of his initials, will be counted, although it might serve as a distinguishing mark, the voter not having participated in the irregular indorsement. *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405.

And the indorsement of a ballot by an abbreviation of the judge of election's name, instead of with his initials, will not invalidate the vote, where there is no suggestion that it was done with the intention of thereby being able to identify the ballot. *Coulehan v. White*, 95 Md. 703, 53 Atl. 786.

And the writing of a name in a blank space on a number of ballots by a clerk of election, for the purpose of defeating an

was held by using such ballots in the several precincts of the county, the election will not be held void, either upon the ground that the numbering was an invasion of the constitutional secrecy of the ballot, guaranteed to the people, nor upon the ground that the ballots contained distinguishing marks.

Same — statutory construction.

5. The prohibition contained in § 408 of the Rev. Codes, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties; but the statute nowhere prescribes that the penalty for violating this duty or a failure to faithfully discharge it shall be visited upon the electors, or avoid the election.

Same — effect of construction.

6. To hold that the numbering of ballots by the election officers, who are charged with the preparation and distribution of election supplies and ballots, has the effect of rendering an election void, would place it within the power of the officers to disfranchise the entire electorate of their county, and prevent the holding of a valid and legal election, and would turn this statute safeguarding the elective franchise into an instrument of injustice and disfranchisement.

Same — purpose of safeguards.

7. The purpose of the constitutional

election for the office for which such person's name was used, is not such a distinguishing mark as will prevent the counting of such ballots for candidates for other offices. *Graham v. Graham*, 24 Ky. L. Rep. 548, 68 S. W. 1093.

And it was held in *Durgin v. Curran*, 106 Me. 509, 77 Atl. 689, that the placing of a distinguishing mark on a ballot by a ward clerk when it was being counted did not invalidate it.

So, the fact that distinguishing marks were fraudulently placed on ballots after they were deposited in the ballot box will not invalidate them. *Atty. Gen. ex rel. Blanck v. Howcroft*, 107 Mich. 85, 64 N. W. 954. It does not appear in this case by whom the marks were made.

And figures on the back of a ballot will not invalidate it where an election judge testifies that he wrote them on the ballot for the purpose of keeping tally of the number of ballots taken from the envelop as put up by the county clerk, and that it was not done with the intention that any particular voter should get it. *Xerxoth v. Schein*, 206 Ill. 80, 69 N. E. 240.

And very short and faint pencil marks on nearly all of the ballots, evidently made by the election officers for the purpose of checking names, are not distinguishing marks which invalidate the ballot. *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708, 32 L.R.A. (N.S.)

guaranty of "an absolutely secret ballot" and the statutory provisions against "distinguishing" marks on ballots, is not so much to prevent marks and characters on ballots whereby it would be possible to distinguish the ballot of a particular elector, as it is the aim to prevent fraud, corruption, intimidation, and oppression in elections, and to so guard and hedge about the individual elector that he may vote his individual, conscientious, and deliberate judgment without fear of anyone calling him to account therefor, and to prevent the corrupt voter from selling his vote and furnishing to the purchaser satisfactory visual evidence of the casting of the vote, in accordance with the contract.

(December 1, 1910.)

APPEAL by contestant from a judgment of the District Court for Nez Perce County, sustaining a demurrer to a petition to contest a local option election. Affirmed.

The facts are stated in the opinion.

Messrs. Charles L. McDonald and Eugene A. Cox, for appellant:

All provisions of the general election laws of the state of Idaho not in conflict with the terms of the local option statute are applicable to all elections held thereunder.

Gillesby v. Canyon County, 17 Idaho, 586, 107 Pac. 71.

The failure, through ignorance or carelessness on the part of election officers, to remove the number from the ballots cast, does not render them illegal, where the law as to identifying marks only applies to such marks made by the voters. *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153.

And ink marks or blotches on the back of a ballot, probably made by careless handling at the counting of the ballots, will not render it invalid. *Bass v. Leavitt*, — Cal. App. —, 113 Pac. 694.

It was held in *Langley v. Head*, 142 Cal. 368, 75 Pac. 1088, that a tear by election officers could not serve as a distinguishing mark.

And it was held in *Carwile v. Jones*, supra, that the fact that a ballot was torn by the judge in detaching it from the stub did not prevent its being counted. Nothing was said here, however, relative to such tearing amounting to a distinguishing mark.

But in *Sweeney v. Hjul*, 23 Nev. 429, 48 Pac. 1036, rehearing denied in 23 Nev. 430, 49 Pac. 169, where election officers neglected to remove the numbered stubs from several ballots in a precinct, the stubs were held to be distinguishing marks which destroyed the validity of the ballots, there being no numbers on the ballots themselves. The

Numbering the ballots destroys their secrecy.

Brisbin v. Cleary, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Cooley, Const. Lim.* 5th ed. 762; *McCrary, Elections*, chap. 453; *Paine, Elections*, chap. 453; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97.

Statutes providing for a secret ballot are mandatory, and their terms must be complied with.

McCrary, Elections, § 226; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *Fields v. Osborne*, 60 Conn. 544, 12 L.R.A. 551, 21 Atl. 1070; *Slaymaker v. Phillips*, 5 Wyo. 453, 47 L.R.A. 842, 40 Pac. 971, 42 Pac. 1049; *State ex rel. Barry v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Atty. Gen. v. McQuade*, 94 Mich. 439, 53

N. W. 944; *Ex parte Riggs*, 52 S. C. 298, 29 S. E. 645; *Clark v. Hardison*, 40 Tex. Civ. App. 611, 90 S. W. 342; *Brigance v. Horlock*, 44 Tex. Civ. App. 277, 97 S. W. 1060; *Talcott v. Philbrick*, 59 Conn. 478, 10 L.R.A. 150, 20 Atl. 436.

Under the Australian ballot law the use of marks whereby one ballot can be distinguished from another is especially prohibited.

Taylor v. Bleakley, 49 Am. St. Rep. 243, note; 15 Cyc. Law & Proc. p. 357, note 98.

Messrs. D. O. McDougall, Attorney General, O. M. Van Duyn, J. H. Peterson, and Dwight E. Hodge for respondent.

Allshie, J., delivered the opinion of the court:

On the 15th of January, 1909, the commissioners of Nez Percé county made and entered an order calling an election in the

court said: "It was the duty of the election officers to deliver to the elector a proper ballot,—one bearing the water mark, with the strip bearing the number, attached to the right thereof, detached from the stub. It was equally the duty of the voter to know the stub was detached, that the ballot bore the water mark, and had attached thereto the strip on the righthand side bearing the number. He had the means of knowing these facts, and should be held to exercise some intelligence and some diligence in casting his ballot. Where he blindly accepts a ballot from an election officer, bearing marks that will destroy the secrecy of the ballot, he should be held to know that fact. It will not do to cast all responsibility upon the officer except in those matters where the officer has the exclusive right to act, and where his acting would destroy the validity of the ballot."

See also the following cases, which are set out by the court in *MCGRANE v. NEZ PERCÉ COUNTY*; *Farnham v. Boland*; *Re Groton*; *Coughlin v. McElroy*; and *Pennington v. Hare*.

But in *State ex rel. McMillan v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, a different result seems to have been reached.

In *Woodward v. Sarsons*, L. R. 10 C. P. 733, 44 L. J. C. P. N. S. 293, 32 L. T. N. S. 867, it was held that marking the voter's number on ballots at the time they were given out by the officer made them void under a statute prohibiting marks by which they could be identified.

And it was held in *Baxter v. Ellis*, 111 N. C. 124, 17 L.R.A. 382, 15 S. E. 938, that the inscription "O. K." upon the back of ballots was a device which made them void under a statute requiring ballots to be without device. It does not appear in this case, however, by whom the letters were placed upon the ballots.

For a note on constitutionality of statute 32 L.R.A. (N.S.)

providing that ballots be numbered, see 8 L.R.A. (N.S.) 888. For a note on effect of failure to number ballots, see 1 L.R.A. (N.S.) 656.

The argument by which the court in *MCGRANE v. NEZ PERCÉ COUNTY* sustains its decision appears to be directed more to the question whether the ballots cast were illegal because of identifying marks than to the question whether the numbering of the ballots and the consequent possibility of identifying them violated the constitutional guaranty of the secrecy of the ballot. In so far as the decision rests upon the reasoning that the voters who cast the ballots were not in fault, and ought not to be disfranchised because of the violation of the election law by the election officers, it ignores the possibility, or perhaps the probability, that many of the qualified electors who did not vote at the election may have been deterred by the knowledge that if they did vote, the numbering of the ballots rendered it possible for others to ascertain how they voted. If but comparatively few of the ballots cast at an election bear identifying marks, the consideration of the legality of those ballots suffices; but where, as in the *MCGRANE CASE*, all the ballots provided for the use of the electors bear identifying marks, the deterrent effect of the realization of this fact upon qualified electors who, because of timidity or from considerations of self-interest, may be unwilling to have it known how they voted, cannot properly be ignored. In this situation the very publicity of the fact that the ballots bore marks which might serve to identify them, and the absence of the furtive intent which characterizes the making of identifying marks on an occasional ballot emphasize the gravity of the objection based upon the violation of the constitutional guaranty of the secrecy of the ballot.

J. T. W.

county of Nez Percé to determine whether or not intoxicating liquors should be sold as a beverage in that county. The election was called to be held on the 9th day of March following. Ballots printed under the direction of the county auditor, and by him distributed to the election officers of the several precincts of the county, were in the following form:

| | |
|--|---|
| No. 3,403. Nez Percé County Local Op- tion Election, March 9th, 1910. | <div style="display: flex; justify-content: space-between;"> No. 3,403. </div> <p>Local Option Election.</p> <p>"Shall the sale or disposal of intoxicating liquors as a beverage be prohibited in the County of Nez Percé, Idaho?"</p> <div style="display: flex; justify-content: space-around; margin-top: 10px;"> <div style="border: 1px solid black; padding: 5px 20px;">Yes.</div> <div style="border: 1px solid black; padding: 5px 20px;">No.</div> </div> |
|--|---|

This ballot complied with the requirements of law, with the exception that it should not have been numbered. The statute (§ 405, Rev. Codes) provides for numbering the stub, but does not authorize the numbering of the ballot. According to the complaint, the fact that the ballots had been numbered was not discovered by the electors generally, or by anyone except the auditor and printer, and possibly some of the election officers, prior to the opening of the polls on election day. The election was held, and resulted in 3,444 votes being cast in favor of the proposition submitted and 2,612 votes against it. The record shows that 10,388 qualified electors were registered and were entitled to vote at this election, and that the total number of votes cast was 6,050.

It is alleged that this ballot did not afford the plaintiff and the electors generally of Nez Percé county the right of a secret ballot, and that it was in violation of § 1, art. 6, of the state Constitution, which provides: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect." It is also alleged that since these ballots were numbered consecutively from 1 to somewhere in excess of 15,000, and were distributed in consecutive order, it was possible for the election officers and others to identify the ballot cast by any elector, and thereby destroy the secrecy of the ballot, guaranteed to the elector by the Constitution. It is also alleged that this means of identification resulted in intimidating some voters, 32 L.R.A. (N.S.)

so that they refused to vote at all, while others were not able to vote their deliberate convictions for fear of their ballots being identified and thereby exposing them to censure and obloquy from those who voted differently or who were advocating the opposite side of the question. It is further alleged that these numbers constituted identifying and distinguishing marks on the ballots, in violation of the statute. Rev. Codes, § 408.

The defendant demurred to the complaint and the demurrer was sustained, and judgment was thereupon entered against the plaintiff, from which this appeal has been prosecuted.

Now, in the first place, the Constitution of this state (§ 1, art. 6, supra) guarantees to the electors "an absolutely secret ballot;" and counsel argue that the legislature could not constitutionally enact an election law which would provide for and authorize the numbering of ballots, and that if the legislature could not authorize such a ballot, it must necessarily follow that election officers, exercising the political power of the state, cannot furnish the electors with such ballots, and thereby deprive them of the absolute secrecy of their ballots. This proposition requires a brief analysis to detect whether it be sound or faulty. In the outset, it is perfectly safe to say that the legislature would have no authority, under this constitutional guaranty, to require the numbering of the ballots. The authorities to that effect are quite uniform. *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 679; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Paine, Elections*, chap. 453; *McCrary, Elections*, §§ 194, 195, 400, 413. Now that it must be conceded that the legislature could not, in the exercise of its constitutional power, direct the numbering of ballots, the final and decisive question recurs: Is an election valid where the ballots have been numbered without the knowledge or consent of the electors, and the electors themselves are innocent and free from fault?

The local option statute (§ 10, Laws 1909, p. 13) makes the general election laws applicable to the printing of tickets and furnishing supplies in connection with holding an election. See *Gillesby v. Canyon County*, 17 Idaho, 586, 107 Pac. 71. Section 408 of the Revised Codes provides that "no ballot must be used or counted at any election except the legal ballot printed by the county auditor . . . and distributed according to law by the distributing clerk within the polling place. And no ticket must be distributed by the distrib-

uting clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof whereby it might be distinguished from any other ballot legally used on the same day. . . . No elector shall be permitted to vote any other ballot than the one he received from the distributing clerk." It is alleged and conceded that these ballots were furnished by the county auditor and were the only ballots furnished for this election. All the ballots used throughout the county were open to the same objection, namely, that they were numbered. No two ballots contained the same number, but the numbering was consecutive from 1 to 15,000, and the ballots were furnished to the different precincts in books of 100 each. The ballot in each instance contained the same number contained on the stub from which that ballot was taken. Again, it must be conceded that under the provisions of this statute (§ 408), the auditor was forbidden to furnish ballots that were numbered, and likewise the election officers were forbidden to distribute to the electors ballots that contained distinguishing marks. These numbers were not on the back of the ballots. There was, in fact, no distinguishing mark on the back of the ballot; the numbering was on the face of each ballot. The question of numbered ballots has frequently been before the courts of states where a secret ballot is guaranteed, and so we turn to the decisions for light on this question.

In *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, 366, the supreme court of California had under consideration the question as to whether a ballot should be counted where the numbered stub had been left attached to the ballot, thus furnishing the same facilities for identifying the ballots as was furnished in this case. The court said: "We hold that these ballots were properly counted, and likewise those ballots were properly counted which the officers of election placed in the ballot box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or misconduct upon the part of those officers may render them liable to severe penalties, but that is all. The law as to identifying marks refers to marks made by the voter, and it is only marks made by him that demand the rejection of the ballot. After citing many cases to the point, this court said in *People ex rel. Lee v. Prewett*, 124 Cal. 13, 56 Pac. 621: 'The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it

shall appear that a fair election and an honest count were thereby prevented.'"

The same question again arose in California in the case of *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101, and the court quoted with approval from *Farnham v. Boland*, and also from *People ex rel. Lee v. Prewett*, supra, and said: "The failure or neglect through ignorance or carelessness on the part of the precinct election officers, to remove the number of the ballot, did not have the effect to make the ballot illegal on the ground of a distinguishing mark placed thereon by the voter."

As late as 1909, the question of numbered ballots came before the supreme court of New York in *Re Groton*, 63 Misc. 370, 118 N. Y. Supp. 417, over an election where in the ballots were numbered on the back. The court, in disposing of the matter, said: "These ballots were all alike in the respect complained of, those cast for and those against the propositions. The election officers counted them all, determined that they were valid; no one raising an objection or suggestion to the contrary. The ballots plainly disclosed to each voter this defect, and every voter could plainly see the error in the printing of the ballot; but it does not appear that anyone made objection. Quite possibly the voters favoring license, or the advocates and leaders of that side of the questions, thought the defect would tend to their advantage; and perhaps it did. At any rate, they did not protest to the election officers, either before or at the canvass of the votes. They waited until the votes were cast and all counted and allowed, and until the result was declared and the official certificate thereof made and filed, showing a majority for 'no license,' and that the petitioner and those favoring license were defeated. Then they made their protest and complaint. Manifestly their protest should not be allowed, unless the law requires it. Section 88 of the election law [Laws 1896, chap. 909, p. 947] provides for the correction of the ballots when the error is timely brought to the attention of the officer charged with the duty of preparing them. It cannot be the purpose of the law to afford an opportunity for those interested in the result to proceed to a vote and count, without objection or protest, and then, when the result is adverse to their wishes, to give them another chance upon a palpable error which could have been corrected had they called attention to it; but, aside from the absurdity of such a holding, the principles enunciated in *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, 42 N. E. 536, are applicable to this proceeding, and sufficient to require a denial of this application. It is there said

(p. 146): "We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the wilful misconduct of election officers in performing the duty cast upon them."

In *Winn v. Blackman*, 229 Ill. 198, 120 Am. St. Rep. 237, 82 N. E. 215, decided in 1907, the supreme court of Illinois was called upon to determine what constituted distinguishing marks, as the same were contained on ballots used at a general election. In the course of a somewhat extended and interesting discussion of the matter, the court said: "The distinguishing mark prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of a mark put upon the ballot to indicate who cast it, and to furnish the means of evading the law as to secrecy. . . . In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others."

In *McClelland v. Erwin*, 16 Okla. 622, 86 Pac. 287, the supreme court of Oklahoma, in considering what constituted a distinguishing mark made on a ballot, said: "We think that, to constitute a distinguishing mark, that the mark, whether made by the use of a letter, figure, or character, should be such a mark as shows an intention on the part of the voter to identify or distinguish his particular ballot from others of this class; and any mark inadvertently made on a ballot, or made through carelessness or ignorance, which does not show upon the face of the ballot that such mark was made with the intention of distinguishing that ballot from others of the same class, or that that result would be accomplished by the mark, should not be treated as a distinguishing mark. Human experience teaches us that it is often very difficult to preserve absolute cleanness and neatness of the ballot; that in marking the various names on the ballot with the device provided by the election officers, a man will, through inadvertence or carelessness, place a stamp where it is not intended to be, and, on discovering the error, will immediately correct it, and at the same time this inadvertent or careless marking will not be done with the intention of identifying this particular ballot, nor will such be the result; nor do we think that the law should be so strictly construed as to render, in the absence of fraud, such a ballot illegal."

The same court, as late as 1908, in *Eufaula v. Gibson*, 22 Okla. 507, 98 Pac. 565, quoted and approved the foregoing lan-

guage from the *McClelland Case*, and in course of the opinion added the following observation: "A voter ought not to be disfranchised and his ballot rejected where, as in this case, an election official improperly marks or numbers it, when it is not shown when it was done, or that it was done with the connivance, consent, or knowledge of the voter, and for the purpose of distinguishing it."

Connecticut was one of the first states of the Union to adopt what is popularly known as the Australian ballot system, and in view of that fact it is worth while observing that in the case of *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854, the court, in considering distinguishing marks affecting the secrecy of the ballot, said: "Marks upon the face of ballots, which appear or are shown to have been made accidentally, and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith either appears upon the face of the ballot or is shown by proof, do not render the ballots void." And to the same effect was the holding of the supreme court of Nebraska in *State ex rel. Waggoner v. Russell*, 34 Neb. 116, 15 L.R.A. 740, 33 Am. St. Rep. 625, 51 N. W. 465, wherein it was said: "It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to, and not distinguishable from, others of a designated class." In *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116, the supreme court of Minnesota says: "In the eighth precinct of the ward, ninety-three ballots were cast and counted for the appellant, and forty-two for the respondent, which had been numbered without the knowledge of the electors casting them, by the judges of election, by reason of a misunderstanding of the law on their part. These ballots were properly counted for the respective parties. To hold otherwise would place it in the power of the election officers to disfranchise electors at their pleasure." See *Parker v. Hughes*, 64 Kan. 216, 56 L.R.A. 275, 91 Am. St. Rep. 216, 67 Pac. 637; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, 42 N. E. 536; *Peabody v. Burch*, 75 Kan. 543, 89 Pac. 1016, 12 A. & E. Ann. Cas. 719.

Authorities might be multiplied to the foregoing effect, and it will be noted from

an examination of them that while they all hold that numbering or other distinguishing marks on a ballot is contrary to both the letter and spirit of the law guaranteeing a secret ballot nevertheless this alone will not justify the rejection of the ballot upon the canvass of votes, unless it appears that the numbers were placed there either by the voter, for the purpose of designating and distinguishing his vote, or by someone else, with his knowledge and consent, and with the intention of accomplishing such purpose.

While our statute (§ 408, *supra*) prohibits the election officers furnishing or distributing ballots containing such distinguishing marks, they have nevertheless done that very thing in connection with holding the election now under contest. It is not difficult to say in advance of their action what they should have done and should not have done. The law is clear, and it was the unmistakable duty of the officers to follow its mandates; but we are now confronted with a condition, and not a theory. They have acted, and the election has been held. The electors have cast their votes. The electors have already been subjected to the predicament of casting their votes under circumstances which, at least, rendered it possible for the secrecy of their ballots to be invaded. This was done solely by and through either the negligence or wrongful act of the printer or officers charged with the preparation and furnishing of the ballots. The law does not say that an election shall be void under such circumstances. It does not speak of the condition after it has arisen, but contains directions and commands to the officers as to how they shall act, and these directions and commands are given in advance of the election. After all these things have occurred, the question arises as to whether the court shall visit the results and penalties of the negligence or wrongdoing of the election officers upon the innocent electors, and declare their votes illegal and the election void, and thereby rob the people of their right of suffrage until the time arrives for another election. The question is simply reduced to this: Shall the electors be visited with two invasions of their rights instead of one? Shall they be deprived of the right of suffrage for the time being, because their officers have acted negligently or wrongfully in the preparation of ballots, or shall the election be sustained and the penalties, if any, be visited upon the parties responsible for the errors or wrongs which have been committed? The same rule that will apply to numbered ballots in this election will necessarily apply in a general election. Now, if a general election is to be held

void on account of such an error on the part of the election officers, which extended throughout the county and into every precinct thereof, we would have the anomalous condition of the officers of a county, who might not have succeeded in being renominated for their respective offices, or who feared they might not be re-elected, furnishing the electors with numbered ballots, so as to avoid the entire election, and thereby enable the officers to hold over for two years in the very offices for which the election is being held to elect their successors. This would be allowing the officers to profit by their own mistake or wrong, and placing a double penalty upon the people. Under the laws of this state, a general election can only be held biennially; and so, if it is not held on the day fixed by law, there will be no other general election for two years thereafter, and in the meanwhile the old officers will hold until their successors are elected and qualified. Rev. Codes, § 32a.

While we are obliged to condemn in unqualified terms the ballots used in this election, and hold that they were not in conformity with law, in that they were numbered, we also hold that the electors of Nez Percé county were not chargeable with this error or mistake, and that the wrong of the officers cannot be visited upon the electors, so as to deprive them of the right of suffrage, where the electors themselves have not been parties to the wrong. Two wrongs will no more make a right in law and government than in morals. To follow up the wrongful preparation of ballots with setting aside the election would only be adding another injury to an already outraged electorate.

Attention is also called to the provisions of § 407 of the Revised Codes, which provides as follows: "Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or descriptions of the candidates nominated for office, or in the printing of the tickets, the probate court of the county may, upon application of any elector, by order, require the county auditor or municipal clerk to correct such error, or to show cause why such error should not be corrected." This section provides for the correction of just such errors as occurred in this case, on application to the probate judge of the county. Of course, according to the allegations of the complaint, the electors did not discover the error until the polls had opened, and, of course, the provisions of this section would not have been available to accomplish any real results at this present election. It does show, however, that the purpose of the lawmakers was to provide for correcting such errors and mis-

takes as this that might occur in the preparation of ballots.

At this point, it is well to observe that no contention is made that the secrecy of the ballot of any elector was actually invaded, or that the vote of any person has been in fact identified or disclosed. The whole complaint made is that it was rendered possible, and not that the thing was actually accomplished, nor is it contended that it was done with a purpose of invading the secrecy of the ballot, or that the printer who printed the ballots or the officers who furnished them did so wrongfully, intentionally, or criminally, or that it was anything other than a negligent act or mistake. While the Constitution guarantees "an absolutely secret ballot," it is nevertheless true that "absolute" secrecy is practically impossible under the prevailing method of printed ballots, which are delivered to the elector, and which he is permitted to handle, and on which he may mark his choice with a pencil. The law tells him just where and how he shall mark his choice of candidates, and the statute of this state also directs that there shall be a blank column printed on the ballot wherein the elector can write the names of any persons he desires for any particular offices, and it is also true that in many of the precincts of the several counties no nominations for precinct officers are usually made, and the electors are authorized to write upon the ballot in the proper place their choice for justices of the peace and constable. Now, it is quite clear that the handwriting of almost any elector may be identified, not only by the person himself, but by others who are acquainted and familiar with his handwriting. It is not only true that identification may be had through this means, but it may be made by the manner or method of marking the ballot, and yet those marks may have been made in substantial compliance with the statute. Again, the man fresh from the field, the forge, the carpenter shop, or the mason's trade, may leave the imprint of his fingers on his ballot, so that not only he, but the election officers and bystanders, may be able to identify the ballot, and still this has been done unintentionally and innocently, and without any purpose or intent of leaving distinguishing marks upon the ballot. The purpose of the law in pronouncing against distinguishing marks and requiring secrecy was to guard against the corrupt voter selling and delivering his vote to the vote purchaser, so that he might not identify the article that he was selling to the purchaser. A man who will corrupt a voter will not trust to the mere word of that voter as to whether he has deliv-

ered the vote according to contract. He will want some visual evidence of the performance of the contract before he parts with the consideration. These are some of the things the law intends to protect the people at large against, and at the same time it intends to guard the individual elector from intimidation and undue influence and greater temptation than he is able to withstand. It leaves the voter so that he does not run the risk of losing a position, being thrown out of employment, or subjected to various annoyances on account of having cast his vote in a given way, or having failed to vote as he had promised to do. Under this method, there is no way of knowing whether he will vote as he promises, and but little inducement for extracting from him a promise at all.

We conclude that the judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, Ch. J., concurs.

KANSAS SUPREME COURT.

HENRY S. IRETON, Appt.,

v.

R. M. THOMAS.

(— Kan. —, 113 Pac. 306.)

Deed — warranty — breach — levee — flooding land.

Where a portion of a tract of land is appropriated under the authority of chapter 69, Gen. Stat. 1909, and a levee is erected thereon to a sufficient height to dam up the surface water naturally flowing therefrom, which levee covers about 15 acres of the land, and thereafter the land is sold to a purchaser who actually sees, or has an opportunity to see, the levee, and the owner of the land executes to him a deed with the usual covenants of warranty, with no exception referring to the levee, the purchaser has no cause of action against the seller for a breach of warranty by reason of such encumbrance.

(February 11, 1911.)

Headnote by SMITH, J.

Note. — *Effect of purchaser's knowledge of encumbrance in action for breach of covenant.*

This question was treated in the note to *Browne v. Taylor*, 4 L.R.A. (N.S.) 309, and the present annotation, like that of which it is a continuation, is limited to decisions involving the question of the effect of mere knowledge of an encumbrance in an action for breach of a covenant against encum-

APPEAL by plaintiff from a judgment of the District Court for Neosho County in defendant's favor in an action brought to recover damages for an alleged breach of covenant of warranty against encumbrances. Affirmed.

The facts are stated in the opinion.

Mr. J. E. Torrance for appellant.

Messrs. W. R. Cline and J. Q. Stratton, for appellee:

The levee was not an encumbrance.

2 Tiffany, Real Prop. § 397, p. 906; Rawle, Covenants, §§ 77, 78; Lindley v. Dakin, 13 Ind. 388; Kellum v. Berkshire L. Ins. Co. 101 Ind. 455; Demars v. Koehler, 60 N. J. L. 314, 38 Atl. 808; James v. Lichfield, L. R. 9 Eq. 51, 39 L. J. Ch. N. S. 248, 21 L. T. N. S. 521, 18 Week. Rep. 158; Pease v. Christ, 31 N. Y. 141.

branches either physical or of title, and consequently does not include cases involving the effect of knowledge in case of other covenants than those against encumbrances.

The few cases which have been decided since the compilation of the earlier note accord with the general rules therein deduced, and, in view of this fact, further discussion thereof at this time is deemed unnecessary.

Encumbrances affecting title.

In *Simons v. Diamond Match Co.* 159 Mich. 241, 123 N. W. 1132, it was held that an outstanding lease constituted a breach of a covenant against encumbrances, although the covenantee had knowledge of the tenant's possession and claim at the time of the purchase. *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039, is to the same effect.

And in *Doyle v. Emerson*, 145 Iowa, 358, 124 N. W. 176, it was held that notice to the purchaser, of a lien for paying taxes on the property purchased, would not protect the seller from his covenant against encumbrances, it being said that the covenant was broken as soon as made.

In *Maitlen v. Maitlen*, 44 Ind. App. 559, 89 N. E. 966, it was held that the purchaser's knowledge of the existence of a lien against property, at the time of receiving the deed, did not affect his right to sue for a breach of a covenant against encumbrances. This was upon the ground that since a covenant against encumbrances runs with the land, the grantee may assume that the lien will be taken care of without recourse to the land itself. But that a bare covenant against encumbrances is personal, broken when made, if at all, and does not run with the land, see *Simons v. Diamond Match Co.* supra.

Encumbrances affecting physical conditions.

In *Patterson v. Freihofer*, 215 Pa. 47, 64 Atl. 326, it was held that a purchaser 32 L.R.A. (N.S.)

Even in states where a highway is regarded as an encumbrance, though a conveyance of land as bounded by the highway passes the land to the center of the highway, subject to the highway use, the grantor is not liable, under his covenants, on account of such highway.

2 Tiffany, Real Prop. § 397, p. 907; Rawle, Covenants, § 85; *James v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731; *Freeman v. Foster*, 55 Me. 508; *Watts v. Welman*, 2 N. H. 459; *Frost v. Angier*, 127 Mass. 212; *Patten v. Fitz*, 138 Mass. 456; *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845; *Cincinnati v. Brachman*, 35 Ohio St. 289.

of property conveyed by deed containing covenants against encumbrances could set up breach thereof in that an adjoining owner had a right to the use of certain cesspools and privy wells, opened and maintained on the purchased premises, as a defense to an action for purchase money, although such encumbrances were open and visible, and he had knowledge thereof, it being said that "when one protects himself against an encumbrance by a positive covenant that the property is to be conveyed to him clear of all such encumbrance, he is entitled to the benefit of his contract whether he had knowledge of the existence of the encumbrance or not."

And in *Brodie v. New England Mortg. Secur. Co.* 166 Ala. 170, 51 So. 861, in holding that an outstanding right in a third party to extract rosin from pine timber conveyed is an encumbrance, and within a covenant against encumbrances, even though the grantee had knowledge of such right, the court said: "Knowledge on the part of the grantee, of an encumbrance on the lands conveyed, such as the one alleged in the complaint, does not estop him from recovering of the grantor all damages suffered by a breach of the covenants of his deed against such encumbrances. Probably the grantee relied upon the covenant, and would not have accepted the deed but for the covenant. The grantor should have excepted this lease from his covenant, if he desired not to be bound thereby."

And in *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496, it was held that a covenant against encumbrances was breached by a building restriction in the chain of title, of which the grantee had notice.

For cases involving the effect of knowledge of the existence of a public highway, private way, or a railroad right of way across land at time of conveyance, as breach of a covenant against encumbrance, see note to *Van Ness v. Royal Phosphate Co.* 30 L.R.A. (N.S.) 833. G. J. C.

Smith, J., delivered the opinion of the court:

The appellant brought suit against the appellee, alleging that the appellee executed and delivered to him a certain deed of general warranty for a tract of land in Neosho county containing 276.29 acres; also, that the said premises were encumbered with a certain easement or servitude, known as a levee, running through said land and occupying a large portion thereof, to wit, about 15 acres, which levee was under the control of the board of county commissioners of that county and subject to special taxes levied for repairs; that it also had the effect of holding surface water on the land to the great damage and detriment thereof; that, by reason of such levee and the possession and control thereof by the board of county commissioners and their superintendent, he has no control or possession of that portion of land so occupied by said levee; that the levee was and is of no benefit to the land; and that by reason thereof there is a breach of appellant's covenant of warranty against encumbrances; and praying for damages in the sum of \$5,006. To this petition the appellee demurred. The court sustained the demurrer, and the appellant brings the case here. The only question in the case is whether there was error in the ruling.

There can be no question under the authorities but that the levee and the right of the county commissioners and their superintendent to enter upon the land and repair the same constituted an encumbrance upon the land. It is conceded in the briefs that the levee was erected under the authority of chapter 69, Gen. Stat. 1909, that the statute is constitutional, and a levee erected under the act is a public utility. See *Missouri, K. & T. R. Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809. The appellant, however, contends that the levee is less a public utility than is a public highway, and hence falls within the quasi public easements. We see no force, however, in this distinction. The state has no power to take the land of an individual under the power of eminent domain, except for public use, and must compensate the owner therefor or provide for such compensation. The extent of the public use does not seem to be determinative of the right.

The only real question involved is whether the levee is such an encumbrance that, under all the circumstances, the existence thereof constituted a breach of the covenant of warranty. It is conceded in appellant's brief that the encumbrance is analogous to that of a public road, and it is contended that a public road is an encumbrance upon land such that, if the land be

conveyed without any exception of the highway, it constitutes a breach of the covenant of warranty. This seems to be the law by the decisions of the courts generally in the New England states and some other states, and it is conceded not to be the law by the decisions of the courts of New York, Pennsylvania, and Wisconsin. This question seems never to have been decided by this court. We conceive that it would be a great surprise to the people and to the bar of the state if this court should decide that a public highway is such an encumbrance.

Distinctions have been made that the knowledge or want of knowledge of the purchaser, of an existence of an encumbrance upon land, was determinative of whether or not it constituted a breach of warranty. No general rule can be based upon this distinction. One may buy a tract of land knowing that it is encumbered, by a mortgage for instance, or that some outstanding title exists, and rely upon the warranty as a guaranty that the mortgage will be discharged or the title perfected, and his knowledge of the existence of the encumbrance would not defeat his right to recover on the covenant in case the mortgage should not be discharged or the title be not perfected. The proper distinction, it seems to us, is whether the encumbrance is a physical one, open to the view of the purchaser, and which, from the very nature of the case, is a continuous easement or servitude. For instance, the public have a right to the continuance of a flowing stream across one's land. The owner of the land may divert the stream from its channel upon his own land, provided he returns it to the channel also upon his own land. He may not prevent the stream from crossing his land, or from entering upon the land, or from passing therefrom, in the proper channel. In a sense, this constitutes a servitude upon his land, yet it would nowhere be held that the existence of the stream constitutes a breach of a covenant of perfect title.

The true principle of interpretation of contracts by the courts is to give effect to the intention of the contracting parties, and it is not to be presumed that a seller of land would make a conveyance of land and warrant against an encumbrance which is plainly visible upon the land, and which, from its very nature, cannot be removed, with the understanding that he must pay such damage as its continuance may occasion the purchaser. Neither is it to be presumed that a purchaser would make his purchase upon the assumption that the grantor was to remove the encumbrance

which, under the law, known to each, the grantor has no right to remove or which is incapable of being removed. In other words, it is not to be presumed that two contracting parties would make a contract of sale and purchase of land which is broken the instant it is completed, and the only possible remedy of which is the payment of damages by the grantor to the grantee,—in effect that the grantor should immediately repay a part or the whole of the purchase price. It is more reasonable to presume that both the grantor and the grantee, in fixing the purchase price, would consider the damages necessarily and inevitably following from the continuing of the encumbrance, and contract with reference to such physical fact.

Both the grantor and the grantee, when consummating the sale and purchase of the land in question, are presumed to know of the physical existence of the levee upon the land, and to know that it could not be removed by any act of either of them, and that the public had a right to maintain the same in perpetuity; and it is only reasonable to conclude that the parties contracted with this in view, and that the purchaser did not rely upon any covenant for the removal of the encumbrance occasioned by the levee, or with any expectation of remuneration for any damage caused thereby.

It may well be conceded that a greater number of courts of different states of the Union, strictly construing like covenants, have held similar easements or servitudes upon land as a breach of the covenant. The question has not been heretofore decided in this state, we believe, as between the grantor and grantee; but there is, as is conceded by the appellant, very respectable authority for holding this view, and we are impressed with the idea that it is sustained by the better reasoning. "Where, however, the encumbrance does not affect the title, but the physical condition of the property, *e. g.*, an open, notorious easement of which it is the servient tenement, the purchaser must be presumed to have seen it, and to have fixed his price with reference to the actual condition of the land at the time, and such encumbrance is no breach of the covenant." *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542. See also *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Lalonde v. Wentz*, 18 La. Ann. 289; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85.

The judgment is therefore affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

WILLIAM FLYNN, Plff. in Err.,
v.

GEORGE BOGLARSKY et al.

(— Mich. —, 129 N. W. 674.)

Libel — representations to police magistrate — privilege.

1. A petition presented to a police magistrate, charging misconduct on the part of occupants of a dwelling and asking that they be required to move therefrom, is if the charges are pertinent, material, and positive, absolutely privileged, although it cannot properly be called a pleading in a case.

Trial — libel — privilege — question for jury.

2. The court cannot take from the jury the consideration of the excessive character of the publication, or malice in the circulation about the community, and publication in the public press of a petition designed for presentation to a police magistrate, containing charges of misconduct of a libelous character against the occupants of a dwelling and asking that they be required to remove therefrom.

(February 1, 1911.)

ERROR to the Circuit Court for Wayne County to review a judgment in defendants' favor in an action brought to recover damages for the publication of an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. Philip A. McHugh and William Henry Gallagher, for plaintiff in error:

The petition addressed by the defendants to the judge of the police court was not an absolutely privileged communication.

Folkard's Starkie, Slander & Libel, § 208, p. 267; *Miller v. Nuckolls*, 77 Ark. 64, 4 L.R.A.(N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 A. & E. Ann. Cas. 110.

Assuming the petition to be qualifiedly privileged, there was such evidence of malice as to entitle the plaintiff to go to the jury.

Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181; *Conroy v. Pittsburgh Times*, 139 Pa. 334, 11 L.R.A. 725, 23 Am. St. Rep. 188, 21 Atl. 154.

Mr. James H. Pound for defendants in error.

Note. — Privilege of informal communication with respect to criminal charge.

This note is supplementary to one on the same subject appended to *Miller v. Nuckolls*, 4 L.R.A.(N.S.) 149.

Where persons who have been defrauded of goods have probable cause to believe that

Stone, J., delivered the opinion of the court:

The plaintiff brought suit in the Wayne circuit court against George Boglarsky, Joseph Reck, John P. Vollrath, and others for publishing an alleged libel, consisting of a petition addressed to the judge of the police court of the city of Detroit, the petition being in the following words and figures:

Detroit, Nov. 2, 1907.

To the Honorable Judge of the Police Court:—

We, the undersigned, do hereby request that Mr. and Mrs. Wm. Flynn, now residing at 241 Russell street, upstairs, be requested to move from said premises, and vacate entirely the immediate neighborhood of 241 Russell street, inasmuch as making their residence there. The grounds for our petition is due to the obnoxious manner the said parties conduct themselves in the forced relations with their immediate neighbors, as disturbers of the peace, quarrelsome, and a general nuisance to the peaceful citizens about them. We sincerely pray, your Honor, that you grant our petition, which we assure you is from no personal prejudices, and herewith affix our signatures.

Mr. and Mrs. George Boglarsky,
241 Russell St.

Mr. and Mrs. J. C. Hacker,
243 Russell St.

Fred Foss,
252 Russell St.

B. Marschall,
257 Russell St.

A. Moeller,
245 Russell St.

Jos. Reck,
237 Russell St.

Mrs. Becker,
232 Russell St.

Mr. and Mrs. J. P. Vollrath,
121 Sherman St.

Dr. and Mrs. H. C. Beck,
119 Sherman St.

Mrs. Ponkey,
248 Russell St.

Mrs. Weber,
125 Sherman St.

The case was tried before a jury. The testimony of the defendant George Boglarsky (called as a witness on behalf of the plaintiff) showed that the petition was signed by defendants Boglarsky and Joseph Reck, and was delivered to the defendant Vollrath without his signature, and returned by him bearing his signature, and that the signatures of some of the other defendants were affixed by members of their families. He further testified that he had been annoyed and disturbed in the peace of his home by the plaintiff and the plaintiff's wife; that he visited Police Justice Stein and told his story to him; that the police justice told him to present a petition signed by the residents in that locality; that accordingly he caused the petition set forth above to be prepared by a law student, then signed it himself, and caused it to be signed with the names of the other persons appearing upon it; and that after securing said signatures it was presented by him to Police Justice Stein. The testimony of Police Justice Stein was to the effect that he had been visited by the defendant George Boglarsky with reference to his troubles with the Flynn, but that he had not directed the preparation and presentation of the petition above set forth, or of any other petition of like character, and that such paper was of no force and effect, and served no purpose in the court over which he presided. The plaintiff testified to the publication of the said petition in the daily press, to the falsity of the matters therein contained, and to the notoriety, annoyance, inconvenience, and damage resulting to him, and thereupon rested his case. The defendants thereupon moved the court to direct a verdict of no cause of action, upon the ground that the petition was an absolutely privileged communication, and the presenting of it to the police justice afforded no basis for the plaintiff's case, which motion was allowed by the court, and a verdict of no cause of action was directed. The case is here upon writ of error. Error is assigned by plaintiff upon direction of the verdict as to defendants George Boglarsky, John P. Vollrath, and Joseph Reck.

For the purposes of this case, the plain-

a certain individual was a party to the fraud, the preparation and signing of a paper by them stating that they had been "robbed and swindled" by such individual and others, and agreeing to bear between them the expenses of a criminal prosecution, is lawful and is a privileged communication in the absence of actual malice, although the terms are plain and strong. *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360.

And the filing of a petition in court, alleging that the plaintiff in a libel suit was

maintaining a liquor nuisance, is privileged where the allegations are material and necessary to invoke the action of the court. *Hess v. McKee*, — Iowa, —, 130 N. W. 375.

For a note on privilege in libel and slander as affected by extent of publication, see note to *Coleman v. MacLennan*, 20 L.R.A. (N.S.) 361.

For a note on privilege in cases of libel and slander as to proceedings for impeachment or removal of public officers, see note to *Yancey v. Com.* 25 L.R.A. (N.S.) 455.

J. T. W.

tiff is entitled to the most favorable aspect of the evidence, and to have the fact testified to by the witness Justice Stein, that he did not direct the preparation of the petition in question, accepted as true; and, further, that the petition was communicated and circulated among the different defendants and signers, and by the defendants exhibited to persons not parties to this suit. Did the circuit judge err in holding that the said petition was an absolutely privileged communication? And this involves the question whether it was made in the due course of a legal proceeding. It is the contention of the appellant that this case does not involve the question of liability for, or of the materiality of, libelous matter in pleadings, for the reason that the paper or document in which the alleged libel occurs was not contained in, and did not appear in, any complaint, pleading, affidavit, or legal document required or properly filed in any civil or criminal proceeding, or suit in any court of this state.

It is urged that it is not such a paper or pleading as has any place in the files of the court to whose presiding officer it was addressed; that it is not such a paper or pleading as that officer could consider or act upon; that it was never filed in the court, and therefore cannot assume to itself the character of a document the contents of which cannot be charged to be libelous, because of its being absolutely privileged. We think that this is too narrow a view to take of this matter in so far as presenting the paper to the police justice was concerned. We are aware that there are authorities which hold that extrajudicial process, though before a magistrate, may be libelous, and counsel have cited us to authorities supporting this view. The main case, however, cited by counsel, that of *Miller v. Nuckolls*, 77 Ark. 64, 4 L.R.A. (N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 A. & E. Ann. Cas. 110, is a case where the defendant addressed a letter to a police magistrate, communicating certain rumors that he had heard concerning the plaintiff, and the letter was held to be a communication that was qualifiedly privileged only. But this paper is not of that character. It charges positive misconduct on the part of the plaintiff and his wife, and states that they are disturbers of the peace, are quarrelsome and disorderly, and a general nuisance to the peaceable citizens about them. The matter stated in this petition was clearly pertinent and material to the subject of the investigation desired. If true, the plaintiff and his wife were very undesirable residents of the neighborhood. The magistrate had jurisdiction over such matters. We are not disposed to narrow 32 L.R.A. (N.S.)

or abridge the right of a citizen to make even an oral complaint before a magistrate charged with the duty of investigating the matters complained of. An efficient administration of justice requires that considerable latitude must be given to parties in laying their complaints and grievances before such magistrate. Such a course tends to the peaceable adjustment of difficulties and the quiet of the neighborhood. The matters charged seemed to be pertinent, material, and positive, and we think that the statements, verbal or written, under such circumstances, must be held to be absolutely privileged in so far as the proceeding before a magistrate is concerned. *Hart v. Baxter*, 47 Mich. 198, 10 N. W. 198; *Graham v. Cass* Circuit Judge, 108 Mich. 425, 66 N. W. 348; *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887; 25 Cyc. Law & Proc. pp. 375 et seq., 384. Such communications are made in the strictest confidence, and are as sacred in the eyes of the law as the communications between client and lawyer, or patient and physician.

Another and different question, however, is presented when we come to consider the conduct of the defendants Boglarsky, Vollrath, and Joseph Reck in so far as notoriety and publicity were given to this paper by its circulation around the neighborhood and its publication in the daily press, and the intercommunication and exhibition thereof, complained of. This petition may have been absolutely privileged in so far as presenting it to the magistrate was concerned, and yet it may not have that character at all when considered in connection with its general circulation and publication among other people, and in the community generally. The privileged character of the instrument may be lost where the extent of the publication is excessive. This doctrine has been recognized by our own courts, as appears from the following cases: *Smith v. Smith*, 73 Mich. 445, 3 L.R.A. 52, 16 Am. St. Rep. 594, 41 N. W. 499; *Pollasky v. Minchener*, 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5. The occasion often determines the question of privilege. Privilege does not extend to false publications made to persons who have no interest in the subject-matter. *Garn v. Lockard*, 108 Mich. 196-199, 65 N. W. 764; *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397, 80 Am. St. Rep. 527, 80 N. W. 575; *Clemmons v. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626. That the article stripped of its privileged character contained libelous matter there can be no doubt. It tended to degrade the plaintiff, and to hold him up to the contempt, if not the ridicule, of the community. We are of

opinion, therefore, that this branch of the case should not have been overlooked by the circuit judge, and that it presented a question for the consideration of the jury. Even if, considered as to the public generally, or in connection with the persons to whom the document was exhibited, the instrument was only conditionally privileged, or qualifiedly privileged, the question of malice would have been a proper question to submit to the jury. *Smith v. Smith*, supra; *Howard v. Dickie*, 120 Mich. 238-240, 79 N. W. 191; *Garn v. Lockard*, supra.

For the error pointed out, the judgment of the Circuit Court is reversed, and a new trial granted.

IOWA SUPREME COURT.

FRANK UPP, Appt.,

v.

FRANK W. DARNER.

(— Iowa —, 130 N. W. 409.)

Unsafe property — sale — continuing liability for injury.

One who strings a barbed wire some distance from his boundary line to prevent the use of his property as a driveway is not liable for injury thereby caused to the runaway horse of one who had gone upon the property on business with the then owner, after he had sold and delivered possession of the property to another, although in stringing the wire he violated the provisions of a municipal ordinance, and the act was so negligent that he would have been liable for injuries occurring while he owned the property, to persons entering it by his invitation, express or implied.

(March 13, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Wapello County after direction of verdict in favor of defendant in an action brought to recover damages for injuries to plaintiff's horse alleged to have been caused by the negligence of defendant in stringing barbed wire in violation of an ordinance. Affirmed.

Statement by Deemer, J.:

Action at law to recover damages due to the erection of a barbed-wire fence by the defendant within the city of Ottumwa, contrary to an ordinance thereof, resulting in

Note.—Liability of one erecting or creating a nuisance upon his land for continuance of same after he has parted with the title, see note to *Mansfield v. Tenney*, 25 L.R.A. (N.S.) 731.
32 L.R.A. (N.S.)

the death of an animal owned by plaintiff which while frightened ran into the fence and received injuries which necessitated her killing. The defendant, while admitting the erection of the fence, pleaded that he had sold the premises upon which it had been placed, before the accident, and that after he sold the property the fence was cut, part of it knocked off the poles, and some of the wires placed across a driveway. He also pleaded that the fence, as erected by him, did not constitute a violation of the city ordinance. Upon the issues thus joined the trial court directed a verdict for defendant, and plaintiff appeals.

Mr. Chester W. Whitmore, for appellant:

Plaintiff was not guilty of contributory negligence as a matter of law.

Bullard v. Mulligan, 69 Iowa, 416, 29 N. W. 404; *Nocks v. Whiting*, 126 Iowa, 405, 106 Am. St. Rep. 371, 102 N. W. 109; *Amstein v. Gardner*, 132 Mass. 28, 42 Am. Rep. 421; *Lundeen v. Livingston Electric Light Co.* 17 Mont. 32, 41 Pac. 995; *Overhouser v. American Cereal Co.* 118 Iowa, 422, 92 N. W. 74; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Walrod v. Webster County*, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598; *Harvey v. Clarinda*, 111 Iowa, 532, 82 N. W. 994.

Defendant was guilty of negligence under the common law in hanging the wire in the manner he did.

Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559; *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, 14 N. E. 381; *West v. Ward*, 77 Iowa, 323, 14 Am. St. Rep. 284, 42 N. W. 309; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61, 9 So. 378; *Siglin v. Coos Bay Co.* 35 Or. 79, 76 Am. St. Rep. 463, 56 Pac. 1011; *Loveland v. Gardner*, 70 Cal. 317, 4 L.R.A. 395, 21 Pac. 766; *Foster v. Swope*, 41 Mo. App. 137; *McFarlane v. Swihart*, 11 Ind. App. 175, 54 Am. St. Rep. 499, 38 N. E. 483; *Lowe v. Guard*, 11 Ind. App. 472, 54 Am. St. Rep. 511, 39 N. E. 428; *Brown v. Cooper*, 10 Tex. Civ. App. 512, 31 S. W. 316.

The violation of the city ordinance by defendant was an act of negligence *per se*.

Tobey v. Burlington, C. R. & N. R. Co. 94 Iowa, 265, 33 L.R.A. 496, 62 N. W. 761; *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 74.

Defendant's liability is not dependent in any way upon ownership of either wire or lot.

West v. Ward, 77 Iowa, 323, 14 Am. St. Rep. 284, 42 N. W. 309; *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559.

Messrs. Tisdale & Heindel for appellee.

Deemer, J., delivered the opinion of the court:

The city of Ottumwa had an ordinance which made it unlawful for anyone to use any barbed wire, either in the construction or maintenance of any fence inclosing in whole or in part any lot within the corporate limits of said city. In the year 1907 defendant was the owner of lot 160, which was within the limits of the city, and for the purpose of keeping teams from driving over this lot he hung a single strand of barbed wire between two electric light poles some 152 feet apart at the rear of his lot. This was an inside lot, and there was no alley at the rear thereof. The strand of wire was 3 or 4 feet north of the south boundary line of the lot, and, as we have said, was placed there to keep coal teams from driving across the rear end. This wire was often down and was put up by defendant, save the last time he saw it, when he owned the place, and again after he sold it. So that according to defendant's testimony, who was offered as witness for plaintiff, the wire was down when he sold the place, was again replaced, then came down again, and had been replaced by someone at the time when the accident in question occurred. Some time prior to the accident, defendant sold the property in question to one Sampson. Plaintiff was a contracting carpenter, and as such had undertaken the construction of a house on lot 160 for the then owner thereof, who had purchased the same from the defendant. On May 28, 1908, he drove into the east side of the lot from the front to a point 30 or 40 feet from the rear of the lot, got out of his buggy, fastened a 20-pound iron hitching weight to the bit of the animal he was driving, and turned to speak to one of his workmen, who stood near with the working plans for the building which was being constructed, in his hands. The wind caused a fluttering of the pages of these plans, and this frightened the animal so that she started to run, dragging the weight by her bit over the smooth wet grass. Before plaintiff could overtake her, she ran into the strand of barbed wire which was then hanging loosely between the posts, causing the injuries which resulted finally in her death. Upon this state of facts, the trial court, at the conclusion of the testimony, directed a verdict for defendant, and the appeal is from this ruling.

Plaintiff's counsel very frankly admit that, if this be an action of nuisance, no recovery can be had of defendant, for the reason that he was not maintaining the same when the accident happened. His in-

sistence is that his action is for a tort (in other words, for negligence), and that defendant is responsible for that negligence both at common law and because of his violation of the ordinance of the city.

We shall assume for the purpose of argument that defendant would have been liable both at common law and under the statute had the accident happened while he was the owner of the property, and had expressly or impliedly invited plaintiff to enter upon the premises where said barbed wire was being maintained, and this liability might have been predicated upon the theory that the wire was a nuisance or upon negligence of the defendant in erecting the wire. We shall also assume, for present purposes, that the erection of the wire was contrary to the ordinance of the city, and that by reason thereof negligence might have been found by the jury, had defendant retained the ownership of the property.

Eliminating, as we must, the idea that defendant may be charged because of his maintenance of a nuisance, we have the single question: Is he liable on the theory of negligence? It is fundamental, of course, that the first requisite in establishing negligence is to show the existence of a duty which it is supposed has not been performed. There can be no negligence unless there is a duty which has been violated. *Eakins v. Chicago*, R. I. & P. R. Co. 126 Iowa, 324, 102 N. W. 104; *Hughes v. Boston & M. R. Co.* 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070. Actionable negligence is the breach of a duty owed by defendant to plaintiff, and where there is no duty there is no negligence. Again, in *Faris v. Hoberg*, 134 Ind. 274, 39 Am. St. Rep. 261, 33 N. E. 1029, it is said: "In every case involving actionable negligence, there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." This duty may be general and owing to everybody, or it may be particular and owing to a single person only by reason of his peculiar position. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him occasion to insist upon its performance. It then becomes a duty to

him personally. Cooley, Torts, 3d ed. p. 1412.

It is difficult at times to distinguish between actions of nuisance and actions bot-tomed on negligence; but in either case there must be a breach of some duty on the part of the defendant before an action will lie against him. Thus one is under no duty to keep his premises in a safe condition for the visits of trespassers. But, if he expressly or by implication invites others to come upon his premises, it is his duty to be reasonably sure that he is not inviting them into a place of danger, and to this end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. *Wagner v. Chicago & N. W. R. Co.* 124 Iowa, 462, 100 N. W. 332; *Dalin v. Worcester Consol. Street R. Co.* 188 Mass. 344, 74 N. E. 597. But after the owner of such premises has disposed of them he is no longer liable for what may happen thereon, for the reason that he is in no position to control the use thereof, and his duty to persons who may be invited there by another is at an end. The purchaser who invites the guest or visitor upon the premises then owes a duty to the person invited, and the person so invited is a stranger to the original owner.

It is for this reason that plaintiff admits defendant cannot be held for nuisance. But he contends that an action for negligence will lie upon the same state of facts. Here again, however, there must be found a duty upon the part of the defendant to the person who suffered the injury. Remembering that the fence in question was at the rear of the lot which defendant formerly owned, and was upon the lot itself, and not at the lot line, defendant would not have been liable for negligence even to a trespasser upon his lot had he continued to own the property. After he sold it, he had no control over the use of the property and was under no duty to one who was invited thereon by his grantee. This grantee had no authority to extend the invitation for him, and the plaintiff under the facts in this case was a stranger to the defendant; defendant owing him no duty whatever. Moreover, defendant could not, after sale, go upon the property to tear down the barbed wire. This was for the grantee to do so, to become responsible to anyone whom he invited upon the premises, and who was injured by his want of care or through failure to abate the nuisance.

The cases should be distinguished from one where a barbed-wire fence is erected along a public street or highway near where all people have a right to pass. In such 32 L.R.A.(N.S.)

cases it may possibly be that the person who erects the fence may be liable to a passer-by who is injured, although the person building the fence may have disposed of the property. Such a case would be much stronger than the one here presented; but we do not say that even in such an one recovery might be had from the original wrongdoer. Our conclusions find support in the following, among other, cases: *Southwestern Teleg. & Teleph. Co. v. Beatty*, 63 Ark. 65, 37 S. W. 570; *Smith v. Clarke Hardware Co.* 100 Ga. 163, 39 L.R.A. 607, 28 S. E. 73; *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; *Smith v. Trimble*, 111 Ky. 801, 64 S. W. 915; *Boardman v. Creighton*, 95 Me. 154, 49 Atl. 663; *Cochran v. Seas*, 108 N. Y. 372, 61 N. E. 639; *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410.

Several barbed-wire cases are to be found in the books; but they are practically all against the owner or occupant of the premises. Some of these proceed upon the doctrine of negligence and some upon the theory of nuisance; but in either event the defendant held liable was found guilty of some negligent act, and was charged because he was maintaining defective premises. In no case to which our attention has been called has any person ever been held liable for injuries such as were received in this case. After defendant sold his property, he was no longer under any duty to persons who might be invited upon the premises by his grantee, for the reason that he had no control over such grantee, could not dictate as to who should be invited or kept off the premises, and could not have removed the fence even had he been so disposed. As already indicated, we are not now considering a case of public nuisance, for the reason that the fence was wholly upon private property, and not in a position to jeopardize the general public. As defendant, after having sold the property, owed plaintiff no duty, and did not in any manner invite plaintiff upon the dangerous or defective premises, there is no liability on his part, and the trial court was right in directing the verdict. *West v. Ward*, 77 Iowa, 323, 14 Am. St. Rep. 284, 42 N. W. 309, and *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559, so strongly relied upon by appellant, are not in point, as an examination will show.

The judgment must be, and it is, affirmed.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN

v.

WILLIAM WELCH, Plff. in Err.

(— Wis. —, 129 N. W. 656.)

Food — oleomargarine — liability of waiter.

1. A waiter in charge of a lunch counter who makes requisitions for supplies needed, and fills the orders of patrons from materials received, furnishes such material to them within the meaning of a statute providing for the punishment of one who furnishes oleomargarine instead of butter.

Same — ignorance of waiter — effect.

2. Ignorance on the part of a waiter at a lunch counter that material furnished by him as butter is in fact oleomargarine will not absolve him from liability to punishment under a statute providing for punishment of anyone who furnishes oleomargarine for butter without first informing the customer of the fact.

(January 31, 1911.)

ERROR to the Circuit Court for Portage County to review a judgment convicting defendant of violating the law against furnishing oleomargarine at a lunch counter to a patron without notifying him that the substance so furnished was not butter. **Affirmed.**

The facts are stated in the opinion.

Note. — *Ignorance that article furnished as butter is oleomargarine as a defense.*

The statutes in general which prohibit the selling, furnishing, etc., of oleomargarine, do so without reference to the intention or knowledge of the offending party. Under such statutes it is held, in accord with the decision in *STATE v. WELCH*, that the want of knowledge on the part of the defendant as to the nature of the article sold or furnished constitutes no defense.

Thus, where a statute makes it unlawful to furnish or cause to be furnished, to guests in any hotel, oleomargarine, butterine, or any similar substance, without first notifying such guests that the article furnished is not butter, it is not necessary to prove that the defendant knowingly and intentionally furnished oleomargarine instead of butter, and neither is it necessary that the jury find that he knew or had reason to know by the exercise of due diligence that the substance was not butter. *State v. Ryan*, 70 N. H. 196, 85 Am. St. Rep. 629, 46 Atl. 49. The court said: "It is true that 'in the earlier history of the common law only such acts were deemed criminal as had in them the vicious element of an unlawful intent, indicating a deviation from moral rectitude; but this quality has ceased to be essential, and now acts unobjectionable in a moral view, except so far as being prohibited by law makes them so, constitute a considerable portion of the Criminal Code. In such 32 L.R.A. (N.S.)

Mr. W. A. Hayes, for plaintiff in error: The defendant neither furnished nor caused to be furnished the oleomargarine, within the meaning of those terms as used in the statute.

Goodrich v. State, 133 Wis. 242, 113 N. W. 388, 14 A. & E. Ann. Cas. 932; *Meyer v. State*, 134 Wis. 166, 14 L.R.A. (N.S.) 1061, 114 N. W. 501; *Brown v. State*, 137 Wis. 543, 119 N. W. 338; *State v. Hall*, 141 Wis. 30, 123 N. W. 251; *Wieden v. State*, 141 Wis. 585, 124 N. W. 509.

Messrs. *Levl H. Bancroft*, Attorney General, *A. C. Titus*, and *George B. Nelson*, for the State:

Lack of knowledge or intent does not constitute a defense to the crime for which defendant was tried and found guilty.

State v. Hartfiel, 24 Wis. 60; *State ex rel. Conlin v. Wausau*, 137 Wis. 311, 118 N. W. 810; *Meshbesh v. Channellenne Oil & Mfg. Co.* 107 Minn. 104, 131 Am. St. Rep. 441, 119 N. W. 428; *State v. Ryan*, 70 N. H. 196, 85 Am. St. Rep. 629, 46 Atl. 49; *Com. v. Farren*, 9 Allen, 489; *Com. v. Nichols*, 10 Allen, 199; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Com. v. Smith*, 103 Mass. 444; *Com. v. Evans*, 132 Mass. 11; *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47; *Com. v. Vieth*, 155 Mass. 442, 29 N. E. 577; *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308; *People v. Snowberger*, 113 Mich. 86, 67 Am.

statutes the act is expressly prohibited without reference to the intent or purpose of the party committing it, and is usually of the class in which the person committing it is under no obligation to act unless he knows he can do so lawfully. Under these statutes it is not a defense that the person acted honestly and in good faith, under a mistake of fact. He is bound to know the fact as well as the law, and he acts at his peril. These statutes do not make a guilty knowledge one of the ingredients of the offense." To the same effect is *Com. ex rel. Allegheny County v. Weiss*, 139 Pa. St. 247, 11 L.R.A. 530, 23 Am. St. Rep. 182, 21 Atl. 10.

And where a statute makes it unlawful to manufacture for sale, to offer for sale, or to sell, any adulterated or misbranded article of food, the want of knowledge that an article sold as dairy butter is oleomargarine is no defense. *Groff v. State*, 171 Ind. 547, 85 N. E. 769, 17 A. & E. Ann. Cas. 133. To the same effect is *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415.

And a statute making it a penal offense to sell or deliver any oleomargarine which contains coloring matter is violated by a sale to a food inspector for analysis, regardless of the fact that the dealer was ignorant that the article contained coloring matter. *State v. Rippeth*, 71 Ohio St. 85, 72 N. E. 298.

And in *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604, under a like statute it was held not essential that the person selling

St. Rep. 440, 71 N. W. 497; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 706; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 N. W. 698, 84 Am. St. Rep. 360; *Groff v. State*, 171 Ind. 547, 85 N. E. 769, 17 A. & E. Ann. Cas. 133; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 A. & E. Ann. Cas. 700; *State v. Rippeth*, 71 Ohio St. 85, 72 N. E. 298; *Lansing v. State*, 73 Neb. 124, 102 N. W. 254; *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415; *State v. Smith*, 10 R. I. 258; *People v. Secor*, 113 N. Y. Supp. 487.

Timlin, J., delivered the opinion of the court:

The plaintiff in error after waiving a jury trial was found guilty and sentenced to pay a fine of \$100, under § 4607d, St. 1898, for furnishing oleomargarine at a certain lunch counter in the city of Stevens Point to one R. B. Southard, a guest and patron at said lunch counter, without first

notifying said Southard that the substance so furnished to him was not butter.

It is contended that the accused believed the substance to be butter, was without evil intent, and did not furnish the substance within the meaning of the word "furnish" in the statute. The facts shown are that accused was a waiter in charge of a lunch counter owned and operated by the Wisconsin Central Railway Company. He made requisitions upon some officer or employee of this corporation higher up in the scale of authority, for the supplies to be consumed at the lunch counter, received them pursuant to such requisition, and delivered them to the patrons and guests as ordered by the latter. He appears to have had no assistants, no subordinates, and no superiors in making the requisitions, receiving the goods, or delivering them to the guests or patrons. He gave his immediate superior an order for butter, received a package containing a substance resembling butter, and which he believed to be butter. He did not notice whether there was a United States internal revenue stamp on the package, but did notice that it was marked in small print "U. S. Inspected," or something like that."

Where, for the purpose of delivering or

oleomargarine should know that it was colored.

So, under an act forbidding the sale of any article as butter unless a wrapper or label of a specified character, describing the article, was attached to it, the fact that the failure to attach the label was the result of inadvertence, and was not intentional, is no defense, since it is not necessary under the act to prove a guilty intent. Com. v. Gray, 150 Mass. 327, 23 N. E. 47.

And there are *dicta* in *Williams v. State*, 25 Ohio C. C. 673, 4 Ohio C. C. N. S. 193, that, under a statute forbidding the sale of oleomargarine unless certain conditions were complied with, it is the duty of the seller to know that the article which he offers for sale is not adulterated. The question involved in the case was as to the liability of an employer for the sale of oleomargarine by his employee.

In *Com. use of Allegheny County v. Hendley*, 7 Pa. Super. Ct. 356, where a restaurant keeper was sued for a violation of an act prohibiting the sale of imitation butter, it was argued that the object of the defendant in adopting an arrangement by which butter was furnished patrons without cost was to protect himself from the deception practised upon him by dealers engaged in selling butter; but it was held that he was nevertheless subject to the penalty provided, where he had furnished oleomargarine as a part of the meals served.

But where a boarding-house keeper purchases oleomargarine in good faith believ-

ing it to be butter, and has no knowledge or information, and there is no circumstance which would lead her to believe, that it was not butter, and she is entirely innocent of an intent to violate the statute, the maximum penalty should not be imposed. *People v. Secor*, 113 N. Y. Supp. 487.

And in *Prather v. United States*, 9 App. Cas. 82, where the statute involved made a person who knowingly sold or offered for sale, or delivered or offered to deliver, any oleomargarine in any other form than that prescribed, liable to a penalty, a charge was given that, in order to convict one in whose place of business a sale in violation of the statute was alleged to have been made, the jury must find that the defendant sold the article as butter, knowing it to be oleomargarine. The real question involved in this case was whether the defendant could be convicted where he did not make the sale personally, but by a clerk.

For a note on applicability of oleomargarine statutes where resemblance to butter results from choice of ingredients, and not from the introduction of foreign matter, see note to *State v. Meyer*, 14 L.R.A. (N.S.) 1061.

An examination of the Index to Notes, under Criminal Law,—"Effect of ignorance or mistake," will disclose a number of notes covering other concrete phases of the general question as to criminal responsibility as affected by ignorance or mistake of fact.

J. T. W.

selling to others, one selects and collects, together with opportunity for examination, and thereafter delivers from such collection to guests or patrons, he may be said to furnish the substance so delivered, within the meaning of this statute, although he acts only as the agent of the owner in the whole transaction. This rule is deduced from the statute in question and authorities collected in 4 Words and Phrases relating to the word "furnish" under various circumstances and applied to different legal relations. It is a legal commonplace that penal statutes prohibiting not merely the doing of a described act, but the wilful, intentional, or malicious doing of such act, if they do not require the prosecution in the first instance to prove something more than the doing of the prohibited act, at least permit the accused to exculpate himself by showing that, although he did the act, he did not do it wilfully, intentionally, or maliciously. Where a particular intent is necessary to constitute the offense, as *animus furandi* in larceny, or malice in murder, ignorance or mistake of fact without negligence on the part of the accused may be ground for acquittal. As one exercising due care, who might hand to the thirsty wayfarer who called for water a liquid exactly resembling water, believed to be water, but in fact a deadly poison causing death, would not be guilty of murder. Or one taking and carrying away property belonging to another, under the honest, but mistaken, claim that the taker had legal title thereto, would not be guilty of larceny. On the other hand, it is also a legal commonplace that where a statute commands that an act be done or omitted which, in the absence of such statute, might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. As where one in the honest, but mistaken, belief that such person was adult, sold intoxicating liquor to a minor who resembled an adult. *State v. Hartfiel*, 24 Wis. 60. Even a conscientious belief that an act is right, as labor on Sunday by a believer in the Jewish religion, will not exempt from liability where the statute makes no such exception. *Com. v. Has*, 122 Mass. 40. Neither will a bona fide assertion of a political right, pursuant to the advice of counsel learned in the law. *United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459. Or the fact that it was the custom of the country to do the prohibited act. *Bankus v. State*, 4 Ind. 114. The learned counsel for plaintiff in error raises a question which may be interpreted as lying somewhat deeper than these rules, and we think not fully appreciated by the defendant in error. He 32 L.R.A. (N.S.)

asks: "Can a person be convicted of crime without having an opportunity to avoid the act which is held to constitute the crime?" The answer to this in the instant case is that the evidence does not present that question. The statute imposes a duty upon persons furnishing eatables in hotels, boarding houses, restaurants, or lunch counters. When one enters upon the business of furnishing guests or patrons with eatables at any of the establishments mentioned, he thereby undertakes to inform himself and to know the nature of the substance he is dispensing. The law casts on him this duty. He cannot enter into or continue the occupation, and omit the duty. To furnish the substance without knowing what it is, and without informing the guests, is ordinarily to take the chances of violating the statute. Defendant fails to show that there was no United States internal revenue stamp on this substance when he received it. There ought to have been and presumably there was. He does show that he observed thereon the words "U. S. Inspected," or something of that kind." He had no reason to believe that butter is subject to United States inspection. He had opportunity for inquiry, examination, and rejection or acceptance, and giving notice to guests. He seems to have resolved all doubts in favor of the substance being butter, and to have forborne all inquiry or investigation, and disregarded or misinterpreted all suggestions from the inspection stamp on the package. He is therefore not in a position to raise the question suggested by his counsel, but the case falls under the rule of *State v. Hartfiel*, 24 Wis. 60, and the conviction must be affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

AMERICAN FEDERATION OF LABOR
et al., Appts.,

v.

BUCK'S STOVE & RANGE COMPANY.

(33 App. D. C. 83.)

Injunction — boycott — responsibility.

1. The executive officers of the American Federation of Labor, who indorse a local boycott and place the name of the boycotted

Note. — Right of labor union to notify persons not to deal with a certain individual.

The foregoing was the subject of note appended to *Hey v. Wilson*, 16 L.R.A. (N.S.) 85, and *Lindsay v. Montana Federation of Labor*, 18 L.R.A. (N.S.) 707. The present note is merely supplemental to those notes.

As shown in the foregoing notes, the

concern on their "We Don't Patronize" list, knowing that the result will be the actual maintenance of a boycott by the members of the union throughout the country, cannot defeat the issuance of an injunction against themselves on the theory that they are not connected with, or responsible for, the acts done under the boycott.

Boycott — definition.

2. A boycott is a combination to harm one person by coercing others to harm him.

Injunction — boycott.

3. A labor union and its members may be enjoined from placing the name of a concern on its "Unfair" or "We Don't Patronize" list, if their sole intention in doing so is, and the result will be, to coerce its customers to refrain from dealing with it, although the remote object sought is a benefit to its own members, and no physical coercion is practised.

Same — boycott — validity.

4. That each member of a labor union has a right to withdraw his patronage from a given concern and those who deal with it does not make valid a combination of all the members to do the same thing by concert of action.

Free speech — injunction.

5. No unconstitutional interference with freedom of speech is effected by enjoining the placing by a labor union of the name

of a concern on its "We Don't Patronize" list, in furtherance of a boycott against it.

Injunction — newspaper.

6. The publication and circulation of a newspaper cannot be enjoined merely because it contains the "Unfair" list of a labor union, which is published in furtherance of a boycott.

Same — boycott.

7. An injunction against a boycott should be limited to acts of commission.

Same — voluntary association.

8. An injunction to restrain a boycott will not lie against an unincorporated association of workmen.

Same — executive officers.

9. Jurisdiction to restrain the members of an unincorporated association of workmen from the prosecution of a boycott may be secured by service of process upon its executive officers, where they fairly represent its membership.

(Shepard, Ch. J., dissents.)

(March 11, 1909.)

A PPEAL by defendants from a decree by the Supreme Court, enjoining them from interfering with complainant's business. Modified and affirmed.

The facts are stated in the opinion.

weight and trend of authority sustain the doctrine asserted by Justices VanOrsdel and Shepard in *AMERICAN FEDERATION OF LABOR v. BUCK'S STOVE & RANGE COMPANY*, that each member of a labor organization has the absolute right to bestow his patronage where he chooses, and the fact that he exercises this right in concert with his comembers does not render his otherwise lawful act unlawful, or make concerted action in this regard a wrongful conspiracy, such members being interested in bringing to a successful issue an industrial controversy between members of a labor organization and the person or manufacturer whose product, by a concerted action, such members had ceased to use. By the weight of authority, an act lawful if done by one is not necessarily rendered unlawful by the mere fact of concerted action. To render such a concerted act unlawful, the object or the means used must be unlawful, or exercised for the malicious purpose of injuring another, rather than benefiting the persons engaged therein; mere concert of action, in and of itself, not being sufficient. On the other hand it does not follow merely because some act or course of conduct by an individual does not amount to an actionable wrong, that the same act or course of conduct by a combination of persons would not be actionable. If the act or course of conduct is in the exercise of a qualified right, as distinguished from an absolute right (see note in 29 L.R.A. (N.S.) 869), the test as to the lawfulness of concerted action is whether there is any lawful object or purpose com-

mon to such persons which that course of conduct is reasonably and fairly calculated to promote, and whether they act in good faith, for the primary purpose of promoting that object, or wilfully, for the primary purpose of injuring another.

The decision of the court in *AMERICAN FEDERATION OF LABOR v. BUCK'S STOVE & RANGE COMPANY* was appealed to the Supreme Court of the United States; but it appearing during the argument on the appeal that the parties to the case had settled their differences, the appeals were dismissed on the ground that the questions raised were moot. 219 U. S. 581, 55 L. ed. —, 31 Sup. Ct. Rep. 472.

But the court of appeals of the District of Columbia in *Gompers v. Buck's Stove & Range Co.* 33 App. D. C. 516, apparently departed from the doctrine declared in the case under annotation, and, in a proceeding in that case, against certain of the defendants, for contempt of court for the violation of an injunction issued in the main case, asserted that a "labor organization can conduct an unlawful boycott as effectively by compelling its own members to refrain from dealing with the party boycotted as by coercing others into similar action." The conduct of the defendants complained of, and claimed to violate the injunction, was the publication of the fact of the issuance of the injunction, which was construed as requiring the defendant American Federation of Labor, or the members thereof, to patronize the complainant, and purchase the complainant's products, and the publications in question were to

Messrs. Jackson H. Ralston, Frederick L. Siddons, and W. E. Richardson, for appellants:

The exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intent prompted such exercise.

Quinn v. Leatham [1901] A. C. 524, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749; Bradford v. Pickles [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; National Protective Asso. v. Cum-

ming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369.

What a man has an absolute right to do, he may threaten to do.

National Protective Asso. v. Cumming, supra; Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148.

Persons situated as were defendants and their associates in this case may notify others that a business house is unfair.

Foster v. Retail Clerks' International Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860; Cohen v. United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341; Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; Mills v. United States Printing Co. 99 App. Div.

the effect that no court had the power to compel this labor organization or its friends to purchase any of the product of the complainant. According to the view of the court, as expressed in the contempt proceedings, any resolution by this labor organization, asking or requiring its members not to purchase the products of the complainant, constituted an unlawful boycott. And emphasis is also laid by the court upon the fact that, in some of the publications complained of, the publication referred to the members of the union and their friends. It is clear that, under the great weight of authority, any attempt by this labor organization to have its members and their friends refrain from patronizing complainant, or purchasing its product, did not constitute an unlawful boycott, in the absence of intimidation or coercion, and as to the members of the organization, a resolution requiring its members not to patronize the complainant or buy its products, on pain of a fine or expulsion did not constitute unlawful coercion. (See note to L. D. Willcutt & Sons Co. v. Driscoll, 23 L.R.A. (N.S.) 1237.) The boycott, if it be so termed, being in itself lawful, any publication in furtherance thereof, if that was the purpose of the publication, would be lawful. To the extent that the injunction attempted to restrain this lawful act, it came within the inhibition of the constitutional provision against the right of free speech. See note to M. Steinert & Sons Co. v. Tagen, — L.R.A. (N.S.) —.

An appeal was taken from the judgment of the court in this contempt proceeding, and the same was reversed on the ground that the contempt proceeding was a civil proceeding, and not, as held by the lower court, a criminal proceeding. Gompers v. Buck's Stove & Range Co. 221 U. S. —, 55 L. ed. —, 31 Sup. Ct. Rep. 492.

It is a more serious question as to the lawfulness of concerted action to divert trade or patronage from one person by threatening possible customers with financial loss or other injury if they patronize such person. Such concerted action was held lawful in *Pierce v. Stablemen's Union*, 32 L.R.A. (N.S.)

156 Cal. 70, 103 Pac. 324, wherein the question received very able consideration at the hands of the court, and the doctrine was asserted that "after striking, the employees may engage in a 'boycott,' as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer; and may use the moral intimidation and coercion of threatening a like boycott against him if he refuses so to do. This last proposition necessarily involves the bringing into a labor dispute between A and B, C, who has no difference with either. It contemplates that C, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy. This is the 'secondary boycott,' the legality of which is vigorously denied by the English courts, the Federal courts, and by the courts of many of the states of this nation."

This doctrine also finds support in *Montgomery Ward & Co. v. South Dakota Retail Merchants' & H. Dealers' Asso.* 150 Fed. 413, which, however, was not a case involving a labor union. The rule is there asserted as applicable to a hardware dealers' association, that such dealers have a lawful right to agree among themselves that they will not purchase merchandise from wholesalers and jobbers who sell to catalogue or mail-order houses, and as a necessary corollary to this right, they have the right to notify each other as to what wholesalers and jobbers do sell to mail-order and catalogue houses, and to notify wholesalers and jobbers of their intention in this regard; and it is not unfair competition, intimidation, or coercion for such a combination to interfere with a third per-

605, 91 N. Y. Supp. 185; *Rogers v. Evarts*, 17 N. Y. Supp. 264; High, Inj. § 1415 i.

Mr. Alton B. Parker, also for appellants:

The liberty of the press consists in the unrestricted right to publish; subject, of course, to legal responsibility which may arise from the publication.

Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689; *Fleming v. Newton*, 1 H. L. Cas. 363; *Story*, Const. § 1885; *De Lolme*, Const. of Eng. p. 872; *Negley v. Farrow*, 60 Md. 176, 45 Am. Rep. 715; *Cooley*, Const. Lim. § 441; 2 Kent, Com. §§ 17 et seq.

The use of the writ of injunction is inconsistent with the liberty of the press.

Fleming v. Newton, 1 H. L. Cas. 363;

son's right to transact and carry on business, by persuasion or any peaceable means.

In other jurisdictions, a boycott is defined to be a combination of several persons to injure or destroy the trade, business, or occupation of another, by threatening or producing injury to the trade, business, or occupation of those who have business relations with him; and such a boycott is held to constitute an unlawful conspiracy which may be restrained by injunction. *AMERICAN FEDERATION OF LABOR v. BUCK'S STOVE & RANGE CO.*; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 22 L.R.A. (N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997, followed in *Charles A. Olcott Planing Mill Co. v. Fuelle*, — Mo. —, 114 S. W. 1013. This case apparently distinguishes between what may be termed a "primary" boycott and a "secondary" boycott; and while holding the latter unlawful, the rule is expressly asserted that a combination between persons, merely to regulate their own conduct and affairs, is allowable and lawful, though others may be indirectly affected thereby.

In *Funk v. Farmers' Elevator Co.* 142 Iowa, 621, 24 L.R.A. (N.S.) 108, 121 N. W. 53, a boycott is defined to be a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. The court, in this definition, quoted from and approved the definition given in 8 Cyc. Law & Proc. p. 639.

The right to divert trade of persons not directly interested in an industrial dispute, by coercion, is also denied in *Iron Molders' Union No. 125 v. Allis-Chalmers Co.* 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45, wherein the court said that in "contests between capital and labor, the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund; for only at this point

Gee v. Pritchard, 2 Swanst. 413, 19 Revised Rep. 87; *Martin v. Wright*, 6 Sim. 297; *Seely v. Fisher*, 11 Sim. 581, 10 L. J. Ch. N. S. 274; *Clark v. Freeman*, 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 149; *Mulkern v. Ward*, L. R. 13 Eq. 619, 41 L. J. Ch. N. S. 464, 26 L. T. N. S. 831; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142, 44 L. J. Ch. N. S. 192, 31 L. T. N. S. 866, 23 Week. Rep. 249; *Browne v. Freeman* [1873] 178; *Fisher v. Apollinaris Co.* L. R. 10 Ch. 297, 44 L. J. Ch. N. S. 500, 32 L. T. N. S. 628, 23 Week. Rep. 460; *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368; *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148; *Kidd v. Horry*, 28 Fed. 773; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. 95; *Chase v. Tuttle*,

exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct—the primary—attack is upon society itself."

It is clear that an attempt to interfere with the business of another by threats, intimidation, and violence is unlawful, and a labor union or members thereof who thus interfere with the business of another with whom they are in an industrial dispute are guilty of a conspiracy. *Branson v. Industrial Workers*, 30 Nev. 270, 95 Pac. 354.

So, any interference with the business of another, where the object sought to be gained thereby is not justifiable, and hence malicious, is unlawful; and, if engaged in by a body of employees, constitutes a conspiracy. *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457.

In *George Jonas Glass Co. v. Glass Blowers' Asso.* 72 N. J. Eq. 653, 66 Atl. 953, affirmed in 79 Atl. 262, an organized or concerted attempt to induce the public to refrain from purchasing the product of a manufacturer, thereby depriving him of a market for his product, in order to compel him to unionize his manufacturing plant, is held to be an unlawful conspiracy.

A labor union has no right to order shops which have complied with union demands not to sell goods to persons against whom the union has made a demand which it seeks to enforce by such boycott, and the person so boycotted may have an injunction against any persons who, by means of such threats, interfere with his right to buy. *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. 221, 124 N. Y. Supp. 280.

Cases involving the right of labor unions to require their members to refuse to handle the product of one deemed unfair to labor are not included in this note. Such cases will be found in a note appended to *Meier v. Speer*, post, 792.

A. G. S.

27 Fed. 110; Fougères v. Murbarger, 44 Fed. 292; New York Filter Co. v. Schwarzwald, 58 Fed. 577; Computing Scale Co. v. National Computing Scale Co. 79 Fed. 962; Balliet v. Cassidy, 104 Fed. 704; Montgomery Ward & Co. v. South Dakota Retail Merchants' & H. Dealers' Asso. 150 Fed. 413; Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616; A. B. Farquhar Co. v. National Harrow Co. 99 Fed. 160; New York Juvenile Guardian Asso. v. Roosevelt, 7 Daly, 191; Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310, 64 N. E. 163; Butterick Pub. Co. v. Typographical Union No. 6, 50 Misc. 1, 100 N. Y. Supp. 292; Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Raymond v. Russell, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544; Mauger v. Dick, 55 How. Pr. 132; Root v. King, 7 Cow. 628; Hovey v. Rubber Tip Pencil Co. 57 N. Y. 119, 15 Am. Rep. 470; Green v. United States Dealers' Protective Asso. 16 Abb. N. C. 419; People v. Crosswell, 3 Johns. Cas. 337; Mayer v. Journeymen Stonecutters' Asso. 47 N. J. Eq. 519, 20 Atl. 492; Baltimore L. Ins. Co. v. Gleisner, 202 Pa. 386, 51 Atl. 1024; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Everett Piano Co. v. Bent, 60 Ill. App. 372; Life Asso. of America v. Boogher, 3 Mo. App. 173; Flint v. Hutchinson Smoke Burner Co. 110 Mo. 492, 16 L.R.A. 243, 33 Am. St. Rep. 476, 19 S. W. 804; Consumers' Gas Co. v. Kansas City Gaslight Co. 100 Mo. 501, 18 Am. St. Rep. 563, 13 S. W. 874; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; State ex rel. Liversey v. Civil Dist. Judge, 34 La. Ann. 741; Reyes v. Middleton, 36 Fla. 99, 29 L.R.A. 66, 51 Am. St. Rep. 17, 17 So. 937; Singer Mfg. Co. v. Domestic Sewing Mach. Co. 49 Ga. 70, 15 Am. Rep. 674; Caswell v. Central R. & Bkg. Co. 50 Ga. 70; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458.

Messrs. J. J. Darlington and Daniel Davenport for appellee.

Mr. Justice Robb delivered the opinion of the court:

This is a bill of complaint on behalf of the Buck's Stove & Range Company, of St. Louis, Missouri, against the American Federation of Labor, a voluntary association, Samuel Gompers, its president, its eight vice presidents, its secretary, and cer-

tain other defendants local to the District of Columbia. After hearing upon the bill and defendants' return to the rule to show cause, an injunction *pendente lite* was granted. Evidence was thereupon taken by each side, and a final hearing had which resulted in the following decree:

"The above entitled cause coming on at this time for final hearing, and having been submitted to the court by the respective parties, through their solicitors, upon the pleadings and the evidence, and having been duly considered, it is thereupon by the court, this 23rd day of March, A. D. 1908, adjudged, ordered, and decreed that the defendants the American Federation of Labor, Samuel Gompers, Frank Morrison, John B. Lennon, James Duncan, John Mitchell, James O'Connell, Max Morris, Denis A. Hayes, Daniel J. Keefe, William D. Huber, Joseph F. Valentine, Rodney L. Thixton, Clinton O. Buckingham, Herman C. Poppe, Arthur J. Williams, Samuel R. Cooper, and Edward L. Hickman, their and each of their agents, servants, attorneys, confederates, and any and all persons acting in aid of or in conjunction with them or any of them, be, and they hereby are, perpetually restrained and enjoined from conspiring, agreeing, or combining in any manner to restrain, obstruct, or destroy the business of the complainant, or to prevent the complainant from carrying on the same without interference from them or any of them, and from interfering in any manner with the sale of the product of the complainant's factory or business by defendants, or by any other person, firm, or corporation, and from declaring or threatening any boycott against the complainant, or its business, or the product of its factory, or against any person, firm, or corporation engaged in handling or selling the said product, and from abetting, aiding, or assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any other printed or written newspaper, magazine, circular, letter, or other document or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business or its product, in the 'We Don't Patronize' or the 'Unfair' list of the defendants, or any of them, their agents, servants, attorneys, confederates, or other person or persons acting in aid of or in conjunction with them, or which contains any reference to the complainant, its business or product, in connection with the term 'Unfair,' or with the 'We Don't Patronize' list, or with any other phrase, word, or words of similar import, and from publishing or otherwise cir-

culating, whether in writing or orally, any statement or notice, of any kind or character whatsoever, calling attention of the complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainant, its business or its product, or that the same are, or were, or have been, declared to be 'unfair,' or that it should not be purchased or dealt in or handled by any dealer, tradesman, or other person whomsoever, or by the public, or any representation or statement of like effect or import, for the purpose of, or tending to, any injury to or interference with the complainant's business, or with the free and unrestricted sale of its product, or of coercing or inducing any dealer, person, firm, or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession, stoves, ranges, heating apparatus, or other product of the complainant, and from threatening or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in the complainant's product, either directly or through orders, directions, or suggestions to committees, associations, officers, agents, or others, for the performance of any such acts or threats as hereinabove specified, and from in any manner whatsoever impeding, obstructing, interfering with, or restraining the complainant's business, trade, or commerce, whether in the state of Missouri, or in other states and territories of the United States, or elsewhere wheresoever, and from soliciting, directing, aiding, assisting, or abetting any person or persons, company or corporation, to do or cause to be done any of the acts or things aforesaid.

"And it is further adjudged, ordered, and decreed that the complainant recover against the defendants the cost of this suit, to be taxed by the clerk, and that it have execution therefor as at law."

The complainant is a manufacturer of stoves and ranges, and its business represents an investment of about \$1,000,000, and its sales each year amount to about \$1,250,000, and extend throughout the various states and territories of the United States.

The American Federation of Labor includes nearly two million wage earners in the United States and Canada. Under the constitution of the Federation its members are classified according to their trades into separate groups or organizations. In St. Louis there is a Metal Polishers' Union and various other local unions. In addition there is the St. Louis Central Trades and Labor Union, composed of the local unions. In August, 1906, certain metal polishers employed in complainant's factory became

involved in a controversy with the complainant and simultaneously withdrew from complainant's employ; in other words, struck. Thereupon the Metal Polishers' Union declared the complainant "unfair" to organized labor, and published the declaration in their local labor journal, issued circulars to the same effect, and in various ways sought to boycott complainant's product. Thereafter application was made to the Central Trades and Labor Union for an indorsement of the boycott, and in November, 1906, such indorsement was made.

The American Federation of Labor in November of each year holds a convention, which is composed of delegates from the various subordinate bodies. At the November, 1906, convention, a resolution was introduced for an indorsement of the action of the St. Louis bodies in their controversy with the complainant, and to have complainant published in the "We Don't Patronize" list of the American Federationist, the official organ of the Federation. This resolution was referred to the executive council with power to act, and said council, at its next meeting, in March, 1907, placed complainant and its product upon the "We Don't Patronize" list of the Federation, and directed the publication thereof in said list in the Federationist, and such publication was thereafter made. The executive council is composed of the president, secretary, treasurer, and the eight vice-presidents of the Federation. Immediately following the action of said executive council in so placing complainant upon said list of the Federation, the following circular was given wide publicity:

IMPORTANT NOTICE!

The executive council of the American Federation of Labor, in session at Washington, D. C., March 18-23, 1907, placed the

Buck's Stove & Range Company,
of St. Louis, on the
Unfair List.

The publication of this concern will be made in the "We Don't Patronize" list commencing in the May issue of the American Federationist.

This firm is commencing to advertise in daily papers all over the country, endeavoring to offset the above action. All members take notice. Appoint committees to visit the dealers and bring it to the attention of all friends of organized labor.

The effect of the action of the local and national bodies upon the business of the complainant was immediate and far-reaching. In St. Louis dealers were waited upon by officers and representatives of the various local organizations, notably the

Central Trades and Labor Union, and were told that they must cease handling complainant's product or they would themselves be boycotted. On October 18, 1907, which, it will be noted, was subsequent to the action of the Federation in indorsing the position of the local bodies, a committee composed of the secretary of the Central Trades and Labor Union, the vice president of the Metal Polishers' Union, and a representative of the International Metal Workers Union, called upon the St. Louis House Furnishing Company and notified the company that if it did not cease handling the product of the complainant it would be boycotted. The representative of the company informed the committee that the company had about \$5,000 worth of Buck's stoves and ranges on hand, and offered to discontinue dealing with the complainant if the committee would purchase the stoves the company had in stock. This the committee refused to do, and left with the admonition that if the company did not stop, it would be put upon the "unfair" list. Thereupon, the company continuing to handle the product of the complainant, a boycott against it was prosecuted by the local unions, and circulars were distributed in the following forms:

BOYCOTT
ST. LOUIS HOUSE FURNISHING CO.,
 904 Franklin Ave.
AGENT FOR BUCK'S STOVES AND
RANGES,
 —which are—
UNFAIR TO ORGANIZED LABOR.

Indorsed by: { Metal Polishers Union No. 13.
 Stove Mounters No. 86.
 Steel Range Workers No. 34.
 Central Trades and Labor Union of St. Louis and vicinity.

H. D. Hackman, a hardware dealer of St. Louis, and the Hencken & Broeken-Kroeger Furniture Company, of East St. Louis, were also boycotted for dealing in complainant's product.

Notices were given other local dealers, but, owing to their acquiescence in the demands made upon them, further action was not taken against them. The action taken in St. Louis is typical of that pursued throughout the country.

The Strauss-Miller Company of Cleveland, Ohio, was compelled to cancel all back orders and abandon all relations with complainant, owing to the position taken by the labor unions of that city.
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The H. L. McElroy Company, of Youngstown, Ohio, after a conference with union representatives, wrote complainant: "It would be a serious calamity for us to be compelled to change our line at this time, but we cannot endanger the success of our entire business by arousing the antagonism and animosity of the labor unions."

Bass & Harbour, of Oklahoma City, after an interview with labor representatives, wrote complainant that they "found it a good deal cheaper to stay out of the trouble than to get into it."

Alonzo Miller, of Staunton, Illinois, wrote that he had been waited upon by a committee from the Miners, Clerks, and Labor Unions, who stated the union's side of the controversy with complainant. The letter closes with: "They therefore forbid me of selling the Buck's stove any way, shape, or form, and if I did they would boycott me; and of course I cannot ruin my business on account of your stoves." Under date of September 30, 1907, Miller wrote complainant that a motion was carried in the local union to fine any member who should buy a Buck's range or heater. The letter concludes: "If you do not send your man, I will send these stoves and ranges back at once, as I will not ruin my business on account of your stoves."

J. H. Kaufman & Company, of Aberdeen, Washington, wrote complainant that they had been advised by the Trades Council that complainant's stoves and ranges had been boycotted by the labor union on account of strike. The letter concludes that, if the difficulty was not soon settled, the concern would be compelled to discontinue dealings with complainant.

The Brownfield-Canty Carpet Company, of Butte, Montana, wrote in part as follows: "We have been notified by the Labor Union of Butte that we must stop handling your line, as your company has been declared unfair to labor. We know nothing about the affair only what a circular from the Metal Polishers' Union says, but as Butte is the strongest union city in the union, we will have to quit the line."

Baker & Gidcumb, of Harrisburg, Illinois, wrote that the union people of that city would not allow them to handle complainant's goods.

F. W. Schneck & Company, of Milwaukee, Wisconsin, wrote that they had been notified by a "vice president of the International Union of N. A." that the complainant was on the "unfair" list, and that they would be reported as complainant's agents or representatives unless some settlement was made.

A letter dated September 9, 1907, from one of complainant's customers at Great

Falls, Montana, stated that their plans to put in a carload of complainant's product had been "knocked in the head by the unions in the town" requesting the firm not to handle complainant's product, which request, the firm added, "is equal to a demand."

A letter dated October 12, 1907, from the Davenport Furniture & Carpet Company, of Davenport, Iowa, contained the information that the firm had been waited on by labor union representatives, "who stated there was now a boycott on against your company, and would be against all people handling your product."

A letter from Mobile, Alabama, stated that the firm had received a notice from the local organization of the boycott against complainant's stoves, and a request that the firm cease handling them; which, the letter adds, "of course I refused to do, telling them that we had contracted ahead with you for your stoves, and that we were compelled to use them, and asked them not to put us on the unfair list, owing to our circumstances; but I don't know what the committee will do."

A letter from Louisville, Kentucky, from one of complainant's customers, stated that they had been notified by representatives of the local labor organizations that if they handled complainant's stoves they were liable to be considered as unfair to union labor.

A letter from Galesburg, Illinois, read in part as follows: "A committee representing the Buffers and Metal Polishers Union of this city called upon us today at the request of a similar union in your city. They claim you are on what they call 'the unfair list,' and requested us to take action in the matter and discontinue handling your goods. This looks like 'boycott' to us. They are coming again to talk the matter over."

F. S. Bode, of Kenosha, Wisconsin, wrote that he needed stoves, but could not handle them, owing to the labor unions in his city. His letter concludes: "Always had nice dealings with you, but I'm forced to do this."

A letter from the Schunk-Marquardt Company, of Toledo, Ohio, stated that "again we have been notified by the labor unions that the Buck Stoves & Range Company, are still on the unfair list, and that if we continue to handle Buck stoves and ranges they will boycott us. Not only on Buck stoves and ranges, but on all hardware."

Similar letters were received from many other cities, but we do not deem it necessary to make further allusion to them in this connection.

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Different traveling salesmen of complainant testified to loss of patronage in different cities because of representations made by representatives of labor unions that dealers handling Buck's stoves would themselves be boycotted.

The bill charges that the publication of concerns in the "We Don't Patronize" list of the Federationist is "for the purpose of singling out and designating individuals and concerns so named, and of notifying their customers, and the public generally, and all the members of said twenty-seven thousand local unions in their several localities, and of the several national and international unions, state federations and central city labor unions, that they are to be treated by them as unjust and hostile to the unions upon whose application such action is based, and that their business, products, and customers are to be boycotted by each and all the members of the American Federation of Labor and their friends and sympathizers, and that the whole power of its vast organization and combination is to be used against them to injure and destroy their business thereby, and that all the members of the American Federation of Labor are to abstain from purchasing or using said products, and from dealing with any person who purchases, handles, or uses said product."

The bill proceeds to set out specific instances of boycotts against complainant's patrons because they had continued to handle complainant's stoves.

In answer to these averments in respect to the publication in the "We Don't Patronize" list of the Federationist, defendants "deny that the purpose thereof is to use 'the whole power of its (American Federation of Labor) vast organization and combination to 'injure and destroy their (those not patronized) business thereby.' They deny that said 'We Don't Patronize' list prohibits or interferes with any constituent organization or its members 'dealing with any person who purchases, uses, or handles said product.'"

They also disclaim knowledge concerning specific instances of boycotting mentioned in the bill.

The first question, therefore, to be determined, is whether the defendants were connected with, and under this complaint responsible for, the acts above set forth. The complainant on the one hand contends that the action of said executive council and the publication in the "We Don't Patronize" list of the Federationist signified to each labor union throughout the land that they were to boycott not only complainant's product, but all those who, upon demand, did not cease business dealings with

complainant. In other words, that what actually happened was the result intended. The defendants, on the other hand, earnestly contend that the sum total of their offending has been a concerted severance of business intercourse with complainant, and that they are not responsible for what actually occurred.

The record shows that Mr. Gompers has been the president of the Federation since 1886, and that he is a man of ability and a natural leader of men. It is apparent from a perusal of the record that during all these years he has been a dominant factor in the affairs of the Federation, and that the general policy of organized labor throughout the land is shaped and controlled by the association of which he is the president. The record shows that a very large number of boycotts have been declared and prosecuted by the Federation in the past, and that as a result of these boycotts considerable litigation has ensued. The decisions of the courts in the various labor cases where the boycott has been under consideration have been the subject of frequent discussion by Mr. Gompers, and he has frequently issued instructions and advice to the members of the Federation, both in the annual conventions of the Federation and through the editorial columns of the *Federationist*. We will briefly review the previous position of the Federation in respect to the boycott in our effort to ascertain the significance of the "We Don't Patronize" list.

In the annual convention of 1894, delegates from an organization that had refused, or neglected, to enforce a boycott against a wholesale clothing house, were not seated, and it was resolved "to recommend to the public and organized labor to refuse to patronize or deal with any retail clothier handling the goods of said manufacturers."

The convention of 1899 was held at Detroit, Michigan. Mr. Gompers, in his annual report to that convention, under the head "Boycott—The Right and Practice," said:

"It has been my purpose for some time to present, in a comprehensive manner, the right of the workers to employ the power of the 'boycott.' With that object in view, the editorial appearing in the October issue of the *American Federationist*, under the caption, 'The Boycott as a Legitimate Weapon,' was written and published. It is commended to your serious consideration."

This report was referred to a committee, which in its report indorsed the above editorial and urged its careful reading. In 32 L.R.A. (N.S.)

the editorial referred to Mr. Gompers said:

"A sympathetic boycott is as legal and legitimate as a sympathetic strike. Just as men may strike for any reason, or without any reason at all, so may they suspend dealings with merchants or others for any reason or for no reason at all. Thus a boycott may extend to an entire community without falling under the condemnation of any moral or constitutional or statutory law. But I shall be triumphantly told, boycotters never do confine themselves to moral suasion and appeal; that they resort to threats, intimidation, and coercion, and it is this which makes what is called 'compound boycotting'—that is, boycotting which extends to parties not concerned in the original dispute—criminal and aggressive. . . . This sounds very plausible. It is easy to deduce from such premises that boycotters interfere with property rights and the pursuit of lawful callings, and that under the national and state Constitutions, to say nothing about explicit anticonspiracy laws, they are to be held civilly and criminally liable. . . . But this argument about the employment of threats and intimidation is fallacious and superficial. Its apparent validity disappears when, not satisfied with ugly-looking words, we demand precise definitions. No one pretends for a moment that it would be proper for a boycotter to approach a merchant and say 'You must join us in suspending all dealings with that employer, or newspaper, or advertiser, on pain of having your house set on fire or physical assault.' This would be an unlawful threat, and people who would try to enlist others in their campaign by threats of this character would certainly be guilty of a criminal conspiracy. Do boycotters use such threats? Do they contend for the right to employ force or threats of force? Our worst enemies do not contend that they do. They 'threaten,' but what do they threaten? They 'intimidate,' but how? Let Judge Taft, who issued his sweeping antiboycotting injunction, be a witness on this point. He said: 'As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial interests through threats that unless those others do so, the many will cause similar loss to them.' . . . No man in his senses will dispute this axiomatic proposition, namely, that a man has a right to threaten that which he has a right to carry out. . . . You may tell a man that if he does a certain thing, you will never speak to him or call at his house. This is a threat, but it is a threat that

you have a right to make. Why? Because you have a right to do what you threaten. The same thing is strictly true of boycotting. . . . A man may be coerced by actual force, by the threat of force, or by indirect means which the law cannot and does not prohibit. Coercion by a threat to suspend dealings is, to revert to our illustration, in the same category with coercion through a threat to cease friendly intercourse. . . . Labor claims the right to suspend dealings with any and all who refuse to support what it considers its legitimate demand."

In his testimony Mr. Gompers took occasion to say that he had not uttered a word of which he was not proud and which he would not reaffirm. Counsel for the defendants in their brief refer to this editorial as correctly setting forth the position of organized labor in respect to the boycott.

The 1905 convention adopted a report from the committee on boycotts, in which it was stated:

"We must recognize the fact that a boycott means war; and to successfully carry on a war, we must adopt the tactics that history has shown are most successful in war. The greatest master of war said that war was the trade of a barbarian, and the secret of success was to concentrate all your forces upon one point of the enemy; the weakest, if possible. In view of these facts, the committee recommends that the state federations and central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of unfair parties or places in their jurisdiction. One would be preferable. If every available means at the command of the state federations and central bodies were concentrated upon one such, and kept up until successful, the next on the list would be more easily brought to terms, and within a reasonable time none opposed to fair wages, conditions, or hours, but would be brought to see the error of their ways and submit to the inevitable. Under the present system our efforts are largely wasted and our ammunition scattered. Let us reduce the boycotts to the lowest possible number and concentrate our efforts upon those, and we feel certain better results will be obtained."

In an editorial in the February, 1908, *Federationist*, Mr. Gompers reviewed the opinion of the learned justice below in issuing the temporary injunction, and among other things said: "Neither coercion, threats, nor conspiracy, in the *unlawful sense* (italics ours), have been resorted to, yet the whole injunction is based upon this wrong assumption."

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At the annual convention of the Federation at Norfolk, Virginia, in 1907, Mr. Gompers, in his report, discussed the boycott against complainant, and its causes, and also this suit, which had then been commenced. After stating his version of the original controversy with complainant, Mr. Gompers continued:

"The investigation demonstrated clearly Mr. Van Cleave's hostile purpose towards the organization in question (International Brotherhood of Foundry Employees), and every effort at an amicable adjustment was fruitless. It was then that my colleagues and myself, the executive council, approved the position and action of the organization affected, and this fact was published in the *American Federationist*."

A resolution was thereupon introduced and adopted:

"That each central body affiliated with A. F. of L. be and is hereby instructed to appoint a committee who shall conduct and manage a 'campaign of education' among the membership affiliated with their central body, as well as dealers in stoves and ranges in their locality, and thoroughly inform them of the entire facts of the dispute between the Metal Polishers, Buffers, Platers, Brass and Silver Workers' Union of North America, the Brotherhood of Foundry Employees, also as to the attitude of J. W. Van Cleave and the Manufacturers' Association towards organized labor. Be it further

"Resolved, That the said committee shall report on the first of each month to the officers of the A. F. of L. the progress of the 'campaign of education,' together with a complete list of all dealers in their locality who are handling and selling the product of the Buck Stove & Range Company. Be it further

"Resolved that all commissioned organizers of the A. F. of L. shall report on the first of each month to the officers of the A. F. of L. the progress made in this 'campaign of education' by the different committees of the different central bodies in their respective districts, and also render such aid to all committees as lay in their power."

The committee on boycotts recommended:

"That the executive council be instructed to remove from the 'We Don't Patronize List' the names of firms in all instances wherein the executive council has knowledge that the national or international union responsible for the boycott are not aggressively pushing the same."

Under date of November 26, 1907, an official statement over the signature of Mr. Gompers as president, and attested by Frank Morrison as secretary, "By order of

the Executive Council of the American Federation of Labor," was sent out "To all Organized Labor and Friends." In this statement we find the following:

"As you are well aware, so inimical to the welfare of labor was the Buck's Stove & Range Company's management that the organization concerned felt obliged to declare the product of that company unfair. The workmen's organization appealed to the American Federation of Labor to indorse its action. *After due investigation that indorsement was given and is still further affirmed.* The circumstances leading to this action are so widely known that they need not be here recounted."

It will thus be seen that, in the nomenclature of the Federation, "We Don't Patronize" is synonymous with and equivalent to "boycott;" the publication of the former being notice to the craft that the latter is to follow. The record shows that during the year 1907 Mr. Gompers was in the city of St. Louis at least four different times, and that while there he was in conference with some of the labor leaders who were responsible for the inauguration of the boycott against complainant. It further appears that in his lecture tours and in his official capacity as president of the Federation he frequently visited other sections of the country. It also appears that the Federation has in the field over 1,200 so-called "organizers," whose duty in part appears to be to aid in pushing boycotts and to report thereon to the Federation. Nowhere in his testimony, nor in the testimony of any of the defendants who were called as witnesses, is the denial made that the publication of complainant in the "We Don't Patronize" list was not intended to inaugurate exactly the sort of boycott that was in fact prosecuted. Nowhere does it appear in the testimony of these defendants that any one of them ever even suggested to any of the subordinate organizations and membership of the Federation that they modify in any way their boycott against complainant. It will be noted that the answer to the specific averment of the bill hereinbefore set out only goes so far as to deny that the "We Don't Patronize" list prohibits or interferes with any constituent organization or its members" dealing with persons who handle complainant's stoves. The answer does not deny that the "We Don't Patronize" list indicates to subordinate organizations the course of conduct that was in fact pursued.

It is also highly significant that throughout the country the notice to dealers that they must cease handling complainant's product was not the sporadic and unau-

thorized act of individual unionists, but, on the contrary, the act of accredited leaders. From whom did they derive their inspiration? Was it a mere coincidence that they acted in such perfect harmony and ever to the same end and purpose? We think not.

In the editorial, to which allusion has been made, and which was brought to the attention of and indorsed by the Federation in convention assembled, Mr. Gompers contended for the right to do, and advised the doing, of exactly what was done in this case.

The bill of complaint was filed August 19, 1907. The defendants were therein notified of the exact nature of the boycott that was then being prosecuted against complainant; but, notwithstanding the knowledge thus obtained, we find the executive council of the Federation, on November 28, 1907, reaffirming without qualification, and in an official statement, as before stated, what had been done.

In view of all this, we think there is no room for doubt that this combination or boycott which had its inception in St. Louis was inaugurated in accordance with the settled policy of the American Federation of Labor, and that when the Federation in due course approved and indorsed the same, it acted with full knowledge not only of what had already occurred, but of what would be likely to follow. If, therefore, anyone is responsible for what happened, these defendants certainly are. *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 218, 47 L. ed. 451, 23 Sup. Ct. Rep. 294; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Standard Oil Co.* 152 Fed. 294.

We approach a consideration of the legal questions involved in this case with a full realization of their widespread importance. We realize to the fullest extent that through the instrumentality of labor unions much has been accomplished for the betterment and amelioration of the conditions surrounding those who toil. In common with all who have the welfare of their country at heart, we are gratified that such progress has been made in behalf of labor, and we are proud of the intelligence, thrift, and patriotism of the American workman. We believe him to be anxious for his rights, but, like all other good citizens, desirous of obeying the law. We would not if we could, and could not if we would, take from him the right of organization. We would accord him every right under the law that his employer enjoys; and we believe mature consideration will fully convince him and those whose solemn respon-

sibility it is to counsel and guide him that he should ask for no more.

Eliminating, as we have, all collateral considerations, the clean-cut question is presented, whether a combination such as was entered into in this case, which has for its object the coercion of a given firm through the instrumentality of the boycott, is lawful.

In the Declaration of Independence, it is stated that among the inalienable rights with which the Creator has endowed all men are life, liberty, and the pursuit of happiness. The 5th and 14th Amendments to the Constitution contain provisions against deprivation of life, liberty, or property without due process of law; the former Amendment operating upon Congress, the latter upon the several states.

Mr. Justice Harlan, speaking for the court in *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257, said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the 14th Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

Again, in *Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427, the court quoted with approval the following from the concurring opinion of Mr. Justice Bradley in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 762, 28 L. ed. 588, 4 Sup. Ct. Rep. 652: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence. . . . This right is a large ingredient in the civil liberty of the citizen."

In *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912, the circuit court of appeals for the eighth circuit, said: "The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage."

It will thus be seen that the supreme law of the land guarantees protection to 32 L.R.A.(N.S.)

all who desire to engage in a lawful calling or business, subject, of course, to such reasonable regulations as it may be necessary to impose. And when Mr. Gompers advises his followers that a man is entitled to protection against a threatened destruction of his house, but none against a malicious destruction of the business which enables him to maintain his house, Mr. Gompers is mistaken. Was the combination entered into by appellants unlawful? A conspiracy has been defined as a combination of two or more persons to accomplish something unlawful, or something not in itself unlawful, by unlawful means. *Pettibone v. United States*, 148 U. S. 203, 37 L. ed. 422, 13 Sup. Ct. Rep. 542. In determining whether the acts of the appellants are within this definition, we will here review a few of the adjudged cases on this branch of the law.

Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, was an information in the police court of the District of Columbia, charging the defendants with a conspiracy to prevent certain members of a local union, who had been expelled therefrom, from pursuing their calling as musicians in the United States. The conspiracy, as set forth in the complaint, was to be effected by the defendants and the members of other associations with which they were affiliated refusing to work in any capacity with the expelled members, or with, or for any person or firm working with or employing them, and by warning and threatening every person or firm employing such expelled members that, if they did not cease to employ and refuse to employ them, they would not receive the custom or patronage either of the persons so conspiring or of the members of affiliated organizations. The question before the court was whether the offense charged was a petty offense or one of so serious a nature that the defendants were entitled to a trial by jury. The court held that the offense charged was of the latter character.

Mr. Justice Harlan in reviewing *Callan v. Wilson*, in *Arthur v. Oakes*, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169, said: "It thus appears that combinations and conspiracies by two or more persons, with the intent to injure the rights of others, were illegal at common law." He further said: "According to the principles of the common law, a conspiracy upon the part of two or more persons with the intent by their combined power to wrong others, or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. This is

theless is applicable here. In our opinion, it is more important to wage earners than to employers of labor that we declare this combination unlawful, for, if wage earners may combine to interfere with the lawful business of employers, it follows that employers may combine to coerce their employees.

It is next contended that the decree entered in this case is an infringement of the constitutional guaranty of freedom of speech and of the press. In so far as it seeks to restrain acts in furtherance of the boycott, we do not think it constitutes either a censorship of the press or an abridgment of the right of free speech. An unlawful combination was found to exist, which, unless checked, would destroy complainant's business and leave complainant without adequate redress. The court, therefore, very properly sought to restrain the cause of the mischief,—the unlawful combination. The "We Don't Patronize" or "Unfair" list and oral declarations of the boycott were included in the decree because they were among the means employed in carrying out the unlawful design.

Courts of equity have refused to enjoin the publication of a mere libel, but they have not hesitated to enjoin either written or oral publications constituting a means to the carrying out of an unlawful combination. Thus, in *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077, an injunction was granted restraining threats against these willing to be employed, such threats being a step in the prosecution of the conspiracy. In *Beck v. Railway Teamsters' Protective Union*, supra, "picketing and distribution of boycotting circulars and all acts of intimidation and coercion" were enjoined. In *Casey v. Cincinnati Typographical Union No. 3*, 12 L.R.A. 193, 45 Fed. 135, the publication and circulation of posters, handbills, and circulars printed and circulated in furtherance of the conspiracy were enjoined. Similar decrees were entered in *Cœur d'Alene Consol. Min. Co. v. Miners' Union and Barr v. Essex Trades Council*, supra; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 79 Am. St. Rep. 783, 56 Atl. 327; *Purvis v. Local No. 500*, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275; *My Maryland Lodge No. 186 v. Adt*, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; *Jackson v. Stanfield*, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; *Brown v. Jacobs' Pharmacy*, 115 Ga. 439, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553. In *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 32 L.R.A. (N.S.)

62 Fed. 818, the court said: "It would be strange, indeed, if that right [of free speech] could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be." In *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276, Mr. Justice Holmes, speaking for the court, said: "It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan, and the plan may make the parts unlawful." Again, in *Aikens v. Wisconsin*, 195 U. S. 205, 49 L. ed. 159, 25 Sup. Ct. Rep. 3, the same justice said: "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

The cases relied upon by appellants are not in point here for the reason that they involved mere libels, which, as above stated, courts of equity have uniformly refused to restrain.

Oral and written declarations in furtherance of a conspiracy are tentacles of the conspiracy, and must be treated as such, and not as independent acts. It would be an anomalous situation, indeed, if a court of equity, having ample jurisdiction to restrain the carrying out of a conspiracy to deprive a citizen of rights guaranteed him by the Constitution, could be prevented from affording relief by the interposition of such a claim as is here made. Freedom of action is at least as sacred as an untrammelled tongue or pen, and those who conspire to defeat the former right ought not to be permitted to interpose a plea based upon the latter.

But, we think the decree in this case goes too far when it enjoins the publication or distribution through the mails or otherwise of the *Federationist* or other periodicals or newspapers containing any reference to complainant, its business or product, as in the "We Don't Patronize" or "Unfair" list of the defendants. The court below found, and in that finding we concur, that this list in this case constitutes a talismanic symbol indicating to the membership of the Federation that a boycott is on and should be observed. The printing of this list, therefore, was what the court sought to prevent, and what, in our opinion, the court had power to prevent; but the decree should stop there and not attempt to regulate the publication and distribution of other matter over

which the court has no control. In other words, this branch of the decree should merely prohibit the printing of complainant, its business, or product, in the "We Don't Patronize" or "Unfair" list *in furtherance of the boycott*. The italicized words should be added, for, when the conspiracy is at an end, the Federation will have the same right that any association or individual now has to comment upon the relations of complainant with its employees. It is the existence of the conspiracy that warrants the court in prohibiting the printing of this list. Manifestly, when the conspiracy ends the prohibition ought also to end.

We are of the opinion that the decree is too broad in other respects. It, being based upon a finding that a conspiracy to boycott exists, should deal with acts of commission, and not acts of omission. To be more specific, we think it should attempt no more than a prohibition of the boycott and the means of carrying it on; that is, the declarations or threats of boycott on other manner of intimidation against complainant's patrons or those handling or wishing to purchase its product. We have no power to compel the defendants to purchase complainant's stoves. We have power to prevent defendants, their servants and agents, from preventing others from purchasing them.

There being no evidence in any way connecting council for defendants with the prosecution of this boycott, we think the decree should not be so worded as to include them. While "attorneys" probably was used in the decree in a tautological sense, its inclusion at all was unnecessary.

The point is made that this decree should not include the Federation because it is a mere voluntary association. This point appears to be well taken, since there is no such legal entity as an unincorporated association. *Taff Vale R. Co. v. Amalgamated Soc.* [1901] A. C. 426, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698. This, however, is not a suit at law for damages, but a proceeding in equity against certain representative members of an association composed of a large number of members, service upon all of whom individually would be impossible. In such a case it has been held "that a number of members may be made parties defendant as representative of the class." *Pickett v. Walsh*, 192 Mass. 590, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638. We think it clear in this case that the named members of the Federation fully represent its membership, and that service upon them is sufficient.
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For the reasons given the decree is modified and affirmed as follows: It is adjudged, ordered, and decreed that the defendants, Samuel Gompers, Frank Morrison, John B. Lennon, James Duncan, John Mitchell, James O'Connell, Max Morris, Denis A. Hayes, Daniel J. Keefe, William D. Huber, Joseph F. Valentine, Rodney L. Thixton, Clinton O. Buckingham, Herman C. Poppe, Arthur J. Williams, Samuel R. Cooper, and Edward L. Hickman, individually and as representatives of the American Federation of Labor, their and each of their agents, servants, and confederates, be, and they hereby are, perpetually restrained and enjoined from conspiring or combining to boycott the business or product of complainant, and from threatening or declaring any boycott against said business or product, and from abetting, aiding, or assisting in any such boycott, and from directly or indirectly threatening, coercing, or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in complainant's product, and from printing the complainant, its business or product, in the "We Don't Patronize" or "Unfair" list of defendants in furtherance of any boycott against complainant's business or product, and from referring, either in print or otherwise, to complainant, its business or product, as in said "We Don't Patronize" or "Unfair" list, in furtherance of any such boycott.

The costs of this appeal are equally divided between appellants and appellee.

Modified and affirmed.

An appeal by the appellants to the Supreme Court of the United States was allowed March, 26, 1909.

Mr. Justice Van Orsdel, concurring:

I concur fully in the conclusion reached by my associate, Mr. Justice Robb. I do not desire to take issue with the reasoning employed by him in arriving at that conclusion. Hence, what I may say will be rather in addition to, than in criticism of, anything that appears in the opinion.

It is insisted that the decree of the court below deprives the defendants of the right of freedom of contract, of free speech, and of a free press, as guaranteed in the Federal Constitution. If this contention is well founded, it is clear that a court of equity cannot be used for such a purpose. The equitable writ of injunction is an agency placed in the hands of the court to protect rights and restrain wrongs where the law is remediless; but it should never be used as an instrument of oppression. This great writ for the enforcement of equitable rights was not intended to be used as a short cut

to escape the inconvenience of a suit at law, with the chances involved in submitting the issue to the judgment of a jury. Where there is legal redress and a right of trial by jury, a court of equity is powerless to intervene and deprive the citizen of that right, except to avoid a multiplicity of suits, or where the legal remedy is inadequate. The guaranty of freedom of speech and freedom of the press was placed in the Constitution to prevent government censorship, as practised at that time in many of the governments of Europe. That, therefore, which was placed in the organic law, to accomplish an end so essential to the freedom and general welfare of the people, is hardly susceptible of nullification by judicial decree.

The courts of the United States will be useful and fulfil the functions for which they were created, only so long as they are content to interpret the laws in conformity with the limitations of the Constitution. Any attempt to disobey these restrictions is a step across the danger line; and will, of necessity, lead to judicial arrogance, tyranny, and oppression. If, in any particular, we have outgrown the Constitution, the remedy is plain and simple. It is within the power of the people to amend it; but this prerogative is not reposed in the courts.

It must be remembered, however, that there is a point where the right of free speech and a free press ends, and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the Constitution. It protects no one in uttering or disseminating slanderous or libelous matter. A citizen cannot invoke the protection of the constitutional guaranty of free speech and a free press to destroy the right of property secured to his neighbor by the same instrument. There is nothing complained of in this case for which there is not a specific legal remedy provided. Hence, the only excuse for a court of equity taking jurisdiction is because the legal remedy is inadequate to prevent irreparable injury and avoid a multiplicity of suits. This is the one instance when equity jurisdiction will be assumed and exercised with the utmost caution; not assuming anything that can be avoided, or taking jurisdiction where the legal remedy is at all adequate. I agree, however, that within these limitations, the record presents a case calling for equitable relief.

The word "boycott" at the present time is no more obnoxious than was the word "strike" a quarter of a century ago. Then it was sought through the courts of equity

to invoke the injunctive writ to restrain laboring men from organizing a peaceable strike. In some instances, inferior Federal courts granted injunctions, but they were never upheld in the superior courts of the country. It is well settled now that a man, or a number of men, may refuse to continue to work for their employer, and they may combine for the purpose of organizing a strike. They may advise others to quit work and join in the strike, so long as no contractual rights are invaded, and they may advise others not to engage their services to the employer against whom the strike is directed. All this is within their constitutional rights, and is justified by their freedom to do those things which they think will better their condition. It is no answer that it may not, in many instances, accomplish that end, or that it invariably damages the employer and interferes with his property rights. Of course, a man has a property right in his business; so has a laboring man a property right equally sacred in his labor; and when these rights conflict, there must, of necessity, be injury to one or the other, or both. This is the result of conflicting opinion and an exigency of the contractual relation, for which the law furnishes no relief.

I am not unmindful of the rule of the common law that combinations of two or more persons to injure the rights of others were held to be illegal. But if the injury there referred to be held to include the combination of two or more persons to withhold patronage from another, then the rule of the common law has long since been overruled by the courts of this country in dealing with strikes. I am aware that, at common law, a combination of two or more persons to do an unlawful thing, even if nothing is done in furtherance of the intent, is a conspiracy,—a substantive offense; while in the case of an individual, there can be no offense until there is some affirmative act tending to carry the intent into effect. But that has no bearing where the unlawful intent is the same, and the offense has actually been committed, either by the individual or by a number of persons combined together for that purpose.

The old rule that one may do lawfully what, if done by two or more persons in combination together, may become unlawful, has been greatly modified in this country. It is a rule that gained currency at a time when even the right of assembly was looked upon with disapproval and suspicion. When this rule was first announced by the English courts, a labor union would not have been tolerated. In one of the early English cases, decided in 1721 (*Tubwomen v. Brewers of London*, 3 Co-

lumbia L. Rev. 447), it was held to be a criminal conspiracy for two or more persons to combine together and refuse to continue to work for their employer unless he should comply with their demand for higher wages. In other words, it was held to be a criminal conspiracy for workmen to join together and strike. It was conceded in the same case that one person might abandon his employment if his demand was not complied with, but it was held unlawful for two or more persons to combine together for the purpose of demanding higher wages. It was held that such a combination constituted a criminal conspiracy. The same rule was applied as late as 1809 in New York, in the case of *Re Journeymen Cordwainers*, reported in *Yates*, Sel. Cas. 111.

The right of laboring men to organize into unions, and the right of these unions to conduct peaceable strikes, is justified because of their inability to compete single-handed in contests with their employers. In this competition, any peaceable and lawful means may be resorted to, and it is only when the means employed become unlawful that the courts will interfere. The law recognizes the right of both labor and capital to organize. The contest between employer and employee is one which courts of equity should recognize as entitled to be fought out upon the basis of equality; and the rule applied by the courts to the strike is based, I think, upon that principle. The fundamental principle underlying this contest is, that the employer who employs one thousand workmen is in possession of the same competitive power to force those workmen to his terms as the one thousand workmen, by the most powerful lawful organization, have to force him to a compliance with their terms. The contest, therefore, opens with the one on one side and a thousand on the other upon a substantial basis of equality. The employer has a property right in his business which he asks the courts to protect, and which is entitled to protection. It consists, among other things, in his right to employ whom he pleases. That right extends to a discrimination against workmen of a certain class, or to men belonging to labor organizations. He may use in his business such types of machinery and appliances as he may think adapted to carry out his work most successfully, so long as they are reasonably safe and sanitary. The law protects him in these rights, and the courts will require others to respect them. On the other hand, the thousand employees have a property right in their labor, which is equally sacred with that of the employer. They have a right to engage their

services wherever and to whomsoever they can secure the largest rewards and the fairest treatment. They have a right to cease working for their employer, with due regard for their contractual relations, when, in their judgment, they can better their condition by so doing. They have a right to organize for this purpose, and they have a right to advise others to join their organization, and the law will protect them in the exercise of these rights equally with the rights of the employer. The refusal of the employees to work for the employer may result in his financial ruin, but the loss will be no greater than the damage his refusal to employ the one thousand laborers may work in the aggregate upon them and those dependent upon their labor. In this contest between employer and employed, it should be remembered that the one who most strictly recognizes and observes the legal and equitable rights of the other enters the struggle with tremendous odds in his favor.

Applying the same principle, I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion or a threat. As long as the actions of this combination of individuals are lawful, to this point it is not clear how they can become unlawful because of their subsequent acts directed against the same person or corporation. To this point, there is no conspiracy,—no boycott. The word "boycott" is here used as referring to what is usually understood as "the secondary boycott;" and when used in this opinion, it is intended to be applied exclusively in that sense. It is, therefore, only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another, that the power of the courts can be invoked. This point must be passed before the unlawful and unwarranted acts which the courts will punish and restrain are committed.

The definition of a boycott given by Judge Taft in *Toledo A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730, is as follows: "As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse through threats that, unless those others do so, the

to escape the inconvenience of a suit at law, with the chances involved in submitting the issue to the judgment of a jury. Where there is legal redress and a right of trial by jury, a court of equity is powerless to intervene and deprive the citizen of that right, except to avoid a multiplicity of suits, or where the legal remedy is inadequate. The guaranty of freedom of speech and freedom of the press was placed in the Constitution to prevent government censorship, as practised at that time in many of the governments of Europe. That, therefore, which was placed in the organic law, to accomplish an end so essential to the freedom and general welfare of the people, is hardly susceptible of nullification by judicial decree.

The courts of the United States will be useful and fulfil the functions for which they were created, only so long as they are content to interpret the laws in conformity with the limitations of the Constitution. Any attempt to disobey these restrictions is a step across the danger line; and will, of necessity, lead to judicial arrogance, tyranny, and oppression. If, in any particular, we have outgrown the Constitution, the remedy is plain and simple. It is within the power of the people to amend it; but this prerogative is not reposed in the courts.

It must be remembered, however, that there is a point where the right of free speech and a free press ends, and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the Constitution. It protects no one in uttering or disseminating slanderous or libelous matter. A citizen cannot invoke the protection of the constitutional guaranty of free speech and a free press to destroy the right of property secured to his neighbor by the same instrument. There is nothing complained of in this case for which there is not a specific legal remedy provided. Hence, the only excuse for a court of equity taking jurisdiction is because the legal remedy is inadequate to prevent irreparable injury and avoid a multiplicity of suits. This is the one instance when equity jurisdiction will be assumed and exercised with the utmost caution; not assuming anything that can be avoided, or taking jurisdiction where the legal remedy is at all adequate. I agree, however, that within these limitations, the record presents a case calling for equitable relief.

The word "boycott" at the present time is no more obnoxious than was the word "strike" a quarter of a century ago. Then it was sought through the courts of equity

to invoke the injunctive writ to restrain laboring men from organizing a peaceable strike. In some instances, inferior Federal courts granted injunctions, but they were never upheld in the superior courts of the country. It is well settled now that a man, or a number of men, may refuse to continue to work for their employer, and they may combine for the purpose of organizing a strike. They may advise others to quit work and join in the strike, so long as no contractual rights are invaded, and they may advise others not to engage their services to the employer against whom the strike is directed. All this is within their constitutional rights, and is justified by their freedom to do those things which they think will better their condition. It is no answer that it may not, in many instances, accomplish that end, or that it invariably damages the employer and interferes with his property rights. Of course, a man has a property right in his business; so has a laboring man a property right equally sacred in his labor; and when these rights conflict, there must, of necessity, be injury to one or the other, or both. This is the result of conflicting opinion and an exigency of the contractual relation, for which the law furnishes no relief.

I am not unmindful of the rule of the common law that combinations of two or more persons to injure the rights of others were held to be illegal. But if the injury there referred to be held to include the combination of two or more persons to withhold patronage from another, then the rule of the common law has long since been overruled by the courts of this country in dealing with strikes. I am aware that, at common law, a combination of two or more persons to do an unlawful thing, even if nothing is done in furtherance of the intent, is a conspiracy,—a substantive offense; while in the case of an individual, there can be no offense until there is some affirmative act tending to carry the intent into effect. But that has no bearing where the unlawful intent is the same, and the offense has actually been committed, either by the individual or by a number of persons combined together for that purpose.

The old rule that one may do lawfully what, if done by two or more persons in combination together, may become unlawful, has been greatly modified in this country. It is a rule that gained currency at a time when even the right of assembly was looked upon with disapproval and suspicion. When this rule was first announced by the English courts, a labor union would not have been tolerated. In one of the early English cases, decided in 1721 (*Tubwomen v. Brewers of London*, 3 Co-

lumbia L. Rev. 447), it was held to be a criminal conspiracy for two or more persons to combine together and refuse to continue to work for their employer unless he should comply with their demand for higher wages. In other words, it was held to be a criminal conspiracy for workmen to join together and strike. It was conceded in the same case that one person might abandon his employment if his demand was not complied with, but it was held unlawful for two or more persons to combine together for the purpose of demanding higher wages. It was held that such a combination constituted a criminal conspiracy. The same rule was applied as late as 1809 in New York, in the case of *Re Journeymen Cordwainers*, reported in *Yates*, Sel. Cas. 111.

The right of laboring men to organize into unions, and the right of these unions to conduct peaceable strikes, is justified because of their inability to compete single-handed in contests with their employers. In this competition, any peaceable and lawful means may be resorted to, and it is only when the means employed become unlawful that the courts will interfere. The law recognizes the right of both labor and capital to organize. The contest between employer and employee is one which courts of equity should recognize as entitled to be fought out upon the basis of equality; and the rule applied by the courts to the strike is based, I think, upon that principle. The fundamental principle underlying this contest is, that the employer who employs one thousand workmen is in possession of the same competitive power to force those workmen to his terms as the one thousand workmen, by the most powerful lawful organization, have to force him to a compliance with their terms. The contest, therefore, opens with the one on one side and a thousand on the other upon a substantial basis of equality. The employer has a property right in his business which he asks the courts to protect, and which is entitled to protection. It consists, among other things, in his right to employ whom he pleases. That right extends to a discrimination against workmen of a certain class, or to men belonging to labor organizations. He may use in his business such types of machinery and appliances as he may think adapted to carry out his work most successfully, so long as they are reasonably safe and sanitary. The law protects him in these rights, and the courts will require others to respect them. On the other hand, the thousand employees have a property right in their labor, which is equally sacred with that of the employer. They have a right to engage their

services wherever and to whomsoever they can secure the largest rewards and the fairest treatment. They have a right to cease working for their employer, with due regard for their contractual relations, when, in their judgment, they can better their condition by so doing. They have a right to organize for this purpose, and they have a right to advise others to join their organization, and the law will protect them in the exercise of these rights equally with the rights of the employer. The refusal of the employees to work for the employer may result in his financial ruin, but the loss will be no greater than the damage his refusal to employ the one thousand laborers may work in the aggregate upon them and those dependent upon their labor. In this contest between employer and employee, it should be remembered that the one who most strictly recognizes and observes the legal and equitable rights of the other enters the struggle with tremendous odds in his favor.

Applying the same principle, I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion or a threat. As long as the actions of this combination of individuals are lawful, to this point it is not clear how they can become unlawful because of their subsequent acts directed against the same person or corporation. To this point, there is no conspiracy,—no boycott. The word "boycott" is here used as referring to what is usually understood as "the secondary boycott;" and when used in this opinion, it is intended to be applied exclusively in that sense. It is, therefore, only when the combination becomes a conspiracy to injure by threats and coercion the property rights of another, that the power of the courts can be invoked. This point must be passed before the unlawful and unwarranted acts which the courts will punish and restrain are committed.

The definition of a boycott given by Judge Taft in *Toledo A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730, is as follows: "As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse through threats that, unless those others do so, the

many will cause similar loss to them." In *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172, the word "boycott" is defined as follows: "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others, against their will, to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction." In *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163, 3 Rep. & Corp. L. J. 561, it is said: The word itself implies a threat. "In popular acceptance it is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs." It will be observed that the above definitions are in direct conflict with the earlier English decisions, and indicate a distinct departure by our courts. This undoubtedly is in recognition of the right of a number of individuals to combine for the purpose of improving their condition. The rule of the English common law, from which we have so far departed, is expressed in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, 1 Eng. Rul. Cas. 706, as follows: "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it."

From this clear distinction, it will be observed that there is no boycott until the members of the organization have passed the point of refusing to patronize the person or corporation themselves, and have entered the field where, by coercion or threats, they prevent others from dealing with such persons or corporation. I fully agree with this distinction. So long, then, as the American Federation of Labor, and those acting under its advice, refused to patronize complainant, the combination had not arisen to the dignity of an unlawful

conspiracy or a boycott. It is, therefore, the boycott, thus defined, with which we are here dealing, and not with the events that led to it. Hence, all that can be restrained are the acts which constitute the boycott and were incident thereto.

The unlawful conspiracy here consists in the membership of the American Federation of Labor banding together, not to cease dealing with the complainant or purchasing or using its products, but by threats to coerce others not to patronize the complainant, on penalty of the destruction of their business. What, up to this point, was the legitimate exercise of the right of freedom of contract, of free speech, and of a free press, now becomes destructive of property rights. The threats and actions of these defendants, as disclosed by this record, were as efficient in this instance to destroy the complainant's property in its right to do business with those against whom they were directed, as it would have been to bar its doors, or to place a guard to prevent, by physical force, the public from dealing with it. When a labor strike assumes the proportions of physical or threatened interference with the conduct of the former employer's business, either by physical force or destruction of property, or by threatening injury or destruction of business to others having dealings with such person or corporation, it assumes such proportions that a court of equity will intervene and restrain, not the combination, or its right of existence, but the unlawful acts. So, in this case, applying the same rule to the boycott, the American Federation of Labor, while not interfering with complainant's business by physical force or by destruction of property, has clearly been guilty of coercing and threatening those having business dealings with complainant, and there is abundant evidence of the defendants conspiring together to do these unlawful acts. But the decree of the court should restrain the commission of the acts and specifically point out the offenses that should properly come under the decree, and not embrace within its commands such acts as may lawfully be performed by these defendants. In making this distinction, however, it should be remembered that threats of coercion and injury to property rights, to become actionable, need not be declared in positive terms. It is sufficient if there is an unmistakable intimation that such injury will occur unless the demands be complied with. *Purvis v. Local No. 500*, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275.

Assuming that we are asked to enjoin a conspiracy entered into by these defend-

ants to destroy the business of complainant, or force it to their terms, surely there is nothing to invoke the interference of the court until the defendants reached a point where they were wrongfully jeopardizing the property rights of complainant, either by affirmative action, or by threatening of such action. Until this point was reached, there was no unlawful conspiracy. It, therefore, certainly follows that acts done by defendants before the unlawful conspiracy was formed were performed within their legal rights; and when the unlawful acts cease, they will still be legal. The power of the court cannot, therefore, be invoked to restrain all the acts of defendants against complainant, embracing within its sweeping decree not only the unlawful but the lawful acts of the defendants in this connection. But it is said that the acts here complained of are incident to, and form a part of, the general conspiracy. It is the conspiracy that can be enjoined. Hence, only the forbidden acts which constitute the conspiracy can be embraced in the decree. The court has no power to perpetually restrain the defendants from doing anything which, separated from the unlawful acts constituting the conspiracy, is legal.

The courts of this country now recognize the legal right of laboring men to form unions for the protection and promotion of their interests, and deny the power to enjoin the members of such organizations from peaceably withdrawing from the service of their employer. Here we have clearly a combination of two or more individuals doing injury to the property rights of a third, which right the courts have upheld. This right is based upon the protection of the property which one man, or a combination of men, have in their business. As said by Justice Bradley in the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394: "For the preservation, exercise, and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." Or, as was said in *Gray v. Building Trades Council*, supra: "A person's occupation or calling, by means of which he earns a livelihood, and endeavors to better his condition and to provide for and support himself and those dependent upon him, is property within the meaning of the law, and entitled to pro-

tection as such, and, as conducted by the merchant, by the capitalist, by the contractor, or laborer, is, aside from the goods, chattels, money, or effects employed and used in connection therewith, property in every sense of the word. Labor may organize, as capital does, for its own protection, and to further the interests of the laboring class. They may strike and persuade and induce others to join them; but when they resort to unlawful means to cause injury to others with whom they have no relation, contractual or otherwise, the limit permitted by the law is passed, and they may be restrained." In *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 16, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, the court said: "It is conceded that courts of equity have jurisdiction to restrain conspiracies of this character when irreparable injury is sure to follow. Suits at law would be inadequate, and a multiplicity of suits at law would arise. Complainants were engaged in a lawful business, and carrying it on in a lawful manner. They had done nothing to the defendants, or any of them, either illegal, immoral, or unjust. They were paying wages to their teamsters in fact greater than union teamsters received, because they made no deductions for certain lost time, which the union employers made. The law protects them in the right to employ whom they please, at prices they and their employees can agree upon, and to discharge them at the expiration of their term of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor, when, to whom, and for what price he chooses, is involved."

It will be observed, therefore, that while the law sanctions combinations of laboring men for the purpose of bettering their con-

dition, and accords to the union the same liberty in bestowing and withholding its benefit that it does to an individual, it only permits of peaceful means in the accomplishment of its ends, and will restrain not alone acts accompanied by violence, intimidation, or threats of violence, but where the means used are of a threatening nature and intended to restrain those against whom they are directed, through fear of loss of property or personal violence, from exercising freely their rights.

The American Federation of Labor is not an unlawful organization *per se*. If the Federation, from the nature and terms of its organization, is one in restraint of trade, extending to interstate commerce, Congress, by the anti-trust act, has furnished an effective, speedy, and adequate remedy at law for its dissolution, to which, in that instance, it should be made to respond, and not to a court of equity. It is not unlawful for citizens to organize together for any of the main purposes for which the American Federation of Labor exists. It is not unlawful for that order to have an official organ; it is not unlawful for that organization, though the medium of that organ, to express freely its opinion as to the fairness or unfairness with which certain employers deal with their employees; and it is not unlawful for the paper to contain advice to the friends of labor not to patronize such employer. Again, we do not assume that it will be contended that a citizen has not perfect freedom to deal with whom he pleases, and withhold his patronage for any reason that he may deem proper, whether the reason be one originating in his own conscience, or through the advice of a neighbor, or through the reading of an article in a paper. Neither would it be unlawful for such citizen to advise another not to deal with a person with whom he has concluded not to continue his patronage. If this advice may extend to one, it may to a hundred; and the thing done will not be actionable so long as it is an expression of honest opinion, and not slanderous, however much the intercourse between this citizen and his neighbor may operate to injure the person against whom the advice is directed. As long as confined to a mere expression of opinion as to the fairness or unfairness of a business transaction, it is not actionable. Of course, such advice could not be directed to the honesty of purpose that actuated the employer, without making the person liable for slander or libel if the charge could not be justified. But it has never been held in this country, that either slander or libel can be enjoined.

It is insisted that this entire movement by defendants against complainant is to 32 L.R.A. (N.S.)

better their own condition. This may be true. The improvement of their condition, however, can only be the result of the direct injury inflicted upon complainant, and the courts will look to the direct consequences of defendants' actions, and not to the probable indirect results. The court will not tolerate the unlawful acts of defendants to accomplish what would otherwise be a justifiable end. It is not the injury of complainant that measures the right of the court to intervene, for a peaceable, lawful strike may inflict great injury; but it is the unlawful actions of the defendants, directed against the rights of the complainant. In the one instance, the defendants are exercising their lawful rights, and if damage incidentally occurs to others, it is due to a conflict of lawful interests. In the other case, the actions are unlawful, and no resulting advantage can justify the court in overlooking a breach of the law.

No one doubts, I think, the right of the members of the American Federation of Labor to refuse to patronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers not only for the use of its members, but as notice to their friends that the employers whose names appear therein are regarded as unfair to labor. This list may not only be procured and kept available for the members of the association and its friends, but it may be published in a newspaper or series of papers. To this extent they are within their constitutional rights, at least, where a court of equity cannot intervene. But as soon as, by threats or coercion, they attempt to prevent others from patronizing a person whose name appears on the list, it then becomes an unlawful conspiracy,—a boycott.

Let us assume, therefore, that the object of the Federation in publishing complainant's name in the "Unfair" or "We Don't Patronize" list in the *Federationist* was a part of this conspiracy, and was notice to each other, and to others, that the boycott would be extended to persons patronizing the complainant; no one would contend but that the unlawful feature of the publication would consist, not in the fact that a list of names had been published, among which was the name of the complainant, but in the object of the publication of complainant's name therein. As to defendants, it would become one of the steps in the conspiracy. While I have no doubt from this record that the publication of complainant's name in the list may be restrained, I also entertain no doubt in asserting that the publication of the paper, and its delivery and distribution through

the mails or otherwise, under the facts in this case, cannot be restrained.

Conceding, then, that the name of complainant was published in the "We Don't Patronize" or "Unfair" list of employers in the American Federationist for the purpose of notifying not only the members of the American Federation of Labor, but dealers generally, to withhold patronage from complainant on penalty of having a boycott inaugurated against such dealers,—and on this I think there is sufficient in the record to support such an inference,—the most a court could do would be to restrain the publication in the list of the name of complainant, together with any other article or articles in the American Federationist published in pursuance or furtherance of the boycott. Without the existence of the boycott, the court would be powerless to reach the paper. Hence, its power to restrain any publication appearing therein can only be upheld when it is clearly apparent that such publication is in support or furtherance of the boycott, and the restraining order must be limited to the particular article or articles so published in furtherance of the boycott, and cannot extend to the paper itself. Is that what was done? The decree restrains the defendants "from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any printed or written newspaper, magazine, circular, letter, or other document or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business or its product, in the 'We Don't Patronize' or the 'Unfair' list of the defendants, or any of them, their agents, servants, attorneys, confederates, or other person or persons acting in aid of or in conjunction with them, or which contains any reference to the complainant, its business or product, in connection with the term 'Unfair' or with the 'We Don't Patronize' list, or with any other phrase, word, or words, of similar import, and from publishing or otherwise circulating, whether in writing or orally, any statement or notice, of any kind or character whatsoever, calling attention to the complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainant, its business or its product, or that the same are, or were, or have been, declared to be 'Unfair,' or that it should not be purchased or dealt in or handled by any dealer, tradesman, or other person whomsoever, or by the public, or any representation or statement of like effect or import, for the purpose of, or tending to, any injury to or interference with the complain-

ant's business, or with the free and unrestricted sale of its product, or of coercing or inducing any dealer, person, firm, or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession stoves, ranges, heating apparatus, or other product of the complainant."

The sustaining of such a decree by a court of equity would violate the constitutional rights of the citizen. It would mark the beginning of the era of judicial tyranny by the branch of the government charged with the duty of protecting the citizen in his constitutional and legal rights. The clause in the Constitution guaranteeing free speech and a free press was placed there to prevent a repetition of the abuses that had grown up in the monarchies of Europe,—government censorship of the press. It is folly to assert that this provision of the Constitution is a mere inhibition on Congress from passing any law abridging the freedom of speech and the freedom of the press. It forbids government censorship in all forms; and it would be difficult to conceive of a more effective method of establishing a government censorship than through the writ of injunction. For the violation of its commands, the contemner can be dealt with in the most summary manner,—tried, adjudged, and sentenced by the judge whose order has been disobeyed. The right of the citizen to express his opinions in the way of just criticism, either orally or through the press, is a privilege that cannot be abridged. This right is as essential to his liberty as the right to choose his calling. It may not be assailed, even by the courts. The right is equally sacred, whether exercised individually or in conjunction with others.

To hold, however, that the court is powerless, because of the constitutional inhibition, to restrain publications in furtherance of a conspiracy to boycott, is equivalent to a declaration that a court of equity is powerless to restrain the unlawful conspiracy. The conspiracy here consists of declarations and publications in the nature of threats to coerce innocent persons into withholding patronage from complainant. If the Constitution forbids the restraint of the publications under the protection of a free press, it would for the same reason prohibit the restraint of the declarations under the guaranty of free speech. They are both equally sacred in the eyes of the Constitution. They are coupled together in the same Amendment, and must stand or fall together. The jurisdiction of the court to limit or restrain one will extend with equal force to the other. To hold that the court is powerless to restrain the publica-

tions renders the decree against oral threats nugatory; for it leaves the defendants in a position where they may obey the decree as to oral threats, but accomplish all the objects of the unlawful conspiracy by promulgating the threats through the medium of the press.

I agree fully that the record discloses a state of facts calling for equitable relief, but the decree of the supreme court of the District should be modified so as to apply only to the unlawful acts of defendants as established by the record. It should only restrain the conspiracy, which, in this case, consists of threatened damage to persons having business dealings with complainants, or threats directed against complainant corporation which tend to prevent others from freely transacting business with it. The publications complained of, not being in themselves subject to equitable restraint, the decree should only restrain these publications as an incident to and in furtherance of the conspiracy. With these modifications, as embraced in the modified decree set forth in the opinion, I concur.

Mr. Chief Justice **Shepard**, dissenting in part:

Unable to concur entirely in the modified decree directed to be entered in this case, it is proper to state the grounds of my conclusion.

1. A conspiracy is rightly defined to be a combination of two or more persons to accomplish something that is unlawful, or to accomplish something that is not unlawful by the use of unlawful means.

The logical deduction is, that a thing which is lawful when done by one person does not become unlawful when done by two or more persons in combination, provided no unlawful means are agreed upon or used. This doctrine having been denied by some of the English judges, in cases arising out of trades disputes, it was finally settled by act of Parliament. The first section of the statute, adopted December 21, 1906, reads as follows: "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." Pub. Acts, 6 Edw. VII. chap. 47. The courts of this country, without the aid of statute, have now generally agreed that this is the doctrine of the common law. It has been declared by McSherry, Ch. J., as follows: "Employees have a perfect legal right to fix a price upon their labor, and to refuse to work unless that price is obtained. 32 L.R.A. (N.S.)

They have that right both as individuals and in combination. They may organize to improve their condition and to secure better wages. They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy. But the law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion." My Maryland Lodge No. 186 v. Adt (1905), 100 Md. 238, 249, 68 L.R.A. 752, 59 Atl. 721, see also National Protective Assn. v. Cumming, 170 N. Y. 315, 321, and dissenting opinion of Vann, J., at p. 339, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369.

2. One person may not only cease to labor for another without liability to action, but may also cease or decline to further purchase his goods, or to have any business relations with him.

This being lawful for one person to do, does not become unlawful when two or more persons, impelled by a like motive, voluntarily agree to do the same thing. Consequently, the persons composing the organization of the Federation of Labor had a legal right to agree together not to purchase the goods of the Buck's Stove & Range Company. Refusing to purchase those goods does not constitute a "boycott" in the legal sense. A boycott in this sense must amount to what has been sometimes called a "secondary boycott." In the language of Brown, J., delivering the opinion of the supreme court of Minnesota: "A boycott may be defined to be a combination of several persons to cause loss to a third person by causing others, against their will, to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs." Gray v. Building Trades Council, 91 Minn. 171, 179, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172; see also My Maryland Lodge No. 186 v. Adt, 100 Md. p. 248, 68 L.R.A. 752, 59 Atl. 721; 8 Cyc. Law & Proc. p. 639.

So long, therefore, as the members of the

Federation of Labor contented themselves with refusing to purchase the goods of the Buck's Stove & Range Company, from it or from others, their combination was not illegal. But when they exceeded that limit and extended their purpose to the attempted coercion of other persons to compel them, against their will, to cease business relations with the company, the combination became unlawful. It is unlawful for one man to do such an act, and a combination of two or more to do it becomes a conspiracy as heretofore defined. That there was such a conspiracy is shown by the evidence of the attempts made to coerce the St. Louis House Furnishing Company, and other customers of the Buck's Stove & Range Company, into refusing to have further business relations with that company; which attempts were successful in several instances. To constitute this coercion, I do not consider it essential that it shall amount to violence, or threats of violence to person or property. It may consist of any act or acts reasonably calculated to overcome the will of the party operated upon. In many instances, as illustrated by the testimony in this case, threats to cease all business relations with an independent dealer unless he shall cease to do business with a party named by the threateners may be as effective to compel him to take action against his judgment and will, as threats of actual violence. To the extent that all such coercion of third persons is restrained, I concur in the modified decree.

3. Assuming that the publication of the Buck's Stove & Range Company, in the "We Don't Patronize" column of the American Federationist was a step in the formation of a conspiracy to coerce independent dealers into refusing to have further business relations with that company, I cannot agree that the publication can be restrained for that reason. Regardless of its character or purpose, the publication is protected from restraint, in my opinion, by the 1st Amendment of the Constitution, which forbids any law abridging the freedom of the press.

The liberty of the press became an established principle of the British Constitution after a long and arduous struggle, and consists in complete freedom from any kind of restraint. In the language of McCauley, it "has done more for liberty and civilization than the Great Charter or the Bill of Rights." De Lolme, whose treatise was published before our Constitution was framed, defined its meaning as follows: "The liberty of the press, as established in England, consists therefore . . . that neither the courts of justice,

nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury." Const. of Eng. chap. 12, p. 252. Blackstone discusses the principle thus: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what matter he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. . . . The only plausible argument heretofore used for the restraining the just freedom of the press, 'that it was necessary to prevent the daily abuse of it,' will entirely lose its force when it is shown (by a reasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it can never be used to any good one when under the control of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty, of the press." 4 Bl. Com. 151.

The framers of our state and Federal Constitutions were compelled to choose between the danger to free institutions that would result from any abridgment of the freedom of the press, and the evils that attend the abuse of that freedom through the frequent publication of matter calculated to wound feelings, injure character and rights of property, and provoke the disturbance of the peace. They preferred to risk the latter evil. For it there is some remedy, though often inadequate, through civil actions and criminal prosecutions. On the other hand, there is no

remedy for the mischief of censorship and restraint.

"It has, accordingly," says Chancellor Kent, "become a constitutional principle in this country that 'every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech or the press.'" 2 Kent, Com. 17. Courts of equity cannot act as censors of the press, or abridge its freedom by the exercise of any character of restraint. They have no inherent power to exercise a jurisdiction that the Constitution forbids to be conferred upon them. They have invariably denied their jurisdiction to restrain the publication of libels of any and every character. This has been sometimes ascribed to the principle that they have no jurisdiction to prevent the commission of crimes; but this is not a satisfactory explanation. Undoubtedly, a court of equity has no criminal jurisdiction, and will not undertake to restrain the commission of a crime merely. But when the threatened criminal act will also work an irreparable injury to property or rights of a pecuniary character, the jurisdiction to restrain or arrest its commission is equally undoubted. *Re Debs*, 158 U. S. 504, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900. The publication of libelous matter is a criminal act, but it frequently, if not generally, also, works a serious injury to property rights. In case, then, of a threatened publication of a libel from which pecuniary injury would necessarily flow, there must be found some other ground for the denial of jurisdiction to prevent the injury.

The true ground for the denial of jurisdiction to restrain the publication of a libel destructive of property is that the exercise of such jurisdiction would amount to an abridgment of the freedom of the press by establishing a censorship over the press so enjoined. The soundness of this view is demonstrated in an able opinion by Fenner, J., speaking for the supreme court of Louisiana, in such a case. *State ex rel. Liversey v. Civil Dist. Judge*, 34 La. Ann. 741, 745. He says: "There would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established? Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed. Such powers do not exist in courts, and they have been constantly disclaimed by the highest tribu-

nals of England and America. It has passed into a settled rule of jurisprudence that 'courts of equity will not lend their aid to enjoin the publication of libels or works of a libelous nature; even though the libelous publication is calculated to injure the credit, business, or character of the person against whom it is directed.'"

In view, then, of the provision of the 1st Amendment, I can come to no other conclusion than that the only remedy for libelous, or otherwise malicious, wrongful, and injurious publications, is by civil action for damages, and criminal prosecution. There is no power to restrain the publication.

For the reasons given I cannot agree to the terms of the decree as modified. In my opinion, it should be modified so as to restrain the acts, only, by which other persons have been, or may be, coerced into ceasing from business relations with the Buck's Stove & Range Company; but so as not to restrain the publication of the name of that company in the "We Don't Patronize" columns of the American Federationist, no matter what the object of such publication may be suspected or believed to be.

In what has been said, I am not to be understood as intimating that because a publication of any character cannot be restrained, it may not become actionable or punishable by some one of the processes of the law, when shown to have been made as an act, or one of a series of acts, in furtherance of the objects of an ascertained conspiracy. That question is not involved.

Appeal dismissed by the United States Supreme Court, February 20, 1911 (219 U. S. 581, 55 L. ed. —, 31 Sup. Ct. Rep. 472).

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

ORA TURNER, Appt.

(82 Kan. 787, 109 Pac. 654.)

Criminal law — evidence — acts induced by intimidation — confession — self-incrimination.

At a trial on the charge of murder, neither the rule excluding proof of an involun-

Headnote by MASON, J.

Note. — Incriminating evidence furnished by defendant acting under compulsion.

This note is limited to cases where the defendant was required to assist actively in

tary confession, nor that relating to a self-incrimination, forbids evidence that the defendant produced from a hiding place a revolver similar to that with which the homicide was known to have been committed, although such production was brought about by intimidation.

(June 11, 1910.)

APPEAL by defendant from a judgment of the District Court for Rice County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. D. A. Banta and W. W. Stahl, for appellant:

To make acts induced by intimidation competent proof, they must be shown to be the voluntary act of the person making

them, and they are incompetent until so shown to be voluntary.

Underhill, Crim. Ev. § 137; 3 Enc. Ev. pp. 301, 303; State v. Kornstett, 62 Kan. 221, 61 Pac. 805; State v. Ingram, 16 Kan. 14.

The admissibility of an alleged confession is precluded by the fact that it was the result of a putting in fear by threats or intimidation intended to elicit such confession.

United States v. Pumphreys, 1 Cranch, C. C. 74, Fed. Cas. No. 16,097; Hoober v. State, 81 Ala. 51, 1 So. 574; Wyatt v. State, 25 Ala. 9; Joe v. State, 38 Ala. 422; Beckham v. State, 100 Ala. 15, 14 So. 859; People v. Ah How, 34 Cal. 218; Simon v. State, 5 Fla. 285; Daniels v. State, 78 Ga.

furnishing the evidence. It does not include involuntary confessions, or evidence discovered as the result of that confession; nor does it include cases where articles offered in evidence were taken from him by force, if he was a mere passive agent, and was not required to assist actively. As to the latter subject, see note to State v. Fuller, 8 L.R.A. (N.S.) 762, and People v. Campbell, — L.R.A. (N.S.) —.

The case most like STATE v. TURNER of any that have been found is State v. Middleton, 69 S. C. 72, 48 S. E. 35, holding that evidence is admissible against one charged with burglary and larceny, that the stolen property was found under his guidance, although it appears that he was arrested in the presence of several persons on the second night after the alleged crime, and led the party, under threats of violence, to an old stump under which they found such property.

Somewhat similarly, incriminating evidence, as to the condition of his hand, is admissible against one on trial for murder, although he was ordered, while under arrest, to unwrap and exhibit his hand to witnesses, and the inspection was obtained by intimidation. State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1.

But in State v. Jacobs, 50 N. C. (5 Jones' L.) 259, it was held that a defendant on trial as a free negro, for carrying arms, could not be compelled to exhibit himself, against his consent, to the jury, for the purpose of enabling them to decide upon his status as a free negro, because that would in effect compel him to furnish evidence against himself.

The most numerous cases involving the admissibility of incriminating evidence furnished by defendant, acting under compulsion, are those where he has been compelled to make tracks to compare with those found at the scene of the crime with which he is charged, or to place his foot in such tracks; and as to the admissibility of such evidence, there is some conflict.

In State v. Graham, 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182, where the 32 L.R.A. (N.S.)

privilege against self-incrimination was not invoked, but the evidence was objected to only as partaking of the nature of a forced confession,—it being argued that "making the prisoner put his foot in the track was procuring evidence by duress,"—it was held that evidence was admissible against a defendant charged with the larceny of growing grain, that the officer who had him in custody made him put his foot in tracks found in the field from which the grain was stolen, and that his foot fitted the tracks perfectly. The court said: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury, and fit for their consideration." And further: "When the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so."

So, evidence that officers who had in custody one charged with rape caused him to pull off his shoes and took the measurement of his bare foot, which measurement corresponded with the measurement previously taken by them of barefoot tracks at the scene of the alleged crime, is not inadmissible against the defendant as an infringement of statutes with reference to unwarned confessions. Thompson v. State, 45 Tex. Crim. Rep. 190, 74 S. W. 914.

Nor is evidence inadmissible, under a statutory rule applying to confessions, that one charged with theft, while under arrest,

98, 6 Am. St. Rep. 238; *State v. Mason*, 4 Idaho, 543, 43 Pac. 63; *State v. Freeman*, 12 Ind. 100; *State v. Chambers*, 39 Iowa, 179; *People v. Stewart*, 75 Mich. 21, 42 N. W. 662; *State v. Jones*, 54 Mo. 478; *Clayton v. State*, 31 Tex. Crim. Rep. 489, 21 S. W. 255; *Searcy v. State*, 28 Tex. App. 513, 19 Am. St. Rep. 851, 13 S. W. 782; *Grosse v. State*, 11 Tex. App. 364; *Womack v. State*, 16 Tex. App. 178; *Rice v. State*, 22 Tex. App. 654, 3 S. W. 791; *Neeley v. State*, 27 Tex. App. 324, 11 S. W. 376; 3 Enc. Ev. p. 313.

The testimony as to the production of the

weapon was inadmissible as it in effect compelled the accused to criminate himself.

Elizabeth v. State, 27 Tex. 329; *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *State v. Andrews*, 35 Or. 388, 58 Pac. 765; *Davis v. State*, 131 Ala. 10, 31 So. 569; *Re Nickell*, 47 Kan. 734, 27 Am. St. Rep. 315, 28 Pac. 1076.

Messrs. Fred P. Green, Samuel Jones, and Foley & Hopkins, for the State:

As the act of the defendant in digging up the gun, although involuntary, was corroborated by the finding of the gun, show-

was carried by the sheriff to a point where tracks were found supposed to have been made by the one who committed the alleged crime, that the sheriff ordered him to take off his shoe, that he obeyed, and that the sheriff put it in the track, and it fitted exactly. *Guerrero v. State*, 46 Tex. Crim. Rep. 445, 80 S. W. 1001.

In *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595, where one charged with murder was required by the examining magistrate to make his track in ashes and sand in the latter's office, it was held that evidence of that fact, and that the impression so made was about the same as tracks found at the scene of the homicide, was not incompetent and inadmissible on the ground that it was evidence which the defendant was compelled to make and to give against himself.

So, in *Magee v. State*, 92 Miss. 865, 46 So. 529, it was held that one accused of assault and battery with intent to kill, who is compelled to put his foot in a track found near the scene of the alleged crime, for the purpose of identifying him, is not compelled thereby to be a witness or to give evidence against himself, in violation of the constitutional provision. The court here said: "He is not in such case giving evidence. He is not testifying as a witness. He is not delivering any testimonial utterance."

And in *Pitts v. State*, — Tex. Crim. Rep. —, 132 S. W. 801, evidence that tracks found near premises burglarized corresponded with and fitted the track of one charged with the burglary, and that he had placed his foot by one track and in another, was held admissible against him, although, at the time he made the track which formed the basis of comparison, he was under arrest and subject to the control of the deputy sheriff who made him so place his foot.

Evidence that one accused of murder, while under arrest, was taken hold of and made to put his foot in a track is not inadmissible, where there is no evidence whatever as to the kind of track he was forced to make, that such track resembled any other track, or that his foot fitted any track found by the witnesses. *Dunwoody v. State*, 118 Ga. 308, 45 S. E. 412.

And evidence of a sheriff that he identified footprints near the scene of an alleged

homicide as those of defendant, by placing defendant's foot over the footprints, is not inadmissible on the ground that this was not a reliable test. *State v. Williams*, 120 La. 175, 45 So. 94.

On the other hand, evidence that a witness forcibly took defendant to the scene of a burglary with which he is charged, and forcibly put his foot in a track there, against his consent, and that his shoe fitted the track, has been held inadmissible against the defendant as compelling him to give testimony tending to incriminate himself. *Day v. State*, 63 Ga. 667.

And in *Cooper v. State*, 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110, evidence was held inadmissible against a defendant charged with burglary, that when told, upon his arrest, that if he would take off his shoes and wet his socks and make tracks to compare with those left by the burglar, he would be released, if the tracks did not correspond in every particular, he declined to do so, as the admission of such evidence would accomplish by indirect means the same result as forcing the defendant to make evidence against himself, in violation of the constitutional provision against compelling an accused to give evidence against himself.

So, on the trial of one charged with murder, the court should not allow the prosecuting attorney to place before the attorney a pan of mud shown to be about as soft as the mud at the scene of the alleged crime, in which a barefoot track was found, and to call upon the defendant to put his foot in the mud, thus asking him, in the presence of the jury, to make evidence against himself; and the court's assenting to such action is not cured by his telling the defendant he could put his foot in the mud if he wanted to, but he would not be forced to do so, and telling the jury that defendant's refusal to put his foot in the mud was not to be taken as evidence against him. *Stokes v. State*, 5 Baxt. 619, 30 Am. Rep. 72.

And the defendant charged with burglary cannot legally be compelled to submit to a measurement of his foot, after witnesses have testified that they saw tracks of some person going to and away from the house burglarized, and that they were defendant's tracks. *Bridges v. State*, 86 Miss. 377, 38 So. 679.

A. C. W.

ing conclusively not only that the gun was buried, but that the defendant knew where it was buried, evidence of the act was admissible.

Underhill, *Crim. Ev.* § 138; Wharton, *Crim. Ev.* 8th ed. § 678; 1 Bishop, *New Crim. Proc.* § 1242; 1 Greenl. §§ 231, 232, 13th ed.; 1 Wigmore, *Ev.* § 859; *State v. Mortimer*, 20 Kan. 93; *State v. Moran*, 131 Iowa, 645, 109 N. W. 187; *State v. Height*, 117 Iowa, 650, 59 L.R.A. 437; 94 Am. St. Rep. 323, 91 N. W. 935; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Duffy v. People*, 26 N. Y. 589; *State v. Graham*, 74 N. C. 646, 1 Am. Crim. Rep. 182, 21 Am. Crim. Rep. 493; *Whitney v. Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257, 12 Am. Crim. Rep. 170.

Mr. F. S. Jackson, Attorney General, also for the State.

Mason, J., delivered the opinion of the court:

Ora Turner was convicted of murder in the first degree, and appeals.

The questions presented are whether error was committed in the refusal of instructions and in the admission of evidence. The court gave one instruction regarding the effect of circumstantial evidence in the exact language of the second paragraph of the syllabus in *Horne v. State*, 1 Kan. 42, 81 Am. Dec. 499, and another substantially following what was said in *State v. Furney*, 41 Kan. 116, 122, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131, to be the correct rule. The instructions refused were practically but elaborations of the principles embodied in those given, and their refusal cannot be regarded as material error.

The body of Roy Snyder, with whose murder the defendant was charged, was found on the highway, his death having resulted from several bullet wounds. Circumstances tended to indicate Turner as the murderer, and jealousy as the motive. Two bullets were recovered. They weighed substantially 149 grains each, and showed that they had been discharged from a barrel rifled with six grooves. Persons familiar with the subject said that the only firearm that would mark a bullet of that weight in such a manner was what is known as a Colt's 38-caliber "Police Positive" revolver, and an investigation was begun to learn whether a weapon of that description was owned in the neighborhood. It was learned that one had been bartered about two weeks before the homicide, to Turner's cousin, who, upon inquiry, said that he in turn had traded it to the defendant. The sheriff and several other persons then went to the defendant and asked about the revolver he had obtained from his cousin. He at first denied

any knowledge of it, but, upon being pressed, finally procured a pitchfork, and, leading the party into a grove where it had been buried, dug it up and gave it to the sheriff. The state was permitted to show the fact of finding the revolver and a part of what the defendant had said in the conversation leading up to it. The admission of this evidence is complained of on the ground that it violated the rule against the use of involuntary confessions, and virtually compelled the defendant to be a witness against himself.

In stating the case to the jury, one of the attorneys for the prosecution told them that the testimony would show that he had said to the defendant before the revolver was produced: "I want you to get that gun, and, if you don't do it, we will have 200 men here to search every inch of the ground, and you know when we find it what will happen, and no man can stop it." No evidence was offered that such language was in fact used; but the state must be regarded as admitting that the production of the revolver and anything said about it by the defendant after his talk with this attorney resulted from fear on his part.

The only evidence that was introduced, however, of any statements made by the defendant about this matter, related to conversations that took place before any threat had been made. Moreover, there was no error in its introduction for another reason. The statements attributed to the defendant were not of the nature of admissions; they consisted of denials of any knowledge of the revolver; they were exculpatory rather than incriminating, and were not within the rule applicable to confessions. *State v. Campbell*, 73 Kan. 688, 9 L.R.A. (N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203; 1 Wigmore, *Ev.* § 821. One witness testified that at one time the defendant said he knew where the revolver was, but that he immediately retracted the statement.

The contention that evidence of the production of the revolver from its hiding place by the defendant should have been rejected is more serious; but the authorities support the contrary view with substantial unanimity. Some of them go so far as to justify the admission of an extorted confession, so far as it is corroborated by undisputable facts which it discloses. The only substantial difference of opinion relates to the admissibility of the confession itself. The narrow scope of the conflict and the reasoning upon which the courts have proceeded are exhibited by the following typical expressions:

"Where an involuntary confession discloses incriminating evidence which is subsequently on investigation proved to be

true, or where the confession leads to the discovery of facts which in themselves are incriminating, so much of the confession as discloses the incriminating evidence and relates directly thereto is admissible. And the facts discovered in consequence of such involuntary confession may be proved. Thus, in a prosecution for murder, evidence of the discovery in a certain place of the remains or clothing of the deceased, or of the weapon by which he was killed, with so much of an involuntary confession as relates directly to such facts, is admissible." 12 Cyc. Law & Proc. p. 478.

"A modification of the rule which excludes a confession not shown to be voluntary exists where the information derived in consequence of a confession leads to the discovery of material facts which go to prove the commission of the crime confessed. In that case, so much of the confession as strictly relates to the facts discovered, and the facts themselves, will be received in testimony, though the confession may be shown to be involuntary, for the reason that the discovery of the facts corroborates the truth of the confession to that extent, and excludes the idea of its fabrication under undue influence, though in some jurisdictions it seems that in such case the entire confession is admissible." 6 Am. & Eng. Enc. Law, 2d ed. p. 551.

"If the confession, being inadmissible because improperly procured, brings to light facts or circumstances tending to show guilt, the prosecution is not precluded from proving the facts thus disclosed by other evidence, because they were brought to light by a confession which is itself incompetent. Some cases have gone further and held that not only may the fact disclosed be proved, but that portion of the confession disclosing it. But other cases hold that, while the fact may be proved, the declaration accompanying it must be excluded." 3 Enc. Ev. 341.

"The main reason for rejecting confessions uttered under the influence of hope or fear is the great probability that the prisoner has been influenced by his expectation of punishment or of immunity, to speak what is not true. If, however, the existence of extraneous facts is discovered through the statements of the accused, no reason exists for rejecting those parts of the confession which led to the discovery, and which, though not voluntarily made, . . . have been corroborated convincingly by the facts discovered." Underhill, Crim. Ev. § 138.

"The object of all the care which, as we have now seen, is taken to exclude confessions which were not voluntary, is to exclude testimony not probably true. But 32 L.R.A. (N.S.)

where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact, is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there. . . . If the prisoner himself produces the goods stolen, and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess held out by the latter, there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery and explanatory of its character and design, though they may amount to a confession of guilt." 1 Greenl. Ev. (16th ed.) §§ 231, 232.

"Although confessions made by threats or promises are not evidence, yet, if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony; *e. g.*, where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clue to other evidence which proves the case." Wharton, Crim. Ev. (8th ed.) § 678.

"Independent facts and evidence, discovered through a confession inadmissible because impelled by hope or fear, are not therefore to be rejected. . . . There is some authority for saying that no part of the confession, or even the fact of its having been made, can be given in evidence to connect the defendant with the thing discovered. On the other hand, there are statutory provisions, and perhaps common-law adjudications in some of the states, permitting the entire confession to be laid before the jury when thus confirmed. But the better common-law doctrine in authority, and probably in reason, is that, when the confession is thus confirmed, simply so much of it as led to the finding, and, should the prisoner have been present at the search and finding, his declarations and conduct during this period, or his decla-

rations when he surrenders back an article stolen, may be shown to the jury in connection with the thing itself. The finding makes the truth of so much of the confession sufficiently evident." 1 Bishop, New Crim. Proc. (4th ed.) § 1242.

"The fundamental theory upon which confessions become inadmissible is that, when made under certain conditions, they are untrustworthy as testimonial utterances. . . . If . . . a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded, and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be adopted. This is the theory of 'confirmation by subsequent facts,' which has been in vogue ever since there has been any doctrine about excluding confessions. That theory is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, the possible influence which, through caution, had been attributed to the improper inducement, is seen to have been nil, and the confession may be accepted without hesitation. This theory has always been accepted, at least in the abstract. It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs only to be stated to expose its equal lack of logic, principle, and expediency." 1 Wigmore, Ev. §§ 856, 859.

So far as concerns the rule that the accused shall not be required to be a witness against himself, evidence extorted from him by intimidation stands upon the same footing as though it had been procured by force, or by any other unfair or illegal method. It has already been decided by this court that articles of which the prosecutor has obtained possession by unlawful means—for instance, by seizure without process—may be introduced in evidence over the objection of a defendant whose rights have been thus violated. *State v. Miller*, 63 Kan. 62, 64 Pac. 1033. The rule authorizes the use as evidence not only of articles taken by force, but also of those which the defendant has been coerced into delivering. The manner of their procurement however reprehensible will not prevent their use as evidence so long as the person against whom they are used has not been constrained by the court to produce them. A document that has been taken stealthily from the defendant's desk, or forcibly from his pocket, or that he has surrendered under a threat of personal violence, may be used against

him, because its wrongful procurement creates no estoppel, and the story it tells is its own, and not that of the defendant. But if he produces it in obedience to an order of the court, it is incompetent, because under such circumstances his act is performed in the capacity of a witness, and to admit the fruits of it as evidence would be to make use of him as a witness against himself. The distinction is thus discussed in 3 Wigmore on Evidence, § 2264: "Documents or chattels obtained from the person's control without the use of process against him as a witness are not in the scope of the privilege, and may be used evidentially; for obviously the proof of their identity or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility. . . . This distinction has received repeated illustration and almost universal acceptance, in a variety of applications to documents and chattels obtained by search or seizure independent of testimonial process. It would apparently never have suffered any judicial doubt, but for a modern opinion, in which (in spite of a protest by a minority of the court) the seeds of a dangerous heresy were sown. In *Boyd v. United States*, 116 U. S. 616, 618, 29 L. ed. 740, 747, 6 Sup. Ct. Rep. 524, an order for production of documents involving self-criminating matter was properly held to be within the privilege, on the principle of paragraph 1, *supra*; but the opinion of the majority, speaking *obiter*, declared the privilege applicable also to documents obtained by officers' search or seizure, legal or illegal, irrespective of testimonial process. . . . The *obiter* expressions of opinion by the majority . . . have led a few other courts, since the publication of that case, to adopt its erroneous view, and to exclude documents obtained by seizure." In the supplement the author adds: "That case, however, . . . in later Federal opinions, has in effect been pared down, and for practical purposes repudiated (in respect to the *obiter* statements in the majority opinion, above noted)." 5 Wigmore, Ev. § 2264.

The cases bearing on the admissibility in evidence of articles wrongfully obtained from the defendant are fully collected in *State v. Fuller*, 34 Mont. 12, 8 L.R.A. (N.S.) 762, 85 Pac. 369, 9 A. & E. Ann. Cas. 648, and in notes thereto in 9 A. & E. Ann. Cas. 655, and in 8 L.R.A. (N.S.) 762, citing an earlier note in 59 L.R.A. 465.

True, in receiving as evidence information unlawfully obtained, a court may seem by judicial sanction to encourage wrongdoing. But such is not the real aspect of

the matter. The sole question under investigation in a criminal trial is the guilt or innocence of the defendant. Nothing not pertinent to that subject can be considered. Everything throwing light upon it should be admitted unless forbidden by some rule of law. Extorted confessions are not excluded as a rebuke to those who have obtained them, but because they are regarded as of doubtful credibility. The provision of § 10 of the Bill of Rights, that in a criminal prosecution "no person shall be a witness against himself," forbids his being compelled to testify, but does not extend so far as to prevent the prosecution from making use at the trial of information obtained from him under duress. The courts do not approve a resort to illegal means to obtain evidence. They are not indifferent to a violation of the letter or spirit of the law designed for the protection of one accused of crime. But a far-reaching miscarriage of justice would result if the public were to be denied the right to use convincing evidence of a defendant's guilt, because it had been brought to light through the excessive zeal of an individual, whether an officer or not, whose misconduct must be deemed his own act, and not that of the state.

We think it clear that no error was committed in receiving the evidence complained of.

The judgment is affirmed.

All the Justices concur.

MINNESOTA SUPREME COURT.

WILLIAM G. WHITE, Appt.,

v.

RUFUS C. JEFFERSON et al., Respts.

(110 Minn. 276, 124 N. W. 373.)

Street — dedication — vacation — title to fee.

The strip of land here in controversy was originally the part of a dedicated street which lay between two corner lots. That street was vacated. That fact appeared of record. Defendants afterwards acquired from the original proprietor, who made the plat, title to the two lots. Subsequently plaintiff purchased the strip from the same person. In an action to determine adverse claims it is held:

1. When the owner of the land executes a plat thereto, he dedicates to the public an easement of way in the streets there appearing, and retains the fee therein subject to such easement.

Same — assignment of fee.

2. That owner may, in the exercise of his

right of freedom of contract, sell a lot abutting on a street, and part with or reserve the fee to the middle of the street, subject to the public easement.

Same — intention.

3. What disposition he has in fact made, and what his grantee receives, depends upon the intention of the parties. In the absence, however, of expression or necessary implication from peculiar circumstances to the contrary, the law, from many considerations of public policy, imputes or presumes an intention to pass to the grantee title to the lot and to the middle of the adjoining street, subject to the easement of public way.

Same — conveyance of lots — effect on title to street.

4. Where, however, a street has been legally vacated before any lot has been transferred, the reasons for imputing or presuming intention have ceased. The proprietor holds the land free from the easement as land when he parts with the lots abutting it. Title to a tract correctly and accurately described by metes and bounds on the plat passes, but not to a parcel distinct from it.

Appeal — new trial — further facts.

5. Plaintiff acquired title to the strip here in controversy, if his deed from the original proprietor was valid. Whether it was valid is left to be determined on the new trial, necessarily granted.

(January 14, 1910.)

Note. — Conveyance of parcel abutting on abandoned street as carrying grantor's title to fee of former street.

The rule announced in *WHITE v. JEFFERSON* finds ample support among the authorities. Thus it was held in *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2, that the grantor of certain lots described by lot numbers as per a subdivision map of a large tract of land being part of what was known as the "Sanchez tract" did not convey by such description a former street abutting on such lots. It appeared in this case that the map did not exhibit the land included in the street as a part of the tract in question, and that it had been conveyed to the grantor defendant, in the suit, by a separate conveyance after its abandonment as a street. This point is noted by the court in the following from the opinion: "The conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway; . . . there is, therefore, no more reason to say that any part thereof passed under the designation of those lots in the deed, than for extending the scope of that description to adjacent land—if such there had been—which never was impressed with the highway use; more especially since neither party claims that plaintiff owned the fee in any part of said land before its vacation as a highway."

A PPEAL by plaintiff from an order of the District Court for Ramsey County denying plaintiff's motion to vacate and set aside the decision and for a new trial in an action brought to determine adverse claims. Reversed.

The facts are stated in the opinion.

Mr. William G. White in *propria persona*.

Mr. John E. Stryker for respondents.

Jaggard, J., delivered the opinion of the court:

Allie Hewitt duly platted certain land belonging to her as "Hewitt's Outlots, First Division." The short side of lots 23 and 24 fronted on one street and the long side abutted La Salle street. In 1889 La Salle

street was duly vacated by the city council. The portion of that street between the lots is the land the title to which is here in controversy. Allie Hewitt remained owner of the lots until in 1892, when defendants acquired a fee-simple interest in said lots through deeds and proceedings, in which the property was described as lots 23 and 24, Hewitt's Outlots, First Division, according to the recorded plat thereof. In 1898 Allie Hewitt died. In 1906 one Barnum, "in his capacity as trustee under the last will and testament of Allie Hewitt, deceased," executed to plaintiff a deed which purported to convey, *inter alia*, that portion of La Salle street, so called, lying between lots 23 and 24. The trial court found and ordered judg-

Where an owner of a parcel of land abutting on a street, and of the fee of the street, conveyed such parcel by block number, and also quitclaimed "all title in being and reversion to the land now occupied by Depot street . . . lying contiguous to and adjoining said block," the description of the block and the street separately bound the grantor and all subsequent grantees, so that upon a reconveyance after the street had been vacated, in which the former grantor became grantee, a deed containing a description of the block only, by number as before, "together with all and singular the hereditaments and appurtenances," did not convey the former street as appurtenant to the lot. In other words, where a deed shows the intent of the grantor to convey a piece of property as distinct from an abutting street, such separation is binding upon future grantees so far as to prevent the conveyance of the property in the street as appurtenant where the same is not specifically described. *Overland Mach. Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574.

It was held in *Brown v. Taber*, 103 Iowa, 1, 72 N. W. 416, that statutory provision for replatting vacated lots and including therein the proportionate part of the abutting street did not apply when the street only was vacated; and that the provision for describing lots in platted subdivisions by number when conveying the same made such descriptions good and valid for all intents and purposes; and that the same could not be construed to include the portion of the vacated street on which the lots abutted, it appearing that by statute the acknowledgment and recording of a plat is equivalent to a deed in fee simple of the land set apart for streets.

In *Schonleben v. Swain*, 130 App. Div. 521, 115 N. Y. Supp. 23, the owner of a certain lot abutting on Fifth avenue in the city of New York became vested with the fee in the street by virtue of a statute to that effect, passed upon the abandonment of that avenue, or the part of it in front of the lot in question. When the owner conveyed the lot he described it specifically, and also the parcel in front of the lot which had been 32 L.R.A. (N.S.)

the bed of the street to the center. Subsequently the lot again changed hands, but the description of the property conveyed covered the lot only without reference to the part formed by the abandoned street. It was held that the parcel in question could not thereby pass to the grantee by inference, nor was it material that in describing the lot reference was made to the former line of the abandoned street.

And see *Terrett v. New York & B. Steam Sawmill & Lumber Co.* 49 N. Y. 686, where a holding that a deed bounding property on one side "by the southeasterly line or side" of what was formerly known as First avenue, which had been discontinued, the conveyance containing the clause, "together with all the right and title of the grantor in and to one half of the streets and avenues by which said lots are bounded," carried title to the center of the avenue,—was reversed without opinion.

But where the acknowledgment, filing, and recording of a map or plat of a city vests the fee of the streets in such city by statute, and further statutory provision causes such streets when vacated to revert to the adjacent owners, with the right reserved to the city to reopen the street if necessary, there is no absolute cession of the property in the street to the respective adjoining lot owners, but only a provisional and temporary giving up of the public use, and under such circumstances the street becomes such a part of the lot that a conveyance by the abutting owner takes with it the attached portion of the vacated street. *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 471.

Basing their decision largely on the rule that, where land is described in a deed as bounded by a street, the fee is conveyed to the middle of such street, subject to the easement, the court in *Paine v. Consumers' Forwarding & Storage Co.* 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626, in an opinion by Taft, J., held that the conveyance of certain lots in a vacated tract of a city, according to lot numbers as fixed in a recorded plat of the said tract, carried the fee to the center line of the street upon which the

ment for defendants in this an action to determine adverse claims. This appeal was taken from its order denying plaintiff's motion to vacate and set aside the decision and for a new trial.

1. The first question presented by the record concerns the title to the strip between the lots which had been a part of the street before its vacation.

Defendants' position is this: "That, had the respondents acquired lots 23 and 24 before the vacation of La Salle street, the boundary of the lots would have been the center line of the street, and that, if the street had been vacated after such purchase of the lots, their common boundary would still have been the center of the street, relieved, of course, of the public easement. . . . Now, if the platted boundary, which is that of the respondents' conveyances, was the center line of the street, and if vacation of the street after their acquisition of the property would not have changed that boundary, upon what principle had the area of the lots been diminished?"

On principle the answer is clear. In the first case at the time of the transfer the lots would front on a street; in the second case they would not front on a street. A conveyance according to a plat is a con-

veyance by recorded metes and bounds, except where the lots front on a street. Defendants' second proposition assumes the matter in controversy. The conclusion of course follows. But there is no argument. The fallacy of the defendants lies in postulating that the vacation of the street was without legal effect.

It is true that in cases presenting the question whether a grant according to a recorded plat of premises abutting on a street conveyed only the land described in the plat by metes and bounds, or also the fee to the middle of the street subject to easement of public use, the opinions of the courts have often contained utterances to the effect that the fee title to the middle of the street was a necessary or integral part of the lot indicated by the plat, that interest was part and parcel of the lot conveyed, that the center line of the street is a boundary line of abutting lots; that the grantor is estopped from denying a conveyance of the fee subject to the easement, and the like. Such general statements must, of course, be limited to the particular facts involved, and are not at all inconsistent with the application of another rule to a substantially different state of facts. Where the street had been vacated before the granting, are the facts substantially

lots abutted and which had likewise been abandoned, even though the lots were described in the deed by their numbers "according to the survey of the town plat of Grandon, which was first recorded, but now lying in the vacated part of said Grandon, and for a more particular description of said lot reference must be had to said first recorded survey of said town plat," and although the dimensions of the lots as shown by the plat would not embrace any part of the street. The court said: "But it is to be observed that the intent of the parties is to be ascertained as of the date of the deed, and the construction of the descriptions in the plat is to be of that date, wherever construction is necessary. It might well be that the plat regarded as a statutory dedication and conveyance would make impossible a construction by which a numbered lot should include one half the adjoining street, and this because of the peculiar effect of a statutory dedication; and yet a description by lot number on the plat, after it has ceased to have statutory efficacy, made merely for convenience in showing the boundaries and courses and distances of the land to be conveyed, must be construed without regard to the terms or effect of the statute, and exactly as if the description of the lot on the plat by word and drawing had been incorporated into the deed without reference to the plat."

It should be noted that some of the lots affected by this decision were conveyed by number only, without dimensions, but described as "opposite to" certain other lots, 32 L.R.A. (N.S.)

thus implying the existence of a street. This was held not to prevent the passing of the fee to one half the abandoned street. The circumstance that many of the conveyances were made "subject to all legal highways" was viewed by the court as an indication that the grantors thus supposed that they were parting with their interest in the street as well as the lots described.

It was held in *Glover v. Shields*, 32 Barb. 374, that a conveyance of lots abutting on a public road, described by numbers with reference to a map or plat on file, carried the fee to the line of the road as it then existed, although a change in the course of the road subsequent to the filing of the map resulted in the abandonment of a strip of ground in front of the lots. It appeared that in a prior deed and mortgage that strip had been described as a separate parcel. But the court said that that was of little significance, since both pieces were conveyed to the same party.

In *Snider v. Snider*, 3 Phila. 158, a testator devised in trust a parcel of land, describing it as "my" lot on the east side of a certain road, giving the foot frontage on such road and its depth. The will was dated the 17th of April, 1850, and it appeared that the road in question was vacated by act of assembly on the 14th of March, 1850, thus making the time of the conveyance by will, of the lot in question, subsequent to the abandonment or vacation of the road. Citing the fact that the general rule that a deed bounding a parcel of land upon a highway carries the fee to the center of the

different? The rule in such a case can be determined only by a consideration of relevant principles.

The fundamental doctrine is that the law jealously protects the freedom of contract because of the constitutional right and of an obvious public policy. Accordingly the owner can sell a lot adjoining a street, and part with or reserve the interest in the street, subject to the easement, as he sees fit. What he has done in a particular case depends necessarily upon the intention of the parties. Defendants' brief furnishes the true rule: "The idea of an intention in a grantor to withhold his interest in a road to the middle of it after parting with all his right and title to the adjoining land is never to be presumed. . . . It would require an express declaration . . . to sustain such an inference." 3 Kent, Com. 349 (later editions, 433). Every case which sustains the rule and which involves a street, and not a vacated street, to which our attention has been directed or which we have been able to discover after diligent and extensive search, is in accord in basing the rule on the intention of the parties.

When a deed contains an express reservation, or the circumstances justify the inference of intention not to convey a fee to any

part of the street, the vendor remains its owner. If, for example, the owner should transfer the fee to the street subject to the easement to one person, and afterwards transfer the adjoining lots to other persons, the implication would be that he did not intend to grant to the latter any interest in the land which had been a street.

Where there is neither a deed containing such an express reservation, nor circumstances justifying the inference of intention to reserve, the courts are called upon to determine the legal effect of the conveyance. It is clear that they have imputed intention to transfer the land described by metes and bounds and also the fee to the middle of the street, subject to the public easement. There is good reason for this presumption. The rule which construes the deed most strongly against the grantor applies. 2 Dembitz, Land, p. 1441, § 1028. The parties contract with reference to and with the least constructive knowledge of the plat including the street. Such intention is the natural, and in the overwhelming majority of cases the actual, one. The rule is compelled by uncontrovertible public policy. The owner of the land platted usually becomes entirely disassociated with the title to the land sold, and has neither a proximate interest in nor a prac-

road depends upon the principle that the intention or the parties must govern, the court here held that the fee in the road passed in trust for the benefit of the devisee of the abutting lot. The court said: "It is hardly to be presumed that at the time of the execution of the will he knew that the lane had been vacated; and even had he possessed this information, it would be difficult for us to believe that he had the requisite technical knowledge of a rule of law, or of the act of 1849, which placed at his absolute disposal the fee in the soil of the vacated lane to the middle thereof. This view is strengthened by the language of the will; he does not devise the entire lot in question by metes and bounds, nor by boundaries and admeasurement of feet and inches; the admeasurement by feet and inches, and the specification of the eastern boundary, relate, in fact, to the front and depth of the said lot, and not to the northern boundary thereof. So that, from the language of the devise itself, we are left to infer that the northern boundary must of necessity have been the lane in question, and, if so, shall we by the application of the strictest rule of law infer that the testator intended to exclude the object of his bounty from the enjoyment of the lane in dispute?"

The case of *Bird v. New York*, 125 N. Y. Supp. 1028, has been cited as an authority for the rule that when a deed of property which abuts on an abandoned road describes the land as running along the road, title passes to the center of the road, but from 32 L.R.A. (N.S.)

the facts appearing in the opinion of the lower court, which was made that of the appellate division upon the appeal, it is not altogether clear that the deed in question was made subsequent to the abandonment of the road, it appearing that the conveyance was in 1848 and that the road was abandoned "prior to 1869."

Following the rule of the *Patch Case* supra, it was held in *Challiss v. Atchison Union Depot & R. Co.* 45 Kan. 398, 25 Pac. 894, that the perpetual use of a lot abutting on a vacated street acquired by the railroad company included that part of the abandoned street in front of the lot taken. This decision is based on the same statute that controlled the *Patch Case*, with stress laid upon the fact that the fee of the street was not in the abutting owner, but that his right in such street was merely incidental and appurtenant to his property in the lot. It will be noted that the condemnation proceedings were begun before the street in question was vacated, but that the deposit and payment of the award did not take place until afterward, and the question was apparently treated as would be a conveyance after an abandonment.

Attention is called to the early case in the supreme court of *Harris v. Elliott*, 10 Pat. 25, 9 L. ed. 333, passing upon questions closely connected with the one in hand, but not decisive of it because of the circumstance that the sale to the United States of the land abutting on the streets actually took place before the abandonment of such streets.

W. A. S.

tical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. Indeed, as Smith, J., said in *Kimball v. Kenosha*, 4 Wis. 321, 331, the lots would be "comparatively useless" without the implication of conveyance to the middle of the street. He is logically entitled to improve the property as he chooses. It conduces to the best use of the premises to allow him to do so in reliance on access to the street on the ground itself and for light and air above. So long as the land is used as a street these rights would be protected, irrespective of who owned the fee. But upon vacation of the street these rights would be legally destroyed unless the vendee had the fee. It is much more the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property, which it consists with public policy to favor. On the other hand, the state itself is concerned, *e. g.*, as to who should determine and pay for improvements to the street made under the power of taxation to be paid for in some form of local assessment. The owners of the lots adjoining the street are the natural ones to determine whether improvements should be made and what their character should be, and who are, required to discharge the assessment levied for the improvement determined upon. Upon vacation of the street, they are naturally entitled to the street in its improved condition. Other practical considerations justify the reasonable. They are the ones who logically would reasonably to vest that fee in him than in ableness of the rule.

Where, however, the street has been vacated while the original proprietor owns the lots in question, the situation is substantially different. On vacation of a street in a case like the one at bar, he owns lots 23 and 24 and the space between in fee simple. He can transfer the whole tract, or any part of it, or transfer lot 23 to any person, and lot 24 to another person, and the space between the two to a third person. It is immaterial in what order of time such transfers were made. If the strip was granted before the lots, the intention would be certain; if afterwards, equally clear. What had been a street would be mere land. It would be taxable as land and so descend. Its transfer would be subject to the appropriate section of the statute of frauds. That it was not numbered nor properly named on the plat would be wholly insignificant. The case would be the same as if no street had ever existed, and, instead of being designated as "street," the tract had been marked

"sand hole," or "mound," or any other name, or had had no name. The land which had been a street assumed exactly the same legal status as any other land which had not been impressed with a public easement. There is neither mystery nor magic in the word "street." The easement of use is the significant fact. When the easement ceases, there is no occasion nor justification for any imputation of intention. The parties would contract with reference to a record showing that no street existed, where the vacation proceedings are required to be recorded. Neither alienation nor improvement would be jeopardized by selling lots without the strip; merely less land would be sold to any one person. What had been a possible creator of local improvement assessments would become a possible subject of such public charge. When the reason for the rule ceases, the rule itself should cease. The courts do not indulge in unnecessary, artificial assumptions, nor make new contracts for parties who have definitely agreed upon its terms. This they would do if in such cases they should construe a deed to pass title to a parcel of land distinct and different from what that contract accurately described.

In the instant case, before the transfer to either plaintiff or defendants, there were on record in the office of the register of deeds two recorded plats of this addition, namely, the plat originally filed and the plat required to be there filed, together with a transcript of the resolution canceling and vacating the street, which was required by § 17, pp. 24, 25, 3d ed. Charter of St. Paul, as a necessary condition to the validity of the ordinance. And it is here stipulated that the ordinance was valid. The defendants, therefore, had notice that there was no La Salle street, and contracted with reference to a record showing that the strip did not adjoin a street. This case did not involve any inconsistency, uncertainty, or ambiguity of description of the premises transmitted to the plaintiff or to the defendants. The metes and bounds on the plat, it is conceded, would have been sufficient if the lot had been in the center, instead of the corner, of the block. That was its legal situation when the street was vacated. The rule that artificial monuments, like streets, prevail over courses and distances, has no application here, because there was no such permanent monument as a street in existence, and because the description in the instruments and proceedings by which title was transferred was clear, complete, and consistent. Cf. *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N. W. 33, and other cases.

The conclusion follows, on principle,

that the fee to the strip belongs to plaintiff, if conveyed to him by valid deed.

The authorities are in conflict. In *Hopkinson v. McKnight*, 31 N. J. L. 422, the court said: "No authority has been produced for the proposition that the reference in a conveyance of land by definite metes and bounds to an alley or road as abutting on the premises vacated, where no such alley or road exist, can be construed to be a grant of such an alley or road." There is, however, an elaborate opinion by Judge Taft to the contrary in *Paine v. Consumers' Forwarding & Storage Co.* 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626. The facts there presented were similar to those at bar, except that "in nearly all the deeds . . . the description of the lots conveyed by reference to the plat closes with this phrase, 'subject to all legal highways.' . . . It is clear that the grantors . . . supposed that they were parting with all their interest, not only in the land within the lot lines, but also in the street." The significant difference in the language of the deeds in that and in the instant case is emphasized by the expressed doctrine of the opinion, that the intention of the parties controls. Plaintiff insists that the authorities relied upon do not support its general principle. Indeed, the only one involving similar facts—*Lough v. Machlin*, 40 Ohio St. 332—was decided contrary to the conclusion reached, and supports plaintiff's view. It was, more or less, successfully distinguished. Page 633 of 71 Fed. The other authorities cited support the general doctrine applicable where the transfer took place at a time when a highway was in existence. Certainly not *Dawson v. St. Paul F. & M. R. Co.* 15 Minn. 136, Gil. 102, 2 Am. Rep. 109, which is cited, nor any other decision of this court, justify the conclusion there reached. The view which we have previously expressed herein does not seem to have been fully presented to the court, and was not expressly considered. It is, we think, entirely consistent with and confirmed by these authorities.

Defendants rely only on the Kansas cases. *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 471; *Showalter v. Southern Kansas R. Co.* 49 Kan. 421, 32 Pac. 42; *Challiss v. Atchison Union Depot & R. Co.* 45 Kan. 398, 25 Pac. 894. Under the Kansas statute, however, the certified plat vests the fee of such parcels of land as are therein named in the county in trust for the uses only therein named. Section 4364, Kan. Gen. Stat. 1901 (which took effect 1868); *Showalter v. Southern Kansas R. Co.* supra. On the vacation of a street the title to the land does not revert to the owner. 32 I.R.A. (N.S.)

er. The city council may at any time order the street to be opened without expense or payment of damages. Laws Kan. 1881, p. 95, chap. 37, § 34. "The city permits the lot owner provisionally and temporarily to hold and occupy the portion of the vacated street in front of his lot. Under these circumstances, we think it fair to consider that it becomes as it were a part of the lot, something in the nature of an accretion to it, and, if so, then any conveyance of the lot takes with it this attached portion of vacated street." *Brewer, J., in Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 473. It is evident that the court intended that the right to use the property, and not the actual title thereto, passed with the lot. See *Challiss v. Atchison Union Depot & R. Co.* 45 Kan. 398, 25 Pac. 894. This consists with the well-settled principle that land is never appurtenant to land. Cf. *Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 495, 496, 28 S. W. 626. "It would be absurd," says *Platt, J., in Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263, speaking of a road adjoining land passed by grant, "to allow the fee of one piece of land not mentioned in that deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries." This view at all events justifies the judicial determination that these Kansas cases are not controlling, because turning upon a peculiar statute. *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2.

Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33, is entirely consistent with the conclusion here reached. In the first place, the description was ambiguous (page 206 of 184 N. Y.); in the second place, the whole doctrine of intention was viewed as here (page 205 of 184 N. Y.), and applied to a case in which the deeds were executed long before the street was discontinued (page 198 of 184 N. Y.). And see second section of syllabus. The same features distinguish *Baltimore & O. R. Co. v. Gould*, 67 Md. 60, 8 Atl. 754. Nor does *Gilbert v. Emerson*, 60 Minn. 62, 61 N. W. 820, tend to strengthen defendants' position. That case involved the construction of a deed to swamp lands according to a plat. The reasoning of the court served to confirm the view herein previously taken that the rule applies only to conveyances of lots abutting on an actual street or alley. *Buck, J., said at page 67 of 60 Minn.*: "No intent can therefore be inferred or presumed that the owner of block 159 intended, by conveying the same, to pass the title to the whole alley . . . so as to include the unplatted space in contro-

versy." It is to be noted that, strictly in accordance with the opinion here expressed, this court has held that the right of a riparian owner upon navigable waters to improve the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 7 L.R.A. 722, 44 N. W. 1144, overruling *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679, 38 N. W. 200. And see *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 59, 53 N. W. 1066. *Wait v. May*, 48 Minn. 453, 461, 51 N. W. 471, 473, construed a deed of a lot to include riparian rights across a street, "in the absence of language in the deed or circumstances indicating contrary intention." That case and its reasoning tends to confirm the conclusion here reached on principle.

On the other hand, plaintiff relies, *inter alia*, upon *Harris v. Elliott*, 10 Pet. 25, 9 L. ed. 333. In point of identity of facts—the lots were acquired in 1800 and the street vacated in 1801—the case is not, as the trial court remarked, "much in point." But it is a well-reasoned authority for the proposition that "land cannot be appurtenant to land." See 3 *Rose's Notes on U. S. Reports* 542–544.

The Iowa court has sustained the opinion herein previously reached on principle. *Brown v. Taber*, 103 Iowa, 1, 72 N. W. 416; *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25, 65 N. W. 1017. Defendant insists that the significance of these cases is destroyed by the rule as to the effect of the dedication of streets by plat under the Iowa statute, similar to the Kansas statute, in that a plat conveys the highway in fee simple to the public. See *Tomlin v. Cedar Rapids & I. C. R. & Light Co.* 141 Iowa, 599, 22 L.R.A. (N.S.) 530, 120 N. W. 93. However, in *Brown v. Taber*, the court points out in the opinion that "no evidence was offered tending to show that the dedication of the street had been accepted. The title thereto did not vest in the city without acceptance. . . . As the conveyance was not accepted, the proprietors of the plat remained owners of the land included in the street." This case is therefore a specific authority.

Sanchez v. Grace M. E. Church, supra, defendants insist, was an opinion of a mere commission, and so far as it relates to the matter in controversy was mere *dictum*. On examination, however, it appears to us to be directly in point. In *Overland Machinery Co. v. Alpenfels*, 30 Colo. 163, 69 32 L.R.A. (N.S.)

Pac. 576, the court expressly stated that it was not required to pass upon the question now before this court. The whole reasoning, however, confirms the view previously herein expressed. The court points out as "too clear for argument" the right of the landowner, who has the fee to the street and the abutting lots, to separate the two estates or titles, and to treat them as distinct or separate tracts or parcels. The decision expressly views the intention of the parties substantially as has hereinbefore appeared. And see 8 Am. Dec. 266, note. In *Plumer v. Johnston*, 63 Mich. 165, 173, 29 N. W. 687, 690, the court said: "The doctrine is well established that the grantee of a lot bounded upon a street or other highway takes to the center of such street, subject only to the public easement, unless something appears upon the plat or in the terms of the conveyances excluding the title from passing under a boundary so described. But this doctrine is limited, and is applied to actual highways, and not to mere paper highways." *Darrow v. Homer*, 122 Mich. 229, 81 N. W. 262, is not in point.

The conclusion follows that the weight of authorities, and especially the later decisions, sustain the plaintiff's title as a valid deed to the premises.

The second question concerns plaintiff's title. Defendants insist that the deed through which plaintiff claims conveyed no title, because it was executed by Barnum in his capacity as a trustee under the will of Allie Hewitt, which did not avail to create a trust, but vested the property absolutely in Barnum as an individual. It appears, but not clearly or certainly, from the stipulated facts, the brief findings of the court, and its memorandum attached, that the point was not considered by it. The conclusion previously reached necessitates a new trial. New findings are necessary; for the findings made state as a conclusion of fact that defendants, not the plaintiff, are the owners of the premises, and do not detail the facts. New findings must be made, not by this court, but by the trial court. In view of the uncertainty of the record before us and the statements of counsel upon argument, we have concluded that it would not be proper for us to here determine the merits of this controversy. Defendants will have opportunity to fully present and argue the question at the time of the trial.

Reversed, and new trial ordered.

A reargument having been granted, the following *Per Curiam* response was handed down March 11, 1910:

In a motion for reargument, defendants,

among other things, challenge the correctness of the statement in the original opinion, that "before the transfer to either plaintiff or defendants there were on record, in the office of the register of deeds, two recorded plats of this addition, namely, the plat originally filed and the plat required to be there filed, together with a transcript of the resolution canceling and vacating the street, which was required by § 117, charter of St. Paul, as a necessary condition to the validity of the ordinance." The court had been of impression that this fact had been conceded.

Upon reargument plaintiff insists that, as a matter of fact, when defendants acquired the title there were two plats on record in the office of the register of deeds; one being the original plat, in which La Salle street appeared as a public way, and the other the plat which located and divided the portion of La Salle street which had been vacated, together with a transcript of the resolution vacating the same. This statement he insists is literally true, and in proof thereof attaches to his brief what purports to be a certified copy of the plat recorded in the register of deed's office many years before defendants acquired their title.

It is unnecessary to pass upon a number of questions thus presented, because defendants' own brief insists that the charter provisions in force at the time of the vacation proceedings control this case, and that they required that "a transcript of such resolution (of vacation), duly certified by the city clerk, shall be filed for record and duly recorded in the office of the register of deeds of the county of Ramsey." Sp. Laws 1874, p. 38, chap. 1, subchap. 4, § 8. The stipulation, as has previously been stated, agreed that the street in question had been "duly vacated." It follows naturally from the stipulation, that at least the transcript of the resolution had been recorded in the register's office. That was constructive notice of the vacation of the street to all persons in general, and to these defendants in particular.

We must therefore adhere to the original opinion.

DISTRICT OF COLUMBIA COURT OF APPEALS.

PHIL D. POSTON, Appt.,

v.

WASHINGTON, ALEXANDRIA, & MOUNT VERNON RAILWAY COMPANY et al.

(— App. D. C. —.)

Libel — jury's findings — exceeding authority.

A special grand jury summoned to inquire

investigate charges that a railroad company failed to maintain order on its trains exceeds its authority in making a long recital of facts tending to bring the complaining witness into contempt and disgrace, and charging him with malice and improper conduct, without any presentment against him for perjury; and such charge is therefore not privileged, but one who publishes it in a public newspaper is answerable for libel.

(February 6, 1911.)

Note. — Libel and slander: privilege as to proceedings of grand jury.

It was held in *POSTON v. WASHINGTON, A. & Mr. V. R. Co.* that a report by a special grand jury to the effect that there was no foundation for the indictment brought, and further charging the complainant with malice and improper conduct, was beyond the power of such a jury, and that it was therefore not a judicial proceeding which afforded a privilege.

A case similar to this, in that the grand jury exceeded its power, is *Rector v. Smith*, 11 Iowa, 302, holding that where a grand jury had no power to present to the court otherwise than by an indictment, a report to the district judge presented by a grand juror, concerning the misconduct of a county judge in the performance of his official duties, was not privileged. The court, however, apparently meant to deny only the absolute privilege, and practically admitted that it was qualifiedly privileged, for it held that there being no malice, and the report having been made in good faith and under the belief that it came within the discharge of a public duty, an action for libel could not be maintained.

It is generally held that the proceedings of grand juries are judicial proceedings which render the transactions taking place before them privileged.

Thus, it has been held that statements which are pertinent and material to the matter under consideration, made to the grand jury in the course of their proceedings, are made in a judicial proceeding, and are privileged, so that an action for defamation because of them cannot be maintained. *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066, 7 A. & E. Ann. Cas. 528. The court said: "Whatever defendant may have stated to the grand jury or the district attorney must be held pertinent and material from the very nature of the complaint now made against defendant for damages. It is not disputed but that the injury complained of arises out of the transaction resulting in the indictment by the grand jury, which it is charged that the defendant falsely and maliciously instigated. From this it must follow that the alleged defamatory matter was applicable and pertinent to the subject under consideration by the grand jury, and that it was communicated to them in the course of a judicial proceeding. The order appealed from forbids disclosure of statements

APPEAL by plaintiff from a judgment of the Supreme Court entered upon demurrer to his amended declaration in an action brought to recover damages for the alleged publication of a libel. Reversed.

The facts are stated in the opinion.

Messrs. **J. Barrett Carter** and **John C. Brooke**, for appellant:

The matter was libelous.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; **Cropp v. Tilney**, 3 Salk. 225; **Nichols v. Daily Reporter Co.** 30 Utah, 74, 3 L.R.A. (N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 A. & E. Ann. Cas. 841; **Colby v. Reynolds**, 6 Vt. 489, 27 Am. Dec. 574; **Washington Times Co. v. Downey**, 26 App. D. C. 258, 6 A. & E. Ann. Cas. 705.

It was not privileged.

McCabe v. Cauldwell, 18 Abb. Pr. 377;

Rector v. Smith, 11 Iowa, 302; **Park v. Detroit Free Press Co.** 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; **Sutton v. A. H. Belo & Co.** — Tex. Civ. App. —, 64 S. W. 686; **Barber v. St. Louis Despatch Co.** 3 Mo. App. 377; **Wills v. Jones**, 13 App. D. C. 482; **White v. Nicholls**, 3 How. 266, 11 L. ed. 591; **Garrett v. Dickerson**, 19 Md. 418.

When not material or pertinent to the issue, matters set forth in a lawsuit are not privileged, and an action will lie upon them.

Newell, Defamation, 419; **Gilbert v. People**, 1 Denio, 41, 43 Am. Dec. 646; **White v. Carroll**, 42 N. Y. 161, 1 Am. Rep. 503; **Wyatt v. Buell**, 47 Cal. 625; **Kean v. M'Laughlin**, 2 Serg. & R. 469; **Smith v. Howard**, 28 Iowa, 51; **Ruohs v. Backer**, 6 Heisk. 395, 19 Am. Rep. 598; **Hooper v.**

and communications so made to the grand jury and to the district attorney who were investigating this subject, and these statements and communications must be held to have been made on an 'occasion of privilege,' and to be therefore not actionable in the law."

And it has been held that a complaint made to the grand jury charging a person with perjury is made in the regular course of justice, and is therefore privileged. **Kidder v. Parkhurst**, 3 Allen, 303.

And a charge against a person before the grand jury, by a justice of the peace, which he voluntarily stated as having repeatedly come to him as a rumor, furnishes a prima facie excuse for such charge having been made, and it falls upon such person in a suit for slander to show that the occasion was used only as a colorable pretense, and to establish express malice by the defendant. **Sands v. Robinson**, 12 Smedes & M. 704, 51 Am. Dec. 132.

But it has been held that proceedings before a grand jury are not judicial proceedings within the meaning of an act regulating the matter of privilege in libel cases, which begins by speaking of reporters, editors, or proprietors of newspapers, a class never admitted before the grand jury, and further speaks of debates and arguments which never occur there; and one therefore who publishes a report of such proceedings in a newspaper is liable in an action for libel. **McCabe v. Cauldwell**, 18 Abb. Pr. 377. The court said: "Moreover, there is the law imposing secrecy on the individual members of the body, and making it a misdemeanor if such secrecy is not observed; and certainly if a member of the body is not permitted to divulge what transpires before themselves, the law did not contemplate that the editor or reporter of a newspaper could. The very oath which the individual juror takes obliges him to keep secret their counsels; and although contrary to the spirit of our institutions, which do not shun the light, this secrecy is required perhaps for a wise purpose. The duration of secrecy does not appear to be 32 L.R.A. (N.S.)

definitely settled. In some cases where the evidence is required to contradict a witness who appeared before the body, it is allowed to be divulged, but even against this practice there are numerous authorities."

And where one addresses a communication to the grand jury and publishes it in a newspaper, the communication is not privileged, and he may be guilty of criminal libel. **Com. v. Duncan**, 127 Ky. 47, 104 S. W. 997. The court said: "Judicial proceedings are privileged. The testimony of a witness even in a preliminary examination was held privileged in **Beiser v. Scripps-McRae Pub. Co.** 113 Ky. 383, 68 S. W. 457, on the ground that where the law imposes a duty upon a citizen, he cannot be held responsible in damages as for slander or libel for the testimony that he gives. Upon the same principle, if the witness testifies before the grand jury, his statements would be privileged. The law protects testimony given before the grand jury by declaring that it shall not be divulged. But **Duncan** did not testify before the grand jury. Had he testified before the grand jury, nobody could have known what he said but the grand jurors or the commonwealth attorney, and they were required to keep it secret. When, for the purpose of publicity, he published his communication in a daily newspaper, he was discharging no duty which the law imposed upon him so far as the grand jury was concerned; and the fact that he addressed his communication to the members of the grand jury altered in no way its legal character. If the communication would be libelous when addressed to the public at large, it is equally libelous when addressed to persons who are styled grand jurors. The law does not tolerate this manner of bringing matters to the attention of the grand jury; and he who libels another cannot escape responsibility for his act by addressing his publication to the grand jury or to some public official. Were this the rule, prosecutions for libel could always be defeated."

J. T. W.

Truscott, 2 Bing. N. C. 457, 2 Scott, 672, 5 L. J. C. P. N. S. 177.

The publication is not privileged, because it was clearly in excess of the duties and powers of the grand jury.

Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; Jones v. Robbins, 8 Gray, 329.

It is the report of an *ex parte* proceeding, in which the appellant had no opportunity to appear and defend himself.

Cooley, Const. Lim. 7th ed. 637; Stanley v. Webb, 4 Sandf. 21; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; Belo v. Wren, 63 Tex. 686.

Messrs. John S. Barbour and D. S. Mackall, for appellees:

The report of a grand jury is a privileged communication.

Newell, Defamation, p. 418, § 16; 6 Bacon, Abr. 348; 1 Chitty, Crim. Law, 323; Harlow v. Carroll, 6 App. D. C. 128; Vogel v. Gruaz, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; Blakeslee v. Carroll, 64 Conn. 225, 25 L.R.A. 106, 29 Atl. 473; McGehee v. Insurance Co. of N. A. 50 C. C. A. 551, 112 Fed. 853; Hollis v. Meux, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505; McLaughlin v. Cowley, 127 Mass. 316; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Hyde v. McCabe, 100 Mo. 412, 13 S. W. 875; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Shaftsbury's Trial, 8 How. St. Tr. 769.

The legality of the grand jury cannot be collaterally attacked.

1 Bishop, Crim. Proc. § 860; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; Re Gannon, 69 Cal. 541, 11 Pac. 240; Kelly v. Wilson, — Cal. —, 11 Pac. 244; Ex parte Hammond, 91 Cal. 545, 27 Pac. 859; State ex rel. Dunn v. Noyes, 87 Wis. 340, 27 L.R.A. 776, 41 Am. St. Rep. 45, 58 N. W. 386; Hyde v. United States, 35 App. D. C. 461.

The report of the jury being a privileged communication and the result of a judicial investigation, the Washington paper was entitled to publish it.

25 Cyc. Law & Proc. p. 401, note 78; Lawyers' Co-op. Pub. Co. v. West Pub. Co. 32 App. Div. 585, 52 N. Y. Supp. 1121; Johnson v. Brown, 13 W. Va. 73; Hartung v. Shaw, 130 Mich. 180, 89 N. W. 701; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Edsall v. Brooks, 2 Robt. 29, 17 Abb. Pr. 221, 26 How. Pr. 426; Salisbury v. Union & Advertiser Co. 45 Hun, 120; Townshend, Slander & Libel, 4th ed. §§ 229, 240; Starkie, Slander & Libel, 3d Eng. ed. 214, 281; Odgers, Libel & Slander, 2d Eng. ed. 229, 248; 13 Am. & Eng. Enc. Law, pp. 319, 423; 32 L.R.A. (N.S.)

Wason v. Walter, L. R. 4 Q. B. 92, 8 Best. & S. 671, 38 L. J. Q. B. N. S. 34, 19 L. T. N. S. 409, 17 Week. Rep. 169; Usill v. Hales, L. R. 3 C. P. D. 319, 47 L. J. C. P. N. S. 323, 38 L. T. N. S. 65, 26 Week. Rep. 371, 14 Cox, C. C. 61; Conner v. Standard Pub. Co. 183 Mass. 474, 67 N. E. 596.

The interests of society require that immunity should be granted to the discussion of public affairs, and that all acts and matters of a public nature may be freely published with fitting comments or strictures.

25 Cyc. Law & Proc. p. 401; The Count Joannes v. Bennett, 5 Allen, 169, 81 Am. Dec. 738; Bailey v. Holland, 7 App. D. C. 184; DeArnaud v. Ainsworth, 24 App. D. C. 167, 5 L.R.A. (N.S.) 163; Harlow v. Carroll, 6 App. D. C. 128.

Shepard, Ch. J., delivered the opinion of the court:

This is an action by Phil D. Poston against the Washington, Alexandria, and Mount Vernon Railway Company and Robert A. Chester to recover damages for the publication of a libel.

Plaintiff's amended declaration alleged substantially that he was a resident of Fairfax county, Virginia, engaged in business in the District of Columbia, and had frequent occasion to use the late cars of the defendant railway company between the city of Washington, and Falls Church, Virginia. That disorder frequently existed in said cars, caused by drunken persons, and they were often overcrowded. That plaintiff and others made complaints to the defendants, which proved ineffectual. That thereafter the plaintiff brought said conditions to the attention of the judge of the circuit court of Alexandria county, Virginia, who summoned a special grand jury to investigate the same, and to report to the court whether or not presentments should be found against defendant for permitting the nuisances complained of. That said grand jury was irregularly and illegally summoned, and not composed of disinterested freeholders and bona fide residents of Alexandria county, Virginia. That said grand jury, in violation of their oaths and the instructions of the court, proceeded in an illegal manner, and, on February 18, 1900, made a report in writing to said court, which, among other things, contained certain false, malicious, and libelous statements of and concerning plaintiff, reflecting upon his credibility as a witness and in fact and effect charging him with committing the crime of perjury before said grand jury. That said malicious statements, being so far in excess of the right or duty of said grand jury under the instructions of the court, were expunged by the court as irrelevant to the issues in-

volved. That the said false and malicious report was known to, connived at, and procured by the said defendants. That defendants, well knowing the premises, but maliciously contriving and intending to injure plaintiff in his good name, reputation, etc., and to bring him into scorn, public scandal, and disgrace, and to injure him in the community where he lived and carried on business, and to vex, harass, oppress, and injure him, did, on February 18, 1909, obtain a copy of said report before the same had been recorded, and did falsely, wickedly, and maliciously, compose and publish, and cause to be composed and published, of and concerning the plaintiff and the testimony given by him under oath before said grand jury, in a newspaper called the Washington Post, printed and published in the city of Washington, and widely circulated in Alexandria and Fairfax counties, Virginia, a copy of said false and malicious report. That they caused to be composed, prefixed thereto, and published therewith, certain scandalous, malicious, and defamatory headlines, observations, and comments. The said publication, with the innuendos explanatory thereof and the headlines and catch lines included thereof, reads as follows:

Good Order on Cars.

Grand Jury Fully Exonerates W. A. & F. C. Railway.

Complainant is Discredited (meaning thereby the said plaintiff).

Complete Investigation of Charges of Disorder on Cars Proves Them Groundless—Publication of Trumped-up Accusations Severely Condemned—Railway Company Takes Every Precaution (meaning thereby that the accusations against said railroad company were trumped-up by said plaintiff and were false).

The special grand jury of the Alexandria county circuit court, in session at Fort Myer yesterday, made a report exonerating the Washington, Arlington, and Falls Church Railway of the charges of disorder and other reprehensible conduct on its cars. The report follows:

"To Hon. J. B. T. Thornton, Judge of Circuit Court, Alexandria County, Va.:

"We, the special grand jury now attending the Alexandria county circuit court at its February term, 1909, after having made a most careful, painstaking, and exhaustive investigation of the complaint to said court, dated February 12, 1909, and signed by William H. Lynch, Talbott Lynch, Edward Ballinger, W. T. Sinclair, ——— Hough, F. H. Poston, and Phil D. Poston, charging that disorder, vicious conduct, drunkenness, and other reprehensible conditions are wilfully permitted to exist on the cars of the Wash-
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ington, Arlington, and Falls Church Railroad Company, and after the most patient examination of a great number of witnesses concerning the matters complained of, hereby report to your honorable court that the said complaint (meaning thereby the complaint made by the said plaintiff and others to the Honorable J. B. T. Thornton, as aforesaid) is so grossly overdrawn, so misleading in character, and is such an exaggeration and misstatement of facts as testified to before this grand jury, to suggest, if not absolute untruthfulness, at least a malicious intent, not only to unjustly implicate the said railroad company, which appears to be blameless in this matter, but also to spread abroad a reputation for disorder in this community and on the cars of said railroad company, as shall be a positive detriment not only to the community at large, but in a greater degree to the individual members thereof and to all property interests as well, and to prejudice the minds of the public and create the impression that lawlessness is rampant in Alexandria county (meaning thereby that the said plaintiff had testified falsely, with a malicious intent to injure said railroad company and the community through which it passed, as well as the residents thereof).

"Seeks to Maintain Order.

"Whereas the testimony presented before this jury shows conclusively that the said railroad company is using its utmost endeavors to maintain order over its lines, and, as a matter of proven fact, is keeping much better order on its cars than is usual on either city or suburban lines; and that, at the very worst, such sporadic cases of disorder as sometimes occur are usually mild in character and quickly controlled, being confined to the late cars, especially on Saturday night;

"And this grand jury wishes especially to call attention to the statements contained in the newspaper articles published in the Washington Herald February 8, 1909, and in the Evening Star February 9, 1909, which the testimony of no less than four responsible witnesses, whose high standing for honor, integrity, and truthfulness cannot be questioned, and who were passengers on the car at the time referred to in said newspaper articles, shows to have been misleading in every particular, besides which the sworn testimony of the party lodging said complaint (meaning thereby the said plaintiff) with your honorable court, as well as that of many other witnesses, shows that said newspaper articles were cooked up at the house of said complainant (meaning thereby that the said plaintiff had not only inspired and cooked up newspaper articles which were untrue and misleading, but had

also testified to such as being the fact before said grand jury) out of several incidents which occurred at periods of time far remote from each other, and which the reporters of the said newspapers served to the public as the successive experiences of one continuous midnight ride.

"Protests Against Untruths.

"And this grand jury hereby wishes to protest in the most earnest and emphatic manner against such untruthful and hurtful publications, and to condemn in unmeasured terms the meddlesome and misguided spirit which would inspire such misleading statements, since the result cannot be otherwise than detrimental to the best interests of our county, and a direct material loss to every member of this community.

"And, further, this jury wishes to express its indignation at the harmful and unjust course of the said newspapers in publishing unedited and unverified articles of the scandalous and libelous character of those under consideration, and we most sincerely deprecate the meddlesome interference of the principal complainant in this matter (meaning thereby the plaintiff), who turns out to be a man who is not even a resident of this county, but who seems to be possessed with a spirit of enmity and unfairness towards the said railroad company, which has been fully termed crankiness, but by reason of a peculiar altruistic twist, is likely to gain a hearing from those who do not look beneath the surface; a man, too, whose testimony before this jury has not only crumbled to nothing when subjected to even a mild cross-examination, but has been unsupported by a single witness of the dozens which he himself has produced, besides being flatly contradicted by many of the same witnesses. A man, also, whom testimony before this jury has shown to be guilty of destroying the property of said railroad company to the extent of smashing a car window for the ostensible purpose of ventilation (thereby meaning to charge the plaintiff with having published or caused to be published unverified and untruthful articles of a scandalous and libelous character against said railroad company and the community through which it ran, and with being a crank unworthy of belief, and who had in fact testified falsely before said grand jury, and who had also been guilty of destroying private property without the consent of the owner).

"Management is Commended.

"And now, after a careful survey of all the testimony submitted, relating to the matters complained of, it is the sense of this jury that, in order to meet any possible cases of boisterousness or disorder on the late cars out of Washington or from

Rosslyn, that extra men should be detailed to ride on said late cars to give assistance to the conductor, should such become necessary.

"But, since the testimony shows that this has been the practice of the said railroad company for some time past, there is no further recommendation that seems to be necessary, and it only remains for this jury to commend the present management of said railroad company for its efforts to give our people a safe, commodious, and efficient suburban car service, and to assure the said management its efforts in this direction are appreciated, and that, in all betterments of said service, the sentiments and support of the responsible element of this community is heartily with it, recognizing as we do that the best interests of both the railroad company and the community through which it passes are identical.

"Finally, it is the unanimous sense of this jury, based on the testimony submitted, that this community, as well as the said railroad company, have received a gratuitous and unmerited slap in the face by the aforesaid publications, and therefore have a moral right to demand, in the interests of all concerned, that the report of this jury be published in said newspapers in at least as conspicuous a manner as that given to the said articles containing said charges, and we hereby request your honorable court to furnish said newspapers with a copy of this report for publication.

"Thomas J. De Lashmutt.

"S. J. Mulhall.

"A. D. Torreyson.

"Arthur J. Porter.

"Robert L. King.

"I. N. Garrison.

"F. S. Corbett.

"Julian P. Baldwin, Foreman."

Some further allegations follow regarding the motive of defendants, the nature of the charges against plaintiff, etc., and the conclusion is that he has been damaged in the sum of \$15,000.

Defendants demurred to the declaration, assigning as matters of law to be argued on the hearing: 1. No cause of action alleged. 2. The report of the grand jury is a privileged communication. 3. The published report makes no charges that can be construed to be libelous. 4. The legality and jurisdiction of the grand jury cannot be questioned in this proceeding. 5. The proceedings were instigated by plaintiff and others, and he can have no action for the publication of the result.

The demurrers were sustained, and, plaintiff declining to amend, judgment was entered for the defendants.

1. Evidently the demurrer was sustained on the ground that the publication was privileged as the report of a judicial proceeding, and it is to that point that the argument has been chiefly directed.

If not privileged, it is clear that the publication is libelous and actionable. Whether it substantially charges plaintiff with the crime of false swearing, as claimed, we need not pause to determine; for it is plain that it tends to bring him into ridicule, contempt, and disgrace, and therefore furnishes sufficient foundation for the action. *Bailey v. Holland*, 7 App. D. C. 184-189; *Washington Gaslight Co. v. Lansden*, 9 App. D. C. 508-530; *Washington Times Co. v. Downey*, 26 App. D. C. 258-263, 6 A. & E. Ann. Cas. 765.

2. The allegation that the grand jury was irregularly summoned, and composed of unqualified persons, is not essential to the maintenance of the action. In our opinion this is a question that the plaintiff cannot raise in this collateral proceeding. Moreover, called at his suggestion, he had the opportunity, and it was his duty, to make objections to the persons summoned for service on the special grand jury before it was impaneled and entered into the investigation. Instead of doing this, he acquiesced in the qualifications of the jurors and presented his complaint to them.

3. Assuming that the investigation of the conduct of the railway company, by a grand jury charged with that duty by a court of competent jurisdiction, is a judicial proceeding, it is necessary to consider whether the report presented and published was within its jurisdiction and duty. Grant that the grand jury had the power to present or indict the railway company if it had found the charges to be true, or even to present or indict the plaintiff for false swearing upon finding that his testimony in support of the complaint was false, the question remains: Had it the power to make the report that it did, not only that there was no foundation for the indictment of the defendant, but charging malice and improper conduct against the plaintiff? If it had not, the report is not a judicial proceeding, and entitled to privilege as such.

The argument on behalf of appellee is that this report is a presentment within the ordinary power of a grand jury. We cannot concur in this view. The practice under the old English system in which the institution of the grand jury had its origin is thus stated by Mr. Justice Brown in *Hale v. Henkel*, 201 U. S. 43-59, 50 L. ed. 652-659, 26 Sup. Ct. Rep. 370: "Criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order

of society. In such cases the usual practice was to prepare the proposed indictments and lay it before the grand jury for their consideration. . . . A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like, upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it." This last paragraph is quoted from 4 Bl. Com. 301. See also Wharton, *Crim. Proc.* 62; Chitty, *Crim. Law*, 162.

"Presentment, in its limited sense, is a statement by the grand jury of an offense from their own knowledge, without any bill of indictment laid before them setting forth the name of the party, place of abode, and the offense committed, informally, upon which the officer of the court afterwards frames an indictment." *Collins v. State*, 13 Fla. 651, 663; *Hale v. Henkel*, 201 U. S. 62, 50 L. ed. 660, 26 Sup. Ct. Rep. 370.

When an indictment had been prepared and submitted to the grand jury, it was indorsed "a true bill" or "not a true bill," and signed by the foreman, according to the actual finding of the jury or the necessary number thereof.

In the ordinary American practice, where a prosecuting attorney is an officer of the state, and as such gives advice and aid to the grand jury when called upon, the findings are reported to him for preparation of the necessary indictment. When this is adopted and officially signed, it is presented to the court and noted on the minutes thereof. No other presentment is necessary, and seems rarely to be made in modern practice. Where, however, formal presentment, as above described, may have been made upon occasion, no prosecution could be had upon them, but only on the indictment or information founded thereon. The presentment and the resulting indictment were considered as one act. *United States v. Hill*, 1 Brock. 156, Fed. Cas. No. 15,364. The latter took the place of the former for all purposes. *Laird v. State*, 61 Md. 309-311.

The practice in the state of Virginia seems to have been exceptional in this respect. As declared by her court of appeals: "The presentment, moreover, seems in Virginia, from a very distant period, to have been made the foundation for a summons to show cause why an information for the offense presented should not be filed against the accused. No authority has been found in the English books that warrants such an use of the presentment. From what has

before been stated as to the nature of a presentment in the English practice, no such use, it is supposed, could be made of it." *Christian's Case*, 7 Gratt. 631-636; see also *Towles's Case*, 5 Leigh, 743-750.

The presentment referred to by the Virginia court, however, was evidently the regular one presenting the name of the party and his commission of a specific offense, with the time and place and the essential particulars thereof, on which an indictment or information could be framed.

The "presentment," so called, that is under consideration, is nothing of this kind. The grand jury having found no justification for the indictment or presentment of the railway company, its regular and proper course would have been so to report to the court that, its duties being ended, it might be discharged. It might, possibly, have indicted the complainant for false swearing, or made a presentment to that effect as the foundation of an information, if one would lie for such an offense. Instead of pursuing the latter course, a long report was made reciting as facts matters calculated to bring the complainant into public contempt and disgrace. It was not, and was not intended to be, a presentment on which he could be cited to show cause why an information should not be presented against him. Had it been, he could have had an opportunity to test the truth of the charges upon trial. Turning now to the sections of the Code of Virginia that have been brought to our attention, we find no provision authorizing a report of this description. Section 1729a, Pollard's Code, provides that when complaint has been made to the circuit and other courts named, by five or more citizens, setting forth the existence of a public nuisance, the court or the judge thereof, in vacation, shall summon a special grand jury to specially investigate the said complaint. That course was pursued in this case. The section then provides that the grand jury, if satisfied that the nuisance exists, shall proceed to make presentment against such person or persons as it shall find to have created or caused such nuisance. Upon any such presentment, the court shall order a copy served upon the person presented or whose property is presented; and to any such proceeding, if it be *in rem*, any person interested, or for or in behalf of the owner of such premises, may make defense. Other provisions of the Code—3978, 3980, 3982, 3983, and 3984—regulate the calling of grand juries, their duties, and the manner of making and rendering indictments and presentments. They shed no light upon this proceeding. Other sections refer to the examination of certain acts of administration by public officers, the inspection of to-

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bacco, violations of the revenue laws, the protection of fish, etc., and the return of indictments in such instances. Section 3989 provides that all prosecutions for offenses against the commonwealth, unless otherwise provided, shall be by presentment, indictment, or information.

As we have seen, the report of the grand jury charged with the investigation of the complaint in this case was neither an indictment nor a presentment of the commission of an offense.

A practice by grand juries of making reports upon the administration of public affairs, the condition of public works, and other matters of public interest, seems to have grown up in many states, authorized probably by statute. No statute of the state of Virginia has been cited as authorizing such practice. While such reports may, in some instances, tend to the advancement of the public welfare, yet, being extrajudicial, their public character affords no protection to the grand jurors themselves against action, if they contain libelous matters. *Rector v. Smith*, 11 Iowa, 302-307. That was an action for libel against a member of a grand jury for charges contained in a report made to the court, of extravagance and improper keeping of accounts of the expenditure of certain public funds by the county judge. There was no indictment, nor was the report in the nature of a presentment of the commission of a misdemeanor as the foundation of an information. A statute making it the special duty of the grand jury to inquire into the conduct of public officers was relied on as justifying the report. The court held that the grand jury had the power to indict for offenses found to have been committed, and nothing more. It was said: "A report by a grand jury presents nothing upon which the court can act, unless it is in reference to the condition of the prison. The court can take no jurisdiction over the complaint charged by such report. Nor can a person thus presented have an opportunity to show himself innocent of the matters complained of. With this view of the question we conclude that the report presented by defendant as a grand juror was not a privileged communication, and that he cannot plead this in bar of plaintiff's right to recover."

That decision in our opinion is sound in principle.

Our conclusion is that the report of the grand jury in this case was beyond its special powers and jurisdiction in the premises, and that its publication is not a matter of privilege.

This renders discussion of the other questions in the case unnecessary. For the reasons given, the judgment will be reversed.

with costs, and the case remanded with direction to overrule the demurrers, and to take further proceedings not inconsistent with this opinion.

ARKANSAS SUPREME COURT.

JAKE MEIER et al., Appts.,

v.

C. E. SPEER, Admr., etc., of John Carbaugh, Deceased.

(— Ark. —, 132 S. W. 988.)

Boycott — refusal to work on nonunion job.

1. The mere refusal by members of a labor union to lay stone for the foundation of a building in case an employer of nonunion labor secures the contract for the superstructure, which causes their employer to refuse to lay the foundation in that event, so that the nonunion contractor is deprived of the opportunity to do the work, gives him no right of action for the resulting damages.

Same — refusal to handle nonunion material.

2. The loss by a brickmaker of the sale of brick for a building because of a state-

ment by a member of a labor union that union laborers would not handle them gives him no right of action against the officers of the union for the resulting loss.

(December 5, 1910.)

A PPEAL by defendants from a judgment of the Circuit Court for Sebastian County in plaintiff's favor in an action brought to recover damages for an alleged boycott and conspiracy against his business. Reversed.

Statement by Wood, J.:

John Carbaugh, who lived in Ft. Smith, Arkansas, was a contractor, and engaged in the building of houses; he also was engaged in the manufacture and sale of brick. The Ft. Smith Biscuit Company had instructed its president to let a contract to Carbaugh for the building of its factory and two ovens. Carbaugh was unable to procure one O'Neal, a stone contractor, to lay the foundation of the building. O'Neal refused to take the contract to lay the foundation for the reason that the masons in his employ, among whom were appellants Meier and McCauley, would not do the work if Carbaugh was to erect the superstructure. If Carbaugh had succeeded

Note. — Right of labor union to forbid its members to handle one's product.

This is the subject of a note in 12 L.R.A. (N.S.) 643. Only cases subsequent thereto are included herein.

As shown in the former note on the subject, the courts are not in harmony as to the right of a labor union to require its members not to handle the product of one deemed unfair. The right so to do is sustained and was affirmed in *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165. The question there arose as to the right of a labor organization to enforce a rule adopted by it that its members should not handle the product of one deemed unfair to labor, the attempt being to enforce this rule by notifying employers of members of the organization that such members would cease work if they purchased for use by them any of the product of certain persons designated unfair to labor. As to the meaning of the word "unfair," as thus used, the court said that it did not mean that the person with reference to whom it was used had been guilty of fraud, breach of trust, or of any dishonorable conduct, but only that he had refused to comply with the conditions upon which union men would consent to remain in his employ and handle material supplied by him. As to whether such conduct amounted to an unlawful conspiracy, the court said: "The rule that 32 L.R.A. (N.S.)

their members could not work with nonunion men, or handle material supplied by an employer of nonunion men, was adopted before any difference had arisen between them and the plaintiff or its manager. It was a rule which they supposed would benefit them, and that was its sole purpose. Whatever others may think of the policy or justice of such a rule, that is a matter outside the province of the courts, and as with regard to other questions of economic or political aspect, the remedy, if a remedy is needed, must be found by the legislature. In the meantime, and for present purposes, we must recognize the fact that this rule, as established by the council and the affiliated unions, was devised for the promotion of an object certainly not unlawful; that the occasion which called for its application was the voluntary act of plaintiff's agent; and that, with two or three possible exceptions, to be hereafter noticed, the defendants did nothing unlawful in their attempt to make it effective."

A valuable case on this question is *National Fireproofing Co. v. Mason Builders' Assn.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, asserting the doctrine that the direct object or purpose of the combination furnishes the primary test of its legality, and that mere injury inflicted upon third persons in its operation does not render a combination unlawful; that it is not enough to establish illegality in a combination of individuals to show that it works harm to others, since an agreement entered into for the primary purpose of promoting

in erecting this factory, he would have made a profit of about \$2,500. A contractor by the name of Zimmerman, who employed only union labor, had the contract for the construction of certain brick buildings for the Ft. Smith Supply & Construction Company. He would have purchased the brick for these buildings from Carbaugh, but his foreman, Glenn, a member of the union, told him that the union bricklayers would not work them, and he could not afford, therefore, to purchase them from Carbaugh. Had Carbaugh succeeded in selling the brick for these buildings to Zimmerman, he would have made a profit on them of at least \$500.

Appellant Meier was the president of the Stone Masons' Union No. 14, and appellant McCauley was its secretary. James Riddick was secretary of the Bricklayers' Union No. 8. A rule of these unions required their members to work only for those who employed union labor, and on jobs where only union labor was employed. A breach of this rule by a member subjected him to a fine or suspension; the one or the other was imposed, depending upon the gravity of the offense. No official boycott was declared by these unions against Carbaugh. It was attempted, but was "ruled

out of order, and no attention paid to it at all."

To use the terminology of the unions, "fair" work means when the contractor who is having the work done employs only union mechanics, to the exclusion of all other mechanics, on the work. Carbaugh was considered by appellants as "unfair" because he employed nonunion laborers, and refused to employ only union labor. For that reason appellants refused to work on buildings that he had the contract to build. When Meier, at the request of O'Neal, met with the president of the biscuit company and the architect, for the purpose of telling them the reason why the stone masons would not put in the foundation, it was shown that, in explanation of the attitude of himself and the other members of the stone masons' union, Meier said: "Carbaugh is the man we are after." But the testimony further shows that he said in the course of the same conversation that "he mentioned Carbaugh because he was the only man in town that was employing nonunion workmen." The testimony as a whole shows conclusively that Meier had no personal ill-will or animosity against Carbaugh. Nor did any of the other appellants. Their sole reason for refusing to lay the foundation for their employer,

the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons; and conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties; when the chief object of the combination is to oppress or injure third persons, it is a conspiracy; but when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. The rule was also thus asserted: "A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy, and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members, and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy." Applying this doctrine to the facts presented in that case, it was held not an unlawful conspiracy for members of certain labor organizations to adopt and enforce rules that contracts for fireproofing, buildings should not be sublet, but such work must be left to be performed by those doing the other work on the building, with the provision that no member of the union shall work for any contractor or builder not complying with this rule. The court 32 L.R.A. (N.S.)

said: "A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So, several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious,—it may even extend to their ruin,—but, if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*. The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others, or to exercise the rights of the parties for their own benefit."

In *Shine v. Fox Bros. Mfg. Co.* 86 C. C. A. 311, 156 Fed. 357, appeal dismissed in 216 U. S. 609, 54 L. ed. 636, 30 Sup. Ct. Rep. 575, concert of action upon the part of members of labor organizations and the organizations themselves, to prevent employers of members of the organization from handling the product of one with whom the organization is having an industrial dispute, by coercing such employers by threatening to cease working if such product was used, was held to amount to an unlawful conspiracy.

A. G. S.

O'Neal, on a building the superstructure of which was to be erected by Carbaugh, was that Carbaugh employed to do his work nonunion labor, and would not employ exclusively union labor.

Carbaugh alleged in his complaint against appellants, "that they and others with whom they are associated, and the unions, have wrongfully, maliciously, and wilfully conspired together and connived with each other and with the unions to which they belong to cripple and destroy" his brick manufacturing business and his business as a builder and contractor. He alleged "that in pursuance of such conspiracy" appellants had "boycotted the use of his brick," and had refused to use them in any building upon which either they or their associates might be employed, and "had refused to work upon any building or its foundation where plaintiff's brick were to be used, or for the building and erection of which plaintiff had the contract." The complaint alleges that the loss to Carbaugh of the contract to build the factory for the Ft. Smith Biscuit Company, and the loss of the sale of the brick to the Ft. Smith Supply & Construction Company, mentioned above, was a direct and proximate result of the unlawful conspiracy and boycott instituted by appellants to destroy Carbaugh's business. It concludes with a prayer for damages in the sum of \$3,000.

The answer denied all the material allegations. The above is a condensed statement of the pleadings and the facts upon which the cause was submitted to the jury. The appellants prayed for an instruction directing a verdict in their favor, which was refused. A verdict was returned in favor of Carbaugh in the sum of \$2,233. Judgment was rendered against appellants for that sum, and they have duly prosecuted an appeal to this court. Other facts stated in opinion.

Messrs. Mechem & Mechem, for appellants:

Mere refusal to work did not create a liability.

26 Cyc. Law & Proc. p. 819; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; National Protective Assn. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; State v. Van Pelt, 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 A. & E. Ann. Cas. 495; National Fireproofing Co. v. Mason Builders' Assn. 26 L.R.A. (N.S.) 148, 94 C. C. A. 32 L.R.A. (N.S.)

535, 169 Fed. 263; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165; Arnold v. Moffitt, 30 R. I. 310, 75 Atl. 502.

Messrs. Winchester & Martin for appellee.

Wood, J., delivered the opinion of the court:

The court should have directed a verdict in favor of appellants. We do not discover any evidence in the record of a conspiracy upon their part to injure the business of Carbaugh. No attempt was made by them, either individually or collectively, to dissuade O'Neal, for whom they were working, from entering into the contract with Carbaugh to lay the foundation of the Ft. Smith Biscuit Company's factory. Nor does the evidence show any effort upon the part of these appellants to prevent Zimmerman from buying brick from Carbaugh. Certainly there is no evidence in this record that these appellants, severally or in combination, used any violence, or any threats, intimidation, or coercion of any character, whereby to prevent Carbaugh from securing the contract to build the factory for the Ft. Smith Biscuit Company, nor from securing the contract for the sale of brick to Zimmerman for the Ft. Smith Supply & Construction Company. Giving the evidence its strongest probative force in favor of appellee, it only warrants the conclusion that appellants had agreed among themselves, as members of union labor organizations, that they would not work for Carbaugh because he was on what they term the "unfair list;" that is, he employed nonunion men when he could get union men for the same work.

There is no evidence that the union labor organizations took any official action towards "boycotting" Carbaugh because of his attitude towards union labor. On the contrary, the evidence is that such action was "attempted, but ruled out of order." There is no evidence of any conspiracy or confederation among appellants to injure Carbaugh's business by boycotting him; i. e., by threatening injury to the trade, business, or occupation of those who might have or who intended to have business relations with him. True, O'Neal testified that but for the interference of the stone masons' union and some of its members, Meier and McCauley, "he would have put in the foundation for John Carbaugh," but he further testified to the facts which, in his mind, constituted the interference, which were that Meier and McCauley said, when he asked them about it, that they and the members of the stone masons' union would

not work for him in laying the foundation of the biscuit company factory if Carbaugh should have the contract to build the superstructure. He testified that these men had been in his employ twelve or fifteen years; that he did not wish to change his men with the job; "that it would have put him in bad standing; and that he would have been in the same place Carbaugh is, had he done so." But the conclusion of the witness O'Neal as to what might have been his standing with union labor, and what might have been the effect upon his business, had he accepted the contract and laid the foundation for Carbaugh with other than union labor, is not based upon any evidence in this record showing that appellants, by any word or act on their part, threatened him with any such consequences as he says he apprehended. The language employed by them certainly contained no element of intimidation or coercion, and the evidence does not disclose that, in the manner of its use, appellants intended that it should have the effect to intimidate or coerce O'Neal into refusing to take the contract from Carbaugh. O'Neal's apprehensions, therefore, so far as the evidence shows were groundless. There is no evidence that appellants endeavored to coerce O'Neal in any way. They made no threats whatever against his business. They did not even say that they would abandon his employment in the future if he took the contract to lay the foundation for Carbaugh. All they did was simply to tell him upon his own inquiry, and at a meeting had at his instance, that they would not work for him in laying the stone foundation if Carbaugh got the contract to do the brickwork on the superstructure. There is no testimony that the contract of appellants, either individually or in concert, caused Zimmerman to refuse to buy brick from Carbaugh to build the houses for the Ft. Smith Supply & Construction Company.

The fact that Glenn, who was a member of the brick masons' union, told Zimmerman that the bricklayers' union would not use Carbaugh's brick, and that Zimmerman would not buy the brick of Carbaugh because of what Glenn said, does not connect appellants in any manner with that transaction. It is not shown that Glenn was authorized to speak for appellants, and they were therefore not responsible for what he said. After a careful analysis of the evidence, our opinion is that the only reasonable conclusion to be drawn from it is that appellants agreed among themselves that they would not do any work for Carbaugh because "he was on what they termed the 'unfair list,'—that is, he employed nonunion men when he could get union

men" to do the same work, and because he refused to employ union men to the exclusion of all others; that the reason appellants had this understanding among themselves was because they were members of labor unions, one of the rules of which required its members, under a penalty, to work for only those who employed exclusively union labor; that appellants joined the union and adhered to the rule in the instant case, primarily for the promotion of their own interest, and not for the purpose of injuring Carbaugh, except as he might be injured incidentally by adherence to the rule, which was made solely for the benefit and protection of the members of the union to which appellants belonged; that appellants had no ill-will against Carbaugh, and refused to work for him or his intended subcontractor solely because of his (Carbaugh's) attitude toward union labor; that appellants, in their refusal to work for Carbaugh, or one whom he might employ, used no intimidation or coercion of any character in order to dissuade others from working for or patronizing him.

The principles of law applicable to the above facts are few, simple, and well established. Mr. Martin, in his recent work on the Modern Law of Labor Unions, at page 103, § 67, gives a correct definition of "boycott" as follows: "A combination to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, by threats that, unless those others do so, the combination will cause similar loss to them; or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm." He further says (same page, § 69): "Intimidation and coercion are essential elements of a boycott. It must appear that the means used are threatening, and intended to overcome the will of others, and compel them to do or refrain from doing that which they would or would not otherwise have done,"—citing many cases in note. While violence or the threats thereof frequently accompany a boycott, yet it is not essential that physical force, or the threat thereof, be present in order to constitute a boycott. But the things done or the words spoken must be "intended and naturally tend to overcome the will of others," and to induce them to do or not to do the things which those in the combination desire. Martin, Modern Law of Labor Unions, p. 104, § 69, and cases cited.

As we have stated, there is nothing in the conduct of appellants toward O'Neal that would constitute a boycott by them against Carbaugh. It was not proved that they

were under any contract with O'Neal for a definite time to do stone mason work for anyone whom he might designate. In the absence of a contract, appellants had the absolute right, no public duty forbidding, to prescribe the terms upon which they would work for Carbaugh, O'Neal, or anyone else. They had the right to refuse to work unless these terms were accepted and contractual relations were thereby created. This appellants had the right to do severally or in combination,—in the union or out of it. So long as appellants, either individually or collectively, through their labor unions, directed their efforts solely to the control of their own labor and to formulating plans for bettering its condition, and to prescribing the terms upon which it might be had, that would not interfere illegally with the rights of others, they were within the bounds of the law. For the right of every man in this country to dispose of his own labor as he chooses, so long as he does not contravene any duty to the public nor interfere with the legal rights of others, is both fundamental and axiomatic. What appellants could lawfully do acting singly, they could lawfully do conjointly, each and all having a like interest to conserve and promote. The supreme court of Massachusetts, speaking along this line, said: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions" (Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287); and the supreme court of Rhode Island in Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1, says: "It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whosoever they chose, and to annex any condition to the bestowal which they saw fit." And further: "What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful." See also to the same effect, the opinion of Chief Justice Parker, speaking for the court in National Protec-

tive Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, '88 Am. St. Rep. 648, 63 N. E. 369, and of Judge Mitchell for the court in Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346.

Hence, labor unions are held by the courts generally to be lawful. As is said in 24 Cyc. Law & Proc. p. 819: "Legislatures as well as the courts now recognize the right of laboring people to organize for the purposes of promoting their common welfare, elevating their standard of skill, advancing and maintaining their wages, fixing the hours of labor and the rate of wages, obtaining employment for their members, securing control of the work connected with their trade, or favorable terms to their employers in the purchase of material, and contracts for such persons as employ members of their society." The efforts of labor unions by any lawful means to attain these legitimate and commendable objects will not make them or their members liable in damages to those who may be directly or indirectly injured by such efforts. For the purpose and the means used to obtain it both being lawful, there could not be any conspiracy or boycott. And if any injury resulted to anyone, it would be merely incidental, and *damnum absque injuria*. The conservation of the chief asset of the laboring man, namely, his labor, through combination with his fellows and by their organized efforts, is to be commended rather than condemned. For in that way his well-being may be best promoted and the interest of society thereby advanced. As observed by Judge Taft in Thomas v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803, 817: "It is of benefit to them and to the public that laborers should unite. . . . They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered." As to how far the members of labor organizations may go in their efforts to protect and promote their own interests without illegally interfering with the rights and interests of those who are not members of their unions is a question, of late years, under modern conditions of society and government, that has been frequently before the courts of last resort. The decisions of these courts disclose a wide divergence of opinion. We need not enter this realm of controversy to determine which is correct of the different views that have been expressed by courts and indi-

vidual judges. Every case must rest upon its own facts; and we are of the opinion that, under the peculiar facts presented by this record, the conduct of appellants could not be held to be a conspiracy or a boycott to injure Carbaugh under any of the divergent views expressed by any of the courts or judges. Certain it is that the doctrine of the cases cited from which we have quoted supra, and other cases (all to be found in appellants' brief), show most convincingly that the plaintiff Carbaugh had no cause of action against appellants. See especially *National Fireproofing Co. v. Mason Builders' Assn.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 263; and *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165, before cited.

The judgment is therefore reversed and the cause is dismissed.

Kirby, J., not participating.

IOWA SUPREME COURT.

JOE HINES

v.

CITY OF NEVADA, Appt.

(— Iowa, —, 130 N. W. 181.)

Municipal corporations — nuisance — sewer outlet — liability.

1. A municipal corporation which contracts to maintain a sewer outlet, which is permitted to become a nuisance, is liable in damages to the owner of neighboring property which is injured thereby.

Same — receiving aid in construction — effect.

2. A municipal corporation which, by its officers, undertakes the construction of a sewer, and prescribes the conditions under which it may be used, cannot escape liability in case it is allowed to become a nuisance.

Note. — As to right of municipality to create a nuisance by pollution at the point where sewers discharge, see notes to *Platt Bros. & Co. v. Waterbury*, 48 L.R.A. 691; *Georgetown v. Com.* 61 L.R.A. 694; and *State v. Concordia*, 20 L.R.A. (N.S.) 1050.

As to liability of municipality for death or sickness caused by sewage or drainage, see note to *Metz v. Asheville*, 22 L.R.A. (N.S.) 940.

As to liability of municipality for injuries to property from sewage system constructed upon a defective plan, see note to *Hart v. Neillsville*, 1 L.R.A. (N.S.) 952.

As to municipal liability for overflow of stream used by it as a sewer, see note to *O'Donnell v. Syracuse*, 3 L.R.A. (N.S.) 1053.

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sance, on the theory that it is a partnership affair, although the county and certain individual citizens aid in its construction.

Same — violation of conditions — effect.

3. A municipal corporation is not relieved from liability for permitting its sewer outlet to become a nuisance, by the fact that owners of property connecting with it violate the condition upon which permission to make the connections was granted, by turning into it foul matter of a prohibited kind.

Same — connections on private property — effect.

4. That the connections with an outlet of a sewer are on private property does not absolve the municipality from liability for permitting the outlet to become a nuisance, on the theory that it cannot abate it without trespassing on private property, since the right to care for the sewer must be presumed to accompany the right to maintain it, or, if not, the nuisance might be abated by exercising the power of eminent domain, or its use might be forbidden.

(March 10, 1911.)

APPEAL by defendant from a judgment of the District Court for Story County in plaintiff's favor in an action brought to recover damages for the alleged maintenance of a nuisance by the defendant city. Affirmed.

The facts are stated in the opinion.

Messrs. Bert B. Welty and A. A. McLaughlin for appellant.

Mr. Edward M. McCall, for appellee:

A municipal corporation, in the exercise of its ministerial functions, stands upon the same footing with a private individual, and is liable for its wrongful acts and negligence to the same extent as a private citizen.

Fitzgerald v. Sharon, 143 Iowa, 730, 121 N. W. 523; *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517; *Cotes v. Davenport*, 9 Iowa, 227; *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1067; 2 Cooley, Torts, 3d ed. 1309.

If a city fails to abate a nuisance which it maintains or over which it has control, it is liable to the same extent as a private citizen would be under such circumstances.

Fitzgerald v. Sharon, 143 Iowa, 730, 121 N. W. 523; *Randolf v. Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Vogt v. Grinnell*, 133 Iowa, 363, 110 N. W. 603, 123 Iowa, 332, 98 N. W. 782; *Correll v. Cedar Rapids*, 110 Iowa, 333, 81 N. W. 724; *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210; *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Vicksburg v. Richardson*, 90 Miss. 1, 42 So. 234; *Madisonville v. Hardman*, 29 Ky. L. Rep.

253, 92 S. W. 930; *Joyce, v. Nuisances*, §§ 279-287; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; *Briegel v. Philadelphia*, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; *Chalkley v. Richmond*, 88 Va. 402, 29 Am. St. Rep. 730, 14 S. E. 339; *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365; *Richardson v. Boston*, 19 How. 263, 15 L. ed. 639; 2 Dill. Mun. Corp. 4th ed. §§ 980, 985; *Katzenstein v. Hartford*, 80 Conn. 663, 70 Atl. 23, 13 A. & E. Ann. Cas. 470; *Jacksonville v. Lambert*, 62 Ill. 520; *Stoddard v. Saratoga Springs*, 22 N. Y. S. R. 215, 4 N. Y. Supp. 745; *Chapman v. Rochester*, 110 N. Y. 273, 1 L.R.A. 296, 6 Am. St. Rep. 366, 18 N. E. 88; *Carmichael v. Texarkana*, 94 Fed. 561; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; *Elgin v. Hoag*, 25 Ill. App. 650; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858.

Even if the sewer in controversy was intended to carry surface water only, and the same became a nuisance, the city would be liable for maintaining the same with knowledge of its existence.

Fitzgerald v. Sharon, 143 Iowa, 730, 121 N. W. 523; *Vicksburg v. Richardson*, 90 Miss. 1, 42 So. 234; *Bonnell v. Smith*, 53 Iowa, 281, 5 N. W. 128.

A municipal corporation is liable for damages suffered by reason of offensive smells and deleterious gases emanating from the city's drain and sewer, and thereby causing a nuisance, although no part of the sewage is discharged on the plaintiff's property.

Randolph v. Bloomfield, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Bloomington v. Murnin*, 36 Ill. App. 647; *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; *Lindsay v. Sherman*, — Tex. Civ. App. —, 36 S. W. 1019; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72; *Litchfield v. Whitenack*, 78 Ill. App. 364; *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930; *Vernon v. Wedgeworth*, 148 Ala. 490, 42 So. 749.

The municipality is liable in damages to any property owner injured by its neglect to keep its sewers in good condition and repair. *Fitzgerald v. Sharon*, 143 Iowa, 730, 121 N. W. 523; *McCarthy v. Syracuse*, 46 N. Y. 194; *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Randolf v. Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Taylor v. Austin*, 32 Minn. 247, 20 N. W. 157; *Ft. Wayne v. Coombs*, 32 L.R.A. (N.S.)

107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *Vanderslice v. Philadelphia*, 103 Pa. 102.

The fact that the city of Nevada placed the end of the sewer on private property, and the foul hole which it had washed out was on private property, does not relieve the city from liability.

Fitzgerald v. Sharon, 143 Iowa, 730, 121 N. W. 523; *Jacksonville v. Lambert*, 62 Ill. 520.

The city is not relieved from liability by reason of the fact that the portion of the city sewer which constituted the nuisance was originally constructed by private parties, where a large portion of the sewer was constructed by the city, and the city had control of the sewer.

Stoddard v. Saratoga Springs, 22 N. Y. S. R. 215, 4 N. Y. Supp. 745; *Fitzgerald v. Sharon*, 143 Iowa, 730, 121 N. W. 523; *Carmichael v. Texarkana*, 94 Fed. 561.

Mr. U. S. Alderman also for appellee.

Weaver, J., delivered the opinion of the court:

The plaintiff owns a lot in the defendant city, which he occupies and uses as a homestead. He alleges that for a considerable period the city has maintained a sewer passing through or adjacent to his said homestead, which it has so negligently and so improperly sustained as to discharge sewage and filth upon said premises, causing noisome and offensive odors to arise therefrom, and otherwise creating an unsanitary and dangerous condition, interfering with the safe and comfortable enjoyment of said homestead by the plaintiff and his family, and causing members of his family to become sick and suffer great discomfort, for all which he seeks a recovery of damages. The defendant denies the matters charged in the petition, and pleads the statute of limitations.

The evidence shows that the city of Nevada is located upon and across a narrow slough or water way extending from the northeast to the southwest, and opening into a stream known as Indian creek, near the west boundary of the plat. This depression furnishes the most feasible route for a course of drainage from the central business and resident section of the city, and, prior to the laying of the sewer hereinafter mentioned, it was used to a considerable extent as an open drain, with which other drains from the territory on either side connected. In the year 1899, upon the agreement of the county board of supervisors and certain citizens of the city to aid in the enterprise, the city, by action of its council, undertook the construction of a tile sewer along the line of said water

way, between certain named streets, connecting with or incorporating therein a sewer already existing across a block known as the Lockridge property, emerging again into the open drain at the street near the northeast corner of the block on which plaintiff's residence was located. At that date the lot occupying the northeast part of said block, and lying immediately east of plaintiff's lot, was owned by the city and used as a public pond. Soon thereafter the city made a sale of the lot, requiring the purchaser as part of the consideration therefor to extend the tile sewer from its then terminus in the direction of Indian creek to a point at or near the southwest corner of said lot, and near the line of plaintiff's premises, and within 90 to 100 feet of his house. After the sewer had been constructed, an ordinance was passed by the city council allowing property owners in the neighborhood to tap the pipe, and connect therewith lateral sewers or drains from their several premises, on payment to the city of certain specified charges and observing certain prescribed regulations. It was provided, however, that (to quote the language of the ordinance) "any lot owner making such connections shall, in consideration of the privileges hereby granted and enjoyed, hold the city harmless from any loss or damage that may in any way result from, or be occasioned by, said connection, and further, that they will not permit any improper materials, such as grease, rags, shavings, sweepings, kitchen slops, or filthy substance to be thrown into the inlets or openings, nor connect any privy vault therewith, and will at all times keep the inlets or openings properly protected with grating, catch basin, or stench traps so constructed as to prevent effluvia or stench from escaping from sewer or drainage." In another section the city reserves to itself the right to abate any of these lateral or connecting drains on proof that the same had been improperly used, and further providing that the "main drain or sewer may at any time be abated or discontinued, should the same become a nuisance." From time to time owners of various lots within the area accommodated by the sewer constructed lateral sewers or drains, and connected them with the main. These drains were used not alone for carrying off mere surface water or rainfall, but were utilized for the discharge of liquid or fluid waste of all kinds. In many instances connections were made with water-closets and urinals, perhaps not directly with the vaults, but through the medium of cesspools which first received the deposits, and from which the liquid contents were conducted to the sewer. Among the premises served by this drainage was

a hotel, a laundry, the county courthouse, and other places where considerable amounts of sewage and unclean waste, liquid and otherwise, originate. The water pouring from the mouth of the main tile had the effect to wash out a basin or hole in the earth of considerable width and depth, and the sewage held or detained by this excavation naturally tended to become foul and offensive. For some time after the sewer was first constructed, there was no serious complaint from persons owning property at or near the outlet, but later, as the connections increased in number, the matter discharged through the sewer became more and more offensive. The plaintiff and others in his neighborhood complained of the conditions to officers of the city, and, no remedy being effected, this action was instituted. While there is some dispute as to the fact and extent of the stench, and the actual character of the sewage discharged from the main pipe into the open drain, there was ample testimony from which the jury could find the substantial truth of the allegations of the petition. The verdict and judgment must therefore be sustained, unless we are required to hold that, conceding the injury of which plaintiff complains, there is yet no liability therefor on the part of the city, or that the record discloses reversible error in the court's rulings upon the introduction of evidence or in its instruction to the jury.

1. The first and perhaps main contention of the appellant is as follows: The power of a city to abate a nuisance is governmental in character, and failure to exercise it, even though injury thereby results to the person or property of an individual, gives rise to no cause of action. Stating it from another angle, it is argued that the establishment and maintenance of sewers is a governmental function, and injuries arising from its exercise are not actionable, except where, in exercising such power, there is an actual invasion or taking of private property. Again, it is said that, if such liability ever exists, its basis is to be found in some statute, that we have no statute requiring a city to abate or remove nuisances, except such as are found or are maintained in its streets, and, as the nuisance here complained of was not in a public street or on public grounds, the city is in no manner liable for damages thus occasioned. That, in the absence of a statute governing the case, a city is not chargeable with damages because of its failures or mistakes in the exercise of its purely governmental functions, may be admitted. It may also be admitted that a city's power to order or provide for the establishment, construction, and maintenance of public

waterworks, public sewers, street paving, and other schemes of public improvements, is governmental, and for its act or failure to act in the initiation of such an undertaking, it is not answerable to the suit of any person. This principle is so well settled and well known that we need not pause to cite or discuss the authorities. But it is no less well settled that municipal functions are not all governmental or legislative, but that in very many respects cities and towns act ministerially, and that, in the discharge of such duties, they are responsible within certain limits for the manner and method of the performance. The line of demarcation between these powers may sometimes be a narrow one, but it is not ordinarily indistinct. If, for instance, a city grants a franchise to a corporation or person for the establishment and maintenance of a system of waterworks, its act is clearly legislative or governmental, and generally, if not universally, speaking, it cannot be held liable for the acts or omissions of the holders of the franchise in constructing or maintaining the works, or for its own failure to affix terms to the franchise properly guarding the interests of its citizens and property owners. If, however, instead of granting the franchise to another, the city undertakes itself to build or construct or maintain such works, it assumes the performance of a ministerial function, in which its failure to exercise reasonable skill and care makes it chargeable with negligence, and for injuries thus arising it is answerable. *Randolf v. Bloomfield*, 77 Iowa, 60, 14 Am. St. Rep. 268, 41 N. W. 562; *Vogt v. Grinnell*, 123 Iowa, 332, 98 N. W. 782; *Vogt v. Grinnell*, 133 Iowa, 363, 110 N. W. 603; *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210; *Bennett v. Marion*, 119 Iowa, 473, 93 N. W. 558; *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Fitzgerald v. Sharon*, 143 Iowa, 730, 121 N. W. 523; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Vicksburg v. Richardson*, 90 Miss. 1, 42 So. 234; *Jacksonville v. Lambert*, 62 Ill. 519. Discussing the same subject, the New York court has said: "The law is firmly established that in constructing sewers and in keeping them in repair a municipal corporation acts ministerially, and, having the authority to do the act, is bound to the exercise of needful prudence, watchfulness, and care." *Barton v. Syracuse*, 36 N. Y. 54. Other authorities to the same effect are very numerous. The rule is a salutary one, otherwise ownership and use of real property within the corporate limits of a city or town would hardly be an attractive proposition to an investor. As we view the instant case, the principle pervading the decisions we have cited is ap- 32 L.R.A. (N.S.)

plicable. The city undertook to exercise its undoubted authority in the construction of the sewer. It assumed the control and regulation of the finished structure, as it had a right to do. It reserved the right (which indeed it had without express reservation) to abate the nuisance, if one should be produced in the use of the drainage so afforded. It so constructed and maintained the sewer that it discharged its unclean contents in the immediate vicinity of the plaintiff's home, creating a nuisance to his injury, and there is no reason in law or morals why it should not respond in damages. The city has no more right to create a nuisance to the injury of another than has the individual citizen, and, if it does so, it is amenable to the remedies which the law provides for the redress of such wrongs.

2. But it is suggested, though it can hardly be urged with any confidence, that this was not a city sewer, but a sort of informal partnership affair to which the city contributed a share, but did not assume municipal authority or responsibility with respect to its care and maintenance. The action of the city officers at the inception of the project, the ordinance to which we have made reference, and all the circumstances connected with the enterprise, forbid any such conclusion.

3. It is next said that, if the sewer became foul and created a nuisance, it is chargeable to the individual lot owners who made connections with it, and that their conduct in this respect was in violation of the ordinance, and the city should not be held liable therefor. Here, again, we think the record does not bear out the assumption. In the first place, the ordinance is not so much a prohibition of the use of the sewer for the purposes to which it was in fact subjected, as it was to impose upon the lot owners the obligations to hold the city harmless against claims for damages so arising. Indeed, the careful reading of the testimony, and observance of the practical construction put upon the ordinance from the outset, are quite convincing that the use made of the sewer was not other or different than was in fact intended and expected. But, if it be true that some or all of the lot owners making connection with the sewer abused the privilege thus given them, we cannot see how it affects the result of this case. The city would not thereby be relieved from its duty to see that the sewer it had constructed did not become a nuisance. The duty of its maintenance, of keeping it in repair and in proper working order, and preventing its becoming a source of discomfort and injury to others, was a continuing one, a duty which it could not avoid

by delegating it or shifting it to the shoulders of the lot owners.

Nor do we find merit in the thought that, as the mouth of the tile opened upon private property, and as the connections with the main by private tiles were in part on private property, the city could not abate the nuisance without trespassing upon private property, and it is therefore not liable for failing to do so. In the first place, there is neither claim nor proof that the city was a trespasser in constructing the sewer in part upon and across the lands of individual owners, and it will be presumed that the right to do so was in some manner properly obtained. The right to construct a sewer across the lands of another, being in the nature of an easement or perpetual license, carries with it the right to enter upon the premises to make such repairs, and do such work, as is necessary to its proper maintenance. *Brown v. Stone*, 10 Gray, 61, 69 Am. Dec. 303; *McMillan v. Cronin*, 75 N. Y. 474; *Thompson v. Uglow*, 4 Or. 369; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574. In the next place, the abatement of the nuisance did not necessarily involve the unauthorized entrance by the city upon the land of another. It might have acquired the right by condemnation or otherwise to extend the tile to some remoter terminus where it could injure no one, or avail itself of some of the more modern methods of disposing of the sewage without creating a nuisance; or it might have effectually abated the offensive conditions by exercising its undoubted power to forbid and prevent the use of the sewer except for the purposes not giving just cause for complaint by the public or by owners of property exposed to injury therefrom. It is to be admitted that the problem of sanitary drainage is a serious one for all our inland cities and towns, but they should not be permitted to find relief for a part of their people and property owners by concentrating their sewage and casting it upon others, or by creating a nuisance to the injury of others.

Exceptions were saved by appellant to certain rulings of the court upon the introduction of evidence and to the instructions given the jury. The points thus raised are in most instances covered and disposed of by the conclusions we have already announced and in none of the other rulings do we find any reversible error. The trial appears to have been fairly conducted, the evidence is sufficient to justify a recovery by plaintiff, and the amount allowed is not so clearly excessive as to call for interference by this court.

The judgment of the District Court is affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
Appt.,
v.
ILLINOIS CENTRAL RAILROAD COMPANY.

(— Ky. —, 133 S. W. 1158.)

Carrier — separation of races — liability of railroad for act of sleeping car company.

1. A railroad company is not punishable for hauling the sleeping car of another corporation, which is not provided with compartments for colored persons and does not bear any indication of the race for which it is set apart, or having no additional separate sleeping car for colored passengers, under a statute providing for the punishment of any railroad company running or operating railroad cars or coaches, which does not furnish separate coaches or cars for the transportation of white and colored passengers, and have each respective coach or compartment marked with appropriate words in plain letters indicating the race for which it is set apart, where it receives no compen-

Note. — Duty to provide separate compartments for colored passengers in sleeping or palace cars.

In *Pullman Palace Car Co. v. Cain*, 15 Tex. Civ. App. 503, 40 S. W. 220, a negro purchased a ticket from a sleeping car company entitling him to a berth in a sleeper from St. Louis, Missouri, to Galveston, Texas. A law of Texas forbade the transportation of negroes and whites on the same car, and it was assumed that this law was applicable to sleeping cars. On arriving at Texas, he was ejected from the sleeper by a railroad train master, with the acquiescence of the sleeping car officials, and compelled to complete his journey on a day coach set apart for colored passengers. It was held that he had a right of action both against the railroad company and the sleeping car company. The sleeping car company was held not excusable, although, by its arrangement with the railroad company, the latter company had charge of the car and servants of the former, since the sleeping car company could not be relieved from its contract by an arrangement with the railroad company which prevented it from carrying it out. On the question of separate accommodations the court said: "It is further contended that the contract was illegal, since it provided for the transportation of a negro in the same car with white passengers, and on that account could not support an action for damages growing out of a breach thereof. As far as the record shows, it was lawful for negroes and whites to ride in the same cars for the entire passage, until the state of Texas was reached. Appellee did not contract for anything that was unlawful. He did not contract that he should be carried in the same car with white people, in

sation for hauling the car except the regular fare for transportation of persons occupying it and the advantage of its being a part of its train.

Same — control of passengers.

2. The conductor of a railroad company has no such control of the passengers in a sleeping car of another corporation, which becomes a part of his train without any compensation to the railroad company except the ordinary fares collected from its occupants and the advantage to the company of its being part of its train, that he can require a colored passenger therein who holds a sleeping car ticket when he enters the state, to leave the car and enter a compartment set apart for colored passengers, and render the railroad company liable to punishment for his failure to do so.

(January 11, 1911.)

A PPEAL by the Commonwealth from a judgment of the Circuit Court for McCracken County dismissing an indictment charging the defendant railroad company with negligence in failing to provide separate cars and compartments on cars operated by it, for the transportation of white and colored passengers. Affirmed.

The facts are stated in the opinion.

Messrs. James Breathitt, Attorney General, T. B. McGregor, John G. Lovett, and S. E. Clay for the Commonwealth.

Messrs. Blewitt Lee, Trabue, Doolan, & Cox, with Messrs. Wheeler & Hughes, for appellee:

The purpose of the legislature is to separate white and colored travel in ordinary railroad cars.

Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep. 279; Pullman Palace Car Co. v. Hunter, 107 Ky. 519, 47 L.R.A. 286, 54 S. W. 845; Ohio Valley R. Co. v. Lander, 104 Ky. 431, 47 S. W. 344, 882; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101, 21 Ky. L. Rep. 228, 51 S. W. 160; Chiles v. Chesapeake & O. R. Co. 125 Ky. 299, 11 L.R.A. (N.S.) 299, 101 S. W. 386.

contravention of the laws of the state of Texas. He has the right to assume that the Pullman Company did not intend to violate the law, and that, when the state of Texas was reached, he would be furnished with a berth in a coach or apartment of equal comfort and convenience, separate from the white passengers."

In *Gaines v. Seaboard Air Line R. Co.* 16 Inters. Com. Rep. 471, a complaint was made against certain railroad companies and the Pullman Company, by certain negro bishops who alleged that equal accommodations were not being furnished to members of the negro race in the Pullman sleeping cars and palace cars. The question as to whether either the railroad companies or

Settle, J., delivered the opinion of the court:

The grand jury of McCracken county returned against appellee in the circuit court of that county the following indictment: "The grand jurors of the county of McCracken, in the name and by the authority of the commonwealth of Kentucky, accuse the Illinois Central Railroad Company of the offense of operating and running railroad cars and coaches by steam on a railroad track and line, for the transportation of white and colored passengers, without having upon each car and coach and compartment thereof in some conspicuous place appropriate words in plain letters indicating the race for which said coach and car and compartment had been and should have been set apart, committed in the manner and form as follows, to wit: The said Illinois Central Railroad Company in the said county of McCracken on the 4th day of May, 1910, and within one year before finding this indictment, did wilfully and unlawfully fail, refuse, and neglect to furnish and provide separate cars and coaches and compartments upon the railroad coaches and cars being operated by it by steam on its railroad track and the line, for the travel and transportation of white and colored passengers, with each compartment, coach, and car having in some conspicuous place appropriate words in plain letters indicating the race for which it had been and should have been set apart; the said Illinois Central Railroad Company being at the time engaged in operating and running railroad coaches and cars upon a railroad line and track in the state of Kentucky and McCracken county, against the peace and dignity of the commonwealth of Kentucky." Section 795, Ky. Stat. (Russell's Stat. § 5343), for the alleged violation of which appellee was indicted, reads as follows: "Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any rail-

Pullman car companies were obliged to furnish separate compartments and equal accommodations was not specifically raised or discussed. But it was assumed that they were, and the complaint was dismissed on the ground that equal accommodations were in fact being furnished.

As to rights of colored passengers generally, see note to *Ex parte Plessy*, 18 L.R.A. 639. As to right of carrier, independent of statute, to separate passengers on account of race, see note to *Chiles v. Chesapeake & O. R. Co.* 11 L.R.A. (N.S.) 268. As to liability of a carrier for placing a white passenger in a car for colored persons, see *Southern R. Co. v. Thurman*, 2 L.R.A. (N.S.) 1108, and note thereto. R. A. E.

road line or track within this state; and all railroad companies, person, or persons doing business in this state, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person, or persons operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this state; and all foreign corporations, companies, person, or persons organized under charters granted or that may be hereafter granted, by any other state, who may now, or may hereafter, be engaged in running or operating any of the railroads of this state, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." Appellee entered a plea of not guilty, and, both parties having waived the right of trial by jury, and agreed in writing upon the facts constituting the entire evidence, the court, following the submission of the case, rendered judgment holding appellee not guilty, and dismissing the indictment. The commonwealth was refused a new trial, and being dissatisfied with that ruling, as well as the judgment, it has appealed.

According to the agreed statement of facts, appellee's railroad runs from the city of Louisville through the state of Kentucky, by way of Paducah, to Memphis, Tennessee, and that, on the day and occasion indicated in the indictment, appellee ran a train from Louisville to Paducah and points without the state south thereof, which consisted of an engine, tender, baggage car, compartment day car, ordinary day car, and a Pullman or sleeping car; that the compartment car was divided by a substantial wooden partition, on one side of which the seats were exclusively assigned to and occupied by colored passengers, and on the other side by white passengers; that the partition on the side assigned to colored persons contained in a conspicuous place and in plain letters the words, "Exclusively for the use of colored persons," and on the other side in an equally conspicuous place and letters the words, "Exclusively for the use of white persons;" that the ordinary day car also bore in a conspicuous place and letters the words,

"Exclusively for the use of white persons;" that the Pullman sleeper was in the rear of the other cars, but did not have therein a sign or contain words indicating to what race it was set apart. It further appears from the agreed statement of facts that the sleeper was delivered to appellee by the Baltimore & Ohio Southwestern Railroad Company at Louisville, to be hauled by it through Kentucky and into Tennessee; that at the time of its delivery to appellee the sleeper contained, among other passengers, one colored man, whose ticket, which had been purchased at a point without Kentucky, entitled him to ride over the Baltimore & Ohio Southwestern Railroad to Louisville, and from that city over appellee's railroad through Kentucky and to Memphis, Tennessee; that the colored passenger in question had also purchased from the Pullman Company, before reaching Kentucky, a sleeper ticket which entitled him to ride in the sleeper, and to occupy the berth or section designated by the ticket, while being hauled by the Baltimore & Ohio Southwestern Railroad Company to Louisville, and likewise by the appellee railroad company from Louisville through Kentucky and Tennessee to Memphis in the latter state, his destination. It also appears from the agreed facts that the Pullman car was manned by a conductor and porter in the employ and under the control of the Pullman Company; that none of the proceeds derived from the sale of tickets for berths or space in the Pullman car belonged to appellee or was received by it, nor did it derive any revenue from persons purchasing such berths or space, other than for the sale of transportation on its railroad train paid by passengers for riding in the day coaches.

The constitutionality of the statute under consideration has been repeatedly sustained. *Ohio Valley R. Co. v. Lander*, 104 Ky. 431, 47 S. W. 344, 882; *Quinn v. Louisville & N. R. Co.* 98 Ky. 231, 32 S. W. 742; *Louisville & N. R. Co. v. Com.* 99 Ky. 663, 37 S. W. 79; *Chesapeake & O. R. Co. v. Com.* 21 Ky. L. Rep. 228, 51 S. W. 160; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101. A sleeping car owned by the Pullman Car Company, manned and controlled wholly by its servants, and the fares for berths and seats in which were exclusively received and owned by that company, was not, because attached to and hauled with appellee's passenger train, operated by it within the meaning of the statute, *supra*. A railroad coach or car provided with seats and other conveniences is a vehicle for transporting persons, paying for the privilege, from one place to another. A sleeping car is a vehicle for repose as well as

transportation. While equipped with seats and greater conveniences than are found in the day coach, the seats are readily converted into berths or sleeping places for the repose of persons occupying them; but, to entitle such persons to seats or berths in the sleeper, they must pay the Pullman Company the fare it charges therefor, and, in addition, pay the railroad company to whose train the sleeper is attached the regular fare it charges persons for the privilege of riding the same distance in one of its ordinary or day coaches. It does not appear from the statement of facts that appellee was paid anything by the Pullman Company for hauling its sleeper, in view of which, and of the admitted fact that it received no part of the fares collected by the Pullman Company of persons riding in the sleeper, we must assume that the only benefit it derived from the hauling of the sleeper was the increase of travel which the greater comfort and security its connection with the train assured, especially to the sick and unprotected who travel alone. It is patent that the only control appellee had of the sleeper was such as was necessary to its safe transportation. In other respects the sleeper, together with its occupants, was under the exclusive control of the servants of the Pullman Company in charge of it.

It goes without saying that for any injury to the occupants of the sleeper that might have resulted from the negligence of appellee's servants in charge of the train in operating it, appellee would have been liable in a civil action for damages; but that this is true does not make it liable to indictment because of its hauling the sleeping car with its unseparated colored passenger and white passengers within or through the state, because, in thus handling the sleeper, appellee did not operate it in the meaning of the statute. It is admitted that appellee's train contained a separate coach for white and colored passengers, partitioned and lettered as required by the statute, and, if the colored passenger in the sleeper had become a passenger of the train upon a ticket merely entitling him to ride in an ordinary or day coach, upon his entering the train, it would have been the duty of appellee's conductor to direct and require him to enter the compartment of the separate coach set apart for the use of colored persons. But such was not the way in which the colored person became a passenger. He provided himself before reaching this state with a ticket for the sleeper, and, before or after he arrived in this state,

with a ticket that also entitled him to be carried to Memphis, Tennessee, by or upon appellee's train to which the sleeper in which he was a passenger was attached at Louisville. He was therefore a passenger of the sleeper when it was attached to appellee's train, and whether entitled to be classed as an interstate passenger or not (a question we do not decide) appellee's conductor had no such control of the sleeper, its crew, or passengers, as would have authorized him to compel the colored passenger to leave it, and enter the compartment of the separate coach set apart for colored persons; nor could he have required the conductor of the sleeper to eject such colored passenger therefrom and assign him to the car designated for persons of his color.

In the case of *Louisville & N. R. Co. v. Com.* 99 Ky. 663, 37 S. W. 79, which was a penal prosecution under the statute, supra, against the railroad company for unlawfully and wilfully by its agents in charge of its train, failing and refusing, as alleged, to furnish a separate coach for white and colored passengers, it appeared from the proof that the train had been chartered by two individuals to run from Greensburg to Campbellsville and return the same day, that they collected the fares and directed at what stations the train should stop, but that the train was operated by the company's crew, including the conductor. Among the passengers on the train were two negroes, Thomas White and his wife. When they boarded the train, they entered the compartment of the separate coach set apart for persons of their color, and which had theretofore been so used by the railroad company, but, before reaching their destination, they were compelled to give up the colored compartment to white persons, and ride in a mail and tool car attached to the train. It also appeared from the proof that the compartment of the separate coach set apart for colored passengers, and from which White and wife were ejected, conformed in its finish and appointments to the requirements of the statute. Upon the state of facts thus presented, we said: "Where the company has furnished the kind of cars or coaches which the law requires, § 799, Ky. Stat. [Russell's Stat. § 5347], imposes the duty on the conductor or manager of the railroad to assign the white and colored passengers to their respective coaches or compartments therein. Section 800 [§ 5348] provides a penalty to be imposed on the conductor or manager for his failure to discharge the duty required of

him. This is not a proceeding to recover damages of the company for a wrongful act of its agent or employee. It is a penal prosecution to impose a fine against the company for the alleged violation of a statute. The company cannot be fined for an act of those whom it puts in charge of a train because they may have violated a penal statute. The failure to furnish the coaches for the transportation of white and colored passengers of the kind required by the statute is an offense of the company. A failure to assign the white and colored passengers to their respective coaches or compartments is an offense of such conductor or those in charge of the train. For the offense of the company the conductor cannot be convicted and fined; neither can the company be convicted and fined for the offense of the conductor or those in charge of the trains as is the result of this prosecution. The court should have told the jury to find for the defendant."

No reason is apparent for saying that appellee's conductor should have required the colored passenger in the sleeper to leave it and take the compartment in the day coach designated for his race; but, if such had been his duty, appellee cannot under the statute and in view of the authority, supra, be indicted or punished because of its nonperformance. The statute does not require railroad companies to have sleeping cars in their trains or own them. They are owned and furnished by the Pullman Company. Appellee did, however, have in its train a separate day coach for white and colored passengers, partitioned and lettered as the statute requires, and it was not claimed by the commonwealth that this separate coach did not amply accommodate all white and colored passengers on the train, or that the compartment thereof set apart for colored passengers was any less convenient, comfortable, or attractive than the compartment or other day coaches set apart to the whites. The only complaint is that such a sleeping car or compartment thereof as would afford a separation of white and colored passengers in the manner contemplated by the statute was not provided by appellee. As previously remarked, appellee was under no duty to furnish sleeping cars for its train, and such a construction of the statute, which is a highly penal one, is not warranted by its language or by any rule of construction known to us.

The conclusions already expressed being decisive of the case, we deem it unnecessary to consider other questions discussed in the briefs of counsel.

For the reasons indicated, the judgment is affirmed.

32 L.R.A.(N.S.)

MAINE SUPREME JUDICIAL COURT.

LOREN E. KIMBALL

v.

NORTHEAST HARBOR WATER COMPANY et al.

(— Me. —, 78 Atl. 865.)

Water company — duty to supply elevators.

1. A corporation chartered for the purpose of supplying water for domestic purposes may be compelled to furnish a supply for the running of an elevator in an hotel.

Same — rules — requiring storage tanks.

2. A water company may require one desiring to take water from its mains to run an elevator, to install a tank from which the water may be supplied to the machinery, rather than to take it directly from the mains, where the latter method would menace the safety, stability, and usefulness of the water system, and injuriously affect the service to other consumers in the vicinity.

(January 26, 1911.)

Note. — May water company be required to furnish water for power or manufacturing purposes.

As to establishment and regulation of municipal water supply, see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33. As to whether furnishing water and water power to the public for manufacturing purposes is a public purpose justifying the exercise of eminent domain, see note to Jacobs v. Clearview Water Supply Co. 21 L.R.A.(N.S.) 410.

In Methodist Episcopal Church v. Ash-tabula Water Co. 20 Ohio C. C. 578; 10 Ohio C. D. 648, it was held that, under a franchise of a water company requiring it to furnish water free of cost to the churches of the city, it could be compelled to furnish water free to the churches for an organ motor, although at the time of the grant of the franchise no organ motors were in use in any of the churches of the city, especially as the company, by furnishing water free for a number of years without objection, had given a practical construction to the contract. It also held that the company was estopped to charge a church for water for an organ motor by telling the officials of the church that they could use water free for such purpose, whereby they went to considerable expense in installing a church organ and motor.

In Boonton v. Boonton Water Co. 69 N. J. Eq. 23, 61 Atl. 390, affirmed in 70 N. J. Eq. 692, 64 Atl. 1064, it was held that a contract between a water company and a town which recited in the preamble that the town desired to procure, for the present and future needs of the town, a supply of "pure and wholesome water for domestic purposes, the extinguishment of fires, and

REPORT by the Supreme Judicial Court for Hancock County for the determination of the law court of a bill in equity for an injunction against the threatened discontinuance by defendants of a supply of water for use in the operation of plaintiff's elevator. Bill dismissed.

The facts are stated in the opinion.

Messrs. Hale & Hamlin for plaintiff.

Messrs. Deasy & Lynam, for defendants:

The defendant water company is not bound to furnish water for power.

Auburn v. Union Water Power Co. 90 Me. 586, 38 L.R.A. 188, 38 Atl. 561.

Water companies have the undeniable right to impose such reasonable rules as will husband the supply and economize the use of water and protect the plant and keep up its efficiency.

Wood v. Auburn, 87 Me. 291, 29 L.R.A. 376, 32 Atl. 906; Shepard v. Milwaukee Gas-light Co. 6 Wis. 539, 70 Am. Dec. 479; Williams v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; Note to Rushville v. Rushville Natural Gas Co. 15 L.R.A. 322.

Cornish, J., delivered the opinion of the court:

The Northeast Harbor Water Company was chartered by special act of the legislature in 1883, "for the purpose of supplying the village of Northeast Harbor in the town of Mount Desert in Hancock county, and the vicinity of said village, with pure water for domestic, sanitary, and municipal purposes," and for said purposes was given the power to detain and take water from Hadlock lower pond in Mt. Desert and from any streams flowing out of

other lawful uses," and which contained a covenant that the water company shall procure "a full, ample, and sufficient supply of water . . . for the extinguishment of fires and other public and domestic uses and purposes of the inhabitants," did not authorize the company to use the water to supply power to propel machinery either in factories or printing offices, or to drive fans in stores and saloons, nor to supply railroad engines, to the detriment of its use for domestic purposes and for extinguishing fires. It was further held that a schedule of rates attached to the contract containing the clause that "special rates will be given for . . . business and factory use" did not authorize the use of such water in factories for power purposes, but only for its use by the occupants and workmen of the factories. On this subject the vice chancellor said: "It does not convey to my mind the idea that the water was to be used for supplying power to propel machinery either in the factory or the print-

the same. Priv. Laws 1883, chap. 168. Under that charter, a water system was constructed in 1884, and has been in operation since, supplying water now to about 250 takers.

By Priv. Laws 1907, chap. 187, additional powers and rights were conferred upon the company, and, to quote the words of the act, "in addition to the powers now possessed by it, is hereby authorized and empowered . . . to supply water for shipping and for the development of power, to erect dams and other structures for the purpose," etc., and certain rights of flowage on Lower Hadlock pond were also granted.

The plaintiff is the owner of the Kimball House, a summer hotel at Northeast Harbor, and one of the parties supplied by the defendant. In 1898 he installed in the hotel an elevator which has since been run by water power by direct pressure, the water being taken from an 8-inch main in the street through a 4-inch pipe directly to the elevator. In December, 1908, the company notified the plaintiff that, in view of the effect during the preceding years upon the water pressure in the pipes of other consumers in the vicinity of the Kimball House, it would discontinue the supply for use in the operation of the elevator on and after April 1, 1909, unless certain changes were made in the method of applying the water by means of a tank, so as to obviate the difficulties experienced. The plaintiff made no reply to this communication. On March 16, 1909, the defendant by letter extended the time to June 1, 1909. But the plaintiff took no steps towards making the suggested change, and brought this bill in equity against the company and its superintendent, asking for an injunction against their dis-

ing office, or to drive fans in the saloons. In short, I think the words 'business and factory use' are confined to domestic uses as found in factories and places of business, namely, drinking, washing, flushing water-closets, and the like." An injunction against such use was therefore granted.

In Chester Waterworks Co. v. Chester Union, 98 L. T. N. S. 701, 24 Times L. R. 301, 6 Local G. R. 446, 72 J. P. 121, it was assumed that the use of water at a poorhouse for boilers used for purposes of power to engines for a ventilating fan in the kitchen, for a drying fan in the laundry, for wringer and washing machines, and to pump a donkey engine for rain water pumping, was not for domestic purposes entitling the poorhouse to a special rate, under a statute providing that a supply for domestic purposes was to include a supply for one water-closet, but not for baths nor for steam engines nor for hire, nor for any trade, manufacture, or business whatsoever.

R. A. E.

continuing the supply of water as threatened.

Two questions are raised: First. The obligation of the company to furnish water under the facts of this case. Second. The reasonableness of the company's requirements.

The first proposition has been argued only with reference to the additional act of 1907, which gave the company the right to supply water for the "development of power," and were that act under consideration, as in the eminent domain clause, serious doubts might arise under the decision of this court in *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785. We do not, however, deem it necessary in this case to consider the force or validity of that act. We think the language and spirit of the original charter are sufficiently broad to cover this case, for in that charter the company was empowered to supply water for all domestic purposes, and it requires no wrenching of terms to hold that the use of water for operating an elevator in a private dwelling or in a hotel comes within the term domestic purpose in its broad and liberal sense. For what purpose is this use, if not domestic? It certainly is neither a trade nor an industrial purpose, the power is not employed in manufacturing, or in producing any article for sale upon the market. "Domestic" is used as the direct antithesis of commercial or industrial. The word itself, in its derivation from *domus*, a house, suggests its inherent purport. It is defined as "belonging to the home or household, concerning or relating to the home or family" (Standard Dict.); or, as Webster has it, "of or pertaining to one's house or home, or one's household or family." As water is furnished by a public service corporation to private consumers, it may be used in various ways, but the purpose, whatever the method, comes within these definitions of "domestic." Thus it may be used for drinking, cooking, bathing, washing, toilet, heating, or sprinkling. It is not the manner of the use, but its purpose, which is the determining test. Is it to be used for the necessity, cleanliness, health, comfort, or convenience of the house and its appurtenances or of the household? If so, it is a domestic purpose. And it can make no difference whether it be a private home or a hotel, which in this sense is but a larger household, a temporary home for a greater number of people. An elevator in a private house is a convenience; in a hotel is almost, if not quite, a necessity. It promotes the personal comfort of the proprietor, his family, servants, and guests. It is a domestic labor-saving device, and the use of

water in propelling such elevator would certainly seem to be embraced in the term "domestic." This term has been enlarging as the wants and the needs of people have increased. Drinking, bathing, and washing must at first have marked the limit; flushing came with bath rooms, and steam and hot water heating and lawn sprinkling are also of a later date. In the same category belongs the elevator, which is made to do another kind of domestic work. Simply because the water is used in the form of power does not differentiate it. The purpose remains the same. Originally gas was used only for lighting. Because of inventions it is now used for heating and cooking. Can we say that the latter is not as much a domestic use as the former? So, electricity was originally used in the home for lighting; now there are many additional uses, some of them employing the agency in the form of power to operate small motors for domestic purposes, but all tending to the comfort and convenience of the family.

If, however, power is developed for commercial and industrial purposes, the realm of the household has been left behind. Then it is made to operate factories, to drive machinery, to manufacture products for the market. Then it is coined into money. Comfort and convenience are forgotten. Earnings and dividends are alone considered. Then the charter of 1883 would be inadequate, and the broader powers conferred by the act of 1907 would be invoked.

The interpretation which we give to the words "domestic uses" is strengthened by the fact that it is the same as that adopted by the parties themselves, because the operation of this elevator by water furnished by the defendant began in 1898, nine years before the act of 1907 was passed. It required no additional act to authorize the supply of water for any domestic use, although incidentally it might be converted into power and used in that form, and the parties were correct in so viewing it. Authorities on this subject are not numerous, because the question has not often arisen.

Domestic use was held to include water in a stable for washing a private carriage and watering a private carriage horse, in *Busby v. Chesterfield Waterworks Co.* El. Bl. & El. 176, 27 L. J. Mag. Cas. N. S. 174, 4 Jur. N. S. 757, 6 Week. Rep. 515; for watering a pleasure garden, in *Bristol Waterworks Co. v. Uren*, L. R. 15 Q. B. Div. 637, 54 L. J. Mag. Cas. N. S. 97, 52 L. T. N. S. 655, 49 J. P. 564; and running a church motor was held to come within the terms of a contract for furnishing all water needed for use in the churches, in *Methodist Episcopal Church v. Ashtabula Water Co.* 20 Ohio C. C. 578, 10 Ohio C. D. 648. In *Erie v. Erie*

Gas & Mineral Co. 78 Kan. 348, 97 Pac. 468, a contract was made between the city and the gas company by which the company was to pay to the city annually one fifth of its net profits from the sale of gas to the inhabitants for domestic purposes, and, in reply to the contention that a sale of gas to churches, stores, offices, and opera house was not a sale for domestic purposes, the court say: "The term was probably used with reference to the ordinary distinction usually made in the sale of gas for light and heat, for the comfort and convenience of individuals in their homes, offices, stores, churches, and the like, and sales made to manufacturers to generate power. Usually reductions are made for the latter purpose from the schedule of prices for the former. The term 'domestic' has a widely varying meaning, and, while its primary significance relates to the house or home, it is often used in a vastly broader sense. Its significance must always be determined with reference to the subject-matter and the relation in which it appears. In this contract, and with reference to this subject, the more reasonable view is that it applies, not only to the homes of the city, but to other places named, where its principal use is for heating and lighting, and not for power." In *Watson v. Needham*, 161 Mass. 404, 24 L.R.A. 287, 37 N. E. 204, an action to recover damages for failure to supply water to a steam heating plant in a greenhouse as per agreement, the defendant contended that it had no constitutional authority to take and furnish water for this purpose, and that the contract was therefore void. The language of the court on this point is this: "It may be a matter of some difficulty to determine precisely what uses are included within the public purposes for which water lawfully may be taken. In regard to uses strictly domestic, there can be no doubt. We are of the opinion that other uses are included, such as are fairly incidental to the ordinary modes of living in cities and large towns, and as involve the operation of motors requiring but a small quantity of water which may reasonably be supplied from an aqueduct of such capacity as would be needed to meet the ordinary requirements of the inhabitants for domestic and other similar purposes. We are of opinion that the use in the present case was one for which the town might legally furnish water."

The definition given by the supreme court of Alabama in *Crosby v. Montgomery*, 108 32 L.R.A. (N.S.)

Ala. 498, 18 So. 723, is this: "Domestic uses or purposes of water for a family occupying a dwelling house include all uses which contribute to health, comfort, and convenience of the family in the enjoyment of their dwelling as a home." This definition is sufficiently comprehensive to cover the case under consideration.

On this branch of the case the court is of opinion that the use of the water by the plaintiff for operating his elevator was within the term "domestic purposes" in the charter of 1883. It follows, therefore, as a well-established principle of law, that the defendant is bound to supply water to the plaintiff at reasonable rates and subject to reasonable rules and regulations in the conduct of its business. Such rules and regulations must be neither oppressive nor vexatious. *Lumbard v. Stearns*, 4 Cush. 60; *Turner v. Revere Water Co.* 171 Mass. 329, 40 L.R.A. 657, 68 Am. St. Rep. 432, 50 N. E. 634; *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840; *Wood v. Auburn*, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; *Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A. (N.S.) 963, 62 Atl. 136.

This brings us to the second point involved, the reasonableness of the condition imposed by the defendant company. This condition does not concern the question of rate nor of payment nor of discrimination, but the method of applying the water in operating the elevator. The company asks the plaintiff to build and maintain a tank or tanks of sufficient capacity, so that the water may be taken indirectly from the tanks, instead of directly from the main. The reason given for this is that the present method menaces the safety, stability, and usefulness of the system, and injuriously affects the service of other consumers in the vicinity, while the proposed plan would obviate the troubles incident upon the direct pressure, including water hammer, technically so called. A careful study of the evidence, which it would be unprofitable to rehearse, leads to the conclusion that the company's contention is clearly established, and, if so, no one can successfully maintain that its obligation as a public service corporation to other consumers, as well as a proper regard for the protection of its own property, does not justify it in its request.

Upon the whole case, therefore, our conclusion is that the entry should be:

Bill dismissed, with a single bill of costs for defendants.

MARYLAND COURT OF APPEALS.

CONSOLIDATED GAS COMPANY OF
BALTIMORE CITY, Appt.,

v.

GEORGE L. CONNOR.

SAME, Appt.,

v.

ELIZABETH GOODMAN.

(— Md. —, 78 Atl. 725.)

Gas — leak — negligence in discovering — question for jury.

1. The question of the negligence of a gas company in failing to find a leak in a gas pipe when it delegates inspectors to discover it, upon complaint of its existence, is for the jury, where the inspectors merely

visit the place, and detect no odor of gas, but, after an injury has been caused by it, an examination beneath the surface of the ground discloses the leak.

Same — supply pipes — ownership — effect on liability.

2. A gas company which has assumed the duty of keeping in repair the service pipes through which it supplies gas to street lamps belonging to the municipality cannot avoid liability for injuries to third persons from gas escaping through its neglect of duty, because the pipes actually belonged to the municipality.

Master and servant — nonfeasance of servant — liability to stranger.

3. The turning by a gas company of gas into pipes which it has failed to keep in repair, as required by its undertaking with the municipality, as its agent in the sup-

Note. — Liability of gas company for negligence in escape or explosion of gas.

I. Generally, 809.

II. Maintenance and inspection of existing equipment.

a. Instrumentalities exclusively within company's control, 810.

b. Instrumentalities on consumer's premises, 812.

III. Care in active operations.

a. Construction and repair of lines, 814.

b. Operations on consumer's premises, 815.

IV. Regulation of pressure, 817.

V. Effect of notice of leaks, 817.

VI. Effect of intervening acts or omissions of others.

a. Proximate cause generally, 819.

b. Acts or omissions of third persons, 820.

c. Acts or omissions of plaintiff or person injured,

1. Failure to inspect unoccupied premises, 821.

2. Remaining within inclosure, or omitting to act, with knowledge of presence of gas, 821.

3. Tampering with instrumentalities or adjusting fixtures, 823.

4. Searching for leak with open light, 825.

The earlier cases on this question were included in the note to *Ohio Gas Fuel Co. v. Andrews*, 20 L.R.A. 337; and only the later cases are considered in the present note.

The liability for injury to trees, caused by gas escaping from pipes or mains, having been considered in the note to *Gould v. Winona Gas Co.* 10 L.R.A.(N.S.) 890, it is unnecessary to cover that ground again.

As to liability for turning gas into a sewer, see the note to *Smith v. Edison Electric Illuminating Co.* 15 L.R.A.(N.S.) 957.

As to whether a gas plant is a nuisance, see note to *McGill v. Pintsch Compressing Co.* 20 L.R.A.(N.S.) 466.
32 L.R.A.(N.S.)

Cases involving liability for injury resulting from the explosion of gas in mines are *sui generis*, and they are therefore not herein included. For the same reason, master and servant cases have been excluded.

I. Generally.

A company which manufactures gas, and conducts it through pipes throughout the city, is bound to exercise vigilance to prevent injury to third parties from the dangerous qualities of the gas. *Tiehr v. Consolidated Gas Co.* 51 App. Div. 446, 65 N. Y. Supp. 10; *Neuwelt v. Consolidated Gas Co.* 94 App. Div. 312, 87 N. Y. Supp. 1003.

It is bound to exercise such care and skill in its management as the dangerous character of the substance and the attending circumstances demand of a person of ordinary prudence. *Triple-State Natural Gas & Oil Co. v. Wellman*, 114 Ky. 79, 70 S. W. 49, 1 A. & E. Ann. Cas. 64.

And this duty must be measured in the light of the delicacy, difficulty, and dangers of the business. *Marshall Window Glass Co. v. Cameron Oil & Gas Co.* 63 W. Va. 202, 59 S. E. 959.

It requires the exercise of every reasonable precaution suggested by known dangers. *Morgan v. United Gas Improv. Co.* 214 Pa. 109, 63 Atl. 417; *Shirley v. Consumers' Gas Co.* 215 Pa. 399, 64 Atl. 541.

Gas being an extraordinarily dangerous element, an extraordinarily high degree of skill and care is exacted, and the rule of ordinary care with respect to its transmission is adjusted, in view of its known dangers and probable entailments, by a standard of care proportionate to the probable dangers. *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, 102 S. W. 608; *Greaney v. Holyoke Water Power Co.* 174 Mass. 437, 54 N. E. 880; *Hartman v. Citizens' Natural Gas Co.* 210 Pa. 19, 59 Atl. 315; *Stoner v. Pennsylvania Fuel Supply Co.* 40 Pa. Super. Ct. 599; *Barriekman v. Marion Oil Co.* 45 W. Va. 634, 44 L.R.A. 92, 32 S. E. 327.

A gas company whose servant opened the valves between another company's high and

plying of gas for street lighting, is a misfeasance, and not merely a nonfeasance of its duty to repair, and therefore it is liable for injuries thereby caused to strangers to the undertaking.

Municipal corporation — gas pipes — liability for repair.

4. An ordinance charging municipal authorities with the care of city lamps and lamp pillars does not include the service pipes which convey the gas from the mains to the lamps, and which the gas company has undertaken to keep in repair.

Pleading — variance — neglect to repair gas pipes.

5. A complaint charging a gas company with liability in damages for injuries due to negligence in failing to repair its pipes will authorize a recovery in case the negligence is with respect to pipes which, in the

low pressure mains, which he mistook for the mains of his employer, may be found liable for injuries caused by an explosion of gas supplied by such low pressure line, as a result of the increased pressure therein; and it cannot be heard to say that the owner of the lines negligently maintained them in an unsafe condition, for the purpose of avoiding its own liability, where it appeared that, without the negligence of the defendant's servant, the accident would not have occurred. *McKenna v. Citizens' Natural Gas Co.* 198 Pa. 31, 47 Atl. 990 (for similar case, arising from same circumstances, see *Garner v. Citizens' Natural Gas Co.* 198 Pa. 16, 47 Atl. 965).

But such companies are not insurers against injury by gas. *People's Gaslight & Coke Co. v. Porter*, 102 Ill. App. 461; *Greaney v. Holyoke Water Power Co.* 174 Mass. 437, 54 N. E. 880; *Hartman v. Citizens' Natural Gas Co.* 210 Pa. 19, 59 Atl. 315.

There can be no recovery unless the gas company is shown to have been negligent. *Moore v. West Virginia Heat & Light Co.* 65 W. Va. 552, 64 S. E. 721; *Torrans v. Texarkana Gas & Electric Co.* 88 Ark. 510, 115 S. W. 389.

So, the mere fact that the company is the owner of the gas will not, of itself, entail liability upon its part for injury caused by its escape, if the escape is in no manner due to its own fault. *People's Gaslight & Coke Co. v. Amphlett*, 93 Ill. App. 194.

And ownership of a gas well does not render one liable for the explosion of gas which accumulated in a cellar 50 feet distant, unless it appears that the explosion came from such well, or that the well had been negligently constructed, or was being negligently maintained. *Maxwell v. Coffeyville Min. & Gas Co.* 68 Kan. 821, 75 Pac. 1047.

A provision in an application for service, that the gas company is not to be held liable for damages resulting from explosion or fire, or any other damages arising from the use of gas, has no application to the explosion of gas which leaked from house pipes, *oc-* 32 L.R.A. (N.S.)

operation of its business, it uses and assumes the duty of repairing, although they may belong to another.

(November 16, 1910.)

A PPEALS by defendant from judgments of the Superior Court of Baltimore City in plaintiffs' favor in actions brought to recover damages for injuries resulting from the inhaling of gas alleged to have escaped from defendant's pipes through its negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gans & Haman and Vernon Cook, for appellant:

The primary duty with regard to keeping lamp posts and their appurtenances in repair is upon the city.

curring at a time when no gas was actually being used. *Bastian v. Keystone Gas Co.* 27 App. Div. 584, 50 N. Y. Supp. 537.

Damages that may result from the possible negligence of a gas company cannot be considered in proceedings to condemn land for the purpose of using it to lay gas mains. *Indiana Natural Gas & Oil Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487; *Indiana Natural Gas & Oil Co. v. Bailey*, 14 Ind. App. 697, 42 N. E. 488.

II. Maintenance and inspection of existing equipment.

a. Instrumentalities exclusively within company's control.

See also *McKenna v. Citizens' Natural Gas Co.* supra, I., and *McKenna v. Bridge-water Gas Co.* infra, VI. b.

While no absolute standard of duty in dealing with such agencies can be prescribed, it is said in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. The material and workmanship of the pipe and fittings should be of the highest character, and every precaution which is within the bounds of reason should be taken to guard against their deterioration or misplacement. *Heh v. Consolidated Gas Co.* 201 Pa. 443, 88 Am. St. Rep. 819, 50 Atl. 994.

A company which deals in gas is charged with the duty of keeping the instrumentalities of service under its control in proper repair, and in such a condition as to prevent harm to the persons or property of others, by the exercise of a reasonable degree of care, which must be commensurate with the dangerous nature of the commodity. *Anderson v. Standard Gaslight Co.* 17 Misc. 625, 40 N. Y. Supp. 671.

It is bound to lay its mains at such a depth that they will not be affected by the frost, and also to keep them in proper repair. *Thompson v. Cambridge Gaslight Co.* 201 Mass. 77, 87 N. E. 486.

And it must furnish reasonably good and sufficient material, suitable for the pur-

The plaintiff's remedy is against the city as the one primarily liable.

Hand v. Evans Marble Co. 88 Md. 229, 40 Atl. 899; *Eastern Advertising Co. v. McGaw*, 89 Md. 86, 42 Atl. 923; *Lampert v. Laclede Gaslight Co.* — Mo. —, 7 West Rep. 745; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Shearm. & Redf. Neg.* §§ 243, 244.

The mere fact of a leak in the gas pipe is not of itself negligence.

State use of *Brady v. Consolidated Gas Co.* 85 Md. 642, 37 Atl. 263; *Consolidated*

Gas Co. v. Crocker, 82 Md. 124, 31 L.R.A. 785, 33 Atl. 423.

Messrs. Isaac Lobe Straus and William Pinkney Whyte, Jr., for appellees:

There was negligence in the inspection and condition making it necessary.

Consolidated Gas Co. v. Crocker, 82 Md. 113, 31 L.R.A. 785, 33 Atl. 423; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660; *State use of Brady v. Consolidated Gas Co.* 85 Md. 637, 37 Atl. 263; *Mose v. Hastings & St. L. Gas Co.* 4 Fost. & F. 324; *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 36 L.R.A. 683, 45 N. E. 1049; *Smith v. Boston Gaslight Co.* 129 Mass. 318; *Finnegan v. Fall River Gas*

pose for which it is intended to be used, and put the material in place in a good and workmanlike manner. *People's Gaslight & Coke Co. v. Porter*, 102 Ill. App. 461.

Where the existence of a leak is known, means should be taken at once to avoid injury; and where it should have been known that a leak was likely to occur because of the defective condition of the pipe, negligence may be imputed; but companies cannot be required to uncover their pipes without reference to the existence or nonexistence of leaks. *Morgan v. United Gas Improv. Co.* 214 Pa. 109, 63 Atl. 417.

And the failure of a gas company's inspector to detect the fact that a plank box containing a by-pass for connecting high and low pressure lines had been broken into, and the lines connected by someone who was either a blunderer or a criminal, does not show negligence, when there was nothing externally indicating that the box had been opened or the gas tampered with. *McKenna v. Bridgewater Gas Co.* 193 Pa. 633, 47 L.R.A. 790, 45 Atl. 52.

And a gas company cannot be held liable for injuries caused by the inhalation of gas which leaked from its mains, where it had no actual notice of the leak, and its existence could have been ascertained by its employees only through unusual methods. *Hammerschmidt v. Municipal Gas Co.* 114 App. Div. 290, 99 N. Y. Supp. 890.

The mere fact of leakage and explosion of gas is insufficient to render a gas company liable for resulting damage, where there is nothing to show that the gas company or its employees is in any way responsible therefor. *Krzywoszyński v. Consolidated Gas Co.* 4 App. Div. 164, 38 N. Y. Supp. 929.

And the mere fact of a leak in a gas main does not even make a prima facie case of negligence against the gas company. *Hammerschmidt v. Municipal Gas Co.* supra.

It has, on the other hand, been held that a prima facie case, in which the jury may draw an inference of negligence, is established

by proof showing a break or leak in a gas main, and the consequent escape of gas, which operated proximately to cause the loss. *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, 102 S. W. 608.

Natural gas is inflammable and explosive in a high degree; and for this reason, those who transport it are held to the exercise of great care, and are required to lay and maintain pipes that are safe and secure for transporting gas, and carefully to inspect the pipes in order to keep them in a safe condition, and to detect and repair any leaks or defects in them. *Hashman v. Wyandotte Gas Co.* 83 Kan. 328, 111 Pac. 468.

And, of course, a gas company is liable for injury by the explosion of gas, resulting from its negligent failure to maintain its pipes and connections in suitable condition. *Linforth v. San Francisco Gas & Electric Co.* 156 Cal. 58, 103 Pac. 320, 19 A. & E. Ann. Cas. 1230.

It is for the jury to determine whether reasonable care for the safety of the public requires a gas company whose mains are likely to be disturbed by the construction by third persons of a subway, to provide an inspector for its pipes within the line of the subway work. *Koplan v. Boston Gaslight Co.* 177 Mass. 15, 58 N. E. 183.

And in *Olive Stove Works v. Fort Pitt Gas Co.* 210 Pa. 141, 59 Atl. 819, in which there was a recovery for damages to property caused by the explosion of gas claimed to have leaked from a gate in a box maintained in a public street, and to have forced its way under ground to the injured building, it was held that whether it was the duty of the company to provide perforated lids to its gate boxes, so that gas which might leak could escape from the box, whether there was a sufficient number of holes in the lid, and whether the holes were opened or plugged, were questions for the jury.

If a break in gas mains is due to the fault of the gas company, it is liable without notice of the break; and if it occurs through the fault of a third person, liability

Works Co. 159 Mass. 312, 34 N. E. 523; Hunt v. Lowell Gaslight Co. 3 Allen, 418; Emerson v. Lowell Gaslight Co. 3 Allen, 410; Butcher v. Providence Gas Co. 12 R. I. 149, 34 Am. Rep. 626; Chisholm v. Atlanta Gaslight Co. 57 Ga. 28; Ray, Negligence of Imposed Duties, 145; Whitaker's Smith, Neg. 423-428, 234-236; 20 Cyc. Law & Proc. p. 1170; Shearm. & Redf. Neg. §§ 697, 698.

Failure to make proper inspections of a plant carrying agencies dangerous to life and property is negligence.

Koelsch v. Philadelphia Co. 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; Mose v. Hastings & St. L. Gas Co. 4 Fost. & F. 324; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Doc. 233; Craw-

ford v. United R. & Electric Co. 101 Md. 402, 70 L.R.A. 489, 61 Atl. 287.

Escape of gas in public streets, unless explained, is prima facie evidence of negligence.

Smith v. Boston Gaslight Co. 129 Mass. 318; Consolidated Gas Co. v. Crocker, 82 Md. 113, 31 L.R.A. 785, 33 Atl. 423; Consolidated Gas Co. v. Getty, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660; Crawford v. United R. & Electric Co. 101 Md. 402, 70 L.R.A. 489, 61 Atl. 287.

Defendant, in the operation of its business, had appropriated and adopted the pipe from which the gas which injured the plaintiffs escaped, as a part of its plant.

Com. v. Lowell Gaslight Co. 12 Allen, 77; Washington Gaslight Co. v. District of Co-

attaches as soon as the company has had notice and time to repair. Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493.

Where it appears that the smell of gas was noticeable in the street at least a night or two before the explosion, that there was an old break in the main, and there is a dispute as to the cause of the break, the gas company may be found guilty of negligence rendering it liable for damages caused by the explosion. Shirey v. Consumers' Gas Co. 215 Pa. 399, 64 Atl. 541.

So, a gas company may be held liable for the death of a person, caused by an explosion of gas which leaked from its main, percolated through the soil, entered a building, and came in contact with fire, where it negligently suffered its pipe lines to become rusted and incapable of controlling and retaining the gas contained therein, and continued to use such pipes when it knew them to be in such defective condition; and such liability may be predicated of the company's negligence in knowingly permitting its pipes to become defective and out of order, or upon the ground of its negligence in maintaining an excessive pressure in the pipes with knowledge of their defective condition; and it is not necessary to support a recovery to show a special knowledge in the company that the pipes were leaking, for the reason that, from its knowledge of the defectiveness of the pipes, the company was bound to know that such consequences might follow as the natural and ordinary results of its carelessness. Alexandria Min. & Exploring Co. v. Irish, 16 Ind. App. 534, 44 N. E. 680.

And, irrespective of a gas company's liability for the negligence of its predecessor in laying gas mains, it is liable for the destruction of property by the explosion of gas which escaped therefrom, where the company knew, or, by the exercise of ordinary care, should have known, of the existence of such a leak long before the accident. Consumers' Gas Trust Co. v. Corbaley, 14 Ind. App. 549, 43 N. E. 237.

A gas company which maintains on the surface of a highway and beside the highway proper a gas pipe obscured by grass 32 L.R.A. (N.S.)

and weeds may be found liable to one who lawfully driving his traction engine upon the highway, crushed the pipe, and was injured by the explosion of escaping gas. Indiana Natural & Illuminating Gas Co. v. McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287.

A gas company is answerable for damages resulting from the explosion of gas which leaked from its mains and accumulated in a street manhole, where for two weeks the odor of gas was noticeable in the street, and the company's servants negligently failed to detect or report the existence of the leak. Tiehr v. Consolidated Gas Co. 51 App. Div. 446, 65 N. Y. Supp. 10.

Where, in an action for personal injuries sustained by the explosion of gas which accumulated in a catch-basin, it appears that on two occasions shortly before the accident, and at a point in close proximity to where it occurred, gas which came up through the ground was found burning in the street, and that the gas pipes had been in the ground for about nine years, and were considerably rusted and scaled, the jury may find that the gas which caused the explosion escaped from the pipes of the gas company. Hashman v. Wyandotte Gas Co. supra.

The Quebec superior court has held that the charter of a gas company providing that it shall indemnify the possessor and proprietor of houses and properties for all damages by them suffered, and another statute providing that the company may lay pipes in streets and highways, provided that it be responsible for all damages which it may occasion, operate to render the company liable for injury caused by gas which escaped from a leaky pipe that had been laid in the street for some time, unless it can show that the escape is due to *force majeure*. Garand v. Montreal Light, Heat & P. Co. Rap. Jud. Quebec, 33 C. S. 414.

b. Instrumentalities on consumer's premises.

The existence of a trifling leak in an

lumbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

Urner, J., delivered the opinion of the court:

The two appeals embraced in this record were taken from judgments recovered by the appellees in separate suits against the appellant for personal injuries resulting from the inhaling of gas which was alleged to have escaped from the appellant's pipes through its negligence. As the causes of action were practically identical, the cases, by agreement, were tried together in the court below.

The appellees, Elizabeth Goodman, formerly Connor, and her minor son, George L. Connor, lived at the corner of Hakesley

street and Bond street alley in Baltimore city. At this corner there was a city lamp which was supplied with gas by the appellant under a contract with the municipality. While the appellees were asleep at night, in a room on the second floor of their dwelling, they were made ill by gas which escaped from a leak in the service pipe connecting the city lamp with the appellant's main. Subsequent investigation located the leak in the fitting, called an "L," which joined the horizontal pipe, laid from the main to the base of the lamp post, with the vertical pipe, or "riser," extending upwards, through the interior of the post, to the burner. The only rulings of the court below presented for review are those disposing of the prayers offered by the re-

exposed pipe of a building, which is likely occasionally to occur in the best of systems, is not evidence of negligence upon the part of the gas company; and as to such leak, the company is charged only with the duty of reasonable inspection, and, if it is notified of the existence thereof, to respond with reasonable promptness, considering the exigencies and circumstances of the case, for the purpose of making repairs. *Morrison v. Superior Water, Light & P. Co.* 134 Wis. 167, 114 N. W. 434.

But a gas company is not liable for injuries from explosion of gas which leaked from pipes on the premises of a consumer, where it had no notice of the leak. *Mowers v. Municipal Gas Co.* — App. Div. —, 126 N. Y. Supp. 1033.

It has been held that a gas company, before turning on, or permitting to be turned on, gas for the benefit of tenants in an apartment house who have applied for it, must use reasonable precautions to ascertain that the pipes in the building are in such condition that the gas will not flow out into the apartments of tenants who have not applied for it, to their injury; and whether it has exercised such reasonable precautions is for the jury. *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L.R.A. 653, 42 N. E. 202.

And the company cannot, in such circumstances, deny its liability upon the ground that it had no right to enter upon the premises for the purpose of making an inspection. *Ibid.*

Nor can notice of intention to turn on the gas, and request to inspect the condition of the pipes, be insisted upon by the company as a prerequisite to its duty to make such inspection, if it has adopted the custom of permitting anyone to turn the gas into a building after plans of the piping have been furnished to it, and it has provided a meter. *Ibid.*

That a gas company's inspectors were negligent in failing to find a leak in the equipment in a house was held in *Anderson v. Standard Gaslight Co.* 17 Misc. 625, 40 N. Y. Supp. 671, to be demonstrated by the facts that subsequent occurrences in- 32 L.R.A. (N.S.)

indicated that there was a leak, which continued to exist after the examination.

It was held in *United Oil Co. v. Roseberry*, 30 Colo. 177, 69 Pac. 588, that in an action against a gas company for injuries resulting from an explosion of gas, alleged to have been due to its failure properly to inspect the pipes in a house upon turning on the gas and making connections for that purpose, an instruction that if the defendant had, some time previously, installed the pipes in the house, and left them in a proper condition, it was entitled to presume that they remained in that condition when it was asked to turn on the gas, in the absence of notice that any changes had been made, was, at the very least, as favorable to the defendant as it could require.

In *Heinz v. Consumers' Light, Heat, & P. Co.* 81 Kan. 261, 105 Pac. 527, it was held that a gas company was not liable for the explosion in a house of gas which escaped from open jets therein, after the gas had been turned on by the company's servant, where it did not appear that the jets were opened and left open by the servant, and no question as to the affirmative duty of the gas company or its servant to inspect the premises to discover open jets before turning on the gas seems to have been raised.

And in *Smith v. Pawtucket Gas Co.* 24 R. I. 292, 96 Am. St. Rep. 713, 52 Atl. 1078, where the alleged right to recover from the gas company was based upon the failure of its employees, when it installed a meter and turned on the gas in a house, to inspect the service pipes therein, which had long been out of use, the court said that, in the absence of any fact upon which to base an inference of a duty, the court could not infer a general obligation to inspect pipes in a private house which were not under the control of the company, and as to which it had no apparent relation other than the fact that its gas was to be used through pipes placed therein by the owner, as it had suited him to have them.

So, upon the ground that a gas company

spective parties, and the questions involved are, first, as to the legal sufficiency of the evidence to show negligence on the part of the appellant; secondly, as to the liability of the appellant for the consequences of the escape of gas from a pipe, the ownership of which it claims to have conclusively proven to be in the city of Baltimore; and, thirdly, as to the responsibility of the appellant to third persons for alleged negligence under its contract with the city.

In connection with its contract to supply the city lamps with gas, the appellant, as the record shows, undertook the duty of keeping the service pipes in proper condition. Whenever leaks occurred, the established practice was for notice to be given to the gas company through the office of the

city superintendent of lamps and lighting, and the company would make the necessary repairs. Independently, therefore, of any question of obligation on the part of the appellant to the appellees, the primary inquiry is whether the company was shown, by legally sufficient evidence, to have been negligent in the performance of the duty it assumed to keep in repair the pipes through which its gas was furnished to the city.

There is evidence in the record to the effect that, three or four days before the night on which the appellees were injured, gas had been noticed in the street outside of their house; that the odor was slight at first, but grew stronger from day to day; that the street lamp was out all that week, and the lamplighter could not light it; that

was not responsible for the condition of the pipes belonging to the owner of the premises, it was held in *King v. Consolidated Gas Co.* 90 App. Div. 166, 85 N. Y. Supp. 728, that one who was employed on behalf of the owner to search for a leak after the gas company's employee had inspected the premises and found no leak in the company's pipes, and had stated that the leaks were in the pipes of the customer, could not recover for injuries received by an explosion of the leaking gas, which was ignited by him in the course of his search.

III. Care in active operations.

a. Construction and repair of lines.

See also *McKenna v. Citizens' Natural Gas Co.* supra, I.

A gas company which engages in construction work in pursuance of its charter power to deal in gas, and of a permit to lay gas mains in the street, issued to it in its own name by the city, cannot evade its duty to prevent injury to third persons by explosions of escaping gas by letting a contract for the laying of the mains to an independent contractor. *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66.

A fortiori the company cannot escape liability where the contractor was, as a matter of fact, the *alter ego* of the gas company. *Ibid.*

So, the duty and liability in respect of the injury of property, imposed upon a gas company by a statute empowering it to dig trenches in the streets for its mains, cannot be avoided by letting the construction work to an independent contractor. *Ballentine v. Ontario Pipe Line Co.* 16 Ont. L. Rep. 654.

A gas company which lays its pipes in the street in such a manner that gas escapes therefrom in considerable quantity, and forces its way up through the ground, may be found guilty of negligence, and liable to one who was overcome by the gas, which found its way into the building where she was employed. *Blakie v. Brook-*

line Gaslight Co. 167 Mass. 150, 45 N. E. 1135.

So, the jury may find the gas company liable for damages resulting from an explosion, where it appears that the day before the accident gas was discovered on the dangerous premises, and that a break which was found to exist in a pipe in the street was repaired, and that, three days after the explosion, gas again escaped from the pipes at the point where the break had occurred, and, upon examination, it was found that the repair had been improperly made. *O'Donovan v. Philadelphia Co.* 223 Pa. 234, 72 Atl. 527.

And where a gas company stations an employee to patrol a street in which excavations are being made, and to notify it immediately of any escape of gas, and such employee is notified that there is a bad leak in the pipe, and is given additional notices at frequent intervals for a period of nine hours after the first notice, when the explosion occurs, such employee may be found guilty of negligence which will render the gas company liable for damages caused by the explosion. *Diehle v. United Gas Improv. Co.* 225 Pa. 494, 133 Am. St. Rep. 888, 74 Atl. 349.

Where a gas company which supplies its customers within a certain district by two mains finds it necessary to repair the larger main, and its servants, in doing so, shut off such main, but neglect to shut off the smaller main, as a result of which the light of a gas jet goes out, but the pressure of the small main causes gas to leak from such jet, they may be found guilty of negligence rendering the company liable for the death of a person, caused by the inhalation of gas which so escaped. *Hamma v. Haverhill Gaslight Co.* 203 Mass. 572, 89 N. E. 1043.

A gas company is negligent in running without request from, or notice to, the occupants of property, a new service pipe from its main to a house in which the use of gas has long been discontinued, and from which the meter has been removed, leaving the old pipe cut and partly exposed by a change of street grade, and

the gas company was notified, and on Wednesday, two days before the injury to the appellees, the company's employees visited the place and detected no odor of gas; that they made an unsuccessful search for a leak by smelling at the burner, but made no investigation at or beneath the surface of the ground; and that on Saturday, the day after the injury was sustained, the employees of the company dug up the soil at the base of the lamp post, and discovered the leak at the point already described.

It has been held by this court that it is "for the jury to say as a matter of fact, and, therefore, not for the court to determine as a matter of law, whether an inspection which failed to discover what other persons in the same situation as was the in-

spector were aware of was a due and reasonable inspection." Consolidated Gas Co. v. Getty, 96 Md. 688, 94 Am. St. Rep. 603, 54 Atl. 660. If the appellant's agents had made on Wednesday the kind of inspection they made on Saturday, there can be no doubt that the leak would have been discovered and repaired in time to avoid the injury to the appellees. It could not justly be held that an examination which is shown to have been as incomplete and ineffective as the one first made was sufficient to relieve the appellant from the imputation of negligence in the performance of so serious a duty as that of providing against the escape of the dangerous product it was engaged in distributing. It could not discharge that duty, as this court has said,

apparently dead, and making other connections with the riser leading to the meter cock, the position of which is undisturbed, thereby indicating that it is still a part of the dead pipe, and that no gas reaches the meter cock. *Pulaski Gaslight Co. v. McClintock*, — Ark. —, post, 825, 134 S. W. 1189.

There is no negligence on the part of a city employee for which the city would be liable, in searching in the street for a gas leak by applying a flame to the crevices therein, so as to ignite a jet of escaping gas, and explode gas which had accumulated in a tunnel under the street, dug by a plumber employed by the plaintiff for the purpose of making a sewer connection, where there is nothing to show that such is not the usual and ordinary way in which to make examination for gas leaks in the street, or that there was any other method of ascertaining the location of the leak, and it does not appear that the city employee had any knowledge of the condition of the plaintiff's premises. *Littman v. New York*, 36 App. Div. 189, 55 N. Y. Supp. 383, affirmed without additional opinion in 159 N. Y. 559, 54 N. E. 1093.

b. Operations on consumer's premises.

See also *Flaherty v. Scranton Gas & Water Co.* *infra*, VI. c. 2.

Where a gas company assumes to install a gas fixture and connect the pipe upon the premises of a customer, whether it is for a direct compensation or for the indirect benefit flowing from the increased use of gas, it assumes the obligation to provide a skilled workman, and to use care commensurate with the work to be done and the dangers arising from the situation and the conditions surrounding it. *German-American Ins. Co. v. Standard Gaslight Co.* 67 App. Div. 539, 73 N. Y. Supp. 973, affirmed without opinion in 174 N. Y. 508, 66 N. E. 1109.

It is bound to exercise great care to see that openings in such pipes are so tightly closed as to prevent the escape of gas into dwellings. *Bastian v. Keystone Gas Co.* 27 App. Div. 584, 50 N. Y. Supp. 537. 32 L.R.A. (N.S.)

So, a gas company is liable for personal injuries caused by an explosion of gas which escaped from the safety valve of a regulator installed by it in the building of a customer, as a result of its negligent failure so to adjust the safety valve that the gas discharged therefrom would pass out of the building instead of remaining therein. *Dominion Natural Gas Co. v. Collins* [1909] A. C. 640, 101 L. T. N. S. 359, 25 Times L. R. 831.

And the disconnecting of a service pipe without shutting off the gas below the point disconnected is negligence which will render a gas company liable to one who is overcome by the fumes of gas escaping therefrom. *Topolaki v. Chicago Heights Gas Co.* 150 Ill. App. 126.

So, where the servant of the company, after removing a gas meter from the house of a former customer, fails properly to turn off the gas, and it escapes and explodes by the lighting of a fire in the house, the jury may find that the failure to shut off the gas was negligence which caused the explosion. *Haas v. St. Paul Gaslight Co.* — Minn. —, 129 N. W. 769.

And where a gas company's servant, after turning on a street valve to admit gas into a service pipe for supplying a house, ascertains that the gas does not flow into the stove in which it is to be consumed, and thereupon shuts off the gas by means of the house valve instead of the street valve, he may be found guilty of negligence rendering the company liable for injuries sustained by the explosion of gas which flowed from a leak in the service pipe between the street valve and the house valve. *Huntington Light & Fuel Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002.

So, the jury may find a gas company liable for injuries resulting from an explosion of gas, upon the ground that, when it installed service pipes in a house, it failed to plug one of them, where it appears that the gas causing the explosion escaped from the end of such pipe, which the defendant had laid about a month previously, and that it had never been used until the date of the accident, there being

"by assuming, without knowing, that the leak proceeds from one source, when, in fact, it proceeds from a totally different source, which could have been discovered by proper inspection." Consolidated Gas Co. v. Crocker, 82 Md. 124, 31 L.R.A. 785, 33 Atl. 423. The question of negligence was clearly one for the jury to determine under the circumstances shown by the record. It was urged, however, on behalf of the appellant, that according to the uncontradicted evidence, the service pipe in which the leak was found belonged to the city, and that therefore the appellant could not be held responsible for the escape of gas at that point.

By the contract under which the city lamps were supplied with gas, for the period

covering the accident in question, it was provided, among other things, that the appellant should make connection from its main pipes to such lamps as might be erected by the city along the lines of the mains; that the company should make such changes in the services supplying the lamps then in use, or which might thereafter be put in use, as might be requested by the city; that there should be paid by the city to the company the sum of \$5 for each new lamp connected by it to its mains, "this payment to cover the cost of laying the service and making the connection from the gas main to the lamp;" and that the city should pay to the company the "actual cost of making any changes or alterations in its services or connections to any street lamp" then or there-

no evidence that it had ever been disturbed by a third person after its installation. United Oil Co. v. Miller, 19 Colo. App. 46, 73 Pac. 627.

And a gas company is liable for damages caused by the explosion of gas which escaped from a pipe upon which its servant had negligently failed to replace the cap, which he removed for the purpose of testing the pipes upon installing a gas meter and turning on the gas. Kenney v. South Shore Natural Gas & Fuel Co. 134 App. Div. 859, 119 N. Y. Supp. 363.

And a gas company is liable for negligence in respect of the escape of gas from a cracked elbow in a pipe which the company put in, when, after repeated notice to repair it, it has attempted to do so, and has assured the user that it is all right. Richmond Gas Co. v. Baker, 146 Ind. 600, 36 L.R.A. 683, 45 N. E. 1049.

A case sufficient to go to the jury on the question of the liability of a gas company for damages caused by an explosion of gas was held to be made by evidence that persons wearing badges entered the plaintiff's premises and did something in connection with the gas meter, and that some time later men wearing the gas company's badges were seen in the basement with lights, and directly after the explosion occurred. Cohen v. Consolidated Gas Co. 137 App. Div. 213, 121 N. Y. Supp. 956.

It may be found that a gas company's workman who has installed a fixture and made a connection is negligent in searching for the location of a leak, of the existence of which he is aware, by running a lighted match along the pipe within 2½ inches of a wall covered with very inflammable material, so as to ignite a jet of escaping gas, and thereby cause a fire. German-American Ins. Co. v. Standard Gaslight Co. 67 App. Div. 539, 73 N. Y. Supp. 973, affirmed without opinion in 174 N. Y. 508, 66 N. E. 1109.

And irrespective of a gas company's negligence in permitting its gas mains to leak, it is liable for personal injuries to the inmate of a house by the explosion of gas, caused by the negligence of its superin-

tendent in lighting a match while searching for the place at which the gas entered the cellar. Tipton Light, Heat, & P. Co. v. Newcomer, 33 Ind. App. 42, 67 N. E. 548.

The employees of a gas company, who are about to turn off the gas temporarily, for the purpose of removing obstructions from the pipe supplying a house, must use proper care to see that the occupants of rooms have an opportunity to protect themselves against danger; and the care required of them is commensurate with the dangers which attend a shutting off and turning on of the gas. Beyer v. Consolidated Gas Co. 44 App. Div. 158, 60 N. Y. Supp. 628.

But negligence which was the proximate cause of an explosion is not shown by proof that a gas company's servant went into a cellar with a candle, to work on the pipes, that shortly thereafter a strong odor of gas was noticeable, that persons went into the cellar to rescue the workman, and that, as they were about to pick him up, "a big flash of fire came around us, and scattered us all over the floor," if there is no proof that the servant lighted the candle, or other proof of the cause of the explosion. Schaum v. Equitable Gaslight Co. 15 App. Div. 74, 44 N. Y. Supp. 284.

And where a gas company's servant, before making repairs at the house of a customer, notifies the customer that the gas will be turned off during repairs, and the latter essays to shut the lighted gas jets in the house, the gas company cannot be held liable to a boarder in the house who was overcome by the fumes of gas by reason of the failure to turn off the gas in her room, where she was sleeping, for the gas company's servant performed his full duty when he gave notice to the customer that the gas would be turned off, and it was his duty neither to notify all of the occupants of the house, nor to see to it that all gas jets were turned off before again turning on the gas after making the repairs. Skogland v. St. Paul Gaslight Co. 89 Minn. 1, 93 N. W. 668.

It is not negligence for a gas company to leave a pipe in which the gas is shut off

after erected under the contract. The situation, therefore, is one in which the city, owning the lamp posts and lamps, arranged with the gas company to supply the lamps with gas. In order that this might be accomplished, it was necessary for the company to install service pipes extending from the mains to the burners. The "cost of laying the service and making the connection" is stipulated to be paid by the city at a designated flat rate, but no provision is made for the transfer of title to the materials employed in the work. On the contrary, the retention of title in the company is suggested in the stipulation for the payment to the company of the cost of any changes in "its services or connections," made at the request of the city. In the bills rendered by

the company to the city for making new connections, the charge was merely "for connecting services to new gas lamps," at the flat rate per lamp prescribed by the agreement. The lamp post here in question was connected with the main in October, 1908, and the bill for this and other connections for that month was "for erecting new gas lamps" at the flat rate then in force. In none of the bills in the record for connecting the lamps with the mains is any mention made of the materials used for that purpose. There is nothing in the contract expressly requiring the company to repair the service pipes, and yet that duty has been treated by both parties as devolving exclusively upon the company. The only payments shown by the evidence to have been made by the

by a stopcock, upon removing the meter from a house in which gas has ceased to be used, and no presumption of negligence is raised against it by the fact that it did not thereafter make any examination of the pipes, in the absence of any notice to it of the existence of any cause requiring an examination. State use of Brady v. Consolidated Gas Co. 85 Md. 637, 37 Atl. 263.

IV. Regulation of pressure.

See also McKenna v. Citizens' Natural Gas Co. supra, I.; McKenna v. Bridgewater Gas Co. infra, VI. b; and Westfield Gas & Mill. Co. v. Hinshaw, infra, VI. c, 3.

A natural gas company which negligently permits the pressure in its pipes to become dangerously high is liable for the burning of the house of its patron, which results from the overheating of a gas burner by the high pressure. Citizens' Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557; Ibach v. Huntington Light & Fuel Co. 23 Ind. App. 281, 55 N. E. 249 (see this case as set out infra, VI. c. 3); Barrickman v. Marion Oil Co. 45 W. Va. 634, 44 L.R.A. 92, 32 S. E. 327.

So, an action may be maintained against a gas company for damages caused by the burning of a building, upon the ground that on the night of the fire, the gas company failed to keep upon its premises a watchman, as was its usual custom, for the purpose of regulating the pressure of gas in its supply pipes, and that, in consequence, the pressure of the gas became so high that it caused excessive heat in the plaintiff's burner, and communicated fire to his dwelling. Indiana Natural & Illuminating Gas Co. v. New Hampshire F. Ins. Co. 23 Ind. App. 298, 53 N. E. 485.

And a gas company is liable for the destruction of a building by fire started by a gas stove which became overheated by reason of an unusual and excessive pressure in the gas pipes, which resulted from the act of the company's servant, who was maintained as a watchman and inspector, to regulate the pressure of the gas, in be-

coming intoxicated and abandoning his duties. Indiana Natural & Illuminating Gas Co. v. Long, 27 Ind. App. 219, 59 N. E. 410.

But, where the occupant of the house has within his own control the means of regulating the supply and volume of gas, he has no right of action against the gas company, where it does not also appear that the unusual pressure was so great as to impair the efficiency of the means of control in his possession. Hollon v. Campton Fuel & Light Co. 127 Ky. 266, 105 S. W. 426.

And the mere fact that a building was set on fire by a gas meter used therein is not sufficient to justify the inference that an increased pressure of gas caused the fire. Barrickman v. Marion Oil Co. supra.

So, the mere fact of the explosion of a regulator which was installed upon the premises of a customer, for the purpose of controlling the flow of gas, and which had performed its functions properly up to the time of the accident, does not justify an inference of negligence upon the part of the gas company in respect of either the pressure of gas or the repair of the regulator. Marshall Window Glass Co. v. Cameron Oil & Gas Co. 63 W. Va. 202, 59 S. E. 959.

V. Effect of notice of leaks.

See also Morrison v. Superior Water, Light, & P. Co. and King v. Consolidated Gas Co. supra, II. b; and Consumers' Gas Trust Co. v. Corabeley, and Alexandria Min. & Exploring Co. v. Irish, supra, II. a.

While the measure of care exacted of a gas company is not that of an insurer to everyone who sustains loss by reason of gas escaping and exploding, it is liable for an explosion where it knew, or, by the exercise of ordinary care, should have known, of the defect in its pipes or main. Hartman v. Citizens' Natural Gas Co. 210 Pa. 19, 59 Atl. 315; Stoner v. Pennsylvania Fuel Supply Co. 40 Pa. Super. Ct. 599.

So, although the act of a gas company's servant while searching for leaks in a

city to the company on account of repairs were in cases where lamp posts, concededly the property of the city, had been broken off by a runaway team or other cause. When a lamp was removed to a different location, the old service pipe was not taken up, but a new connection was made, for which the city was charged at the contract rate. It was in evidence that the city always disclaimed ownership of the service pipes, and that this was a disputed question between the municipality and the company. There were other circumstances relied upon by the appellees as tending to show that the service pipes were not the property of the city, but those we have referred to are sufficient to make it apparent, at least, that ownership by the

city was not so conclusively proven by the evidence as to justify the withdrawal of the case from the jury on that ground.

It does not appear, however, that this consideration is vital to the appellees' case. In view of the nature of the business in which the appellant is engaged, it would, in our judgment, be unduly limiting its responsibility to hold that, notwithstanding it should be found to have been neglectful of its duty to repair the service pipe in question, it should be exempted from liability to a third person for the injurious results of its negligence merely because the pipe might be shown to be the property of the municipality. The substance which the appellant manufactures and delivers to its consumers through its system of mains and connections

gas main, in applying a lighted torch to an opening in the street to ascertain if gas was escaping therefrom, is not negligence rendering the company liable for an explosion of the gas, causing injury to a building, the company may nevertheless be found guilty of negligence and liable for the damages sustained by the property owner where, for a considerable period before the explosion, there had been numerous leaks in the gas pipes, causing serious inconvenience to adjoining property owners, of all of which the company had seasonable notice. *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493.

And where it appears that, for several days before the explosion occurred, gas was oozing through the surface of the street, and burning thereon in a densely populated portion of a city, the jury has a right to infer that the gas company either knew or should have known, if it had maintained an efficient system of inspection, that there were leaks in its gas mains. *Hashman v. Wyandotte Gas Co.* 83 Kan. 328, 111 Pac. 466.

And it must be left to the jury to say whether a gas company is liable for the explosion of gas which is claimed to have leaked from its mains in the street, and to have passed through the earth into the basement of the building injured, where there is evidence that the odor of gas was noticeable for two weeks before the explosion, but the evidence as to whether the company had notice thereof is conflicting. *Henderson v. Allegheny Heating Co.* 179 Pa. 513, 36 Atl. 312.

Proof that there had been depressions on the surface of a street located on made-ground in which gas mains were laid, and that the gas company had been notified that the odor of gas was noticeable in the street, as tending to show that the company knew that the gas pipe at this place leaked, and that such leaks might be caused by the settling of the ground in which the pipes were laid, is admissible in evidence for the purpose of charging it with liability for injury to a building, caused by an explosion of the escaping gas. *Lewis v.* 32 L.R.A. (N.S.)

Boston Gaslight Co. 165 Mass. 411, 43 N. E. 178.

And the company cannot escape liability for injury to property by the explosion of gas upon the ground that the leakage was caused by the negligence of a municipality in failing properly to fill its sewer trenches, as a result of which the earth settled and caused breaks in the main, where the gas company had notice not only of the negligent manner in which the trenches were filled, but also notice for a considerable period before the explosion of the fact that there were leaks in the main. *Aurora Gaslight Co. v. Bishop*, supra.

A gas company having notice of a break in its pipes must, whether the break is due to its own fault or not, take precautions to prevent injury to third persons from the escaping gas, either by repairing the break or by cutting off the gas. *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547.

And the duty is the same where the pipe from which the gas is escaping belongs to the house owner, and not to the company. *Memphis Consol. Gas & Electric Co. v. Creighton*, — C. C. A. —, 183 Fed. 552.

And the failure of a gas company to exercise any care to discover and remedy a leak which proves to be in its street mains, when notified that gas is escaping into the cellar of a building abutting on the street, may render the escape of the gas evidence of negligence which will make the company liable for injuries thereby caused. *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 31 L.R.A. 785, 33 Atl. 423.

Such failure of the company to act requires the question of its liability for injuries resulting from an explosion of the gas to be submitted to the jury. *Baudler v. People's Gaslight & Coke Co.* 108 Ill. App. 187.

A gas company which, after notice of a leak in a pipe through which it supplies gas to a customer, negligently fails to repair the breach or cut off the gas, is liable for the injury resulting from an explosion, jointly with a stranger whose negligence in searching for the leak with a lighted

is highly dangerous to persons and property, and the duty of the company is to use all reasonable precautions to confine this agency within the channels where it may be employed with safety and utility. As the current which the company sets in motion is sent through the entire extent of mains and service pipes which it has established for its own profit, and which it has undertaken to repair without reference to the technical question of ownership, it is only just that the measure of its liability to those affected by any negligence in this regard should equal that of its duty and opportunity to keep the system in repair.

In *Richmond Gas Co. v. Baker*, 146 Ind. 600, 36 L.R.A. 683, 45 N. E. 1049, where the suit was for injuries sustained by an

explosion of gas which escaped from a leak in an elbow connecting a conducting pipe with the plumbing of a dwelling house, it was said by the court: "The company was supplying the house . . . with artificial gas,—a penetrating, elusive, and explosive material, and hence one that was at any moment liable to become dangerous unless carefully guarded. The company, therefore, owed a duty to all persons who might be injured by the gas to use ordinary and adequate care in delivering the substance into the residence in question."

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, where the District was suing for reimbursement from the gas company on account of damages which the for-

match was a contributing cause of the explosion. *Pine Bluff Water & Light Co. v. McCain*, 62 Ark. 118, 34 S. W. 549.

And the destruction of a building by the explosion of natural gas which escaped from a leak in a high-pressure main at some distance, and reached the building by penetrating the soil under the frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, and this had continued for several years, and notice of the fact had been given to its line walkers. *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350, 32 L.R.A. 146, 43 N. E. 306.

But it has been held that where the odor of gas is noticeable in a house before an injury caused by inhaling the gas, and notice thereof is given to the gas company, which has control only of the mains in the street, and not of the service pipes leading therefrom to the house, there is no duty upon the company to dig up the street to ascertain if its mains are in good condition, its failure to comply with which will render it liable for the injury. *Morgan v. United Gas Improv. Co.* 214 Pa. 109, 63 Atl. 417.

Where the company is notified that gas is leaking on the premises of a customer, it is for the jury to determine whether an inspector sent by the company exercised due care to discover the leak. *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 650.

So, a gas company which, upon being notified of a leakage of gas in the house of one of its customers, sends a servant to repair the same, who, after having apparently repaired a chandelier, informs the occupant of the room that the defect has been repaired, may be found liable to the occupant, who is overcome by gas after having retired in such room. *Ferguson v. Boston Gaslight Co.* 170 Mass. 182, 49 N. E. 115.

And where a gas company received notice that there is a leak in its main, whereupon it sends an inspector to the place, who arrives about 7 o'clock, and finding himself unable to locate the leak, notifies the proper officer, who despatches the "trouble 32 L.R.A. (N.S.)

wagon" and men, who reach the place about 10 o'clock, commence excavation, and continue until about 2, when they suspend operations until 7, the jury may find that the gas company negligently failed to exercise the proper degree of diligence in locating and remedying the cause of the leak, so as to render it liable for the death of a person, caused by the inhalation of gas, which escaped from the leak, and penetrated into his sleeping apartment. *Sipple v. Laclede Gaslight Co.* 125 Mo. App. 81, 102 S. W. 608.

VI. Effect of intervening acts or omissions of others.

a. Proximate cause generally.

See also *Schaum v. Equitable Gaslight Co.* supra, III. b.

If a gas company negligently suffers gas to escape from its pipes, it is liable for the natural and probable consequences of negligence; and if the ignition of the gas by some person ought to have been foreseen as a probability, the gas company is liable, even if such person was chargeable with negligence. *Koplan v. Boston Gaslight Co.* 177 Mass. 15, 58 N. E. 183.

So, a person employed by the owner of a building to install service pipes and connect them with a gas main is liable for negligence in the installation of the service pipe, from which, as a result, gas escapes and causes an explosion, even though he was not responsible for the ignition. *Moore v. Lanier*, 52 Fla. 353, 42 So. 402. In this case the court said: "The explosion caused the injury here; but, if there had been no gas in the storeroom, there would have been no explosion. Whether the defendant was responsible for the ignition or not is immaterial in this case, since the ignition was not an intervening independent cause, but both it and the gas were present and directly contributing causes of the explosion. If the gas was present because of the negligence of the defendant, as alleged in the declaration, he is responsible for all the direct consequences of its presence

mer had been compelled to pay a pedestrian for injuries sustained by reason of a gas box in a sidewalk being out of repair, the supreme court, in enforcing the liability of the company for neglect of duty in reference to the repair of the box, said: "Nor do we think that this duty was affected by the circumstances that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stopcock was a part of the apparatus of the company, and was used for the purpose of its business, it is entirely immaterial who paid the cost, or might in law, on the cessation of the use of the service pipe and gas box by the company, be

regarded as the owner of the mere materials. Certainly, it would not be claimed that if the box and its connections became so defective or out of repair that gas escaped therefrom, and caused injury, that the company could legally assert that it was under no obligation to take care of the apparatus, because of the circumstance that it had been compensated by others for its outlay in the construction of the receptacles from which the gas had escaped." In the present case the duty of the company to make the necessary repairs to the pipe in which the leak occurred was clear and exclusive, and there was evidence from which negligence in the performance of that duty was inferable. Under these circumstances the company would not be exempt from re-

that could reasonably have been anticipated. It cannot be said as a matter of law that ignition and explosion from some condition or cause would not naturally, probably, and directly follow the escape of gas in a storeroom equipped with show-cases, shelves, and windows, and used for the sale of goods, wares, and drugs. If the gas was present because the defendant did negligently and carelessly fit, install, and equip the service pipe in the storeroom, and it became ignited without the plaintiff's negligence contributing thereto, and an explosion occurred, the defendant is liable for the damages resulting from the explosion, even though he was not responsible for the ignition."

The negligence of a gas company in maintaining in a public highway a leaky gate valve in a main, inclosed in a cracked and decayed box, and not the act of a four-year-old boy in throwing a match through a crack in the box, is the cause of an explosion of the gas, to the injury of a person in the highway. *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 23 L.R.A. (N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166.

And the negligence of which a gas company may be found liable by reason of its having suffered gas to escape into the cellar of a house until an explosion occurred, and not the ignition of the gas by a lighted candle, borne by a policeman who sought to find the leak, is the proximate cause of the explosion. *Consolidated Gas Co. v. Getty*, supra.

And the negligence of a gas company in using the old riser designed to carry the gas from the pipe attached to the street main to the meter in a house where the use of gas has been long discontinued and the meter removed, and the flow of gas shut off by the meter cock, when running a new connecting pipe, without request from or notice to the property owner, to conform to a changed street grade, and leaving the old pipe cut off, dead, and partly exposed, and not the act of the property owner in disconnecting the riser, to enable him to pull out the dead pipe, may be

found to be the proximate cause of his death by asphyxiation by gas rushing out of the broken connection. *Pulaski Gaslight Co. v. McClintock*, — Ark. —, post, 825, 134 S. W. 1189.

The existence of an abandoned sewer not belonging to the city, leading from the street to a house, is not such a superseding cause of the entry of gas into a house, which leaked from gas mains and passed through it, as to defeat the liability of the city, which was engaged in manufacturing and selling gas for profit, for its negligence in permitting the gas to escape from the mains. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

b. Acts or omissions of third persons.

See also *McKenna v. Citizens' Natural Gas Co.* supra, I.; *Pine Bluff Water & Light Co. v. McCain*, supra, V.; and *Consolidated Gas Co. v. Getty*, and *Koplan v. Boston Gaslight Co.* supra, VI. a.

A gas company is not liable merely because a pipe breaks and gas escapes and causes injury to someone, where it has not failed to use due care to conduct its gas in a proper manner, and where the escape of gas is due to acts of which the company had no notice, committed by third persons over whom it had no control. *Carmody v. Boston Gaslight Co.* 162 Mass. 539, 39 N. E. 184.

So, a gas company cannot be held liable for the act of a stranger in turning gas into the pipes of a building, without its knowledge or request. *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L.R.A. 653, 42 N. E. 202.

And an explosion of gas in a dwelling supplied by a low-pressure line, caused by connecting therewith a high-pressure line, leaving the gas uncontrolled by the regulator, does not render the gas company liable, in the absence of negligence on its part, where the connection was blunderingly made by an employee of another gas company, who was a trespasser in so doing; and negligence in constructing the box inclosing the by-pass is not shown by the

sponsibility to those suffering from such neglect, even though the ownership of the service pipe had been conclusively shown to have been in the city.

But it is insisted that the company was, in this connection, operating as the agent of the city, under a contract for the illumination of the city streets; and that while it may have assumed the duty of keeping the service pipes in repair, yet that was a duty which it owed solely to the city, and any neglect to perform it could be regarded only as nonfeasance for which the company would not be liable to third persons. The appellant concedes that it would be liable to anyone injured by its misfeasance while acting as the agent of the city, but it contends that any negligence which might be

found in this case consisted only of a failure to do that which was undertaken to be done, and amounted, therefore, only to nonfeasance. The distinction between these two classes of negligence has been frequently considered, and it is well settled that "nonfeasance" is the nonperformance of a duty, for which the agent is liable only to his principal, while "misfeasance" is the improper performance of a duty, for which the agent is liable to third persons injured by such negligence. If, for example, the gas company in this case had failed to supply gas to the city lamps in accordance with its contract, this would have been a nonfeasance, for which the company would have been responsible only to the city. But when, in carrying out the contract, it distributes

fact that such employee of another company, who was an expert, pryed open the box with a long lever or turnkey, and manipulated the gate. *McKenna v. Bridgewater Gas Co.* 193 Pa. 633, 47 L.R.A. 790, 45 Atl. 52.

But if injury is done to adjoining property because of the imperfect manner in which pipes are laid, or because of negligent failure to repair breaks, whether the breaks are caused by the gas company's own fault or that of a third person, the injured property owner has a right of action to recover for all damages sustained by him. *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493.

And a gas company's liability to the patron of a restaurant for personal injuries resulting from the explosion of gas from a leak which it negligently failed to repair is not defeated by the fact that the gas was exploded by the failure of the proprietor to extinguish a fire in the building, upon the theory that the latter's negligence was the proximate cause of the injury. *Merrill v. Los Angeles Gas & Electric Co.* 158 Cal. 499, 31 L.R.A.(N.S.) 559, 111 Pac. 534.

The company cannot escape liability for such negligence by showing that the gas was ignited through the negligence of a third person, over whom the plaintiff had no control. *Logansport & W. Valley Natural Gas Co. v. Coate*, 29 Ind. App. 299, 64 N. E. 338.

And a woman living in the family of her grandson is not chargeable with his negligence or that of his wife with respect to the danger of gas escaping into the dwelling, by the explosion of which she is injured. *Richmond Gas Co. v. Baker*, 146 Ind. 600, 36 L.R.A. 683, 45 N. E. 1049.

The company cannot escape liability for injuries resulting from the explosion of gas which escaped into the cellar of a house from a leak between the street valve and the house valve, where its servant, after turning on the gas at the street valve, and discovering that it did not flow into the stove in which it was to be consumed, closed the house valve instead of the street 32 L.R.A.(N.S.)

valve, by showing that the gas was ignited by a plumber engaged to ascertain the cause of the failure of the gas to flow into the stove. *Huntington Light & Fuel Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002.

And it cannot escape liability for personal injuries caused by an explosion of gas which escaped from gas mains which were being laid in a trench, upon the plea that the negligence, which consisted in the failure to make proper connections, was the act of an independent contractor whom it had employed to lay the mains, where a contributing cause of the explosion was the act of the gas company in forcing the gas into the mains without ascertaining beforehand that they were in a proper condition. *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66.

c. Acts or omissions of plaintiff or person injured.

1. Failure to inspect unoccupied premises.

The failure of the owner of unoccupied premises to inspect them during a period of about twenty-seven days is not, because an inspection would have disclosed to him the leakage of gas from pipes therein, contributory negligence which will preclude him from recovering for damage to his building by the explosion of gas which the gas company negligently allowed to escape. *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660.

2. Remaining within inclosure, or omitting to act, with knowledge of presence of gas.

Persons lulled into a feeling of security with respect to the danger of gas, the odor of which is perceptible, by statements of an employee of the gas company, who has assumed to repair the leak, that it is all right, and that the odor must come from a lamp post on the street, cannot be charged with contributory negligence for relying on his assurance. *Richmond Gas Co. v. Baker*, *supra*.

the gas through defective pipes, and thus permits it to escape into the streets and houses of the city, there is manifestly involved an affirmative element of negligence amounting to misfeasance; and for this the company is liable to anyone who may suffer in consequence.

The supreme judicial court of Massachusetts, in *Osborne v. Morgan*, 130 Mass. 102, 30 Am. Rep. 437, has clearly stated the distinction as follows: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can

maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance,—doing improperly." It was accordingly held that "negligence and unskilfulness in the management of inflammable gas, by reason of which it escapes

And the fact that the plaintiff remained in her house in which there were no gas connections, after having been made ill by the fumes of gas, is not such contributory negligence as will preclude a recovery from the gas company upon the ground that the gas escaped from its mains in the street, where she remained upon being informed by the doctor who was called to attend her, that the gas came from a coal stove in the house, which was thereupon extinguished. *Garand v. Montreal Light, Heat & P. Co.* Rap. Jud. Quebec, 33 C. S. 414.

And one asphyxiated by gas was not necessarily guilty of contributory negligence, and may be found free therefrom by the jury, so as to warrant a recovery against the owner of the mains from which it leaked, where she occupied a sleeping apartment in the house after gas had been escaping into the house for some three weeks, with her knowledge, it appearing that no gas had entered the room occupied by her. *Richmond v. Gay*, 103 Va. 320, 49 S. E. 482.

So, the owner of a house which is not piped for gas, who notices the odor of gas on and about his premises, and who, because the odor is stronger in the cellar than elsewhere, warns his children not to take a light into the cellar, is not, by reason of the fact that he sleeps in the house after an explosion of gas across the street in a house which is also not piped for gas, guilty of contributory negligence which will preclude a recovery for injuries caused by inhaling gas while so sleeping. *Apfelbach v. Consolidated Gas Co.* 204 Pa. 570, 54 Atl. 359.

And one is not guilty of contributory negligence as a matter of law, precluding a recovery for personal injuries caused by inhaling gas, by reason of the fact that she stayed in the house after the odor of gas was perceptible, without taking any step toward remedying the condition, where she had never used illuminating gas, did not know how it smells, and did not recognize the odor. *Thompson v. Cambridge Gaslight Co.* 201 Mass. 77, 87 N. E. 486.

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The question having properly been left to the jury, it may find an absence of contributory negligence, which is necessary to warrant a recovery against a gas company for injuries sustained by one overcome by gas after retiring in a room in which the gas company's servants had made an improper connection, where the person injured was a foreigner, unfamiliar with the methods of gas-fitting, and although he detected the smell of gas in the room shortly after the connection was made, the accident occurred several hours later, and after he had made an unsuccessful attempt to light the gas, and had noticed that the odor had diminished. *Laclede Gaslight Co. v. Cottone*, 81 C. C. A. 471, 152 Fed. 629.

The question of the contributory negligence of an eight-year-old child in playing near a leaky gate valve in a gas main cannot be decided by the court as a matter of law, although he had been warned by his parents to keep away from it. *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 23 L.R.A. (N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166.

In *Flaherty v. Scrantom Gas & Water Co.* 30 Pa. Super. Ct. 446, it was held that the jury properly found an absence of contributory negligence on the part of a mother, which would preclude a recovery for the death of her child, due to the inhalation of gas negligently allowed by the gas company's employees to escape while they were making repairs in the cellar, although she detected the presence of escaping gas, and ordinary prudence and care might have required her to take some steps to protect the child from its harmful effect, where she knew that the employees of the defendant were in the cellar, making repairs, and that she had a right to assume that they possessed the skill, and would exercise the necessary care, to prevent an escape of gas in such volume as to be dangerous to life or health, and when she realized, by being affected herself to the point of sickness, that the volume of gas had assumed dangerous proportions, she was in the situation of one suddenly

and causes injury," could not be regarded as mere nonfeasance. This general principle is recognized in numerous authorities, including *Mechem, Agency*, § 572; 31 Cyc. Law & Proc. p. 1500; *Illinois C. R. Co. v. Foulka*, 191 Ill. 57, 60 N. E. 890; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Southern R. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244. The cases cited by the appellant upon this point were instances of nonfeasance. In *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794; *Davis v. Clinton Waterworks Co.* 54 Iowa,

59, 37 Am. Rep. 185, 6 N. W. 126, no recovery was permitted from water companies, at the suit of third persons, for loss by fire, resulting from the failure to supply water to the municipalities with which they had contracted for that purpose; while in *Lampert v. Laclede Gaslight Co.* — Mo. —, 7 West. Rep. 745, it appeared that the gas company had agreed with the city to keep the street lamps in repair, and it was held that a person injured by a broken lamp post, left in a dangerous condition on a public highway, could not recover against the company. The situations presented in these cases were essentially different from that with which we are here confronted. They would be analogous to the case at bar if the water companies, in the cases first men-

placed, without fault on her part, in a position of danger, and could not, therefore, in her effort to extricate herself, be held to the best use of judgment.

The inmate of a house who remains in the cellar after admitting the superintendent of a gas company, for the purpose of searching for a gas leak, is not guilty of contributory negligence which will preclude her from recovering from the gas company for personal injuries received when the gas exploded, by reason of the superintendent lighting a match in his search. *Tipton Light, Heat & P. Co. v. Newcomer*, 33 Ind. App. 42, 67 N. E. 548.

A husband is not guilty of contributory negligence, as a matter of law, which will preclude him recovering for loss of services of his wife, due to her having inhaled escaping gas, merely because, on the day of the injury, he detected an odor before leaving the house, that he suspected possibly might be illuminating gas, without taking any steps toward remedying the condition, where, upon returning at night, the odor was much more clearly noticeable, and he took steps to have the matter attended to. *Thompson v. Cambridge Gaslight Co.* 201 Mass. 77, 87 N. E. 486.

And neither the fact that a property owner failed to notify a gas company of the existence of an open and abandoned sewer connection running into his building, nor the failure to give notice that gas was escaping into such building at a time when the gas company's employees were searching for leaks in its gas mains, constitutes contributory negligence which will preclude recovery against the gas company for injury to the building by the explosion of gas negligently permitted to escape from the gas mains and enter such building. *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493.

3. Tampering with instrumentalities or adjusting fixtures.

See also *Hollon v. Campton Fuel & Light Co.* supra, IV.

One who, after connections for natural

gas have been installed upon his property, turns on the gas himself, after having been warned by the gas company of defects which must be remedied before it would be safe to turn on the gas, or who, having turned the gas on, leaves it turned on after having been warned of such defective condition, is guilty of contributory negligence precluding a recovery for damages occurring when the gas escapes and explodes. *Kohler Brick Co. v. Northwestern Ohio Natural Gas Co.* 11 Ohio C. C. 319, 5 Ohio C. D. 379.

And the owner of premises cannot recover against a gas company for personal injuries occasioned by the explosion of a gas meter, where the explosion was due to the act of the plaintiff in opening a valve, permitting the full pressure of the gas to enter the meter, instead of opening a valve which would permit the gas first to enter a regulator, whose purpose was to reduce the pressure of the gas before it entered the meter. *Triple-State Natural Gas & Oil Co. v. Wellman*, 114 Ky. 79, 70 S. W. 49, 1 A. & E. Ann. Cas. 64.

So, a landlord whose tenant opens a disused service pipe, and, upon observing that gas escapes therefrom in a considerable quantity, notifies the gas company to shut off the gas in the street, instead of closing the service pipe which he had opened, cannot hold the gas company liable for the explosion which occurred when the tenant threw a lighted match into the gas, upon the ground that the company negligently failed to shut off the gas from the service pipe. *Creel v. Charleston Natural Gas Co.* 51 W. Va. 129, 90 Am. St. Rep. 772, 41 S. E. 174.

The jury must determine whether or not a property owner was negligent in disconnecting the riser leading from the pipe conveying gas from a street main to a house in which the use of gas had long been discontinued, where he was attempting to remove from the premises the old service pipe, which had been cut and partly exposed because of a change in street grade, and was apparently dead, and was asphyxiated by gas, because, unknown to

tioned, instead of failing to furnish water, had forced it through defective pipes, and had thereby caused it to escape, to the injury of the plaintiffs; and if the gas company, in the case last cited, instead of merely omitting to remove a broken lamp post from a highway which it was the duty of the municipality to keep safe, had allowed gas to escape through the post, and had thus caused injury to the person suing. In this case it was not the fractured pipe, but the discharge of gas, that injured the appellees, and their recovery cannot be denied upon the theory that the negligence imputed to the appellant did not amount of misfeasance.

In support of the contention that the only recourse of the appellees was against the city, it was pointed out that the city by ordinance had undertaken to keep the street lamps in repair, and certain of its enactments on the subject were offered in evidence. These commit to the superintendent of lamps and lighting the duty of providing for the lighting, cleaning, and repairing of the "city lamps," and for the "furnishing, construction, erection, repair, or removal of all street lamps and lamp pillars." By their plain terms these provisions deal only with the lamps and lamp posts furnished by the city, and they make no reference to the service pipes through which the lamps were to be supplied with gas. Under the authority of the ordinance quoted, the superintendent, on behalf of the city, contracted with the American Lighting Company for the lighting, extinguishing, and cleaning of the lamps, and the equipment, maintenance, painting, and repair of all the "lamp posts, lanterns, equipment, and property of the city." It therefore appears that the city neither assumed for itself nor undertook to delegate to the contractor, just mentioned, the duty of keeping in order the connecting

pipes, but that duty was left, where it properly belonged, with the company that installed them for the transmission of the gas which it had contracted to deliver to the lamps. *Blondell v. Consolidated Gas Co.* 89 Md. 748, 46 L.R.A. 187, 43 Atl. 817.

The questions we have considered were raised upon exceptions to the granting of the plaintiffs' second prayer, and to the refusal of the prayer offered by the defendant for the withdrawal of the case from the jury. These latter prayers were predicated upon theories which we have discussed and disapproved. The second prayer of the plaintiffs was objected to on the ground, in addition to the contentions we have reviewed, that it permitted the jury to render a verdict against the defendant if they should find that, by reason of its failure to use due care, the gas supplied by the defendant "leaked or escaped from its pipes, or from pipes which, in the operation of its business, it used and assumed the duty of repairing," to the injury of the plaintiffs. It is urged that the alternative we have italicized in this instruction is not in accordance with the declarations, which charge that the gas company was negligent in failing to repair its pipes. We do not consider this objection tenable. The declarations are, in our opinion, sufficiently broad to cover both the theory of ownership of the pipes by the company, and the theory of its assumption of their control and repair, as the pipes which the company assumed the duty of repairing were part of its system for distributing its product, and were "its" pipes for all the intents and purposes of its liability in these suits.

The rulings of the court below accord with the views we have expressed, and the judgments appealed from will be affirmed.

Judgments affirmed, with costs.

him, the riser had been connected with a new service pipe, laid deeper in the ground. *Pulaski Gaslight Co. v. McClintock*, — Ark. —, post, 825, 134 S. W. 1189.

A house owner is not, because he leaves a gas heater in his house lighted during the night, guilty of negligence as a matter of law, so as to preclude him from recovery from the gas company for the destruction of his house by a fire which was started by the overheated gas stove, as a result of the company's failure to regulate the pressure in its pipes. *Citizens' Gas & Oil Min. Co. v. Whipple*, 32 Ind. App. 203, 69 N. E. 557.

But a gas company which maintains an excessive pressure in pipes by which it furnishes gas for a heating stove cannot be held liable for the burning of a building ignited by excessive heat in the stove, where the proximate cause of the fire was

the improper adjustment of a valve on the stove. *Westfield Gas & Mill Co. v. Hinshaw*, 22 Ind. App. 499, 53 N. E. 1069.

So, neither the negligence of the gas company nor the absence of negligence of the plaintiff, which will justify a recovery from the former of damages for a fire caused by an overheated gas burner, is shown by a complaint which alleged that the plaintiff had control of all gas appliances within her home, with the exception of the mixer, which was a so-called No. 7, which the defendant, over her protest, had placed in the house in substitution for a No. 5, but did not show that the defendant was bound to furnish such a mixer as the consumer wished, or that the fire might not have occurred with either mixer, and which alleged that a valve was placed in the pipe to regulate the flow of gas, which otherwise depended entirely upon the pressure, which

was regulated by the company, and that the "valve was used to turn off and put on the gas," and that "she had carefully adjusted the value to suit the pressure before her absence." *Ibach v. Huntington Light & Fuel Co.* 23 Ind. App. 281, 55 N. E. 240.

4. Searching for leak with open light.

See also *King v. Consolidated Gas Co.* supra, II. b.

The occupant of an apartment in a building, who detects the odor of gas therein, will not be held a trespasser in going to an unoccupied apartment with a light, to find where the gas is escaping, so as to preclude his recovery for injuries caused by an explosion of the gas, upon the ground of the gas company's negligence. *People's Gaslight & Coke Co. v. Amphlett*, 93 Ill. App. 194.

Negligence of a property owner or those for whose acts he is responsible, in looking with a lighted match for a leak in gas pipes, will preclude his recovering from the gas company for injuries to his property, caused by a resulting explosion, notwithstanding the company's negligent failure, after notice of the leak, to repair the break or cut off the gas. *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547.

But it is not *per se* negligence to search with a lighted match for the place from which gas is escaping. *Baudler v. People's Gaslight & Coke Co.* 108 Ill. App. 187.

Whether it is negligence to do so is a question for the jury. *Pine Bluff Water & Light Co. v. Schneider*, supra.

So, a gas company cannot defeat its liability for injury to one, caused by the explosion of gas in a house which it supplied, after its negligent failure to shut off the supply after having been notified to do so and of the danger therefrom, upon the theory that the explosion was caused by the act of the house owner in lighting a match while searching for the leak, and that this constituted negligence which was the proximate cause of the injury. *Memphis Consol. Gas & Electric Co. v. Creighton*, — C. C. A. —, 183 Fed. 552.

And one is not, as a matter of law, guilty of contributory negligence in searching with a lighted taper for a gas leak on his premises, where he did so after observing that such was the manner adopted by the defendant's servants in searching, after turning on the gas, for a leak which they knew to exist by reason of the rapid operation of the meter, and especially where, after they made such search, they assured him that everything was all right. *Plonk v. Jessop*, 178 Pa. 71, 35 Atl. 851.

And, where one searched with a lighted match for a gas leak in his cellar containing five open windows and an open door, and in which an open gaslight was burning at the time, and expert plumbers testify that such is a proper manner to search for gas leaks, he may be found free 32 L.R.A. (N.S.)

from the contributory negligence which will preclude a recovery against the gas company for damages caused by the explosion of gas which leaked from its gas main in the street, and found its way into the cellar. *Stoner v. Pennsylvania Fuel Supply Co.* 40 Pa. Super. Ct. 599.

So, one who goes into a room in which there is an open window, for the purpose of searching for a leak in gas pipes with a lighted match, may be found free from the contributory negligence which will preclude a recovery by him for injuries received by an explosion, upon the ground of the negligence of the gas company in allowing the gas to escape. *People's Gaslight & Coke Co. v. Amphlett*, supra.

And no inference of contributory negligence which will preclude a householder from recovery for injuries caused by the explosion of gas arises from the fact that he lighted a gas jet in the house with knowledge that there was probably a leak, where he had, because of the odor of gas in the house, notified the gas company, whose inspector had given assurance that there was no leak. *Anderson v. Standard Gaslight Co.* 17 Misc. 625, 40 N. Y. Supp. 671.

Carrying a lighted lamp into, or igniting matches in, a cellar filled with gas, which afterwards explodes, cannot be pronounced contributory negligence as a matter of law, so as to defeat a recovery for the injury resulting from the explosion, unless it appears affirmatively and without dispute that such act caused the explosion. *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 31 L.R.A. 785, 33 Atl. 423.

Whether or not the act of a boy eighteen years old in searching for a leak in a gas pipe with a lighted candle is negligence which will preclude a recovery from the gas company for his death, caused by an explosion of the gas, is a question for the jury, to be considered in the light of all of the circumstances of the case. *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L.R.A. 653, 42 N. E. 202. L. A. W.

ARKANSAS SUPREME COURT.

PULASKI GAS LIGHT COMPANY,

Appt.,
v.

MARY J. MCCLINTOCK, Admr., etc., of

James McClintock, Deceased.

(— Ark. —, 134 S. W. 1189.)

Appeal — treating pleadings as amended.

1. Where evidence is admitted without ob-

Note. — The question of liability for negligence in escape or explosion of gas is the subject of a note appended to *Consolidated Gas Co. v. Connor*, ante, —.

jection to support a ground of negligence not charged in the complaint in an action to recover for wrongful death, and the cause is tried on that issue, the court on appeal will treat the pleadings as amended to conform to the proof.

Proximate cause — asphyxiation — breaking gas pipe — substitution of new connection without notice.

2. The negligence of a gas company in using the old riser designed to carry the gas from the pipe attached to the street main to the meter in a house where the use of gas has long been discontinued and the meter removed, and the flow of gas shut off by the meter cock, when running a new connecting pipe without request from, or notice to, the property owner, to conform to a changed street grade, and leaving the old pipe cut off, dead, and partly exposed, and not the act of the property owner in disconnecting the riser to enable him to pull out the dead pipe, may be found to be the proximate cause of his death by asphyxiation by gas rushing out of the broken connection.

Gas — negligence — secret changes in pipes.

3. A gas company is negligent in running without request from, or notice to, the occupants of the property, a new service pipe from its main to a house in which the use of gas has long been discontinued, and from which the meter has been removed, leaving the old pipe cut, and partly exposed by a change of street grade, and apparently dead, and making underground connection with the riser leading to the meter cock, the position of which is undisturbed, thereby indicating that it is still a part of the dead pipe, and that no gas reaches the meter cock.

Trial — jury — negligence in disconnecting gas pipe.

4. The jury must determine whether or not a property owner is negligent in disconnecting the riser leading from the pipe conveying gas from a street main to a house in which the use of gas has long been discontinued, where he is attempting to remove from the premises the old service pipe, which has been cut and partly exposed because of a change in street grade, and is apparently dead, and is asphyxiated by gas because, unknown to him, the riser had been connected with a new service pipe laid deeper in the ground.

Gas — inhalation — death of consumer — liability of company.

5. That death was caused by inhalation of gas by one disconnecting service pipes will not relieve from liability for his death a gas company which had negligently left them in a condition indicating that they were dead, when they in fact conveyed gas, unless it was done voluntarily.

Appeal — remarks of counsel — inferences from record.

6. A case will not be reversed because of remarks of counsel in argument as to the effect of instructions which had been given

by the court, if they are no more than correct inferences to be drawn from the record.

Damages — death of healthy man.

7. Ten thousand dollars is not excessive to allow for the negligent killing of a strong, healthy man with a life expectancy of twenty-two years, who was earning \$90 per month, which he contributed to the support of his family, he being of good habits, kind, and affectionate, and taking a great interest in the training of his children.

(January 30, 1911.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. E. W. Kimball, J. W. House, M. House, and J. W. House, Jr., for appellant:

If McClintock, by his own hand, disconnected the riser and caused the gas to escape from the end of the service pipe, which caused his death, he was guilty of contributory negligence, and the plaintiff cannot recover.

McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Mahogany v. Ward, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Bartlett v. Boston Gaslight Co. 117 Mass. 533, 19 Am. Rep. 421; Smith v. Pawtucket Gas Co. 24 R. I. 292, 96 Am. St. Rep. 713, 52 Atl. 1078.

The law imposed only ordinary care on the gas company in the construction and the repair of its pipes, and if the gas did not escape by any act of the defendant, but through the act of an independent agent, it was not responsible.

McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; State use of Brady v. Consolidated Gas Co. 85 Md. 637, 37 Atl. 263; Lanigan v. New York Gaslight Co. 71 N. Y. 33; Creel v. Charleston Natural Gas Co. 51 W. Va. 129, 90 Am. St. Rep. 773, 41 S. E. 174; Cochran v. Philadelphia & R. Terminal R. Co. 184 Pa. 565, 39 Atl. 296; Schwartz v. Shull, 45 W. Va. 405, 31 S. E. 914; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233; Lebanon Light, Heat & P. Co. v. Leap, 139 Ind. 443, 29 L.R.A. 342, 39 N. E. 57; Triple-State Natural Gas & Oil Co. v. Wellman, 114 Ky. 79, 70 S. W. 49, 1 A. & E. Ann. Cas. 64; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547.

A person who voluntarily, and under no immediate necessity for the preservation of life or property, exposes himself to danger, cannot recover against another, even though the latter may have been guilty of negligence.

Mandel v. Wheeler, 59 Ill. App. 459; Chicago & N. W. R. Co. v. Holdon, 66 Ill. App. 201; Illinois C. R. Co. v. Oberhoefer, 76 Ill. App. 672; United States Exp. Co. v. McCluskey, 77 Ill. App. 56; Chicago v. Richardson, 75 Ill. App. 198; Illinois C. R. Co. v. James, 67 Ill. App. 649; Siegel, C. & Co. v. Becker, 83 Ill. App. 600; Rockford Gaslight & Coke Co. v. Ernst, 68 Ill. App. 300; King v. Consolidated Gas Co. 90 App. Div. 166, 85 N. Y. Supp. 728; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233; Bartlett v. Boston Gaslight Co. 117 Mass. 533, 19 Am. Rep. 421; McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Lucas v. New Bedford & T. R. Co. 66 Am. Dec. 406, and note 409, 6 Gray, 64; Martin v. Simpson, 6 Allen, 105; Morgan v. Cox, 66 Am. Dec. 623 and note 627, 22 Mo. 373.

If the leak occurred without fault of the gas company, then it would not be liable until it was notified, and a reasonable time elapsed after such notice.

Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Rockford Gaslight & Coke Co. v. Ernst, 68 Ill. App. 300; Emerson v. Lowell Gaslight Co. 3 Allen, 410; Hunt v. Lowell Gaslight Co. 1 Allen, 343; Martin v. Simpson, 6 Allen, 105; Steele v. Burkhardt, 104 Mass. 62, 6 Am. Rep. 191; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 236; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547.

It was never in the contemplation of an intelligent person that the pipe would be disconnected from the riser and a person thereby suffocated.

Barton v. Pepin County Agri. Soc. 83 Wis. 19, 52 N. W. 1129; Washington v. Baltimore & O. R. Co. 17 W. Va. 190; Burton v. Pinkerton, L. R. 2 Exch. 340, 36 L. J. Exch. N. S. 137, 16 L. T. N. S. 419, 15 Week. Rep. 1139; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205.

Messrs. Mehaffy & Williams and Downie, Rouse, & Streepey, for appellee:

A gas company must use a degree of care commensurate to the danger which it is its duty to avoid.

Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547; Chisholm v. Atlanta Gaslight Co. 57 Ga. 29; Koelsch v. Philadelphia Co. 152 32 L.R.A. (N.S.)

Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522.

Appellant's negligence was the proximate cause of the injury.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 476, 24 L. ed. 259; St. Louis, I. M. & S. R. Co. v. Bragg, 60 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; Foster v. Chicago, R. I. & P. R. Co. 127 Iowa, 84, 102 N. W. 422, 4 A. & E. Ann. Cas. 150; Baltimore & O. S. W. R. Co. v. Slaughter, 167 Ind. 330, 7 L.R.A. (N.S.) 597, 119 Am. St. Rep. 503, 79 N. E. 186; Huntington Light & Fuel Co. v. Beaver, 37 Ind. App. 4, 73 N. E. 1002; Southwestern Teleg. & Teleph. Co. v. Beatty, 63 Ark. 81, 37 S. W. 570; City Electric Street R. Co. v. Conery, 61 Ark. 381, 31 L.R.A. 570, 54 Am. St. Rep. 262, 33 S. W. 426.

Where the danger is not so obvious or apparent that a person should have seen it in the exercise of ordinary care, failure to discover it is not negligence.

Ernst v. Hudson River R. Co. 35 N. Y. 28, 90 Am. Dec. 761; Fero v. Buffalo & State Line R. Co. 22 N. Y. 215, 78 Am. Dec. 178; Baudler v. People's Gaslight & Coke Co. 108 Ill. App. 187; Consolidated Gas Co. v. Crocker, 82 Md. 118, 31 L.R.A. 785, 33 Atl. 423; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547; Chisholm v. Atlanta Gaslight Co. 57 Ga. 29.

Kirby, J., delivered the opinion of the court:

This was an action by appellee for damages for the wrongful death of James McClintock, alleged to have been caused by the negligence of appellant.

The complaint states: "That plaintiff's intestate, James McClintock, for several years prior to and until the 17th day of March, 1909, resided in a house and lot on West Seventeenth street, which had been his property and his residence continuously. That on the 17th day of March, 1909, plaintiff's intestate was engaged in some work on his premises under his residence, and was suffocated and died because of the escape of illuminating gas from the mains of the defendant, negligently permitting said gas to escape; and plaintiff's intestate's death was due to such negligent act of the defendant. . . . That said plaintiff and her children are damaged by the negligent act of the defendant in the sum of fifteen thousand (\$15,000) dollars. That plaintiff's intestate suffered great physical pain and mental anguish from his injuries until his death, and that his estate was damaged thereby in the sum of five thousand (\$5,000) dollars." To this complaint the appellant filed an answer denying each and

every allegation in the complaint, and afterward the appellee filed an amendment to her complaint, which is as follows: "Comes the plaintiff by leave of the court, and files this amendment to her original complaint herein, and states that the defendant negligently failed to install a stop box on a level with the sidewalk, and just immediately next and inside the curb line, when it laid its service pipes on plaintiff's premises, as it was required to do by ordinance No. 1020 of the city of Little Rock, Campbell & Stevenson's Digest of Ordinances of City of Little Rock, Arkansas, on account of which negligence in failing to install a stop box, plaintiff's intestate was killed." Appellant denied every material allegation of the complaint, that James McClintock's death was due to any negligent act on its part, and alleged "that, if he was suffocated by gas, it was because of his own carelessness and negligence in handling the pipes and fixtures of the defendant company, and such carelessness and negligence upon his part directly and proximately contributed to his death, and for which this defendant company is in no way responsible."

The testimony tended to show that James McClintock was asphyxiated and killed by gas escaping from the 1-inch service pipe from appellant's mains, which he disconnected under the front porch of his residence by unscrewing the "riser," on the morning of March 17, 1908, between 7 and 8 o'clock. He had been engaged in removing an old service gas pipe from his premises, which was cut off at the curb line and left in the ground by the gas company when they lowered their mains, upon the grade of the street being cut down in 1905, and when they put in a new service pipe from the main, deeper in the ground than the old and at right angles to the main, and within about a foot of and parallel to the old pipe, and connected it with the same riser under the porch that had connected the old service pipe with the meter and the house. The end of this old pipe stuck out of the ground 2 or 3 inches over the curb line, and the sidewalk was cut down to grade and left it exposed across the sidewalk and an obstruction, and McClintock then unscrewed and broke and pulled up this old pipe, as the ground showed, too near the edge of the porch, under which the riser stood. The porch was about 20 inches high, and he dug a hole with a file about a foot in circumference around the riser, about 8 inches deep, and to within about 2 inches of where it screwed into the elbow on the end of the service pipe. He took a pipe wrench and turned it, and it unscrewed at the elbow at the bottom of

the hole, although there were three other places on it between the wrench and the elbow where it could have been unscrewed. He was found dead, under the porch about to his hips, lying on his belly, stretched out with both hands in front of him in line, as if he tried to shove and could not, as a witness says, with his face pretty near right over the pipe from which the gas was spurting out. The pipe wrench was lying on his left and the disconnected riser or "goose neck," as some witnesses call it, to his right, and the file was in the hole. The gas was first installed in the house in 1899, while deceased lived there with his sister. The 1-inch service pipe was laid from the main in the street in front at right angles with it, under the ground extending under the front porch about 3 feet, where it connected with the riser or upright piece of pipe, upon the top of which was a lead pipe goose neck for connecting the meter and a meter cock to turn on and shut off the gas when the service was discontinued. The gas service in the house had long been discontinued and the meter removed, but when or by whose direction the testimony does not show, and the gas was shut off by the meter cock on the riser near the top of it, leaving the gas in the main free access to the service pipe and the riser, to where the meter cock stopped it. The premises were occupied by a tenant from 1903 to 1907, in the fall, when McClintock and his family moved in, and no gas had been used in the house since 1903. In 1905 the grade of the street was lowered, and appellant's mains, and a new service pipe was put into the McClintock house without any request from or notice to him, and the old one disconnected and left in the ground, as already stated. Deceased had been married about six years, and lived in Little Rock in 1905, and went to Louisiana in 1906, and with his wife first moved into this house in the fall of 1907. There was no testimony tending to show that he had any knowledge of the fact that a new service pipe had been put in, or that the riser, which was the same size as the old pipe and smaller than the new, was connected with a live service pipe other than the riser itself, as it stood there.

The ordinances of the city did not require the gas to be installed on the premises with a stop box and service cock at the curb, to cut off the gas when the service was discontinued, and it was shown that the meter cock on the riser cut it off as effectually and safely, so far as the escape of gas was concerned, as the stop box would have done. No gas escaped; nor could any have escaped but for the action

of deceased in unscrewing the riser, which he could not have done without the aid of a pipe wrench. There was conflicting testimony as to whether death could be produced by asphyxiation from gas escaping in the open air, some of the witnesses saying it was unheard of; and also as to whether death caused by asphyxiation by suddenly inhaling a large volume of illuminating gas would be so speedy as to be without pain and suffering. The court gave seven instructions as requested by appellee, and six of the twenty-three requested by appellant, amending two of them by inserting the word "voluntarily."

Appellant asked the court to instruct a verdict for defendant company, which he refused to do, and of his own motion did instruct the jury to return a verdict for defendant upon the second count of the complaint, which asked damages for physical pain and mental anguish suffered by deceased.

Objection was made to some remarks of Hon. J. E. Williams, of counsel for appellee, in his closing argument to the jury, part of which were withdrawn, and the jury instructed to disregard them, and to the following, which were made over appellant's objection: "Answering the argument of the counsel for the defendant, that the deceased was guilty of contributory negligence in remaining under the porch and trying to stop the flow of gas after he was aware of the escaping gas: This question cannot be considered as showing or tending to show any contributory negligence upon the part of the deceased, because the court has instructed you as a matter of law that there could be no recovery for pain and suffering, and has directed a verdict for the defendant on that ground, that the deceased's death was instantaneous and without any conscious suffering, and, if he died instantaneously, was killed immediately by the escaping gas, he could not be guilty of contributory negligence in remaining there and fighting the gas which was killing him,"—counsel insisting that this phase of the question of contributory negligence had practically been concluded by the court's holding as a matter of law, under the evidence, the deceased's death was instantaneous.

The jury returned a verdict for \$10,000 damages for the widow and next of kin, and appellant appealed.

The complaint alleged that appellant was negligent in permitting the gas to escape, and in failing to install a stop box at the curb line and cut it off there, as required by the ordinances of the city of Little Rock. Appellant strongly insists here that, since no other negligence is alleged, and the

proof is unquestioned that the gas could not have escaped and caused injury but for the action of the deceased in disconnecting the riser and releasing it, and also that no ordinance required the installation of a stop box, the court erred in refusing to give the peremptory instruction as requested. But evidence was introduced without objection, directed to the issue of negligence on the part of appellant in putting in gas service with a new pipe entirely underground, without request from or notice to deceased, and confining the gas with the old riser and meter cock that had been connected with the old pipe at about the same place under the porch, instead of cutting it off with a stop box at the curb, and leaving the old disconnected service pipe in the ground with one end exposed at the curb line, showing it was dead and not connected with the main, and the other still apparently connected with the riser as it had been; and the court below so treated the issue as thus joined on the proof, and the complaint will be treated here as amended to conform to the proof. *Roach v. Richardson*, 84 Ark. 41, 104 S. W. 538.

It is next contended that appellant's conduct, if negligent, was not the proximate cause of the injury, and, third, that the injury was produced by deceased's contributory negligence in disconnecting the riser. True it is that the gas could not have escaped and killed him, if he had not unscrewed the riser. The degree of care required of persons engaged in the manufacture and distribution of gas to guard against injury to persons and property was defined in *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547, where this court said: "The company must use a degree of care commensurate to the danger which it is its duty to avoid. If it fails to exercise this degree of care, and injury results from such negligence, the company is liable, if the person injured is free from fault contributing to the injury,"—citing authorities. See also *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522.

Appellant installed gas in McClintock's house in the usual way, by placing a 1-inch service pipe underground from its main in the street in front, and at right angles with the main, to about 3 feet under the front porch, where it connected with the riser, near the top of which was the meter cock and the meter, which connected with the pipes in the house. Deceased was living there with his sister at the time. The gas service was discontinued, the meter removed, and the gas shut off at the meter

cock, but when or by whose direction it does not appear. There was no gas service in the house during the time it was occupied by Prof. Rust, a tenant, from 1903 to 1907, in the fall, when McClintock and his wife moved back from Louisiana and first moved in, nor thereafter. The grade of the street was cut down, and the gas company lowered its mains in 1905, and, without request from or notice to McClintock, installed a new service pipe, connected with the main and placed deeper in the ground than the old, and near and parallel to it connecting it with the riser that had been connected with the old pipe at about the same place under the porch, leaving the old disconnected service pipe in the ground with one end exposed at the curb line, showing that it was dead and not connected with the main, and the other apparently still connected with the riser as it had been.

Here was a deceptive and misleading condition created by appellant entirely different from that existing when deceased moved from the premises; and in cutting his sidewalk to grade, the old disconnected service pipe was exposed, and it became necessary or desirable to remove it. This he set about doing the morning of his death, and unscrewed, broke off, and pulled up this pipe to near where it went under the porch, on a line to the riser with which it had been connected when he moved away. He then crawled under the porch, which was about 18 inches high and inclosed on three sides, and unscrewed the riser, that the remainder of the old pipe might the more easily be removed. He knew that there was no gas in the old pipe, that none had been used in the house since 1903, that the riser had been connected with this pipe when he went away, and, even if he be held to know that the street had been graded down and the gas mains necessarily lowered,—which we by no means decide,—he knew that he had not since ordered nor consented to the service being again extended to his house, or had any notice that it was done. There was nothing whatever to indicate that this riser was connected with a live service pipe, as it stood there where it had seven years before been connected, and still appeared to be, with the old service pipe now dead. He dug about and unscrewed it, and a stream of gas from an inch pipe shot up in his face, overcame, asphyxiated, and paralyzed him; that he fell with his face over the hole he had dug, from which the gas was escaping, and died. What was the proximate cause of the injury?

This is not a question of science or knowledge, and is a question ordinarily for the jury, to be determined as a fact from the particular situation, in view of the

facts and circumstances surrounding it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 476, 24 L. ed. 259; *Waters-Pierce Oil Co. v. Deselma*, 212 U. S. 177, 53 L. ed. 462, 29 Sup. Ct. Rep. 270. "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances." *Milwaukee & St. P. R. Co. v. Kellogg*, supra.

Our court said in *Gage v. Harvey*, 66 Ark. 68, 43 L.R.A. 143, 74 Am. St. Rep. 70, 48 S. W. 898: "In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act,—such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act." And in *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226: "It is a fundamental rule of law that, to recover damages on account of the unintentional negligence of another, it must appear that the injury was the natural and probable consequences thereof, and that it ought to have been foreseen, in the light of the attending circumstances."

It is not necessary that the particular injury should have been foreseen. In *Foster v. Chicago, R. I. & P. R. Co.* 127 Iowa, 84, 102 N. W. 422, 4 A. & E. Ann. Cas. 150, the court said: "Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents, as they occur, are seldom foreshadowed; otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

In *Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 7 L.R.A.(N.S.) 597, 119 Am. St. Rep. 503, 79 N. E. 186, the court held: "To entitle one to a trial of the question of another's negligence which

resulted in injury, it is not necessary that the effect of the act or omission complained of would in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner."

Here the negligence of appellant consisted in cutting off from the main the old service pipe, and leaving it there exposed, still apparently connected with the riser, thus showing the gas was shut off from the premises, and installing the service again, with another pipe deeper in the ground, and, instead of cutting it off at the curb, confining the gas with the old riser and meter cock, which still appeared to be connected with the old dead service pipe he was removing, long after the use of gas in the house had been discontinued, and without the knowledge or consent of deceased or anything to put him on notice that gas was on the premises. "There was no intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury, and such negligence was the proximate cause of it." *Milwaukee & St. P. R. Co. v. Kellogg*, supra; *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9; *Waters-Pierce Oil Co. v. Deselms*, supra. Deceased had the right to remove this apparently disconnected and dead gas pipe from his premises, and if he exercised as much care in doing so as an ordinarily prudent man would have done under the circumstances, he was not guilty of contributory negligence which would bar his recovery. This was a question that was fairly submitted to the jury, and within their province, and upon which they have decided in appellee's favor; and there is ample evidence to sustain their verdict. The issues in the whole case were fairly submitted on proper instructions.

There was no error committed in inserting the word "voluntarily" in appellant's two requested instructions before giving them, as otherwise they would have told the jury to find for the defendant, if deceased disconnected the riser and inhaled the gas, without regard to his ability to keep from inhaling it after the disconnection was made.

Some of the remarks of Hon. J. E. Williams, of counsel for appellee, in his closing argument, to which objection was made, were withdrawn, and the jury admonished to disregard them, and we cannot see that any prejudice could have resulted. As to other remarks which were not withdrawn, in which he argued to the jury that, since the court had instructed a verdict for de-

endant on the second count of the complaint, in which damages for pain and suffering were asked, because death had been instantaneous and without suffering, there could no longer be any question of the contributory negligence of deceased in remaining under the house and attempting to connect the gas, according to appellant's theory of the injury, such remarks were not improper, nor more than the correct inference to be drawn from such instruction.

Was the verdict excessive? The evidence shows that deceased was a strong, healthy man, with a life expectancy of twenty-two years; that he was industrious and earned about \$90 per month, all of which he contributed to the support of his family, except what he spent for clothing; that his habits were good; that he was a kind and affectionate father, and took great interest in the training of his two little children. Under these facts the verdict of \$10,000 was not excessive. *St. Louis, I. M. & S. R. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678; *St. Louis, I. M. & S. R. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65, 72 S. W. 893; *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *St. Louis, I. M. & S. R. Co. v. Hitt*, 76 Ark. 227, 88 S. W. 908, 990.

Finding no reversible error in this cause, the judgment is affirmed.

Petition for rehearing denied February 27, 1911.

KENTUCKY COURT OF APPEALS.

ALLIE COX, Appt.,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(— Ky. —, 134 S. W. 911.)

Railroad crossing — standing engine — duty to move.

1. Those in charge of a railroad engine standing close to a street crossing should, upon being notified that its presence renders the crossing dangerous or unsafe for travel, move the engine as far from the crossing as is reasonably necessary to permit the free use of it for travel, and as is compatible with safety to the train and persons on or connected with it.

Note.—As to liability for discharging steam from locomotives near street or highway so as to frighten horses, see note to *Ft. Wayne Cooperage Co. v. Page*, 23 L.R.A. (N.S.) 946.

As to liability of railroad company for frightening horse by escape of steam from engine standing on highway crossing, see note to *Weller v. Lehigh Valley R. Co.* 24 L.R.A. (N.S.) 1202.

Same — preventing noises — duty.

2. Those in charge of an engine standing close to a public crossing must prevent unusual or unnecessary noises to be made by the engine, which may have a tendency to frighten horses on the highway, when they are not requisite to the safety of persons or property on the train.

Same — contributory negligence.

3. One who attempts to drive across a railroad track knowing that an engine stands near the crossing making unusual noises from escaping steam, without notifying those in charge of the engine to stop the noise, is guilty of negligence which will prevent holding the railroad company liable for injuries caused by the fright of his horse in so doing.

(February 28, 1911.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Marshall County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Affirmed.

The facts are stated in the opinion.

Messrs. Miller & Miller and John G. Lovett for appellant.

Messrs. Blewett Lee, C. L. Sivley, and Trabue, Doolan, & Cox, with Messrs Oliver & Oliver, for appellee:

A railroad company has the right to make the usual and reasonably necessary noise caused by the escape of steam, incident to the operation of its trains, and is not liable to persons injured by horses being frightened thereby on the highways or crossings.

Willson v. Louisville & N. R. Co. 146 Ala. 285, 8 L.R.A.(N.S.) 987, 40 So. 941; Ohio Valley R. Co. v. Young, 19 Ky. L. Rep. 158, 39 S. W. 415; Omaha & R. Valley R. Co. v. Clarke, 39 Neb. 65, 23 L.R.A. 507, 57 N. W. 545; Hahn v. Southern P. R. Co. 51 Cal 605; Philadelphia, W. & B. R. Co. v. Burkhardt, 83 Md. 516, 34 Atl. 1010; Duvall v. Baltimore & O. R. Co. 73 Md. 516, 21 Atl. 496; Richmond & D. R. Co. v. Yeamans, 90 Va. 752, 19 S. E. 787; Louisville, N. A. & C. R. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774; Newport News & M. Valley Co. v. Howard, 14 Ky. L. Rep. 476; Louisville & N. R. Co. v. Penrod, 108 Ky. 172, 56 S. W. 1, 24 Ky. L. Rep. 50, 66 S. W. 1013; Louisville & N. R. Co. v. Pool, 20 Ky. L. Rep. 1738, 49 S. W. 1060; Louisville & N. R. Co. v. Smith, 107 Ky. 178, 53 S. W. 269; Cincinnati, N. O. & T. P. R. Co. v. Champ, 31 Ky. L. Rep. 1054, 104 S. W. 988; Louisville & N. R. Co. v. Sights, 121 Ky. 203, 89 S. W. 132.

Carroll, J., delivered the opinion of the court:

In July, 1909, the appellant, Mrs. Cox, 32 L.R.A.(N.S.)

while driving in a buggy on a public highway, discovered a freight train standing on the crossing over which she desired to pass. Upon making this discovery, she stopped her horse some 300 feet from the railroad crossing, and, getting out of the buggy, walked down to the track for the purpose of getting the men in charge of the train to "cut it" or move it off the crossing, so she could go on her way. When she reached the train, she discovered on the other side of the cars a person not connected with the railroad, whom she knew, and asked him to tell the engineer to clear the crossing, and then went back to her buggy. When the crossing was cleared, Mrs. Cox got in her buggy, and when she drove down to the track her horse became frightened, and attempted to turn around, when he was caught by a person standing near by and led off the track. The buggy was not turned over, nor was Mrs. Cox thrown out of the buggy. But, claiming that her back was injured by the act of the horse in turning the buggy partly around, she brought suit against the company to recover damages, charging in her petition that her injuries were caused by the negligent conduct of the agents of the company in charge of the train, who, by their failure to use reasonable care, caused her horse to be frightened, with the result that she was injured as stated. In its answer, after traversing the material averments of the petition, the company pleaded that the appellant was guilty of contributory negligence in attempting to cross the track in front of the engine when she knew that steam and noise were escaping therefrom. A trial before a jury resulted in a verdict in favor of the railroad company, and a judgment was entered accordingly. The errors assigned for reversal are that the court misinstructed the jury.

The only witnesses on behalf of the appellant were herself and her husband. She testified:

I got in my buggy and drove towards the track. When I got near, the engine was making a good deal of noise, and I asked if they were ready for me to pass, and the boy on the engine signaled for me to pass, but the fireman did not get out of his seat. I drove a little way, and the steam frightened my horse, . . . and the engine was puffing and shrieking and puffing, and letting off steam it seemed to me at every possible place for steam to be let off.

Q. State what noise it was making when it stopped south of the crossing after it had backed over the crossing.

A. It was howling and shrieking in every place there is for steam to escape.

Q. You say you saw the train back down beyond the crossing?

A. Yes, sir.

Q. That engine was escaping steam at the time, was it not?

A. Yes, sir.

The husband of Mrs. Cox, who at the time in question was a farmer, but had several years before been a railroad engineer, was asked:

What is the proper method with railroad men, if you know, regarding the stopping of an engine at a crossing?

He answered:

An engine should not be allowed to escape steam that way. An engineer can prevent it if he will.

Q. Do you mean that an engine can be stopped without popping off?

A. Yes, sir; it can be done.

Q. Can it be done without putting cold water in it?

A. Well, that is the proper way to do it.

Q. Can he do it without reducing the pressure?

A. No, sir.

Q. When a train is to leave immediately, it is necessary to have steam up all the time?

A. Not to the extent that the engine will make unnecessary noise.

Q. Can you keep up the pressure without allowing it to pop off?

A. Well, when the pressure gets to a certain point, the safety valve will pop off.

The engineer testifies that he had a train of twenty-five cars, and had been on the side track only a few minutes when some person asked if he would have the crossing cleared, and in answer he signaled his fireman, who was also an engineer, to "back up," and thereupon the fireman backed the engine off of the crossing. He further testifies that the engine was popping off steam from the time he pulled in on the side track, and was only making the usual and necessary noises that an engine that has been pulling a heavy train will make when it is stopped; that there was no steam escaping except the popping off, but that could have been controlled and lessened if he or the person in charge of the engine had noticed that it would cause the horse to be frightened, but that he had no information of this kind until after the fright of the horse was discovered, and it was then too late to regulate the engine.

The fireman testified that some person called to him and told him to clear the crossing, and that he did not see Mrs. Cox or her horse at the time, or know who it was that

wanted to cross until after the horse became frightened; that, when signaled to clear the crossing, he backed the engine over it, and stopped about 58 feet from it, and that steam was escaping in the same manner from the engine and it was making the same amount of noise, from the time it stopped until appellant's horse became frightened; that, when he stopped the engine after clearing the crossing, he went over on his side of the cab, and then for the first time saw Mrs. Cox approaching the crossing from that side of the engine: that, when he first saw her, she was close to the track, and, observing that her horse was frightened, he stepped over to the engineer's side with the intention of putting on the injector to reduce the steam pressure, but, upon reflection, abandoned this purpose, because the injector would have caused more steam to escape for a moment, and would have frightened the horse more than did the steam already escaping. He also testified that, when he went over to the engineer's side, he at once looked out, and discovered some person had hold of the horse and he was under control.

From this evidence it appears: (1) That soon after Mrs. Cox got in her buggy for the purpose of driving across the track, and continuously until her horse became frightened, the engine was making the same quantity of noise and emitting the same amount of steam, and that Mrs. Cox, with full knowledge of this fact, left a place of safety and attempted to drive across the track without first requesting the persons in charge of the engine to remove it further from the crossing, or so adjust it as that it would not make so much noise or emit so much steam. (2) That the fright of her horse was not discovered by the persons in charge of the engine until it was too late to remedy or remove the causes that frightened the horse, and that immediately after the horse became frightened, he was caught and put under control. (3) That the noise and emission of steam was not unusual or unnecessary, but could have been lessened if the persons in charge of the engine had been apprised that it was necessary to do so.

But it is insisted that it was the duty of the persons in charge of the engine to have moved it a sufficient distance from the crossing to avoid frightening horses using the public road at or near where it crosses the railroad, or to have so regulated the engine as that it would not have made noises or let off steam in a manner calculated to frighten horses at the crossing. We do not think that a railroad company should be required to remove its engine further

from a crossing than is reasonably necessary to permit the free use of it for travel; but if an engine is standing close to a crossing, the train men, upon being notified that the presence of the engine renders the crossing dangerous or unsafe for travel, should remove the engine as far as can be done with safety to the train and the persons on or connected with it. The railroad has the right to use its tracks, and the public have the right to use the crossing, and each should act with due regard for the rights of the other. The train men should accommodate the traveler when it can be done with safety, and the traveler should respect the rights of the train men, and not attempt to subject them to unnecessary or unreasonable trouble or inconvenience. But when an engine is standing close to a point where a public road crosses a railroad, it is the duty of the persons in charge of the engine, when the safety of persons and property on the train does not require it, to prevent unusual or unnecessary noises to be made by the engine, whether they see or do not see a traveler with a horse on the public road approaching the crossing; or, if they do see one, without reference to whether his horse is frightened or not. If an engine is standing near a crossing that the public have the right to use, the presence of travelers on it must be anticipated; and if the engine is permitted by those in charge of it to make unusual or unnecessary noises, unless the safety of persons or property require it, and the horse of a traveler is frightened thereby and injury results, the company will be liable whether the persons in charge of the engine saw the traveler or not, or knew he wanted to cross, unless it be that the traveler is guilty of such contributory negligence as would defeat a recovery. On the other hand, when a traveler approaching a crossing near which an engine is standing, and before his horse becomes so much frightened as to cause accident or injury, sees and knows that it is making noises or letting off steam, although either or both may be unusual and unnecessary, he should not attempt to approach the engine or cross the track without notifying in some way the persons in charge of the train or engine that he desires to cross, and that his horse is liable to become frightened. If he does this, and the persons in charge of the engine can, with safety to persons and property, prevent the engine from making noises or letting off the steam that alarmed the traveler, and were calculated to frighten the horse, they should do so. But if they do not or cannot with safety do so, then the traveler must remain in his place of safety, or take the risk of attempting to cross. What we have thus said as to the reciprocal

duties and liabilities of the traveler and the train men is not intended to relieve the company from liability in blocking a crossing for an unreasonable length of time or in violation of the statute. If this is done, the traveler may have an action for the delay occasioned, and the commonwealth a prosecution, but a traveler must not venture into a known or obvious danger; if he does, he takes the risk.

Applying the principles laid down to this case, the appellant knew the engine was letting off steam and making noises when she left her place of safety; but, notwithstanding this fact, she attempted to cross. Her statement that she asked if they were ready for her to pass, and was signaled to do so, does not help her case, as she did not ask and was not responded to by any person connected with the train, and, in addition, her request was no notice that the engine would frighten her horse. The persons in charge of an engine are not required to keep a lookout on premises or roads adjacent to the track, for the purpose of discovering whether or not horses are being frightened by the train or engine, and are only under a duty to use precautions to prevent frightening a horse after they have discovered his fright. But in this case, if the train men had been keeping a lookout, they would have seen that the appellant's horse, in approaching the track, did not become frightened until he came within a few feet of the track upon which the engine was standing, and when it was too late to remove the cause of the fright. *Louisville & N. R. Co. v. Penrod*, 24 Ky. L. Rep. 50, 66 S. W. 1013, 1042; *Louisville & N. R. Co. v. Smith*, 107 Ky. 178, 53 S. W. 269; *Louisville & N. R. Co. v. McCandless*, 123 Ky. 121, 93 S. W. 1041; *Louisville & N. R. Co. v. Street*, 139 Ky. —, 129 S. W. 570.

The instructions the court gave do not in all particulars conform to the law as we have announced it, but any error in the instructions was not prejudicial to appellant because we are of the opinion, that her negligence in leaving her place of safety and in attempting to drive across the track was the proximate cause of the injury she complains of, and that the trial court should have given, as requested by counsel for the railroad company, a peremptory instruction to find for it.

The point is made that the train remained an unnecessary length of time on the crossing in violation of the statute, but there is no evidence whatever to support this contention; nor was a recovery sought on account of this alleged negligence.

Wherefore the judgment is affirmed.

MICHIGAN SUPREME COURT.

FRANZ C. KUHN, Attorney General, ex
rel. Guy W. Selby, Mayor, et al.,
v.

BRUCE J. MACDONALD.

(— Mich. —, 129 N. W. 1056.)

Officer — required qualification — constitutional.

Requiring an officer to be a resident of the municipality in which he is to be elected for three years to be eligible to the office is not a test within the meaning of a constitutional provision that no other oath, declaration, or test than a prescribed oath shall be required as a qualification for an office.

(February 24, 1911.)

QUO WARRANTO by the Attorney General on relation of the Mayor et al. of the City of Flint, to test the title of re-

Note. — Constitutional of statute making residence within the district a qualification of a public officer.

A statute providing that each member and officer of the police force shall be a citizen of the United States, and a "resident citizen for three years of the city in which he shall be appointed," is not invalid on the ground that it imposes disqualifications not imposed by the Constitution, where the constitutional qualification was that "no person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector." State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102. The court said in this case that if the framers of the Constitution had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the Constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. "The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable."

In the absence of general provision in a state Constitution respecting eligibility to public office, the legislature may prescribe reasonable qualifications, and a requirement that a person, to be eligible for a certain county office, shall be an elector and householder within the county for not less than four years before the election, is not immoderate or unreasonable. State ex rel. Williams v. Samuelson, 131 Wis. 499, 111 N. W. 712.

The designation in a state Constitution of the qualifications of certain officers named therein creates no implication that in all other cases no other qualifications shall be

spondent to the office of member of the charter commission of said city. Denied.

The facts are stated in the opinion.

Mr. Homer J. McBride, with Mr. Franz C. Kuhn, Attorney General, for relators:

The provision requiring each elector elected to the office to have a residence in the municipality of at least three years is a test not authorized by the Constitution.

Atty. Gen. v. Detroit, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60.

Messrs. Edward Cahill and Brennan, Cook, & Gundry, for respondent:

The legislature had the power to prescribe the qualification in question.

Cooley, Const. Lim. 6th ed. 748, note; Throop, Pub. Off. §§ 73, 74, 79, 80; Mechem, Pub. Off. § 99; State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 116; State ex rel. Thompson v. McAllister, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770; Barker v. Peo-

required than those of an elector, so as to make invalid the provisions of a city charter requiring a tax collector to have been an elector of the city and county for five years next preceding his election. "It may be admitted that the legislature can neither increase nor diminish the qualifications which the Constitution has prescribed for eligibility to any of the offices created by that instrument; but for all offices which the legislature may authorize or establish, either by virtue of express authority therefor in the Constitution itself, or by virtue of its general legislative authority, it may prescribe such qualifications as in its judgment will best accord with public policy, or subserve the interests of those affected thereby." Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

But a provision of a city charter that members of assembly of the common council, to be elected at large from the body of electors, should be residents of certain prescribed geographical districts, was held invalid in State ex rel. Childs v. Holman, 58 Minn. 219, 59 N. W. 1006, because obnoxious to that provision of the Constitution prescribing, as the sole qualification, that an elector "shall be eligible to any elective office . . . in the district wherein he shall have resided thirty days previous to such election."

So, a statute requiring residence in a city for five years as a qualification for membership upon a board of police and fire commissioners is invalid, in that it contravenes the constitutional provision against granting privileges or immunities to any citizen or class of citizens which shall not belong to all citizens upon the same terms. State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267.

W. A. S.

ple, 20 Johns. 461; Atty. Gen. v. Detroit, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887.

Stone, J., delivered the opinion of the court:

This proceeding in the nature of quo warranto was instituted by the mayor, Guy W. Selby, and Joshua C. Cole, George F. Caldwell, Frederick Behrendt, Theodore S. Chaplin, George H. Gordon, Henry McParland, George E. Norwood, William E. Sear, Frank T. Hall, Louis P. Church, John Willdinger, Jr., and Charles E. Wood, aldermen of the city of Flint, filing an information for the purpose of testing the title of Bruce J. MacDonald to the office of member of the charter commission of said city.

The question of general charter revision of the special charter of the city of Flint was submitted to the electors of said city under the provisions of act No. 279 of the Public Acts of Michigan for 1909, being an act entitled, "An Act to Provide for the Incorporation of Cities, and for Changing Their Boundaries," April 4, 1910, at the annual municipal election, and was carried by more than a majority of the electors present and voting thereon at such election, as shown by the returns canvassed by the common council of said city. Candidates were nominated for the offices of the members of charter commission at the September primary following, held Tuesday, September 6, 1910, and elected at the general November election, held Tuesday, November 8, 1910. There were nine persons elected, one elector from each of the six wards of the city, and three at large. All persons elected, previous to their election, had a residence of three years in the city. The members of the charter commission thus selected qualified and commenced the performance of their duties November 22, 1910.

There is no claim but that the provisions of act No. 279, aforesaid, have been complied with in respect to the method therein designated for the nomination and election of the members of the charter revision commission, and that said members have qualified and are performing duties thereunder.

Relators contend that the act under which the city of Flint decided to revise its charter, being act No. 279, aforesaid, is unconstitutional and invalid for the reason that § 18 of said act, among other things, provides that, to be eligible to the office of member of the charter commission, an elector must have a residence of at least three years in the municipality; that such provision prevents the electorate of the city of Flint from voting for whomsoever of the qualified electors they may desire for such office, in that no person not having a resi-

dence of three years in the city is entitled to hold the office or position, under the provisions of said act; that it adds a test not contained in and not authorized by the Constitution of the state, on account of which the act is unconstitutional and invalid. Section 18 of act No. 279 is as follows: "Sec. 18. Any city desiring to revise its charter shall do so in the following manner, unless otherwise provided by charter: When its legislative body shall, by a two-thirds vote of the members elect, declare for a general revision of the charter, when an initiatory petition shall be presented therefor as provided in § 25 of this act, the question of having a general charter revision shall be submitted to the electors for adoption or rejection at the next municipal election; in case the electors shall, by a majority vote, declare in favor of such revision, a charter commission shall be selected consisting of one elector from each ward, and three electors at large, having a residence of at least three years in the municipality; no city officer or employee, whether elected or appointed, shall be eligible to a place upon said commission; the names of all candidates who have been duly nominated as hereinafter provided shall be placed upon a separate ballot at the election designated to be held for the election of a charter commission, and without their party affiliations designated; the candidate having the greatest number of votes in each ward shall be declared elected; and the three candidates at large having the greatest number of votes cast in the city shall be declared elected; the nomination and election of the members of such commission, except as herein specified, shall be conducted as near as may be as now provided by law for the nomination and election of city and ward officers in the respective cities of this state."

The part of the Constitution claimed to have been violated is § 2 of article 16, which is as follows: "Sec. 2. Members of the legislature, and all officers, executive and judicial, except such officers as may be, by law, exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this state, and that I will faithfully discharge the duties of the office of according to the best of my ability.' No other oath, declaration, or test shall be required as a qualification for any office or public trust."

Conceding that the position of member of the charter commission created by said act is an office or public trust, we pass to

consider the question: Is the provision contained in act No. 279, requiring each elector elected to the office to have a residence in the municipality of at least three years, a "test" not authorized by the Constitution to be imposed as a qualification for any office or public trust?

Respondent and his associates have been elected, and they have qualified and are discharging the duties of their offices. It is not claimed that they do not possess the requisite qualifications for the office, or that any other persons have been elected in their stead. The claim is that a "test" has been applied in their selection, which is prohibited by the Constitution of this state, in that they are thereby required to be residents of the city for three years. In our opinion this is not a "test," as that word is used in the Constitution, but is rather a special qualification. *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887. Special qualifications have frequently been required by statute for certain offices. Prosecuting attorneys and circuit court commissioners must be members of the bar. *People ex rel. Hughes v. May*, 3 Mich. 598. Certain conditions may be attached to an office which are not "tests" within the meaning of the Constitution. For instance, by statute, sheriffs and county treasurers cannot hold their offices for more than two consecutive terms. Numerous statutes in this state prescribe residence in the city, township, or county as a qualification to the holding of offices in such municipalities. These in our opinion are not "tests" within the meaning of the Constitution.

In the case of *Barker v. People*, 20 Johns. at page 461, the court made use of the following language: "As to the oath of office prescribed by the sixth article, and the provision that no other oath, declaration, or test shall be required, it is contended that the word 'test' has a most extensive meaning, and prohibits the establishing of any other rule by which the capacity of a person to hold an office shall be determined than that defined, the oath of the person appointed or elected. I cannot accede to this. In my judgment the exclusion of any other oath, declaration, or test as a qualification for an office or public trust means only that no other oath of office shall be required. It was intended to abolish the oath of allegiance and abjuration or any political or religious test as a qualification. The provision that no other oath is to be required as a test imports nothing with respect to the other qualifications. In the case of a person elected a senator or a governor, the oath has no reference to the qualifications required, and they may be 32 L.R.A. (N.S.)

inquired into by some other tribunals. If an alien should be elected, he can well take the oath; but surely the question whether he could hold the office would be open to inquiry."

This office having been created by statute, and existing under the statute, and no claim being made that the respondents do not possess sufficient qualifications, it is urged that the case might be disposed of upon the ground that the relators are not in position to raise the question. It does not appear that any citizen otherwise qualified was a candidate for commissioner and was barred from having his name on the ticket by reason of the three years' residence provision.

In the case of an alleged intrusion upon an office, the court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it. *Vrooman v. Michie*, 69 Mich. 44, 36 N. W. 749; *People ex rel. Blomquist v. Nappa*, 80 Mich. 484, 45 N. W. 355; *Lamoreaux v. Ellis*, 89 Mich. 146, 50 N. W. 812.

But as we have considered this matter upon its merits, and as it is one of public interest, we will dispose of it upon its merits, and we hold that the statute in question does not impose any "other oath, declaration, or test" than that prescribed by the Constitution.

The relief prayed for will therefore be denied, and the information dismissed, and without costs.

MICHIGAN SUPREME COURT.

FRANK M. ROOT

v.

MINNIE M. ROOT.

(— Mich. —, 130 N. W. 194.)

Injunction — against business competition — cross bill — divorce.

1. A cross bill for divorce is proper in a suit by a man to enjoin his wife from competing in business with him, which is based on the theory that he is entitled to

Note. — Right of husband to prevent wife engaging in a separate business in competition with his own business.

A search has disclosed little authority upon the question under consideration.

In *Re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824, the court, in considering whether a married woman could enter into a contract of partnership with her husband under a statute giving full control to married women of all real and personal property owned by them at the time of their mar-

her society and services, and that her competing business is injurious to his own enterprises.

Divorce — dismissal of suit — condonation of grounds.

2. Prior acts of cruelty are condoned by the dismissal by a wife of a suit for divorce on that ground, and her resumption of marital relations, so that they cannot be considered in a subsequent petition for divorce.

Same — grounds — refusal to permit control of business.

3. The refusal of a man to permit his wife actively to control his business is no ground for granting her a divorce, although it results in bickerings and inability to live harmoniously together.

Injunction — against business competition by wife.

4. A man is entitled to prevent his wife from entering into business competition with him, where he is able and willing to support her.

(McAlvay, J., dissents in part.)

(March 13, 1911.)

CROSS APPEALS from a decree of the Circuit Court for Washtenaw County, dismissing a bill filed to enjoin defendant from transacting business in competition with complainant, and granting to defendant, upon her cross bill, a divorce with permanent alimony. Reversed.

Statement by Brooke, J.:

The parties to this cause are husband and wife, having been married in the year 1890. For ten years after the marriage they lived at various places; the husband being engaged a part of the time as a teacher and later as a piano salesman. In the year 1900 they located in the city of Ann Arbor, where, with a capital of about \$300, they opened a small store in which they handled pianos, sheet music, and musical merchandise. The business seems to have prospered from the start. Both husband and wife were untiring in their labors, and the success which crowned their efforts

seems to be attributable to both. In January, 1906, the wife filed a bill for divorce, in which she charged extreme cruelty. No personal violence was charged, and the allegations of cruelty were not very specific. Upon the hearing of the application for temporary alimony in that cause, the parties discussed the question of a settlement of their property interests. This conference resulted in a withdrawal by the wife of her bill of complaint and a renewal of the marital relation. The parties continued to live together as man and wife until January, 1909, when the wife again left her husband, and on February 1, 1909, she started a business in the city of Ann Arbor similar in character, and in opposition, to that of her husband. Thereupon he filed his bill of complaint in this cause, in which he averred his ability and willingness to properly support his wife, and prayed that she be enjoined from continuing against his will to prosecute the competitive business established by her. To this bill of complaint defendant filed an answer, admitting the establishment of the rival business, but averring that complainant had driven her from her home, and it became necessary for her to do something for her own support. She further filed a cross bill, in which she again charged complainant with extreme cruelty, and prayed for a divorce. Upon the hearing, she testified that her action in going into business upon her own account in competition with her husband was without his consent and against his strenuous protest. The trial court dismissed the bill of complaint, and granted to the defendant a divorce upon her cross bill, with permanent alimony in the sum of \$1,000, besides confirming in her the title to a parcel of real estate which had been partially paid for out of the proceeds of the husband's business. Both parties have appealed from the decree entered.

Mr. B. M. Thompson, with Mr. Frank A. Stivers, for complainant:

While a married woman may now engage

riage, or acquired by them during coverture, from any person other than their husbands, and also giving them full control of their earnings, remarked that she might engage in trade, either with or without her husband's consent; certainly with his consent.

The *dictum* in this case, that a married woman is competent to engage in trade without her husband's consent, is partially reconcilable with the decision in *Roor v. Roor*, on the ground that in the *Kinhead Case* the full control of her earnings was expressly given to the wife, by the statute involved in the case.

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The rule laid down in *Roor v. Roor*, to the effect that a married woman cannot conduct a business in competition with that of her husband against his protest, would appear, on the whole, to be sound, since it tends to eliminate an element well calculated to destroy the relations existing between husband and wife; and this is true not only in cases where, as in *Roor v. Roor*, the wife is brought into actual competition with her husband, but in instances where this element is not present, but the wife's attention is equally taken from the domestic matters of the home.

J. T. W.

in business, and be considered as having all the rights therein that are by law accorded to other persons, it is nevertheless a necessary prerequisite that she shall first have the consent of her husband before she may lawfully devote her time and services to such business.

Glover v. Alcott, 11 Mich. 470; Tillman v. Shackleton, 15 Mich. 447, 93 Am. Dec. 198; Mason v. Dunbar, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432; West v. Laraway, 28 Mich. 404; Slack v. Norton, 111 Mich. 213, 69 N. W. 497; Stackable v. Stackable, 65 Mich. 518, 32 N. W. 808; Barnes v. Moore, 86 Mich. 585, 49 N. W. 585; White v. Zane, 10 Mich. 335; Starkweather v. Smith, 6 Mich. 380; Boyle v. Saginaw, 124 Mich. 348, 82 N. W. 1057; Hirshfield v. Waldron, 83 Mich. 116, 47 N. W. 239; Meads v. Martin, 84 Mich. 306, 47 N. W. 583; Lacas v. Detroit City R. Co. 92 Mich. 412, 52 N. W. 745; Lammiman v. Detroit Citizens' Street R. Co. 112 Mich. 602, 71 N. W. 153; Lempke v. Felcher, 115 Mich. 37, 73 N. W. 17; Dowling v. Dowling, 116 Mich. 346, 74 N. W. 523.

Defendant was not entitled to a divorce.

Johnson v. Johnson, 49 Mich. 639, 14 N. W. 670; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; Rose v. Rose, 50 Mich. 92, 14 N. W. 711; Downey v. Downey, 135 Mich. 285, 97 N. W. 609; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Morrison v. Morrison, 64 Mich. 53, 30 N. W. 903; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Stafford v. Stafford, 53 Mich. 522, 19 N. W. 201.

Mr. M. J. Cavanaugh for defendant.

Brooke, J., delivered the opinion of the court:

We are met at the outset by this question: Can the defendant, by way of cross bill, ask for a divorce in a cause where the complainant, by his original bill, seeks injunctive relief only? In the early case of Andrews v. Kibbee, 12 Mich. 94, 83 Am. Dec. 766, Mr. Justice Campbell defined the purpose of a cross bill as follows: "A cross bill for purposes of relief is always designed for the purpose of enabling a defendant to avail himself of some defense which can only be made complete by granting him some affirmative relief against complainant or against some codefendant." In Hackley v. Mack, 60 Mich. 591, 27 N. W. 871, it was said: "A cross bill can be sustained only on matters growing out of the original bill, and embraced in it,"—citing authorities. See also Powers v. Hlibbard, 114 Mich. 533, 72 N. W. 339; Union Street R. Co. v. Saginaw, 115 Mich. 300, 73 N. W. 243; 16 Cyc. Law & Proc. p. 324. In the case here considered the husband

sets out in his bill of complaint the fact that defendant is his wife, and that as such he is entitled to her society and services. He further avers that her act in establishing a competitive business is injurious to his own enterprise, and is without his consent and against his protest. To this bill the wife answers, admitting the existence of the marriage, but by her cross bill she avers that she is entitled to a severance of the relation because of her husband's cruelty.

The husband's sole right to the injunctive relief prayed is predicated upon the existence of a contract which the wife by her cross bill seeks to annul. If his conduct towards his wife has been such as to warrant her in seeking and securing the relief of a divorce from him, she, by establishing this fact, and securing the relief, deprives complainant of the only ground he claims to have which would justify his interference with her business plans. After careful consideration, we have reached the conclusion that the matter set out in the cross bill is germane to the bill. The fact that complainant went to a full hearing upon the cross bill, and his answer thereto, without objection, would not be without significance if it were necessary to give it consideration. We must therefore consider the merits of the cause as presented in the record.

The learned circuit judge who heard the case filed a written opinion as follows: "In January of this year, Mrs. Root felt that her relations with her husband were unendurable, and she endeavored quietly to pass wholly out of his life. She asked and took no assistance whatever at their parting. She engaged in business by herself and for herself. Very shortly thereafter Mr. Root commenced these proceedings, claiming that he was entitled to her services and companionship, and seeking an injunction to restrain her from engaging in or conducting an independent business. It seems to me that one does not often witness a more puerile and cowardly act on the part of the husband towards his wife than this attempt at coercion. During this trial he has frequently declared his great love for this woman. Such conduct on his part may be consistent with chivalry and love, but it does not so impress me. The evidence in this case, however, convinces me that the wrongdoing is not wholly on the side of Mr. Root. There is neither vice nor crime nor immorality on the part of either, but every vestige of the marriage relation save the bare, naked form thereof has disappeared. Where mutual respect, confidence, and love should exist, only repulsion and hatred are

seen, and, so far as Mrs. Root is concerned, this state of mind is hopeless and apparently eternal. If anything but evil can emanate from such a relation, I am unable to discover it. Ill will, unhappiness, keen misery, and social scandal are the only present manifestations of this marriage. It must be a mistaken view of public policy which would demand the continuance of this relation. I do not find Mrs. Root has always been angelic or wholly blameless, or that there is anything bad or vicious in the moral nature of Mr. Root. Physical violence is, however, not the only form of cruelty. There may be a constantly recurring form of refined cruelty that may be less tangible, yet in its effect, more deadly and extreme. In her bill Mrs. Root asks for a decree of divorce upon the grounds of extreme cruelty. I think she is entitled to such relief." We quite agree with the learned circuit judge where he says: "There may be a constantly recurring form of refined cruelty that may be less tangible, yet, in its effect, more deadly and extreme." We have, however, gone over this voluminous record with care, and have failed to discover the evidence which would make the observation pertinent to the facts in this case. The parties lived together for sixteen years without any undue friction. The wife then filed her first bill for divorce. The charges she made in that bill, even if supported by due proof and found to be ample to sustain a decree, cannot here be considered. By her dismissal of that proceeding and the resumption of marital relations, those alleged acts of cruelty were by her condoned. After the reconciliation, they again lived in perfect unity for nearly three years more, according to the testimony of the wife. Her right to relief must be predicated solely upon the occurrences of the last few weeks during which they lived together. A dispute seems to have arisen between them as to the conduct of the business, many of the important details of which had passed into the hands of the wife. For reasons sound or unsound, but to him sufficient, the husband determined to resume control of those details. This determination incensed the wife, and led to her leaving her husband and establishing the rival business. The single act of personal violence charged by the wife in her bill, as occurring after the dismissal of her first bill, occurred at this time and after she had determined to leave, and had so notified her husband. In the light of the husband's explanation of the incident, we attach but

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little importance to it. He did not, as charged, turn her out of the home, but did urge her, perhaps with undue insistence, to leave the store, in order that he might carry out his plans with reference to the conduct of the business. We are impressed with the fact that the sole difficulty between the parties arises from the fact that the wife desired to actively control the business of her husband, and, failing in this desire, determined to leave him and secure a business which she could control. Her manner of dealing with the lot purchased in part with moneys from her husband's business, but standing in her own name, lends color to this view. The learned circuit judge finds "nothing bad or vicious in the moral nature of Mr. Root." And further says: "I do not find Mrs. Root has always been angelic or wholly blameless." In *Hoff v. Hoff*, 48 Mich. 281, 12 N. W. 160, Mr. Justice Cooley said: "And it is as true of divorce cases as any others that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent, not to the guilty." In *Beller v. Beller*, 50 Mich. 49, 14 N. W. 696, this court said: "When we examine the evidence tending to prove extreme cruelty, we are of opinion that it falls far short of establishing a case in favor of either party. It is undoubtedly true that there was more or less wrangling between these parties, growing out of money matters, and that because thereof they did not live as happily together as they should have done, yet still no case of extreme cruelty is made out." See also *Cooper v. Cooper*, 17 Mich. 205, 97 Am. Dec. 182; *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903; *Downey v. Downey*, 135 Mich. 265, 97 N. W. 699.

Neither incompatibility of temper nor the ordinary misunderstandings and bickerings which are characteristic of the marriage relation in a considerable percentage of cases have been made grounds for divorce in this state. The legislature might, if it chose, extend the jurisdiction of courts to grant decrees of divorce upon these grounds. It has not done so, however, and those who are married must bear the real or fancied burdens they have assumed, unless the conduct of one entitles the other, that other being without fault, to a severance of the relation for one or other of the statutory causes.

Is the husband entitled to the relief sought? The husband, being of sufficient ability, is bound in law to afford to his

wife support reasonably consistent with his own means and station. As a necessary corollary to this proposition, it follows that the husband, as a matter of law, is entitled to the services and society of his wife. This right has been affirmed many times in our own state. *Glover v. Alcott*, 11 Mich. 470; *Randall v. Randall*, 37 Mich. 563; *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432; *Harrington v. Gies*, 45 Mich. 374, 8 N. W. 87; *Sines v. Wayne County*, 58 Mich. 503, 25 N. W. 485. That the wife may, with the husband's consent, conduct a business upon her own account, is not open to question (*Tillman v. Shackleton*, 15 Mich. 447, 93 Am. Dec. 198; *Rankin v. West*, 25 Mich. 195); but we have been unable to find any decision (and we are cited to none by counsel) which affirms this right in the wife, where her husband is able and willing to support her and withholds his consent. In the case of *Artman v. Ferguson*, 73 Mich. 146, 2 L.R.A. 343, 16 Am. St. Rep. 572, 40 N. W. 907, in considering the question of partnership between husband and wife, it was said: "The important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal and a mutual liability for the contracts and obligations of each other." If a contract of partnership, with its consequent complications, is liable to imperil the marital relation, it should, we think, be obvious that active business competition between husband and wife would, of necessity, utterly annihilate it.

The decree of the court below is reversed, and a decree will be entered in this court dismissing defendant's cross bill, and granting to complainant a permanent injunction against defendant, in accordance with the prayer of his bill. The complainant will pay to defendant's counsel a solicitor's fee of \$100, this to be in full of all costs in the cause.

Moore, Blair, and Stone, JJ., concurred with Brooke, J.

McAlvay, J.:

The question of divorce was not germane to the injunctive relief complainant asked, and the cross bill should never have been considered. Divorce is purely a statutory proceeding. The complainant was entitled to the relief asked under the proofs. I agree in the result.
32 L.R.A. (N.S.)

MISSOURI SUPREME COURT.
(Division No. 2.)

STATE OF MISSOURI, Resp.,
v.

TURNER S. THORNTON, Appt.

(— Mo. —, 134 S. W. 519.)

Parent — refusal to support child — liability.

One is not within the operation of a statute providing for the punishment of a father who refuses or neglects to furnish necessary food, clothing, and lodging to his infant child, if the child is being supplied therewith as far as is necessary by the wife's parents, to whose house she had taken the child upon separating from her husband, the child's father.

(February 7, 1911.)

Note. — Criminal responsibility of parent for failure to support child where support is furnished by others.

The statutory crime of abandonment of a child is not established where, notwithstanding a desertion, the wants of the child are provided for by others. *Dalton v. State*, 118 Ga. 196, 44 S. E. 977; *Baldwin v. State*, 118 Ga. 328, 45 S. E. 399; *Mays v. State*, 123 Ga. 507, 51 S. E. 503; *Williams v. State*, 126 Ga. 637, 55 S. E. 480; *Williams v. State*, 121 Ga. 195, 48 S. E. 938.

The statute upon which the above Georgia cases were decided made a father guilty of a misdemeanor if he "shall wilfully and voluntarily abandon his child, leaving it in a dependent and destitute condition." As to the meaning of this statute, it was said in *Dalton v. State*, supra: "So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all the necessities of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that if he fails in this duty, he may be convicted under the above section of the Code, although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessities, the father cannot be convicted. It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be strictly construed, we are constrained to give this statute this interpretation."

In *Jackson v. State*, 1 Ga. App. 723, 58 S. E. 272, in passing upon the question as to the exclusion of evidence as to the earnings of the grandmother of the child whom the defendant was charged with deserting, the court said that while it is competent, in defense of the charge of abandonment, to show that others do provide for the support

A PPEAL by defendant from a judgment of the Circuit Court for Boone County convicting him of refusing and neglecting to provide necessary food, clothing, and lodging for his infant children. Reversed.

The facts are stated in the opinion.

Messrs. McBaine & Clark and W. H. Rothwell, for appellant:

Appellant was guilty of no crime under the laws of this state.

State v. Koonse, 123 Mo. App. 655, 101 S. W. 139; Dalton v. State, 118 Ga. 196, 44 S. E. 977; Williams v. State, 126 Ga. 637, 55 S. E. 480; Mays v. State, 123 Ga.

of the child, still it is not material or proper to allow testimony that others are able to do so.

The offense of deserting an infant child "in a manner showing a reckless disregard to life and health" is not made out against a father, where the child is in the care of its mother and grandmother, is carefully provided for by them, comfortably clothed and well fed. *Richie v. Com.* 23 Ky. L. Rep. 1237, 64 S. W. 979.

If a father and husband separates from his wife, and leaves his children in proper care, not dependent and destitute, he is not guilty of a misdemeanor as defined by statute; but if, after having thus left them, they become destitute and dependent because of their mother's inability to support them, and if he then wilfully neglects his duty to support the children, he is properly convicted. *Brown v. State*, 122 Ga. 568, 50 S. E. 378.

But in *State v. Stouffer*, 65 Ohio St. 47, 60 N. E. 985, the defendant was found guilty of violating the criminal statute which made it a felony to neglect to provide a child under sixteen "with necessary and proper home, food, care, and clothing," although the evidence showed that the child was in the custody of its mother, who lived with her parents, and had a comfortable home and necessary food and clothing. It should be noted that the mother had divorced her husband; that the court had awarded the custody of the child to her, but that there was no award of alimony. The court said that it was plainly the duty of the defendant to support the child, and the fact that the divorced wife and her parents had kept the child from want did not absolve him from his obligation in that regard. It would seem that his failure to meet whatever obligation these conditions imposed upon the delinquent husband, whether moral or legal, rendered him liable in a civil action rather than criminally.

As to liability of father for support of children as affected by decree, awarding custody to mother, see note to *Spencer v. Spencer*, 2 L.R.A. (N.S.) 861.

In *Bennetfield v. State*, 80 Ga. 107, 4 S. E. 869, the defendant was found guilty of failure to support his infant child, even though the child was so young as to be entirely dependent on its mother for food and nour-

ishment, 51 S. E. 503; *Richie v. Com.* 23 Ky. L. Rep. 1237, 64 S. W. 979; *People v. Rubens*, 92 N. Y. Supp. 121; *People v. Joyce*, 112 App. Div. 717, 98 N. Y. Supp. 863.

Messrs. E. W. Major, Attorney General, and John M. Dawson for the State.

Ferriss, J., delivered the opinion of the court:

Defendant was convicted at the April term, 1910, of the circuit court of Boone county, upon an information which reads as follows: "L. T. Searcy, prosecuting at-

tachment, and the conduct of the mother had been such as to justify the husband and father in refusing to live with her.

A father was found guilty of abandoning his child in *Daniels v. State*, — Ga. App. —, 69 S. E. 588, where the offense as defined by statute (amended since the earlier Georgia decisions) was held to have been consummated when the child was abandoned in a dependent condition. It appears that the father had forcibly, and by threats of personal violence, driven his wife, the mother of his infant child, from home, and the mother, because of the infancy of the child, it being a babe at her breast, was compelled to take the child with her.

In *Crow v. State*, 96 Ga. 297, 22 S. E. 948, 10 Am. Crim. Rep. 1, a judgment convicting a father of abandonment was reversed because it appeared that he provided for his offspring according to his ability, and had never failed to respond when advised of the child's necessities. The court said in this case: "At all events, neither abandonment nor destitution is proven unless the father leaves the child intending to abandon it to its own fate, without providing for it the necessities of life, and leaving it wholly dependent upon others who are themselves unable or unwilling to provide for it." Whatever implication this remark contains as to the criminal responsibility of a father when others are actually furnishing his child with the necessities of life may be disregarded in view of the later Georgia cases cited.

It is not a defense to a prosecution of a parent for failure to provide a child "with necessary and proper home, care, food, and clothing," that, under an agreement between him and his wife, the latter was given the custody of their children, and for a sufficient consideration agreed to keep and maintain them. *Bowen v. State*, 56 Ohio St. 235, 46 N. E. 708. It will be noted that this decision is based upon the fact that the father shifted the responsibility laid upon him by contracting with another to undertake it. The case is thus not strictly within the scope of the question annotated, but, from the circumstances of the case and the trend of the opinion, it would seem that the decision might have been otherwise had the mother continued to support the children as agreed.

W. A. S.

torney within and for the county of Boone, in the state of Missouri, informs the court that Turner S. Thornton, on the 2d day of November, 1909, at the said county of Boone and state of Missouri, being then and there the father of two infant children born in lawful wedlock, under the age of sixteen years, to wit, Margarite Thornton, aged two years, and Rudolph Thornton, aged five months, feloniously, unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide for said infant children necessary food, clothing, and lodging, and the said Turner S. Thornton, in the county and state aforesaid, from the 2d day of November, 1909, to the 28th day of February, 1910, and thence hitherto, did feloniously, unlawfully wilfully, and without lawful excuse, refuse and neglect to provide necessary food, clothing, and lodging for his said infant children aforesaid, against the peace and dignity of the state." This information is based upon § 4492, Rev. Stat. 1909, which provides: "If any mother of any infant child under the age of sixteen years, or any father of any such infant child, born in or legitimized by lawful wedlock, or any person who has adopted any such infant child, or any master or mistress of an apprentice under such age, or other person having the legal care and control of any such infant, shall, without lawful excuse, refuse or neglect to provide for such infant or apprentice necessary food, clothing, or lodging, or shall unlawfully and purposely assault such infant or apprentice, whereby his life shall be endangered or his health shall have been or shall be likely to be permanently injured, the person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or by imprisonment in the county jail not exceeding one year, or by a fine of not more than \$1,000, or by both such fine and imprisonment."

The following facts are practically conceded: The defendant, Turner S. Thornton, when about nineteen years old, married Metta Baldwin on October 21, 1907. The couple lived together until February, 1909, when they separated, the wife returning to her father's house, where she continued to live up to the date of the trial; the husband returning to the home of his mother, and remaining there. The wife took with her to her father's home the one child which had been born of the union, a girl, Margarite. A second child was born to her in her father's house in September, 1909. The children were supplied by the wife's father, up to the date of the trial, with all necessary food, clothing, and lodging, and, as testified by the mother, "were well taken care of." From and after the separation, in 32 L.R.A. (N.S.)

February, 1909, the defendant contributed nothing to the support of the children. Defendant was an average laborer, earning about \$1 a day. He, on one occasion, sent for the baby, when it was three or four months old, but was refused. He made some attempt to meet his wife and her father to talk over matters with a view to an arrangement about the children, but the effort failed. There was some evidence that defendant and his mother wished to take the girl to live with him and his mother. The evidence for the state shows that the wife refused to give up the children. It is evident from the testimony that the defendant refused to support the children so long as they were retained in the custody of the mother. It is equally clear that the mother and her father did not propose to recognize any right in the father except the right to contribute to the support of the children, the mother to retain the exclusive custody and control.

Whether this conviction can be sustained depends upon the construction of § 4492, set out above. If, as contended by the defendant, it is a crime to fail to provide food, clothing, and lodging only when they are actually lacking, and the failure to so provide shall endanger the life or health of the infant child, then it is clear that the evidence does not sustain the charge. The state proved that the children were amply supplied with food, clothing, and lodging by the wife's father, who seems to have been in full sympathy with his daughter's purpose to keep the children in his household, and entirely away from their father. If, on the other hand, as contended for by the state, it is a crime under this statute for the father to refuse to supply food, clothing, and lodging, regardless whether they are supplied from other sources, and regardless whether life or health is endangered, if mere failure to furnish support is a crime, then the evidence sustains the charge. The defendant admits that he did not support the children.

The statute penalizes the refusal of the father to supply necessary food, etc. Under the law pertaining to necessities, a necessary article is one which the party actually needs. It is not enough to show that the article is *per se* classed as necessary, such as food and clothing. It must also be actually needed at the time. The law will imply and enforce a contract by an infant to pay for necessities out of his estate. This because "otherwise he might suffer for the want of them." Parsons, Contr. 9th ed. p. 355. Or, as another writer puts it, "based on the necessity of their situation." Tyler, Infancy, p. 107. The fundamental principle of the law of infancy is this: It is essential to the welfare of the state that infants be

fed, clothed, lodged, and educated; and also that the state shall not be burdened with their care. So long as infants are properly cared for, the state is not interested as to the source from whence the supplies come. If an infant has an estate, the law will compel him to support himself out of his estate, provided he is not otherwise supplied; but the law will not impose upon his estate a contract to pay for articles which he does not in point of fact need, because he is already supplied, although the articles may be *per se* regarded as necessary to his proper nurture. So, with regard to the custody of minor children, this belongs primarily to the father, but if the welfare of the child requires it, the court will award the custody to the mother; the primary consideration being the good of the child. We apprehend that the enactment of the penal statute in question was inspired by the same idea, namely, the welfare of the child, and upon the grounds of public policy adverted to above.

The legislature did not enact this law for the purpose of punishing parents for failure to do their duty as such. Such a purpose would smack too strongly of paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that if infant children are receiving necessary food, clothing, and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise. Construing § 4492 in the light of the above reasoning, and as applied to the facts in this case, it denounces a penalty for refusal or neglect to supply an infant child with such food, clothing, and lodging as it actually needs. Upon the showing made by the evidence for the state, the instruction (No. 1) asked by the defendant at the close of the state's case should have been given. Cases analogous to this have been passed upon in Georgia and Kentucky. The statute construed by the supreme court of Georgia is as follows: "If any father shall wilfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, he shall be guilty of a misdemeanor." Ga. Code 1895, vol. 3, § 114.

The case of *Dalton v. State*, 118 Ga. 196, 44 S. E. 977, reversed a conviction under this statute. The court said: "The evidence adduced on the trial showed that the father was willing for the wife to leave him and return to her relatives. The child, which she took with her, was between four and five years of age, and was, of course, dependent. The evidence, however, does not

disclose that the child was destitute at the time of the abandonment, or had even become destitute up to the time of the trial. So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all necessities of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that, if he fails to do his duty, he may be convicted under the above section of the Code, although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessities, the father cannot be convicted. It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be construed strictly, we are constrained to give this statute this interpretation."

The Kentucky statute provides: "A parent or other person having the care or custody, for nurture or education, of a child under six years of age, who wilfully deserts the child in a manner showing a reckless disregard to life or health, and with the intention wholly to abandon it, is punishable by imprisonment in the penitentiary for not more than three years." Ky. Stat. 1894, § 329.

Passing upon this statute in *Richie v. Com.* 23 Ky. L. Rep. 1237, 64 S. W. 979, the supreme court of Kentucky found the fact to be that the parents had separated, leaving one child, about one year old, in the care and custody of its mother and grandmother, who lived together, and that after the separation it was carefully provided for by them, but that the accused had contributed nothing to its support. The court said: "Certainly, it cannot be claimed that leaving a child less than one year old in the custody and care of its own mother shows a reckless disregard either to its life or health. The trial judge seems to have proceeded upon the idea that the mere failure to provide for the support of a child under six years of age rendered the defendant liable to the penalty denounced by the statute. There is no testimony in the record conducing to show the guilt of the accused, and we think the circuit judge erred in not directing the jury to find the defendant not guilty."

The views above expressed by us dispose of the case, and the discussion of other questions raised is unnecessary.

The judgment is reversed, and the defendant ordered to be discharged.

Kennish, P. J., and Brown, J., concur.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, Resp.,
v.

BROUGHTON BRANDENBERG, Appt.

(— Mo. —, 134 S. W. 529.)

Kidnapping — decoying child — agent for parent — liability.

Statutory liability for enticing or decoying a child from its parent cannot be avoided on the ground that accused acted as agent for the other parent, where the two were living apart, whatever might have been the freedom from liability on the part of such parent had he or she acted in person.

(February 14, 1911.)

Note. — Taking of a child by or at instance of one parent, from the custody of the other parent, as kidnapping.

This, of course, does not include the question as to contempt of court.

A father who forcibly takes his child of four years from the custody of its mother, to whom its custody had been decreed, and carries it out of the state, violates a statute against unlawfully and forcibly carrying the child out of the state, and it is not necessary to prove expressly that the taking was without the child's consent, since in law he was incapable of consenting. *State v. Farrar*, 41 N. H. 53. The court said: "The custody of the child having been, by a decree of this court, assigned to the mother, that custody must be regarded, for all purposes, as lawful, even as against the father; and he has no 'lawful authority' to take the child from her. If he does so against her will, for the purpose of carrying it out of the state, it comes within the statute. The right of the father over the child was gone by the force of the decree, as much as his right over its mother, his former wife; and the purpose for which he carried it away, whether to subject it to slavery or merely to his parental control, could not affect the question of guilty or not guilty, although it might affect the extent of the punishment."

So, under a statute providing that "if any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child, he shall be punished," a father who takes his child of ten years of age from the mother, who has been decreed the custody of the child, is liable, and the consent of the child is no defense. *State v. Rhoades*, 29 Wash. 61, 69 Pac. 389.

And where the custody of a nine-year-old child has been decreed to the father, any attempt on the part of the mother or agents acting under her, to obtain possession by violence, is unlawful; and her agents, who forcibly took such child from a school in which the father had placed him, and carried him away, are guilty of an assault and battery and false imprisonment, although the child desired to go with them, and although such agents did not know that they were violating the father's right of custody. *Com. v. Nickerson*, 5 Allen, 518.

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis, convicting him of enticing a child from its father, in violation of a statute. Affirmed.

The facts are stated in the opinion.

Messrs. Simon S. Bass and Vital W. Garesche for appellant.

Messrs. Elliott W. Major, Attorney General, and James T. Blair, for the State:

The indictment charges the offense in the language of the statute.

12 Enc. Pl. & Pr. pp. 826, 827; *Dowda v. State*, 74 Ga. 15; *State v. M'Roberts*, 4 Blackf. 178; *State v. George*, 93 N. C. 570; *Gravett v. State*, 74 Ga. 194; *State v. Rhoades*, 29 Wash. 62, 69 Pac. 389.

But such agents cannot be held liable under an indictment for an assault and battery and forcibly seizing the child with the intent to send him and cause him to be sent out of the commonwealth, where such intent is not proved; and they are not, as a matter of law, to be charged with such intent upon proof of such intent on the part of the mother, who employed them. *Ibid*.

A prima facie case for extradition is shown under a statute providing that child-stealing consists "of 'unlawfully taking away a child under fourteen years of age, with intent to deprive a parent having the lawful charge of it, of the possession of such child,'" where a mother takes a child, the custody of which has been decreed to the husband, from New York to Canada, although the father had never had actual separate possession of the child. *Re Lorenz*, 9 Can. Crim. Cas. 158, 7 Quebec, Pr. Rep. 101.

And under such statute, a father is guilty who wilfully removes from the mother's possession a child whose custody has been decreed to the mother. *King v. Watts*, 5 Can. Crim. Cas. 246.

But where the parent taking the child is entitled to its custody, it is generally held that neither the parent taking the child, nor those assisting in the taking, are guilty of kidnapping.

Thus, where a father has obtained a decree of divorce, and been awarded the custody of his child, he cannot be held guilty of kidnapping such child. *Re Marceau*, 32 Misc. 217, 65 N. Y. Supp. 717.

And under a statute making it criminal to take or entice away a child under the age of twelve, with intent to conceal the child from its parent, guardian, or other

The agent is not exempt from punishment for an invasion of the father's lawful custody of his child.

Com. v. Nickerson, 5 Allen, 526; *State v. Farrar*, 41 N. H. 58; *John v. State*, 6 Wyo. 212, 44 Pac. 51; *Re Scarritt*, 76 Mo. 582, 43 Am. Rep. 708; *Brandon v. Carter*, 119 Mo. 583, 41 Am. St. Rep. 673, 24 S. W. 1035; *Oliver v. State*, 17 Ala. 596.

Brown, J., delivered the opinion of the court:

The defendant was convicted in the circuit court of St. Louis city on an indictment charging him with maliciously, forcibly, and fraudulently enticing and decoying away one James Sheppard Cabanne, Jr., a child of seven, with intent to detain and conceal said child from his father, James Sheppard Cabanne, Sr., in violation of § 4489, Rev. Stat. 1909.

The record in this case is rather voluminous, made so by injecting into same the history of the marital infelicities of James Sheppard Cabanne, Sr., and his wife, the parents of the child whom defendant is charged with feloniously enticing away. The mother of this child, Minnie Leonard

Cabanne, deserted her husband on July 16, 1906, and took the child with her to New York, and for several months concealed its whereabouts from the father. She claims to have obtained a divorce from her husband (Cabanne) in the British West Indies in December, 1906, and shortly thereafter married the defendant, who is a newspaper reporter, and appears to have a good standing among the members of that profession. She lived with defendant as his wife in New York until the month of December, 1908, when, the defendant being either in jail or a fugitive from justice, she was greatly distressed financially, and applied to the father to come and get his child and take care of it. Cabanne, Sr., went to New York, secured possession of his child, and placed it in the home of his mother, Julia C. Cabanne, of St. Louis, where he was living. The mother of the child claims that he promised to return it to her in the following spring, if she had a home and was able to take care of it; that he would keep her informed of the child's health and condition; that he would read to it such letters as she might write, and not commit it into the sole custody of Julia C. Cabanne, the child's

person having the lawful charge of the child, one who assists the mother of a child to leave the state with the child is not liable, where the mother has the actual custody of the child. *State v. Beslin*, — Idaho, —, 112 Pac. 1053.

And a warrant issued against the father of children, charging him with kidnapping them, is a mere nullity where it is not alleged or shown that he has parted with his parental right to their custody, although they were in the actual custody of their mother. *Hunt v. Hunt*, 94 Ga. 257, 21 S. E. 515.

And a father who has a right to the custody of his child, and those aiding him in taking his child, under ten years, from the custody of its mother, are not guilty of kidnapping, under a statute providing that "if any person shall maliciously, either by force or fraud, lead, take, or carry away any child under the age of ten years, with the intent to deprive its parent or parents, or any other person having the lawful charge or care of such child, of the possession of such child, by concealing and detaining such child from such parent or parents, or other person or persons having the lawful charge or care of it, or with intent to steal any article of apparel or ornament, or other thing of value or use, upon or about the person of such child, to whomsoever such article may belong, or shall receive and harbor, with any such intent as aforesaid, any such child, knowing the same to have been so, by force or fraud, led, taken, or carried, or decoyed or enticed away, as aforesaid, every such person shall be guilty of a misdemeanor; and 32 L.R.A. (N.S.)

upon conviction thereof, be sentenced to pay a fine not exceeding \$2,000, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years; provided, always, that no person who shall have claimed to be the father of any illegitimate child, or to have any legal right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of getting possession of such child, out of the possession of the mother or other person having lawful charge thereof." *Burns v. Com.* 129 Pa. 138, 18 Atl. 756. The court said: "When parents quarrel and separate, each naturally desires and claims possession of their children; but there is no ironclad rule which secures to either the sole custody of them. In determining to whom the custody shall be awarded in such cases, the welfare of the child is consulted, and is ordinarily the controlling consideration. An assertion of this claim, without the aid of legal process, does not make the claimant a criminal, unless it be accompanied by a breach of the peace. The father who takes and withholds his child from the wife and mother, who, with or without cause, has abandoned his home, does not thereby become a kidnapper. The statute has no application to contests between parents for the possession of their children. It was enacted to protect parental and other lawful custody of children against the greed and malice of the kidnapper; not to punish their natural guardian for asserting his claim to the possession and control of them. The father is the head of the family, and charged with the duty of maintaining it. He is the nat-

grandmother. Cabanne, Sr., the father, denies these promises; but his testimony on that point is so evasive as to leave the impression that he made the promises, and the fact that he failed to write her about the child, and in January, 1909, instituted a suit for divorce against the mother, praying to be awarded the sole custody of the child, indicates that he did not intend to keep his promises. The mother received notice of the suit, but the action did not culminate in a divorce to Cabanne, Sr., and award to him of the custody of the child until May 3, 1909 (after the alleged crime was committed). On April 16, 1909, the defendant, at the request of the mother of James Sheppard Cabanne, Jr., came to St. Louis and decoyed the child away from its father, who was away from home, by telling it that he was going to take it to its mother; but, instead of doing so, he took it to San Francisco, California, where he claims its mother agreed to meet him later. He was arrested there on the charge in this case, and brought back to St. Louis for trial. The evidence does not indicate that the mother demanded the return to her of the child before she directed defendant to take

it away. There was some evidence that the child was allowed by its grandmother to play upon the streets in a filthy condition. This was also denied. The trial resulted in the conviction of defendant, and the imposition of a fine of \$500, from which, after the overruling of timely motions for new trial and in arrest, he brings the case up here by appeal.

The defendant objected, and saved exceptions, to many points in the evidence introduced by the state, and also complains in his motion for a new trial of many of the instructions; but in his brief herein filed seems to stand upon the sole proposition that § 4489, Rev. Stat. 1909, does not apply to the taking or decoying away of a child by a parent, nor by the agent of one of the parents, and that, as he was acting as the agent of his wife, the mother of the child, he did not violate this statute in decoying the child away from the home of its father and taking it to California. Whether or not the defendant's wife, who was the mother of Cabanne, Jr., would have violated the law had she taken the child away from its father, into whose custody it had been voluntarily committed by her, we need not

deal with. The father was the natural guardian of his children, and entitled to the custody of them. This right of custody is not absolute; it may be restrained or qualified in the interest of the child; but until he voluntarily surrenders it, or it is suspended by the order of a court of competent jurisdiction, his possession of his child is neither criminal nor unlawful. An abuse of the right may make such an order appropriate or necessary, but it cannot make him a kidnapper."

To the same effect is *Com. v. Myers*, 146 Pa. 24, 23 Atl. 164.

And under a statute providing that "every person who shall maliciously, forcibly, or fraudulently lead, take, or carry away, or decoy or entice away, any child under the age of twelve years, with intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child, shall, upon conviction, be punished by confinement and hard labor not exceeding five years, or imprisonment in the county jail not less than six months," one who assists a woman to leave her husband, and in so doing assists her in taking her child outside the state, is not guilty of kidnapping, where the mother had an equal right with her husband to the custody of the child. *State v. Angel*, 42 Kan. 216, 21 Pac. 1075.

And where a father abandoned his wife shortly before the birth of his child, and never had custody or possession of the child, the mother and those assisting her are not rendered guilty of kidnapping the child by taking it to another state, especially where the father knew that it was being taken

away, and saw them taking it to the station, and made no objection. *Biggs v. State*, 13 Wyo. 94, 77 Pac. 901.

And where a father takes his child, of which his divorced wife has the care and custody, out of the state, with such mother's consent, he is not guilty of kidnapping, although the removal is for the purpose of preventing the child's appearing as a witness in a public prosecution, in obedience to a subpoena. *John v. State*, 6 Wyo. 203, 44 Pac. 51.

Where there is a statute designed to meet cases in which a child twelve years of age is taken by its parent from one having the custody thereof, a mother and those assisting her cannot be convicted under a statute providing that "every person who wilfully, and without lawful authority, shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap, any other person, with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding \$1,000,"—for taking her child of fourteen years from foster parents who had adopted it, it expressly appearing that the child went gladly and freely with its mother, out of natural love, since such child's wishes must be regarded to some extent. *People v. Congdon*, 77 Mich. 351, 43 N. W. 986.

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decide. Defendant claims he was the husband of the child's mother; but, even if this were true, he would not, as a stepfather, have any rights to its custody under the facts in this case. Woerner, Am. Law of Guardianship, § 13; Browne, Dom. Rel. 2d ed. p. 72.

If it be conceded that defendant's wife, after surrendering possession of her child, still retained the right to decoy it away from the father, it by no means follows that she could confer that right upon the defendant as her agent. The parental affection flowing from both father and mother to a child of tender years would be a protection to such child as long as it remained in the actual and immediate custody of either of them, and the filial love of the child would in most cases enable either parent to properly control its conduct; but these safeguards to the child would not exist between it and a mere agent, like the defendant in this case, who was not bound to it by any tie of consanguinity. It is apparent that one of the objects of the statute under consideration was to protect parents against the mental anguish which necessarily follows the decoying away and retaining of their children, and if a child be taken or decoyed away from one parent by another parent, the mental anxiety of the parent who thus loses the child would not be nearly so great as in the case at bar, where the child passed into the hands of one who was under no obligation, and perhaps no inclination, to properly care for it.

We are of the opinion that the right of one parent to invade the possession of another parent, to take or decoy away their mutual offspring, if such a right exists, cannot be delegated to an agent, as the mother attempted to do in this case. Any other construction of the statute would result in untold confusion, litigation, and probably in assaults and other breaches of the law. To rule otherwise would be to hold that when the parents are living apart, and a child is stolen or decoyed away from one of such parents, he or she must first ascertain whether the party who took or decoyed the child away is an agent of the other parent, or a mere kidnapper, before having such culprit arrested. The letter and spirit of the law we are now construing, and also the welfare of those unfortunate children whose parents are living apart, and who are denied the soothing atmosphere and benignant influences of homes where conjugal love reigns supreme, forbid us from subscribing to any such construction of the statute as the defendant contends for.

In this case the father was not only in the lawful charge, but the legal custody, of his child, and, whatever rights the mother

may have had, the defendant violated the law when he invaded the father's possession and took the child away. He was accorded a fair trial, and we affirm the judgment.

Kennish, P. J., and Ferriss, J., concur.

NORTH CAROLINA SUPREME COURT.

R. B. TURNER

v.

SOUTHERN POWER COMPANY et al.,
Appts.

(154 N. C. 131, 69 S. E. 767.)

Electricity — injury to consumer — *res ipsa loquitur*.

1. Injury by electricity to a consumer by taking hold of a lamp to turn on the light, in the same manner that he had been accustomed to do without injury is evidence of negligence on the part of the company, which had contracted to furnish the electricity for the lights at a certain voltage, where the fixtures are in good condition and the voltage contracted for is not likely to produce harmful results if proper care is observed in its transmission.

Evidence — due care — overcoming presumption.

2. Mere introduction of evidence of due care on the part of one who is furnishing electricity to light a building will not displace the doctrine of *res ipsa loquitur* in case a consumer is injured by attempting to turn on a light in the usual manner, when the fixtures are in good condition and no injury would have happened in the absence of negligence on the part of the one supplying the electricity; but the determination of the question is upon all the evidence for the jury.

Electricity — inevitable accident — liability.

3. One who, in furnishing electricity to light a building, has done all that the highest degree of care could reasonably require in reference to the conditions, maintenance, and inspection of his wires and appliances, is not responsible for injury to a consumer by electricity escaping from a lamp while he is attempting to turn it on.

(December 20, 1910.)

Note. — Applicability of rule res ipsa loquitur to accident on private property, due to escape of electricity from disordered electrical appliances.

This note is supplemental to the note to Western Coal & Min. Co. v. Garner, 22 L.R.A. (N.S.) 1183.

Where a company furnishing electricity for lighting purposes has installed wires and appliances to convey into a building electricity for domestic and lighting

APPEAL by defendants from a judgment of the Superior Court for Mecklenburg County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

Statement by Hoke, J.:

Civil action to recover damages for injury caused by alleged negligence on the part of defendants, tried before his Honor E. B. Jones, Judge, and a jury, at January term, 1910, of the superior court of Mecklenburg county. It was shown at the trial that

purposes and uses, and one in such building, taking hold of an incandescent lamp in a reasonably prudent manner, to turn on the light, is severely burned and shocked by an escape of electricity from the lamp or its connecting part, the doctrine of *res ipsa loquitur* applies, to cast on the company the burden of negating its negligence in the premises. *Alabama City, G. & A. R. Co. v. Appleton*, — Ala. —, 54 So. 638.

And the fact that one is killed by an electric shock received in attempting to turn on an electric light in the usual manner, in his own residence, is itself sufficient to constitute a prima facie case of negligence against the city owning and operating the electric power plant from which, under contract, it was furnishing the current to such residence for illuminating purposes, and, such accident being shown, the burden devolves upon the city to show that it was guilty of no negligence. *Abrams v. Seattle*, — Wash. —, 111 Pac. 168.

As to whether the doctrine of *res ipsa loquitur*, even when applicable, operates to cast the burden of proof upon defendant, see note to *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 16 L.R.A.(N.S.) 527.

So, where it appears that an employee of a contractor engaged by an electric railway company to construct a station house, while rightfully at work there, was killed by contact with a wire carrying a very strong current of electricity, installed within 4 or 4½ feet of the floor, in one of the rooms of such station house, before it was finished, a prima facie case of negligence is made out against the company. *Raker v. Toledo & I. R. Co.* 30 Ohio C. C. 78.

And a prima facie case of negligence is made by showing that a policeman, in putting his key into the keyhole of a police patrol box in the course of his duty, was killed by a high current of electricity generated by a light and heat company, and conveyed to the city wires and the patrol box by the wires of a telephone company, in close proximity to which the light and heat company's wires were strung. *Indianapolis Light & Heat Co. v. Dolby*, — Ind. App. —, 92 N. E. 739.

Where a telephone company, under a lease from a light company, uses for stringing its wires certain cross-arms on a pole of the latter company, which carries also

on December 25, 1908, plaintiff entered his store at some time in the early evening to make a sale to someone, and as he caught hold of the electric lamp suspended from the ceiling by a cord, to turn on the light in the ordinary and usual way, his hand was caught and held by the current, rendering him, for a time, unconscious, severely burning his hand, and causing permanent injury to same; that the electricity was conveyed to the building by defendant companies, under a contract to furnish same for a given number of lamps, at the ordinary voltage, stated to be, for that purpose, 110 volts, and

the latter company's high tension wires, which are highly dangerous to human life unless safely and securely insulated, evidence that a lineman of the telephone company, while working on the pole, is killed by a current from one of such high tension wires, makes out a prima facie case of negligence against the light company in its failing to keep its wires properly insulated. *Trout v. Laclede Gaslight Co.* — Mo. App. —, 132 S. W. 58.

And the doctrine of *res ipsa loquitur* applies where a wire over which an electric company is delivering a powerful and dangerous current of electricity to another company breaks and falls into a yard in front of a private residence, where a child is injured by coming in contact with it; and proof showing the defective and broken condition of the wire, and that the electric company was making use of it in its business, and had supplied the electrical energy which caused the injuries, although it does not own the wire, and showing the circumstances under which the accident happened, throws upon the defendant the burden of rebutting the presumption of negligence arising from the happening of the accident itself. *Hebert v. Hudson River Electric Co.* 136 App. Div. 107, 120 N. Y. Supp. 672.

But where a city employee, while engaged in cutting down a tree in close proximity to which an electric light company maintained wires carrying a heavy current of electricity, claims to have fallen from the tree by reason of an electric shock received by contact with the tree, into which the current is alleged to have passed from the wires, in order to hold the company responsible for the consequences of his fall, he must establish by a fair preponderance of the evidence, not only that he sustained an electric shock which was the immediate cause of his fall, and that the electricity causing such shock came from the company's wires, but that the company was negligent in the construction and maintenance of the same. *Estabrook v. Newburgh Light, Heat & P. Co.* 125 N. Y. Supp. 944.

As to applicability of doctrine to accidents on highway due to disordered electrical appliances, see notes to *Walter v. Baltimore Electric Co.* 22 L.R.A.(N.S.) 1178, and *Lanning v. Pittsburgh R. Co.* — L.R.A.(N.S.) —.

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that the appliances within the building for distributing the light to the different lamps were supplied by a different company, acting independently of defendants, except the bulb for this particular lamp which had been bought from defendants a short time before. There was evidence, on the part of plaintiff, tending to show that the appliances within the building, procured from other persons, were examined by an expert the day after the injury and found to be in good shape, and that on the position of plaintiff, when injured, and under conditions in the building which then and usually obtained, the amount of electricity and at the voltage contracted for would not produce the effects which were shown to have resulted; that plaintiff took hold of bulb, in this instance, as he had been accustomed to do since the light had been installed, and same had never caused any bad effects before or given indications that anything was wrong. There was evidence, on the part of the defendants, tending to show that they have supplied electricity under the contract to the amount and voltage stated, and conveyed the same to the building as claimed; that they had installed a meter and switch with the appliances required for properly protecting the house; that no official report of the occurrence had been made directly to the office, but that, having noted an account of it in the morning paper, the appliances referred to for supplying the electricity were examined and tested by their experts on the afternoon of the day succeeding the occurrence, and their appliances, the ampere plugs, etc., for controlling the volume and voltage, showed to be in good order, and also the charts connected with the transformer gave indication that the proper amount of electricity had been distributed, etc. Speaking of this particular implement and its use and purposes, and the evidence afforded by these charts, W. W. Hanks, a witness for defendants, testified: "These are registered on an automatic instrument that shows, in order to get an excessive voltage at the point Mr. Turner came in contact with, it would have to be in contact with some other source of higher voltage. The system was all right, and it would have to be from some foreign wire or from a primary wire not on the system." There was further some evidence offered by defendants to the effect that at a point near where this particular light was suspended from the ceiling, the floor had been saturated with the brine from a pile of meat, and that, by standing on that point the voltage at 110 might be accelerated or increased so as to import danger to one handling an exposed wire supplying electricity for the lamp, etc. The cause was tried on the ordinary issues as for 32 L.R.A. (N.S.)

negligent injury, and responsibility of defendants was determined under the principles applicable to demands of that nature. The court imposed throughout on plaintiff the burden of the issue as to defendants' negligence, and, under several prayers for instructions offered by defendants, he charged the jury that, if the injury was caused by reason of defective socket or other appliances in the building, the defendants would not be liable, and in effect excluded every cause or feature of responsibility except that which might arise from an excess of voltage negligently conveyed or allowed to enter into the building by reason of the defective appliances of defendants. On the standard of care the court charged the jury, among other things "that, while the law does not regard an electric light company an insurer against injury, such a company owes to its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and the utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances obtainable, consistent with the practical operation of its plant." So it is something more, under the law, as the court understands it, than ordinary care; it is the highest care. Verdict and judgment for plaintiff, and defendants excepted and appealed.

Messrs. Osborne, Lucas, & Cocke, for appellants:

Plaintiff cannot rely merely on assumptions.

Barrett v. Independent Teleph. Co. — Tex. Civ. App. —, 65 S. W. 1128.

The mere happening of a casualty is not sufficient to go to the jury as evidence of negligence.

Alexander v. Cannon Mfg. Co. 132 N. C. 428, 43 S. E. 1003; **Clegg v. Southern R. Co.** 132 N. C. 202, 43 S. E. 836; **Upton v. South Carolina & G. Extension R. Co.** 128 N. C. 176, 38 S. E. 730.

Electric companies are not insurers against injury.

Harter v. Colfax Electric Light & P. Co. 124 Iowa, 500, 100 N. W. 508; **New Omaha Thomson-Houston Electric Light Co. v. Anderson**, 73 Neb. 84, 102 N. W. 89; 15 Cyc. Law & Proc. p. 472; **Peters v. Lynchburg Light & Traction Co.** 108 Va. 333, 22 L.R.A. (N.S.) 1188, 61 S. E. 745; 1 Joyce, Electric Law, § 438.

It was the duty of plaintiff to prove facts and circumstances from which it can be ascertained with reasonable certainty what particular precaution defendants ought to have taken, but did not take.

Shearm. & Redf. Neg. § 57, p. 74; New

Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121; Luehrmann v. Laclede Gaslight Co. 127 Mo. App. 213, 104 S. W. 1128; Abbott, Trial Ev. 2d ed. 736; Joyce, Electric Law, § 450.

The doctrine of *res ipsa loquitur* has no application to the facts of this case.

Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121; Dail v. Taylor, 151 N. C. 284, 28 L.R.A.(N.S.) 949, 66 S. E. 135; Peters v. Lynchburg Light & Traction Co. 108 Va. 333, 22 L.R.A.(N.S.) 1188, 61 S. E. 745; Harter v. Colfax Electric Light & P. Co. 124 Iowa, 500, 100 N. W. 508; Minneapolis General Electric Co. v. Cronon, 20 L.R.A.(N.S.) 816, 92 C. C. A. 345, 166 Fed. 651; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Crowe v. Nanticoke Light Co. 206 Pa. 374, 55 Atl. 1038; Chenall v. Palmer Brick Co. 117 Ga. 106, 43 S. E. 443; Shearm. & Redf. Neg. § 59; Garrett v. People's R. Co. — Del. —, 64 Atl. 254; National Biscuit Co. v. Wilson, — Ind. App. —, 78 N. E. 251; Wigmore, Ev. § 2509; Martinek v. Swift & Co. 122 Iowa, 611, 98 N. W. 477.

When an accident could have occurred from one of two sources, for one of which defendant is liable, and for the other not, there is no liability, and there can be no recovery.

Chesapeake & O. R. Co. v. Heath, 103 Va. 64, 48 S. E. 508; Warner v. St. Louis & M. River R. Co. 178 Mo. 125, 77 S. W. 67; Caudle v. Kirkbride, 117 Mo. App. 412, 93 S. W. 868; Yaggle v. Allen, 24 App. Div. 594, 48 N. Y. Supp. 827; Searies v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; Minneapolis General Electric Co. v. Cronon, 20 L.R.A.(N.S.) 816, 92 C. C. A. 345, 166 Fed. 651; Peters v. Lynchburg Light & Traction Co. 108 Va. 333, 22 L.R.A.(N.S.) 1188, 61 S. E. 745.

Where there is no evidence of negligence, no issue for the jury is presented, and the court should not submit the question to the jury.

Meekins v. Norfolk & S. R. Co. 127 N. C. 37, 37 S. E. 77; Markham v. Raleigh & G. R. Co. 119 N. C. 715, 25 S. E. 786; Russell v. Carolina C. R. Co. 118 N. C. 1098, 24 S. E. 512; Upton v. South Carolina & G. Extension R. Co. 128 N. C. 176, 38 S. E. 736; Foy v. Winston, 135 N. C. 439, 47 S. E. 466; Haltom v. Southern R. Co. 127 N. C. 255, 37 S. E. 262.

Messrs. Burwell & Cansler and R. S. Hutchison, for appellee:

There was sufficient evidence to take this case to the jury.

Haynes v. Raleigh Gas Co. 114 N. C. 205, 32 L.R.A.(N.S.)

26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; Delehunt v. United Teleph. & Teleg. Co. 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515; Bice v. Wheeling Electrical Co. 62 W. Va. 685, 59 S. E. 626; Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121; Smith v. Atlantic & C. Air Line R. Co. 147 N. C. 603, 61 S. E. 575.

Hoke, J., delivered the opinion of the court:

We are of opinion that this cause has been tried on correct principles and that no reversible error appears of record. Where an electric light and power company, operating under a quasi public charter, enters into an ordinary contract to furnish electricity for a given number of lights or for a given amount of power, the obligation as to the amount of power or light to be supplied must be construed and determined according to the general principles of contract, which, as a rule, are absolute, but, in reference to the duties incumbent on the vendor or company, by reason of the dangerous nature of electricity, and as to the methods and appliances for its proper use and delivery, these, in the absence of specific stipulations concerning them, should be considered as arising, in part, from the position the parties have assumed towards each other, and to be determined under the general principles of the law of negligence. A distinction illustrated and applied in the recent case of Dail v. Taylor, 151 N. C. 284, 28 L.R.A.(N.S.) 949, 66 S. E. 135, a case in which liability was established by reason of a breach of a legal duty on the part of the defendant, incident to the contract relations between them, and not contained within its express terms and stipulations. And where the principle applies they may also be said to rest upon the obligations that every quasi public corporation is under to perform its duties properly when they have dedicated their property to a public use, and are in the exercise of chartered rights and privileges, conferred by the lawmaking power, in part for the public benefit. From this it would seem to follow that such companies would not be at liberty to stipulate against negligence, nor to transfer the obligations incumbent upon them, without legislative sanction. The case has been tried substantially according to the principles indicated, and the degree of care obtaining in such cases has been correctly stated in the charge. Owing to the very dangerous nature of electricity, and the serious and often fatal consequence of negligent default in its control and use, the law imposes a very high degree of care upon companies

who manufacture and furnish it, and the exacting requirements laid down by his Honor below are in accord with well-considered authorities in this and other jurisdictions. "The utmost degree of care" was the language adopted and approved in *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 211, 26 L.R.A. 810, 41 Am. St. Rep. 766, 19 S. E. 344, 346. Said Burwell, J., delivering the opinion: "The danger is great, and the care and watchfulness must be commensurate with it." In *Denver Consol. Electric Co. v. Lawrence*, 73 Pac. 39, it was held: "While a corporation furnishing electric light to others for private gain may not be regarded as an insurer, it owes its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances which is attainable, consistent with the practical operation of its plant." 31 Colo. 301. And in *Brice v. Wheeling Electrical Co.* 62 W. Va. 685, 59 S. E. 626, it was held that "electrical companies are required to exercise the highest degree of care in reference to the condition, maintenance, and inspection of their wires and appliances." In approving these formulas as to the degree of care required in such cases, the court does not intend to hold that there is a varying standard of duty in this state by which responsibility for negligence is determined. Speaking to a similar question in *Fitzgerald v. Southern R. Co.* 141 N. C. 536, 6 L.R.A. (N.S.) 337, 54 S. E. 393, the court said: "They were, therefore, charged with a high degree of care in this respect. This statement imports no infringement on the doctrine which obtains with us that there are no degrees of care so far as fixing responsibility for negligence is concerned. This is true on a given state of facts and in the same case. The standard is always that care which a prudent man should use under like circumstances. What such reasonable care is, however, does vary in different cases and in the presence of different conditions, and the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not near so threatening."

It was earnestly urged for error that the judge below refused to nonsuit the plaintiff, and this chiefly on the ground that there was no direct evidence that electricity had been negligently transmitted into the building by defendants, and in excess of the voltage stipulated for in the contract. The court was also asked to charge the jury to the same effect, but the position in our opinion cannot be sustained. The presiding

judge charged the jury that, if the injuries resulted by reason of defective apparatus or appliances existing within the building, they would render their verdict for defendants, and in effect excluded from the consideration of the jury any and all imputation of wrong except that which might arise by reason of an excess of voltage transmitted into the building over the wires of defendants, and by reason of negligent default on the part of the company or their agents. This being true, on the facts in evidence, the case permits and calls for an application of the doctrine of *res ipsa loquitur*, and requiring that the question of defendants' responsibility should be determined by the jury. This doctrine has been discussed and applied in several recent cases before this court as in *Dail v. Taylor*, 151 N. C. 284, 28 L.R.A. (N.S.) 949, 66 S. E. 135; *Fitzgerald v. Southern R. Co.* 141 N. C. 530, 6 L.R.A. (N.S.) 337, 54 S. E. 391; *Ross v. Double Shoals Cotton Mills*, 140 N. C. 115, 1 L.R.A. (N.S.) 298, 52 S. E. 121; *Stewart v. Van Deventer Carpet Co.* 138 N. C. 66, 50 S. E. 562; *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493, and in general terms will be found very well stated in the fifth headnote to *Fitzgerald's Case*, supra, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." And this statement will be found in accord with well-considered cases in other courts as in *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; *Howser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906; *Sheridan v. Foley*, 58 N. J. L. 230, 33 Atl. 484; *Armour v. Golkowska*, 95 Ill. App. 492. These and numerous other authorities on the subject will disclose that it is not the injury alone that can call for the application of this doctrine or maxim, but the injury and the facts and the circumstances immediately attending it, and constituting together the occurrence or event, which present the conditions when it may be properly allowed to prevail. Thus, in *Shearman & Redfield on Negligence*, 4th ed., vol. I., § 59, the authors say: "In many cases the maxim *res ipsa loquitur* applies,—the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred

contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." As shown in the note to Fitzgerald's Case in 6 L.R.A. (N.S.) 361, 363, the term, *res ipsa loquitur*, has been sometimes inaccurately applied to cases where, in addition to facts, the attendant circumstances were more or less objective in their nature, and sufficient to indicate that negligent default is the more reasonable probability. In *Dail v. Taylor*, supra, there is testimony *ultra* tending to indicate personal agency in producing the result complained of, presenting rather an ordinary case of proof by circumstantial evidence. But the doctrine in strictness applies when, the injury and the facts immediately attendant being otherwise sufficient, this direct evidence of personal responsibility is lacking, and this we think is the case presented here. Under the facts submitted for the consideration of the jury, and as accepted by them, all the means, implements, appliances for the generation, transmission, and delivery of this fluid, "this manifestation of kinetic energy," as a very intelligent expert termed it in answer to an inquiry by the writer, were under the control and management of defendants and their agents. Under these circumstances the plaintiff takes hold of a lamp to turn on the light in the same manner he has been accustomed to do without injury for a year or more, and under like conditions, and receives an electric shock causing serious injury; and it is established furthermore that the amount of voltage stipulated for in the contract, even more than that, is not likely to produce harmful results if proper care is observed in its transmission. The usual and ordinary evidence in explanation available is in possession of defendants, peculiarly so in a case of this nature; this last condition being referred to by Connor, J., in *Womble v. Merchants' Grocery Co.* supra, as the basis of the maxim; and in such case as stated the question of defendant's responsibility must be referred to the jury; not, as shown by these authorities cited, under any presumption changing the burden of the issue, but as a cause in which evidence has been offered from which negligence on the part of the defendant may be inferred. Speaking to this special feature of the doctrine in *Womble's Case*, it is said: "The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the 32 L.R.A. (N.S.)

burden of proof, and not, we think, raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence, and say whether, upon all of the evidence, the plaintiff has sustained his allegation." Where the application of the doctrine we are discussing is properly called for, its effect and operation are not displaced or removed because there is testimony offered which, if accepted by the jury, would exonerate the defendant, for in all such cases the credibility of the evidence relevant to the inquiry is for the jury; they may accept or reject it. Undoubtedly, and having in view the high degree of care required in causes of this character, if it should be shown that a defendant has taken all reasonable precaution, and used all the regulating and preventive appliances obtainable and recognized as practicable, and, notwithstanding this, the injury has occurred, in such case the defendant should be exonerated. There may be cases where the explanation offered in evidence is so full and satisfactory that a court would be justified in charging the jury, "if they believe the evidence the defendants are entitled to their verdict." It is recognized that this is a dangerous agent whose properties are not as yet fully known or understood, and from what is known, it appears that at times an amount and voltage of electricity which is ordinarily and reasonably treated as harmless may cause serious and even fatal results, either from some condition of the injured person or other adventitious cause which defendant may not be able either to foresee or prevent, and therefore, when a company shows to a jury by testimony which they accept as worthy of credence, that it has done all that the highest degree of care could reasonably require in reference to the "condition, maintenance, and inspection of their wires and appliances," they should render a verdict relieving defendant of liability. But on the facts presented in this case, and for the reasons stated, the court properly refused to nonsuit the plaintiff, or to hold, as requested, that there was no evidence of negligent default. The objection made to allowing an amendment in the midst of the trial, charging negligence by reason of a defective bulb bought of one of the defendants, and the evidence tending to support it, has become immaterial in view of the charge relieving defendants from any and all imputation of negligence on that account. There is no error, and the judgment entered below is affirmed.

No error.

SOUTH DAKOTA SUPREME COURT.

ALIDA C. BLISS, Resp.,

v.

C. D. TIDRICK, Appt.

(— S. D. —, 127 N. W. 852.)

Evidence — invalid deed — record.

1. A deed void on its face is entitled to record, so as to make the record evidence in judicial proceedings for what it may be worth.

Administrator's deed — covenant — estoppel.

2. An administrator who executes a deed purporting to convey testator's real estate, in which he has a private interest as heir, is estopped to claim that such interest did not pass, although the deed is void on its face,—especially where he warrants the title as fully as by law he is authorized to do, and the statute requires no covenant in an administrator's deed.

Estoppel — administrator — attaching creditor.

3. An attaching creditor of an administrator is bound by an estoppel upon him to contest the validity, as against his own interest, of a deed given by him as administrator which is void on its face, but which purports to convey real estate in which he has an interest as heir.

(June 4, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Brule County in plaintiff's favor, and from an order denying a new trial, in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Preston & Hannett, for appellant:

It is only an instrument that has some validity, and may in some manner affect real estate, that can be recorded. There is no statute authorizing the recording of a void instrument.

Stone v. French, 37 Kan. 145, 1 Am. St. Rep. 241, 14 Pac. 530.

An executor is not estopped by his own

Note. — As to estoppel of one who executes a deed as executor or administrator to set up an existing title in himself, see note to Millican v. McNeill, 21 L.R.A.(N.S.) 60.

Somewhat analogous principles are involved in a note to W. F. Taylor Co. v. Sample, 28 L.R.A.(N.S.) 289, wherein the question of the effect of one spouse joining in the execution of the other's deed or mortgage to convey the former's separate property included in the deed is discussed, as is also the case with the note to Gainey v. Anderson, 31 L.R.A.(N.S.) 323, which discusses the question of the effect upon dower of a voluntary conveyance in which dower is not released, in satisfaction of a mortgage releasing dower.

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void deed of land from suing to dispossess persons claiming under it.

Chase v. Cartright, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; Price v. King, 44 Kan. 639, 25 Pac. 43.

An administrator who, as such, and under the direction of the probate court, sells land which, under a mistake of law, in which the purchaser shares, is believed to belong to the estate, but which in fact does not, and executes an administrator's deed therefor, without personal covenants, is not estopped by such deed from asserting title in himself; neither does the deed estop his heirs from asserting title derived from him.

Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230.

The grantees cannot invoke the doctrine of estoppel, for it does not appear that he has been misled, and he therefore cannot claim that the lips of another should be sealed against the assertion of a right.

Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Mr. James Brown, for respondent:

The deed, even if void, is entitled to record.

24 Am. & Eng. Enc. Law, 2d ed. p. 79; Morrison v. Brown, 83 Ill. 562.

One who, in a representative capacity, assumes to sell and does sell and convey to another the entire estate in land, is estopped, as against the purchaser, from asserting an estate in his own right in the same land, and this although the first sale and deed were void.

Wells v. Steckelberg, 52 Neb. 597, 66 Am. St. Rep. 529, 72 N. W. 865; Poor v. Robinson, 10 Mass. 131; Allen v. DeWitt, 3 N. Y. 276; Johnson v. Brauch, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173.

The attaching creditor had no right to have the administratrix compelled against her will to repudiate her conveyance and defraud her purchaser.

Kendall v. Lawrence, 22 Pick. 540.

Whiting, P. J., delivered the opinion of the court:

This action was brought to determine the title in and to certain land in Brule county, South Dakota, of which land one Ole Larson died seised, leaving surviving him his widow, Anna Larson, and several children. Plaintiff claimed to have received title to an undivided one-third interest in and to said land under and by virtue of a deed from one E. C. Rowell, dated September 20, 1902, and recorded September 22, 1902, and plaintiff contended that her said grantor received title to said undivided one-third interest in said land under and by vir-

tue of an instrument recorded in the office of the register of deeds of Brule county on August 14, 1902, which said instrument is in words and figures as follows:

Know all men by these presents that whereas I, Anna Larson, of Palo Alto county, state of Iowa, administratrix of the estate of Ole Larson, late of said county, deceased, finding the personalty of said estate inadequate to satisfy the debts of said estate, filed a petition in the district court of Palo Alto county, Iowa, praying for power and authority to sell the real estate hereinafter described for that purpose, and whereas by an order of the district court, made at its May, 1902, term, to wit, on the 28th day of May, 1902, I was authorized to sell the same, either at public or private sale, and whereas I have caused the same to be appraised and the appraisement to be duly filed and entered of record, and whereas I, on the 16th day of July, A. D. 1902, did sell the real estate hereinafter named to E. C. Rowell at private sale for \$1,300: Now, therefore, know ye, that I, Anna Larson, administratrix as aforesaid, by virtue of the power and authority in me vested as aforesaid, and in consideration of said sum of \$1,300, do hereby grant, bargain, sell, and convey unto the said E. C. Rowell all the following described real estate situated in Brule county and state of South Dakota, to wit: The northwest quarter of section 17, in township 101, range 67 west of the fifth P. M. And I warrant the title to the same as fully as the authority above mentioned and as by law I am authorized to do.

Witness my hand this 23d day of July, 1902.

Anna Larson,
Administratrix aforesaid.

The defendant contended that he had acquired title in and to said lands by purchase at sale under special execution issued upon a judgment based upon attachment proceedings, wherein said lands had been attached as the property of said Anna Larson, which said attachment suit was begun November 24, 1902. It will be noticed that the deed above set forth purports to be that of an administratrix, acting under and by virtue of an order issued from an Iowa court; and it was the contention of the defendant that such deed was void, and that therefore no title passed to the grantee named therein, leaving said Anna Larson vested with an undivided one-third interest, as heir of Ole Larson, which one-third interest passed to defendant upon his purchase upon such execution sale. The trial court found in favor of the plaintiff, and the defendant has appealed to this court.

Several assignments of error appear in 32 L.R.A. (N.S.)

the record herein, but the only matters meriting our consideration relate to the admissibility in evidence of the record of the purported administratrix deed, which record was admitted for the purpose of proving such deed, and the legal effect of such deed upon the grantor therein named and parties claiming under her. For the purposes of this trial, regardless of whether any testimony was offered to establish the same, it must be conceded that Anna Larson, as the widow of Ole Larson, became vested with an undivided one-third interest in fee simple to the lands in question, for, as was well held in the case of *Den ex dem. Gilliam v. Bird*, 30 N. C. (8 Ired. L.) 280, 49 Am. Dec. 379, wherever both parties claim under the same person, neither of them can deny the title of such person, and, as between two parties claiming from the same person, the one holding the elder title must prevail, with, of course, the reservation that a subsequent purchaser in good faith, for value, and without notice, actual or constructive, will be protected as against a prior conveyance. It must also be conceded that one who purchases at an attachment sale under an attachment levied subsequent to the transfer of the property by the attachment debtor is not a purchaser for value, and is therefore not protected against such conveyance, and this regardless of the question of notice. *Roblin v. Palmer*, 9 S. D. 36, 67 N. W. 949; *Murphy v. Plankinton Bank*, 13 S. D. 501, 83 N. W. 575. Therefore the appellant, under his purchase, could acquire no greater rights than were held by Anna Larson at the time of the levy of the attachment, and, if she had conveyed her title by the aforementioned deed, appellant obtained no rights under such attachment. We think it is also fully established that, if a party is estopped by his deed to dispute that the same conveys the title it purports to convey, such estoppel is binding, not only upon the grantor in such deed, but also upon all parties privy to such grantor, including, as such privy, purchasers under an attachment levied upon the property described in the deed, such levy being subsequent to the execution of such deed, and such attachment issuing in an action against such grantor. This was specifically held in the above case of *Den ex dem. Gilliam v. Bird*. See also 16 Cyc. Law & Proc. at page 716.

Upon the trial of this cause, the respondent offered in evidence the record of the above purported administratrix's deed for the purpose of proving such deed. The appellant objected to its receipt in evidence upon the ground that such deed was absolutely void upon its face, that therefore it was not entitled to record, and, not being

entitled to record, the record thereof was not competent evidence to prove the deed. This objection was overruled, and the record received in evidence. We think the ruling of the court was correct. Appellant cites in support of his position the case of *Stone v. French*, 37 Kan. 145, 1 Am. St. Rep. 237, 14 Pac. 530, and, while there are some statements by way of *obiter* contained in the opinion, which, taken by themselves, would seem to sustain appellant's position, yet a reading of such opinion shows clearly that all the court held therein was that the recording of a void instrument could give to it no validity, and therefore innocent purchasers, relying upon the record of same, could acquire no rights under the recording acts. It did not hold that the record of such instrument could not be received in evidence. Conceding that this instrument was void on its face, it would stand before us the same as any other deed clearly void upon its face, and this court has frequently held, and it has become the established law of this state, that a deed void on its face is yet color of title sufficient for the purpose of founding a claim by adverse possession. *Murphy v. Dafee*, 18 S. D. 42, 99 N. W. 86. It necessarily follows, we think, that such a deed is entitled to record.

The real issue in this case is whether or not, by the said purported administratrix's deed, the grantor therein either conveyed her one-third interest in said lands therein described, or estopped herself from denying the validity of such conveyance so far as her one-third interest is concerned. The respondent herein contends that this question has been determined by our court in her favor by the case of *Johnson v. Brauch*, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173, but the appellant maintains that the opinion in the above case has no application to the case at bar, for the reason that the holding in said case was based upon the fact that the purported administrator's deed then before the court contained general warranties. We have examined the abstract in said cause, and find that it describes said deed merely as an administrator's deed, without any mention of warranties; and it would therefore appear that the facts in said case were parallel to those in this case; but in the opinion it seems to be assumed that such deed contained general warranties, and the holding of the court seems to be based upon such warranties, and to be in no manner based upon the question of estoppel; the court holding that the title of the grantor in such deed passed, owing to such warranties. While we think the conclusion reached in *Johnson v. Brauch* was correct, yet we think that, so far as the one-third interest

held by the grantor as heir at the time of executing his deed, it did not pass to the grantee therein named by virtue of such warranties, as was the case with the interest afterwards acquired by said grantor through the death of a son, but the grantee was entitled to claim said one-third interest by virtue of the equitable doctrine of estoppel, the said grantor being in equity estopped from ever questioning the validity of such deed so far as it affected his one-third interest.

In *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 8th Am. ed. p. 818, note, it is held: "Few rules of law are accordingly better established or of greater antiquity than that a man may bind himself irrevocably by putting his seal to a grant or covenant, and will not be allowed to disprove or contradict any declaration or averment contained in the instrument and essential to its purpose. A recital or allegation in a deed or bond which is certain in its terms and relevant to the matter in hand will therefore be conclusive between the parties in any controversy growing out of the instrument itself, or the transaction in which it was executed." In the case of *Brown v. Edson*, 23 Vt. 435, one of the judges who wrote a concurring opinion said: "In regard to the passing of the title from *Baldwin v. Jonathan Wilder*, there is undoubtedly some irregularity, not easily explained. It is an attempt to convey land in this state, the title of which was in a deceased person, by virtue of an administrator and order of sale, obtained in the state of Massachusetts. Such administrator could have no authority, as such, over lands in this state. No rule of law is better settled than that the authority of an administrator is strictly confined to the jurisdiction. But in the particular case, if the deed attempted to be proved were properly in evidence, and the identity of the parties shown, the title would be in the administrator himself, instead of his intestate. In such a case it becomes a grave question whether the grantor is not estopped to deny that whatever title he possessed did pass. I should, for one, be inclined to believe such must be the effect of his deed. It has often been held that the owner of land who stands by and aids in the execution of a deed of such land by a stranger, and himself becomes a witness of the conveyance, is thereby estopped to deny that the title passes; *a fortiori*, if he give a deed of the land himself, although as administrator of someone possessing no title, and of whose estate he has no legal administration." It will be noted that in this case the administrator was held estopped, although the deed itself, if valid, could not have conveyed title, because there had been no title in the deceased

party; how much stronger, then, in a case where the instrument, if valid, would have conveyed title.

In the case of *Kellerman v. Miller*, 5 Pa. Super. Ct. 443, the court said: "It clearly appears by the evidence that J. H. Miller was one of the actors in securing the sale of this real estate under the proceedings in the orphans' court. He joined in the return to the order of sale, in which he averred that the title to this land was in George Miller; also, that he had received the purchase money, and had, under the authority of the decree confirming the return of sale, executed a deed; but he now asserts that the proceeding was void because the title was not in fact in George Miller, but in *cestuis que trustent*. The order for sale of this real estate was secured after the account of the administration had been filed and a balance had been determined in their favor against the estate of George Miller, as against whose land they claim a lien, and from which they claimed payment of this debt. J. H. Miller was so intimately connected with the title as a party in interest, with the administration account, and with the proceedings to sell the real estate, that he could not have been ignorant of the natural effects of this act; and had the land been purchased by a person unconnected with the title, there could be no question but that J. H. Miller would have been estopped from asserting the title he then held as against such a purchaser. So far as the evidence shows, there was no shadow of title in George Miller, nor any assertion on the part of anyone that such title existed; and, had J. H. Miller desired to put himself in such a position as not to be restrained from asserting the title that he knew he had in the land, it would have been a very easy matter to have described the interest they were selling in the petition asking for the order of sale, and the deed following it, in such a way that he would not be prejudiced thereby; although, had he done so, there probably would have been no price offered. Instead of doing this, he undertook to sell the property under cloak of an order of court as the real estate of the decedent,—that is, to raise money to pay in part the debt due him and his coadministrator,—and, if the purchaser at such a sale would not acquire his individual title by estoppel, the reasons for applying the principle invoked in this case would be no longer well founded in any case, as the convincing argument of the learned trial judge shows. To us this is unanswerable." In the case of *Wells v. Steckelberg*, 52 Neb. 597, 66 Am. St. Rep. 529, 72 N. W. 865, wherein the facts were very similar to those in the case at bar, the court said: "We are of opinion that, under the circumstances, John B. 32 L.R.A. (N.S.)

Wells was estopped, both by deed and *in pais*, from setting up his own life estate against the defendant, and that the estoppel continued as against his grantee by quitclaim. There is in the deed no covenant of title or of warranty, but to create such an estoppel covenants seem unnecessary. As said by the Supreme Court of the United States, reviewing the authorities, and enforcing an estoppel under somewhat similar facts: 'If a deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantors and those claiming under them in respect to the estate thus described as if a formal covenant to that effect had been inserted.'" This last case is particularly in point, for the reason that the appellant contends there are no covenants or warranties in the deed in this case. The appellant refers us to the case of *Gjerstaden v. Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233, but an examination of such opinion will show that, while said court concedes the ordinary rule to be as claimed by the respondent herein, yet it held that in the case before that court there was evidence of an innocent mutual mistake, such as would not bar the grantor in a deed given by him in fiduciary capacity, from afterwards claiming the title which really was in such grantor, and never had been in the deceased party.

Even if a covenant or warranty was necessary in order to entitle the respondent to invoke the estoppel claimed for herein, can it be said that there is no covenant or warranty in the deed in question? Our statute does not require the administrator, in executing a deed as administrator, to enter into any covenant or warranty whatsoever, or use any words purporting to convey any particular estate; but it is necessary merely to use words sufficient to convey whatever interest the deceased had; and certainly no covenant or warranty, either express or implied, would be binding upon the estate. A reading of the deed herein shows that the grantor represented that she was authorized to sell said land; that under such authority she did sell the land; and that therefore, "by virtue of the power and authority in me vested, as aforesaid, . . . do hereby grant, bargain, sell, and convey unto the said E. C. Rowell," etc. Furthermore, the grantor says in such deed: "And I warrant the title to the same as fully as the author-

ity mentioned and as by law I am authorized to do." In the early case of *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83, which has been cited for nearly a century as a leading authority, it is held that, where one purports to warrant or covenant in a representative capacity when one is not authorized so to do, such warranty or covenant becomes personal and binding upon the party as such, the court saying: "Whenever a man by an instrument under seal undertakes to stipulate for another, if he acts without authority or beyond his authority, he is answerable personally for the nonperformance of the contract." In line with this decision, it was held, in the case of *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221, that a covenant by an executor in a conveyance of the estate of the testator is binding upon such executor, and this is held to be true even where the executor purports to covenant only as executor. We cite on this proposition, also, the cases given in a note following the above case in 17 Am. Dec., and also the numerous cases found in 1 Notes to Am. Dec. 663, being the notes to the above case of *Sumner v. Williams*. It is therefore well supported by authority that a grantor in a deed such as the one before us, though such deed may in fact be absolutely void so far as the estate he represents is concerned, is absolutely estopped to question the validity of such instrument as against himself, or to set forth any rights which he was vested with personally at the time of executing such deed. And it certainly conforms to common sense and justice that where a person, the heir to an estate, and also the representative of such estate, intending to convey the interest to such lands owned by the estate, for the benefit of the estate, and through it, for the benefit of the heirs, including such representative, enters into an instrument of conveyance with a purchaser in good faith and for value, purporting to carry out the intention of such parties that the title to the property shall be conveyed, such person should be forever estopped, regardless of any covenants or warranties, from being heard to say that the instrument executed was void and of no effect. Such person being estopped to question the title of the grantee, such estoppel inures to the benefit of those claiming title under him, and is binding upon all persons privy to him.

The judgment of the trial court and the order denying motion for a new trial are affirmed.

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ILLINOIS SUPREME COURT.

MARY J. ZOLLMAN, Appt.,
v.
JACKSON TRUST & SAVINGS BANK.

(238 Ill. 290, 87 N. E. 297.)

Note — security — negotiability.

1. A recital in a promissory note that it is secured by deed of trust does not destroy its negotiability, so as to charge a purchaser for value, before maturity, with notice of latent defenses which the maker may have against the payee.

Deed of trust — assignment — equities — note.

2. The rule that a deed of trust cannot be assigned so as to vest title freed from any defenses which the mortgagor has against the original grantee does not apply to a promissory note which the deed is given to secure.

Note — purchase for value.

3. The substitution by a bank of promissory notes of a third person as security for the debt of its customer, in lieu of other collateral, which it releases to the customer, renders it a purchaser for value.

Equity — jurisdiction — cross bill.

4. One seeking the aid of a court of equity to secure the cancellation of notes alleged to have been misappropriated cannot question the jurisdiction of the court to enter upon a cross bill a money judgment against him for the amount due on the notes.

Pledge — other collateral — release.

5. One whose promissory note has been pledged by the payee to a bank as collateral for his indebtedness to it cannot complain, in an action to settle his rights against the bank, that he has been injured by compromises which the bank made in regard to other collateral held as security for the same debt, if all the collateral held by the bank was not sufficient to satisfy its claim in full.

(February 19, 1909.)

Note. — Recital in note as to security as affecting its negotiability.

Where note considered separate from instrument of security.

The question as to the effect on the negotiability of a note of a reference therein to another instrument, collateral thereto, securing it, depends upon whether the note and security are to be construed together. If the note alone is transferred by the usual methods, or is transferred together with an instrument securing it which contains no provisions affecting the essential attributes of negotiability, the mere fact that its payment is secured by some other instrument will not affect its negotiability, neither will the mere recital of that fact

APPEAL by complainant from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County in defendant's favor in a suit to cancel a trust deed as a cloud on title, and for the cancellation and delivery of certain notes. Affirmed.

The facts are stated in the opinion.

Mr. Ernest Severy, for appellant:

The purchaser of mortgage securities takes subject to equities between the original parties to the mortgage.

Olds v. Cummings, 31 Ill. 188; *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Chicago Title & T. Co. v. Aff*, 183 Ill. 91, 55 N. E. 659; *White v. Sutherland*, 64 Ill. 181; *Y. M. C. A. Gymnasium*

Co. v. Rockford Nat. Bank, 179 Ill. 605, 46 L.R.A. 753, 70 Am. St. Rep. 175, 54 N. E. 297; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 28 N. E. 640; *Thompson v. Shoemaker*, 68 Ill. 256; *Stone v. Palmer*, 166 Ill. 463, 46 N. E. 1080; *Bouton v. Cameron*, 205 Ill. 63, 68 N. E. 800.

When the property of a third person is a security for the payment of a debt or obligation, such property will stand in the position of a surety of the debtor, and any change in the contract of a suretyship which will discharge a surety will release and discharge the property so held as collateral.

Price v. Dime Sav. Bank, 124 Ill. 324, 7 Am. St. Rep. 367, 15 N. E. 754; *Bank of*

in the note; neither fact, in and of itself, being sufficient to put an otherwise bona fide purchaser for value on inquiry as to the terms of the security. On the other hand, if the note and mortgage are transferred together in the usual way, it seems clear that they will be construed together, and the negotiability of the note will be determined by the question whether the essential attributes of negotiability are impaired by any provisions in the mortgage or other instrument of security. The principle involved in these two lines of cases is essentially different, and hence the rule asserted in the former class of cases, to the effect that the mere recital in a note that it is secured by some other instrument does not affect its negotiability, has no application in cases of the latter class, which involve the contemporaneous transfer of the note and instrument securing it. With this distinction in mind, an examination of the cases discloses, for the most part, a uniformity of decision. In this connection it is to be observed that some confusion is caused by the fact that in many cases, although the court has considered, many times at length, the question whether a negotiable note and the collateral instrument securing it should be construed together, to ascertain the negotiability of the note, the case has finally been disposed of by the court holding that, even if so construed, there were no terms or provisions in the security which affected the essential attributes of negotiability of the note. This class of cases involves the question of what provisions will impair the negotiability of a negotiable instrument, and is not discussed in this note. Hence, except for the purpose of distinction, none of such cases are included herein.

Since the mere fact that an instrument otherwise negotiable is secured by a real-estate or chattel mortgage does not affect its negotiability (*Brewer v. Slater*, 18 App. D. C. 48; *Christianson v. Farmers' Warehouse Assn.* 5 N. D. 438, 32 L.R.A. 730, 32 L.R.A.(N.S.)

67 N. W. 300; *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; *Croft v. Bunster*, 9 Wis. 503; *Fisher v. Otis*, 3 Chand. [Wis.] 83), by the weight of authority, the mere fact that the instrument contains a recital that its payment is secured by a real-estate or chattel mortgage is not, of itself, sufficient to destroy its negotiability (*De Hass v. Roberts*, 59 Fed. 853, affirmed in 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227; *Dumas v. People's Bank*, 146 Ala. 226, 40 So. 964; *Commercial Bank v. Crenshaw*, 103 Ala. 497, 15 So. 741; *Mumford v. Tolman*, 54 Ill. App. 471; *Metcalf v. Draper*, 98 Ill. App. 399; *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 197, 45 N. E. 512; *Beckstrom v. Krone*, 125 Ill. App. 376; *Duncan v. Louisville*, 13 Bush, 378, 26 Am. Rep. 201; *Guilford v. Minneapolis, S. Ste. M. & A. R. Co.* 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658; *Knight v. Finney*, 59 Neb. 274, 80 N. W. 912; *Farmers' Nat. Bank v. McCall*, — Okla. —, 26 L.R.A.(N.S.) 217, 106 Pac. 866; *Valley Nat. Bank v. Crowell*, 148 Pa. 284, 33 Am. St. Rep. 824, 23 Atl. 1068; *Albertson v. Laughlin*, 173 Pa. 525, 51 Am. St. Rep. 777, 34 Atl. 216; *National Bank v. Gary*, 18 S. C. 282).

And in *Wise v. Charlton*, 4 Ad. & El. 786, 6 Nev. & M. 364, 2 Harr. & W. 49, 6 L. J. C. P. N. S. 193, as to a recital in a note that payment was secured by the deposit of title deeds, Lord Denman, C. J., remarked that such a memorandum on the face of the note did not qualify its character as a negotiable instrument; that it was only a memorandum added of something else, and was not imported in the main agreement.

And in *Commercial Bank v. Crenshaw*, 103 Ala. 497, 15 So. 741, the court said that the mere fact that a note is secured by a mortgage exerts no influence upon the question of its commercial character, and hence, a recital of that fact does not affect

Albion v. Burns, 46 N. Y. 170; *Campion v. Whitney*, 30 Minn. 177, 14 N. W. 806; *Brandt, Suretyship & Guaranty*, 3d ed. § 43; *Lauman v. Nichols*, 15 Iowa, 165.

The holder of commercial paper as collateral has no right to compromise with the parties to the security.

Union Trust Co. v. Rigdon, 93 Ill. 466; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 549, 25 Am. Rep. 341.

Whenever a cross bill seeks relief, it is indispensable that it shall be equitable relief.

Tobey v. Foreman, 79 Ill. 491; *Jevne v. Osgood*, 57 Ill. 347.

Messrs. Adams & Froehlich, for appellee:

its negotiability; at least, where the mortgage contains nothing which would affect the negotiability of the note.

To the same effect is *Dumas v. People's Bank*, 146 Ala. 226, 40 So. 964.

In *Brewer v. Slater*, 18 App. D. C. 48, the doctrine is asserted that a negotiable note secured by a mortgage upon land loses none of its attributes by reason of that fact. The court said: "The mortgage is an incident of the debt, and passes with its assignment. The debt evidenced by the note gives character to the mortgage, and protects it from the equities between mortgagor and mortgagee on behalf of the bona fide holder of the note, for value. The mortgage, with or without power of sale, detracts nothing from the quality of the debt which it secures, though it may add commercial value through its lien. That the note may recite or show upon its margin, which seems the general custom, that it is secured by mortgage or other lien, cannot affect the doctrine stated." The court added, however: "It may be true that such reference would be sufficient to call attention to any restraining or qualifying words of the mortgage having special relation to the note, and affecting its negotiability, and require the two to be read and interpreted together. But whether true or not is of no moment here, because there are no words in this trust deed that have the remotest tendency in that direction."

In *Mindell v. Reed*, 26 Ala. 730, the court said that a deed securing a negotiable note, when properly recorded, was constructive notice as to the lien upon property in all contests as to it, but it did not run with the mercantile paper, and constructively charge all persons with the knowledge of its recital, so as to affect the right of bona fide holders of such paper. It did not appear in this case whether the note showed on its face that it was secured by the deed.

The doctrine of the foregoing cases, that the mere recital in a note that it is secured by a deed or mortgage does not affect its negotiability, has been asserted as to notes secured by instruments of security that

Notes secured by a deed of trust do not follow the trust deed, but are governed by the law pertaining to negotiable instruments.

Martina v. Muhlke, 186 Ill. 327, 57 N. E. 954; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Metcalf v. Draper*, 98 Ill. App. 399; *Olds v. Cummings*, 31 Ill. 188.

The bank acquired and held the notes in question in good faith, for value, before maturity, and without notice of any existing equities or defenses.

Siegel, C. & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537; 19 Am. St. Rep. 51, 23 N. E. 417; *Chicago Title & T. Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637; *Hide & Leather Nat. Bank v. Alexander*, 184 Ill. 416, 56 N. E. 809; *Mix v.*

contain provisions which, if embodied in the note itself, would render it non-negotiable; and it has been held that even in such a case a purchaser for value is not put upon inquiry as to the terms of an instrument of security which would affect its negotiability by the mere fact that the note refers to the security. Neither is the note rendered non-negotiable as to such a purchaser by such a recital, although the instrument securing it contains non-negotiable provisions which refer to the note. This doctrine, however, has been asserted only in cases wherein the note was being considered as separate and distinct from the instrument securing it.

A case directly in point is *First Nat. Bank v. Mineral Farm Consol. Min. Co.* 17 Colo. App. 452, 68 Pac. 981. The question there was, conceding a quitclaim deed executed as security for a negotiable note placed limitations on the note affecting its negotiability, would such provisions affect the negotiability of the note in the hands of third parties without notice other than the fact of the notation upon the face of the note, that it was secured by a quitclaim deed of that date. In holding that such a notation did not affect the negotiability of the note, or charge a subsequent holder with notice of any limitations contained in the quitclaim deed, the court said: "The mere notation upon the face of the note, 'This note is secured by quitclaim deed of this date,' did not affect the negotiable character of the note. The note, as it appeared, was an unconditional promise to pay a definite amount on demand, with no suggestion upon its face that these unequivocal terms were modified by any other instrument. The memorandum simply advised that, as an incident to the note, given for the purpose of securing it, and for no other purpose, there was a quitclaim deed. There was no suggestion in this notation of an intention of the parties to restrict the unconditional terms of the note by the quitclaim deed. That this notation did not charge appellant with notice of the terms of the quitclaim deed is fully sustained by the authorities."

National Bank, 91 Ill. 20, 33 Am. Rep. 44; Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Fidler v. Paxton, 101 Ill. App. 107; Metcalf v. Draper, 98 Ill. App. 399.

The cross bill of the bank, asking a money judgment, was properly entertained by the court.

Biegler v. Merchants' Loan & T. Co. 164 Ill. 197, 45 N. E. 512; Wehrheim v. Smith, 226 Ill. 346, 80 N. E. 908; Correll v. Freeman, 29 Ill. App. 44; French v. Bellows Falls Sav. Inst. 67 Ill. App. 179; 16 Cyc. Law & Proc. p. 333.

Vickers, J., delivered the opinion of the court:

Appellant, Mary J. Zollman, executed a

The effect of a recital in a note, that it is secured by a mortgage, was considered by the court in Howry v. Eppinger, 34 Mich. 29. On this point it is said: "The object and intent of the parties in putting these words upon the notes was not to limit or impair their value, but to add to it. It was not to notify third parties that the mortgage contained some clause inconsistent with the notes, and which would destroy or affect their negotiable character. One object undoubtedly was to show that they were the notes referred to in the mortgage, and thus connect them; but the principal one was to show that, in addition to the responsibility of the makers, they were also secured by mortgage. If the makers intended to limit the effect of the notes by the terms or conditions of the mortgage securing their payment, they should have done so by language which could admit of no doubt as to its meaning. We think these words were neither sufficient to inform third parties of the contents or terms of the mortgage, or to put them upon inquiry."

In Guilford v. Minneapolis, S. Ste. M. & A. R. Co. 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658, the court said that the mere recital that bonds are secured by a trust deed will not affect the negotiability of the bonds, or be sufficient to put the purchasers upon inquiry as to the conditions contained in the deed.

In Knight v. Finney, 59 Neb. 274, 80 N. W. 912, as to an indorsement on the back of a note, reading: "This note is secured by a contract on land, etc.," the court said that this would serve to inform one who read it, or to lead to the belief, that the note was all the evidence of the debt, and the contract but a security, rather than to convey knowledge that the note had no real existence, and was but a part of the contract, or a mere memorandum of the stipulations stated in the contract in regard to payments of money.

That notes appear on their face to be secured by a trust deed does not affect their negotiability, or require the purchaser to

principal note for \$7,000, together with seven interest coupon notes, payable to her order, and indorsed the same to Henry W. Howe. To secure these notes, appellant executed a trust deed to the Chicago Title & Trust Company on certain real estate owned by her. These notes and the trust deed were delivered to Henry W. Howe upon his promise to advance appellant money with which to construct a six-flat building on the premises described in the trust deed. Howe paid appellant, at the time the notes and trust deed were delivered, \$18.47, which was the only money appellant received for the notes and trust deed. Howe, being indebted to the Jackson Trust & Savings Bank, appellee herein, in the sum of \$25,000, indorsed appellant's notes and delivered them to

make inquiry as to whether the statement concerning the security is true. Metcalf v. Draper, 98 Ill. App. 399.

So, a recital by indorsing on notes that they are secured by a lien upon the maker's interest in certain horses described in a specific agreement does not put a person acquiring the notes in the ordinary course of business upon inquiry as to the terms of such agreement. Biegler v. Merchants' Loan & T. Co. 62 Ill. App. 560, affirmed in 164 Ill. 197, 45 N. E. 512.

An indorsement upon a promissory note of the statement that its payment is secured by a lien upon the maker's interest in certain personalty does not render the note non-negotiable, or put the purchaser on inquiry as to the terms of a verbal agreement for the lien. Biegler v. Merchants' Loan & T. Co. 164 Ill. 197, 45 N. E. 512.

The negotiability of a note secured by a real-estate mortgage is not affected by its being paraphrased *ne varietur* by a notary public, to identify it with the transaction, although the mortgage itself is not negotiable. Schmidt v. Frey, 8 Rob. (La.) 435; Bank of Kentucky v. Goodale, 20 La. Ann. 50; Morris v. Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

Where transferred with security which contains no provisions affecting negotiability.

So, the negotiability of a note or bond is not affected by a recital in the instrument that it is according to the conditions of a mortgage, where the terms of the mortgage, construed with the note, would not affect the essential elements of negotiability. Farmer v. First Nat. Bank, 89 Ark. 132, 131 Am. St. Rep. 79, 115 S. W. 1141; Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297; Bank of Carroll v. Taylor, 67 Iowa, 572, 25 N. W. 810; Dutton v. Ives, 5 Mich. 515; Littlefield v. Hodge, 6 Mich. 326; Brooke v. Struthers, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; Wilson v. Campbell, 110

appellee as collateral security for his debt, and received from appellee a \$10,000 note of William S. Peterson, which appellee held as collateral security, and obtained from appellee a release of a trust deed executed to secure the Peterson note. Soon after this transaction with appellee, Howe committed suicide. The appellant filed a bill in equity, alleging the foregoing facts, and averring that appellee had full notice, at the time it received the notes, that no consideration had been paid for them, for the purpose of removing the trust deed as a cloud upon her title, and for the cancelation and delivery of the \$7,000 principal note and the interest notes. Appellee answered the bill, in which it claimed to be an innocent holder of the notes for value,

and denied all knowledge of the transaction between appellant and Howe. In the meantime, while this chancery suit was pending, the Jackson Trust & Savings Bank instituted an action at law in the superior court of Cook county against appellant to recover a judgment upon the notes. Upon petition of appellant, an order was entered in the chancery proceeding, restraining the prosecution by appellee of the action at law. The Jackson Trust & Savings Bank then filed a cross bill in this case, for the purpose of having a money decree entered in its favor against appellant for the amount due upon the notes. Upon a final hearing in the court below, a decree was entered in accordance with the prayer of the original bill in so far as the trust deed is concerned.

Mich. 580, 35 L.R.A. 544, 68 N. W. 278; Cox v. Cayan, 117 Mich. 599, 72 Am. St. Rep. 585, 76 N. W. 96; Blumenthal v. Jassoy, 29 Minn. 177, 12 N. W. 517; Bradbury v. Kinney, 63 Neb. 754, 89 N. W. 257; Cunningham v. McDonald, 98 Tex. 316, 83 S. W. 372; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Thorp v. Mindeman, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417.

Thorp v. Mindeman, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417, overrules Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409, and W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100, in so far as those cases hold that agreements contained in a mortgage, which rendered the time of payment uncertain, made the note secured thereby non-negotiable. The Thorp Case is influenced in part by the negotiable instrument act, and also by a distinction between the ordinary provisions of a real-estate mortgage which relate to the preservation of the security, and agreements which directly relate to the note itself. Without passing upon the question whether provisions of the latter character are imported in the note, it is held that provisions of the former character are not imported in the note, and hence do not affect its negotiability. And its decision that the negotiability of the note was not affected was upon that ground, and not upon the ground that the recital in the note of the fact that it was secured by a mortgage did not put the purchaser on notice of the terms of the mortgage which were claimed to affect negotiability, although the opinion does state, incidentally, upon the authority of other cases, that the words, "secured by real-estate mortgage," "were not sufficient to charge the assignee with notice of any defense, nor of the terms of the mortgage."

Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872, holds that where a deed of trust is simply the security for the payment of a note, and the sole purpose of its several provisions is to render the security available and effective, such provisions do not 32 L.R.A. (N.S.)

affect the negotiability of the note, and do not impair the obligations contained in the note to pay a sum certain at a time certain, and hence, a reference in the note to the fact that it is secured by a deed of trust is not notice of the conditions thereof, and does not destroy the negotiability of the note.

To the same effect is Campbell v. Equitable Securities Co. 17 Colo. App. 417, 68 Pac. 788. And see *infra*, under heading, "Where provision in mortgage relates to security, and not to the note."

In Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 180, 95 N. W. 61, the rule is recognized that a note otherwise negotiable is not rendered non-negotiable merely by a provision for or a reference to the fact that it is secured by some other instrument; but it is said that this rule does not apply to notes secured by a mortgage executed contemporaneously therewith; that in such cases provisions of the mortgage affecting the negotiable character of the note have effect against a subsequent purchaser who is chargeable with knowledge thereof, by a reference in the note to the mortgage, or by other evidence showing he had notice that the note was secured by a contemporaneous mortgage. In this case, however, the note contained no reference to the mortgage, but the plaintiff was charged with knowledge thereof and its conditions, because the mortgage was turned over to it, with the note. Cases of this nature raise a different question, and are to be found *infra*, under heading, "When note and security are transferred together, and the security contains non-negotiable provisions."

"Where note and security are transferred together, and the security contains non-negotiable provisions.

Where a note and mortgage, or other instrument securing it, are transferred together, and the note refers to the mortgage, if the mortgage is not negotiable, either by reason of the rule of the jurisdiction against the negotiability in general of

The court, however, refused appellant any relief upon the notes, but granted the prayer of the cross bill, and rendered a money decree against appellant for the amount due on the notes. Appellant appealed the cause to the appellate court for the first district, and from a judgment affirming the decree below she has prosecuted the further appeal to this court.

The appellant contends that, since the notes in question showed upon their face that they were secured by a trust deed, appellee cannot be regarded as an innocent holder of such notes, and that the purchaser should be held to have notice of all facts that inquiry would have disclosed. This is a misapprehension of the effect of such recital. A recital upon a promissory note,

to destroy its negotiability, must be of a kind that in some respects qualifies or makes uncertain or conditional the promise. *Siegel, C. & Co. v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 197, 45 N. E. 512. In the case last above cited it was held that a note which recited that "this note is secured by a lien upon my interest in certain horses described in agreement this day made between G. W. Leiby and myself" was nevertheless a negotiable instrument, and that a purchaser for value before maturity held such note free from any latent defenses that the maker might have against the payee.

Appellant insists next that, under the

mortgages, or because it contains provisions relating to the note which affect the essential attributes of negotiability, to the extent, at least, of enforcing the mortgage lien or claiming thereunder, the note and mortgage will be construed together as a non-negotiable instrument, and the assignee thereof will take subject to equities in favor of the mortgagor to the same extent as do assignees generally of non-negotiable instruments or choses in action. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Olds v. Cummings*, 31 Ill. 188; *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433; *McIntire v. Yates*, 104 Ill. 491; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Martina v. Muhlke*, 186 Ill. 327, 57 N. E. 954; *Lauf v. Cahill*, 231 Ill. 220, 83 N. E. 155; *Wright v. Shimek*, 8 Kan. App. 350, 55 Pac. 464; *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Jewett v. Tucker*, 139 Mass. 566, 2 N. E. 680; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Walker v. Thompson*, 108 Mich. 686, 66 N. W. 584; *Brooke v. Struthers*, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; *Wilson v. Campbell*, 110 Mich. 580, 35 L.R.A. 544, 68 N. W. 278; *Renshaw v. Wills*, 38 Mo. 201; *Orrick v. Durham*, 79 Mo. 174; *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; *Northern Counties Invest. Trust v. Edgar*, 65 Neb. 301, 91 N. W. 402, 96 N. W. 1022; *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, on rehearing 65 Neb. 287, 94 N. W. 903; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779.

A well-reasoned case sustaining this doctrine is *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19, which holds that where a note purports on its face to be a mortgage note, the note and mortgage are to be construed together in determining the rights of the holder of the note. In reaching this conclusion, the court considered

the general question of sufficiency of notice to put the holder of a note secured by mortgage upon notice. Upon this point, the court said: "In the nature of things, it can scarcely happen that the question is to be decided upon an isolated fact. It may be that, in a particular case, some single fact, in and of itself, is sufficient; but generally it is not so. The question is ordinarily a broader one, it is this: Do all the facts, taken in connection with the subject-matter, with the situation and relation of the parties, their means of knowledge, the circumstances which should lead to inquiry, together show such a state of facts that it would be inequitable for subsequently acquired rights to supplant rights previously acquired? In this view a fact which, under some circumstances and some situations and relations of the parties would be insignificant, in other relations of the parties, and under other circumstances, would be decisive; and thus, many apparently conflicting decisions will be found to be harmonious. The question is not does any one fact, but does the whole case, disclose such a state of circumstances as that it is inequitable for a person having subsequent rights to enforce such rights against an elder title, defective only by reason of some legal rule. If it does, the elder title should prevail. It is quite clear that a note payable five years after date, with a memorandum upon it that it is secured by mortgage upon real estate, is not what, by men of business, is usually denominated commercial or business paper; and we think there is a material distinction between securities of this kind and strictly mercantile paper; and that if such paper as this may be subject to equities, then strictly mercantile paper would not be; not that the rule of law is different, but what would attract no attention in relation to purely business paper should attract attention in paper of this description."

And in *Jewett v. Tucker*, 139 Mass. 566, 2 N. E. 680, the court remarked that where a note and mortgage refer respectively to each other, the taker of either must take according to the true title of him who

law of this state, there can be no innocent holder of notes secured by mortgages or trust deeds. To this we cannot assent. Ever since the case of *Olds v. Cummings*, 31 Ill. 188, was decided, the law has been regarded as well established in this state that mortgages and trust deeds were not assignable so as to vest the title freed from any defense which the maker had against the original mortgagee or grantee. But this rule has no application to the rights of an innocent holder of negotiable promissory notes to secure which such mortgage or trust deed is executed. The legal right to proceed upon the notes and have a judgment at law is independent of any lien created by mortgage or trust deed. *Martina v. Muhlke*, 186 Ill. 327, 57 N. E. 954.

It is next contended by appellant that the substitution of appellant's notes for other collateral which appellee held to secure Howe's debt does not constitute appellee a purchaser for value of appellant's notes.

transfers it, as said title appears upon a proper examination. The mortgage note may thus be subject to equities where strictly commercial paper would not be.

In *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, the doctrine is asserted that while the title of one who buys ordinary commercial paper in good faith, before its maturity, is not vitiated by the fact that there were suspicious circumstances which might have put him upon inquiry, there is a distinction between the purchase of such paper and that of notes known to be secured by mortgage of real estate, although bought as negotiable paper. The effect of the distinction is that subsequently acquired rights in mortgage notes will not be allowed to supplant rights previously acquired, if all the facts together, and including the means of knowledge and any circumstances which should lead to inquiry, show that such a result would be inequitable. And when the transaction is in terms the purchase of a mortgage as both a debt and a conditional estate in land, the distinction becomes decisive because of the doctrine that the purchaser of a mortgage is charged by statute with the constructive notice of the state of the record title when, as in the present case, the record discloses not only a want of title in the vendor, but the fact that the title to the mortgage was in the person who now claims adversely to the purchaser. One who purchases under such circumstances is not a purchaser without notice, but with constructive notice of the want of title of his vendor. In buying the note, the purchaser knows he is buying the mortgage, and in determining his rights against those of the real owner of both note and mortgage, he is to be charged with knowledge of the facts of which, as purchaser of the mortgage, he had constructive notice. It is to be noted that this case involves 32 L.R.A. (N.S.)

This question has been determined by this court adversely to appellant's contention in the case of *Manning v. McClure*, 36 Ill. 490. In the case above cited, this court, after an extended review of authorities outside of this state, laid down the rule, on page 498, as follows: "We are led, then, by what we consider the equities between the parties and by the acknowledged policy of giving stability to negotiable paper, to hold that the indorsee of such paper, before its maturity, taking it as payment or security for a pre-existing debt, and without any express agreement, shall be deemed a holder for a valuable consideration in the ordinary course of trade, and shall hold it free from latent defenses on the part of the maker." This rule has been adhered to in subsequent cases. *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Doolittle v. Cook*, 75 Ill. 354; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Mix v. National Bank*, 91 Ill. 20, 33 Am. Rep. 44; *McIntire v. Yates*, 104 Ill. 491.

the question as to the rights between respective purchasers of the note and mortgage, rather than the rights between the mortgagor and the mortgagee, or a subsequent assignee.

The doctrine was asserted in *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110, that where a negotiable promissory note contained a recital that it is secured by a mortgage of even date, and the mortgage is delivered at the same time as the note, and relates to the same subject-matter, they form substantially one transaction, and must therefore be considered together. And if the mortgage contains provisions which render the amount of the note or the time of payment uncertain, the negotiability of the note is thereby destroyed.

In *Brooke v. Struthers*, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272, the court reasoned that a mortgage executed simultaneously with a note is a part of the contract, and the two are to be construed together; and where there is a provision in the mortgage not contained in the note, it will control it. Hence, the negotiability of the note will be taken away by provisions in the mortgage which affect the essential attributes of negotiability required in negotiable instruments.

In *Wilson v. Campbell*, 110 Mich. 580, 35 L.R.A. 544, 68 N. W. 278, the court remarked that the test in such cases is: Are the provisions of the mortgage such as to introduce in the note uncertainty as to time or amount?

In *De Hass v. Roberts*, 59 Fed. 853, while the question was not considered, it was assumed that the negotiable note and real-estate mortgage securing it would be considered together in determining the negotiability of the note, and, as so construed, the negotiability of the note was sustained, the court holding that the different provisions in the mortgage as to payment of

Appellant contends next that the court below erred in rendering a money decree against her upon appellee's cross bill. Her contention on this point is that the matters set up in the cross bill were purely legal, and were therefore not cognizable in a court of equity. Even though the matters set out in the cross bill were purely legal, the appellant having brought appellee into equity upon matters of exclusive equitable cognizance, she cannot now be heard to question the jurisdiction of the court of equity over the matters set up by appellee in its cross bill. *Quick v. Lenon*, 105 Ill. 578; *Story*, Eq. Pl. § 399. It must be borne in mind that by her original bill appellant brought these notes into question and prayed relief in respect thereto. The cross bill, therefore, was germane to the original bill. Appellee, on petition of appellant, had been enjoined from the prosecution of its action at law upon the notes. It would seem to

be highly inequitable to require appellee to institute another action at law, merely for the purpose of obtaining a judgment upon the notes, when the court of equity had before it the proper parties and the subject-matter to enable it to do complete justice between the parties.

It is finally contended by appellant that she was injured by certain compromises that were made by appellee in regard to other collateral which it held to secure Howe's indebtedness to the bank. It is a sufficient answer to this contention to say that, if all the collateral held by appellee had been paid in full, there would still have been due appellee more than it will obtain on the judgment against the appellant.

We find no reversible error in the judgment of the Appellate Court. It will accordingly be affirmed.

taxes by the mortgagor, etc., did not affect the negotiable character of the note.

A note is non-negotiable which refers on its face to a mortgage securing it, where the mortgage contains stipulations which render the note uncertain as to the amount to be paid and the time of payment, since, under the Code, several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

The purchaser of a note and mortgage securing it is chargeable with notice of conditions of the mortgage which render uncertain the amount of the note, thereby destroying its negotiability. *Northern Counties Invest. Trust v. Edgar*, 65 Neb. 301, 91 N. W. 402, 96 N. W. 1022.

A note secured by a mortgage to which it refers is affected by provisions of the mortgage which render the amount of the note uncertain, and the negotiability of the note is thereby destroyed. *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779. In this case, the note and the mortgage were transferred together, and the holder thereof claimed to be a bona fide purchaser for value, without notice, on the ground that the note was negotiable, and that he was not chargeable with knowledge of the terms and conditions of the mortgage.

In Illinois, it is a settled doctrine that a real-estate mortgage is not assignable at law as commercial paper, although given to secure commercial paper. Where a bona fide assignee of commercial paper so secured seeks relief in equity by foreclosure of the mortgage, the mortgagor may interpose any defense which would have been available against the original payee or holder of the paper. *Olds v. Cummings*, 31 Ill. 188; *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433; *McIntire v. Yates*, 104 Ill. 491; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Martina v. Muhlke*, 32 L.R.A. (N.S.)

186 Ill. 327, 57 N. E. 954; *Lauf v. Cahill*, 231 Ill. 220, 83 N. E. 155.

In *Orrick v. Durham*, 79 Mo. 174, the doctrine is asserted that the purchaser of a note secured by a mortgage, so far as concerns the lien of the mortgage, takes it subject to any equities disclosed by the records, relating to his claim of title.

A purchaser of a note secured by a deed of trust cannot claim to hold bona fide, where he has notice of the deed of trust, and it contained recitals showing that the trustee held same as a trust deed merely, and that, in making the transfer, he was committing a breach of his trust. *Renshaw v. Wills*, 38 Mo. 201.

In *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123, the rule is stated that a mortgage and note do not constitute one instrument in the sense that they must be read together to determine the negotiability of the note, and provisions in the mortgage will not affect the negotiability of the note secured thereby.

Where provision in mortgage relates to security, and not to the note.

While a note and mortgage executed at the same time, and transferred together, must be construed together, and provisions of the mortgage relating to the indebtedness itself have the same effect as if incorporated in the note, this, however, is not true as to provisions which relate merely to the security, as distinguished from the indebtedness. *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, on rehearing, 65 Neb. 287, 94 N. W. 803; *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680.

While it is not intended to discuss in this note the question of what provisions in a mortgage will impair the negotiability of a note, attention is called to the distinction made in the foregoing Nebraska cases,

between provisions in a mortgage which relate to the mortgage security rather than the note secured. Under this view, although the collateral instrument contains provisions relating to the security which may increase the amount which may be collected from the security, yet, where the provision refers to the security rather than to the note, the negotiability of the note is held not impaired. This distinction is also made in *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872, which has been previously commented on. And see also *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297, where the same distinction is made.

Farmers' Nat. Bank v. McCall, — Okla. —, 26 L.R.A.(N.S.) 217, 106 Pac. 866, also supports the doctrine that a covenant which is framed purely for the purpose of security, and for the enforcement of which resort could be had only to the property mortgaged, and not a part of any debt by virtue of the note, but on account of the terms of the mortgage, the terms and conditions thereof being limited to providing security for the indebtedness, does not affect the negotiability of the note.

This distinction is also made in *Thorp v. Mindeman*, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417, to the extent, at least, of holding that the provisions of a real-estate mortgage which relate to the preservation of the security are not imported in the note, and hence, do not affect its negotiability. The court refused to pass upon the question as to whether or not the provisions which relate primarily to the note are imported therein.

Where note contains on its face provision for security.

An agreement embodied in a negotiable instrument, providing some security for its payment, does not affect its negotiability, where the agreement does not impair the attributes of negotiability, such as rendering uncertain the promise to pay a stipulated sum absolutely on a date certain. *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; *First Nat. Bank v. Slaughter*, 98 Ala. 602, 39 Am. St. Rep. 88, 14 So. 545; *Commercial Nat. Bank v. Consumers' Brewing Co.* 16 App. D. C. 186, s. c. on subsequent appeal, 17 App. D. C. 100; *Howard v. Simpkins*, 69 Ga. 773; *Knipper v. Chase*, 7 Iowa, 145; *Haynes v. Beckman*, 6 La. Ann. 224; *Collins v. Bradbury*, 64 Me. 37; *Towne v. Rice*, 122 Mass. 67; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Ewing v. Clark*, 76 Mo. 545; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Arnold v. Rock River Valley Union R. Co.* 5 Duer, 207; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Mansfield Sav. Bank v. Miller*, 2 Ohio C. C. 96, 1 Ohio C. D. 383; *Mansfield Sav. Bank v. Flowers*, 11 Ohio L. J. 141; *American Nat. Bank v. American Wood Paper Co.* 19 R. I. 149, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305; *Dowie v. Joyner*, 25 S. C. 32 L.R.A.(N.S.)

123; *Merchants' Bank v. Dunlop*, 9 Manitoba L. Rep. 623.

The incorporation in a note of the fact that its payment has been secured by a certain security does not deprive it of its negotiable character, where such words do not constitute an additional agreement, or in any way qualify, or render doubtful or uncertain, the promise to pay, and do not incorporate in the note any promise which can, by any possibility, destroy or render uncertain any of the essential elements which are necessary to make up a negotiable note. *National Bank v. Gary*, 18 S. C. 282.

But agreements incorporated in a negotiable instrument which do affect the attributes or essential elements of negotiability destroy the negotiability of the instrument. *Commercial Nat. Bank v. Consumers' Brewing Co.* 16 App. D. C. 186; *Smith v. Marland*, 59 Iowa, 645, 13 N. W. 852; *Warren v. Gruwell*, 5 Kan. App. 523, 48 Pac. 205; *South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574; *Wright v. Traver*, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Benny v. Dunn*, 2 Lack. Leg. News, 135; *Continental Nat. Bank v. Wells*, 73 Wis. 332, 41 N. W. 409; *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678.

An indorsement on the back of a note that it is secured by a mortgage, to which the payee is alone to look for payment, destroys the negotiability of the note. *Alison v. Hollenbeck*, 138 Iowa, 479, 114 N. W. 1059.

And an indorsement on a note that a certain tract of land is the only property of the maker from which payment of the note can be made destroys its negotiability. *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120.

Recitals in a note that it may become immediately due and payable by reason of the failure to comply with the conditions of an accompanying mortgage, which is made a part thereof, and recitals in the mortgage that the note shall become due and payable at once upon failure of the mortgagor to pay the taxes, etc., levied upon the property, render the note non-negotiable. *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59.

And see *Howard v. Kimball*, 65 N. C. 175, 6 Am. Rep. 739, which holds that the fact that notes were not in the usual form of promises to pay money for value received, but expressed on their face that they were given for the purchase money of certain land, is sufficient to charge a subsequent purchaser with notice that the notes were subject to equities between the original parties, and not collectable if the vendor failed to give good title to the land.

A note secured by a chattel mortgage is rendered non-negotiable by a provision in each of the instruments which renders the amount and time of maturity uncertain. *Iowa Nat. Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237. A. G. S.

KENTUCKY COURT OF APPEALS.

J. G. HENDRICKS, Admr., etc., of Genevieve Hendricks, Deceased, Appt.,
v.

AMERICAN EXPRESS COMPANY.

(138 Ky. 704, 128 S. W. 1089.)

Carrier — failure to deliver medicine — liability.

1. The liability of a carrier for suffering on the part of a sick person, due to its neglect promptly to transport and deliver medicine for him, is not affected by the fact that the order was given without his knowledge or approval.

Action — joinder — suffering and death.

2. Actions to recover damages for the suffering which one undergoes before death because of another's negligence, and for the death itself, cannot be joined.

(June 9, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Muhlenberg County in defendant's favor in an action brought to recover damages alleged to have been caused by defendant's failure promptly to transport and deliver certain medicine tendered it for transportation. Reversed.

The facts are stated in the opinion.

Mr. R. Y. Thomas, Jr., for appellant.

Messrs. Trabue, Doolan, & Cox, with Messrs. Browder & Browder, for appellee:

An action for death and an action for suffering cannot be joined in one and the same action.

Conner v. Pau, 12 Bush, 144; Owensboro & N. R. Co. v. Barclay, 102 Ky. 16, 43 S. W. 177; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236.

The contract was made by Dr. J. G. Hendricks. His patients cannot sue for its breach by the carrier.

Louisville & N. R. Co. v. Brantley, 96 Ky. 297, 49 Am. St. Rep. 291, 28 S. W. 477.

The carrier is not liable when there is a third party or an intervening agency over which it exercised no control whatever.

Note. — *Right to recover in one action for the death of a person and for his suffering before death.*

This question will be found discussed and cases bearing thereon gathered in note to Louisville & N. R. Co. v. McElwain, 34 L.R.A. 788, and a supplemental note to Stewart v. United Electric Light & P. Co. 8 L.R.A.(N.S.) 384, and also to Mahoning Valley R. Co. v. VanAlstine, 14 L.R.A.(N.S.) 893.

But one case other than HENDRICKS v. AMERICAN EXP. Co. has been decided subsequently to the latter note. In that case

Bodkin v. Western U. Teleg. Co. 31 Fed. 134; Lowery v. Western U. Teleg. Co. 60 N. Y. 198, 19 Am. Rep. 154; Western U. Teleg. Co. v. Briscoe, 18 Ind. App. 22, 47 N. E. 473; Chapman v. Western U. Teleg. Co. 90 Ky. 265, 13 S. W. 880.

Carroll, J., delivered the opinion of the court:

Genevieve Hendricks, a child about ten years old, being dangerously ill of pneumonia, her father, who was a doctor, living at Central City, Kentucky, ordered on the morning of December 12, 1907, by telephone, from a drug firm in Louisville, two tanks of Walton's Compound Oxygen for the purpose of administering it to his patient and child. The oxygen was delivered to the appellee express company in time to be and was shipped on the train leaving Louisville at noon on the day it was ordered. The train on which it was sent reached Central City a little after 3 P. M. on the same day, but, by the negligence of the express messenger, the oxygen was not put off the train at Central City. As a result of this negligence, it became necessary to order other oxygen from Louisville, the nearest point at which it could be obtained, and this did not arrive at Central City until early the next morning. The child died, and this action was brought by her father as administrator to recover damages for the negligence of the express company in failing to deliver at Central City, as it should have done, the oxygen that reached there on the afternoon of the 12th.

Two causes of action were set up in the petition,—one, on account of the death of the child, which was attributed to the failure to receive in due time the oxygen, and the other, to recover for the pain and suffering sustained by the child on account of the failure to receive the oxygen in time to relieve her distress. It is charged in the petition that "Walton's Oxygen Compound, which is put up in cylinders, is used for and is very beneficial in cases of pneumonia, often curing the patient and saving life when all other means have failed. That said

subsequently to the latter note. In that case (Dulligan v. Barber Asphalt Pav. Co. 201 Mass. 227, 87 N. E. 567), a conclusion was reached contrary to that reached in the HENDRICKS CASE. It was there held that a count to recover for pain and suffering of the decedent might be joined with a count to recover for his death, and that it was error for the court to compel the plaintiff to elect as to the counts, and go to trial on but one; but, having recovered a verdict on the one count, such verdict was affirmed, and a new trial granted as to the other count.

A. G. S.

oxygen is used by means of an inhaler, and breathed into the lungs of the patient, and is administered for a minute until given three times, every half hour, every hour, or every two or three hours, according to the urgency of the case. The said compound in cases of pneumonia will relieve pain and relieve trouble in the lungs when all other means have failed. . . . That at the time said compound was delivered to the defendant for shipment, as aforesaid, said company was fully notified and apprised of the character of the compound, and of the fact that it was an unusual shipment of goods of an unusual kind, and was notified of the purpose for which it was to be used. That the decedent was for twelve hours deprived of the use and benefit of the oxygen by reason of the gross and concurrent negligence of the defendant company and its agent and messenger in not delivering said compound to plaintiff at Central City in due time. That during said twelve hours said decedent was conscious and suffered excruciating bodily pain and mental anguish because of being deprived of said compound as aforesaid, which, if administered to her, would have relieved and soothed her bodily pain and consequently her mental anguish, and which could and would have been administered to her had it been delivered by defendant within a reasonable time after shipment. There was no other means of relieving her pain and anguish, all other known remedies for said disease having failed to benefit or relieve her. That said compound could not be obtained nearer than Louisville, and no sooner than it was after the first package had been carried by Central City, as aforesaid. That the administration of said compound, had it been received when it should have been, would not only have relieved her of her suffering and mental anguish, but would probably have saved her life." The answer traversed the petition, and set up some other defenses not necessary to mention. Upon a trial of the case before a jury, a verdict was returned in favor of the express company. To reverse the judgment entered on the verdict this appeal is prosecuted.

There was sufficient evidence on the part of the plaintiff below to take the case to the jury; and, in view of the fact that the case must be reversed for error in the instructions, it does not seem either appropriate or necessary to relate the facts.

The principal error relates to instruction No. 2, reading as follows: "The jury will find for the defendant unless they believe from the evidence that the two tanks of oxygen compound were ordered by J. G. Hendricks for the exclusive use and benefit of

Genevieve Hendricks, with her knowledge and approval, and that the defendant, when said tanks of oxygen compound were delivered to it, was notified that said tanks contained medicine for a girl who was sick at Central City, and that it was important that said shipment should go forward and be delivered without delay." It will be noticed that the jury were directed in this instruction to return a verdict for the company unless they believed from the evidence that the compound was ordered with the knowledge and approval of the sick child. This was virtually a peremptory instruction to find for the company, as, at the time the oxygen was ordered, the child was in an almost unconscious condition, and, aside from this, had no appreciation or understanding of what she needed, or what kind of medicine should be ordered for her benefit or administered to her, although it is true that her father states that he told her he was going to send for the oxygen, and she said it was all right. But this instruction was given upon the erroneous idea that there could be no recovery unless the oxygen was directly ordered by the person for whom it was intended. If this were the case, then it would follow that, if a person was actually unconscious, there could be no recovery for the negligence of a carrier for the failure to deliver medicine intended for his use in a state of case in which the carrier would be liable if the medicine had been ordered by the patient. In a case like the one we are considering, it is wholly immaterial whether the medicine was ordered with the knowledge and approval of the patient or not. Any member of the family or other person interested in the patient might have ordered the medicine without the consent or approval of the patient, and the liability of the carrier would be precisely the same as if it had been ordered in person by the patient. If the child had lived, she could have brought suit in her own name to recover damages for the failure of the company to deliver this oxygen. Her administrator also had a right of action to recover damages for either her mental and physical suffering before death, or her death, although both actions could not be joined. And it may here be remarked that, upon the trial, a recovery for damages on account of the death of the child was abandoned, and it is not insisted here that the court erred in taking the case from the jury upon this question. The argument for the company is that there could be no recovery in this case unless there was evidence that the oxygen was ordered by the patient or with her knowledge and approval. Counsel say that the child was not a party or privy to the contract, that the carrier owed her no duty,

because it had no transaction with her, and consequently did not violate any obligation owing to her. But her physician or any member of the family, or any person interested in her recovery, who orders medicine for a sick person under circumstances like those shown in this case, will be deemed to act as the agent of the patient, and, when so considered, the contract will be treated as if made by the patient, through the agent, with the company. In cases like this, so far as the duty and obligation of the carrier are concerned, it is not material by whom articles it fails to carry in due time are delivered to it, nor is it material for whom they are intended or by whom they are ordered. Its obligation is precisely the same whether the thing is ordered by, or delivered to it by, the owner or an agent or a stranger.

It is also insisted that the use of the words "two tanks of oxygen" in the instructions were misleading. We doubt if this criticism is well founded; but upon another trial, in order to remove any possible room for doubt in the mind of the jury, it might be well for the court to designate the oxygen as that delivered to the company at Louisville at noon, or as that which should have been received at Central City at 3:20 P. M.

It is further said that the court erred in instructing the jury that they could not award damages on account of the death of Genevieve Hendricks. This instruction was proper. The administrator, as we have said, could not recover in the same action for both the mental suffering and the death. On another trial these words in instruction No. 2, "that the two tanks of oxygen compound were ordered by J. G. Hendricks for the exclusive use and benefit of Genevieve Hendricks, with her knowledge and approval, and," should be omitted.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

CHARLES T. KNAPP

v.

JOHN S. REED, Appt.

(— Neb. —, 130 N. W. 430.)

Forcible entry and detainer — scope of remedy.

1. The right to recover possession of real estate by an action of forcible entry and de-

tainer is not necessarily limited to cases in which the relation of landlord and tenant exists.

Partnership — renewal of lease — joint interest.

2. When a partnership is carrying on business in premises which it holds under a lease, neither partner can, without the consent of the other, take a renewal of the lease in his own name and so exclude the other partner and secure the good will of the business for himself. If one partner takes such renewal, it will inure to the benefit of both partners, and each will have an interest in the new lease.

Equity — adjustment of partnership affairs.

3. Partnership is a relation of trust and confidence, and upon dissolution of the partnership, without an adjustment by the partners of their rights in the good will of the business and in the premises which they hold under lease, it is the province of a court of equity to adjust such differences.

Justice of peace — jurisdiction — partnership matters.

4. A justice of the peace has no jurisdiction in an action of forcible entry and detainer to determine the rights of partners, upon discontinuing the partnership, in the leases which they hold or in the good will of the partnership business.

Forcible entry and detainer — to oust partner.

5. If partners have been conducting a general real estate, brokerage, and insurance business as copartners in leased premises, and one of the partners secures a renewal of the lease in his own name without the consent of the other, he cannot maintain an action of forcible entry and detainer to put the other partner out of the premises.

(March 16, 1911.)

Note. — Right of partner to take renewal of lease in his own name and exclude copartner.

It is generally held that when a member of a partnership, upon expiration of a lease to the firm, renews it in his own name, it inures to the benefit of the firm. *Clegg v. Edmondson*, 8 De G. M. & G. 787; 26 L. J. Ch. N. S. 673, 3 Jur. N. S. 299; *Clegg v. Fishwick*, 1 Macn. & G. 294, 1 Hall & Tw. 396, 19 L. J. Ch. N. S. 49, 13 Jur. 993; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; 11 Revised Rep. 77; *Alder v. Fouracre*, 19 Swanst. 489, 19 Revised Rep. 256; *Clements v. Hall*, 2 De G. & J. 173, 27 L. J. Ch. N. S. 349, 4 Jur. N. S. 494, 6 Week. Rep. 358, reversing 24 Beav. 333; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044; *Sneed v. Deal*, 53 Ark. 152, 13 S. W. 703; *KNAPP v. REED*; *Speiss v. Rosswog*, 96 N. Y. 651; *Struthers v. Pearce*, 51 N. Y. 357; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252, reversing 61 Barb. 310, later appeal, 84 N. Y. 556; *Betts v. June*, 51 N. Y.

APPEAL by defendant from a judgment of the District Court for Lancaster County in plaintiff's favor in an action of forcible entry and detainer. Reversed.

The facts are stated in the opinion.

Mr. Charles O. Whedon, for appellant: To authorize an action of forcible entry and detainer the relation of landlord and tenant must be established between the plaintiff and defendant at the time the action is instituted.

Gies v. Storz Brewing Co. 75 Neb. 608, 106 N. W. 775; Chicago, B. & Q. R. Co. v. Skupa, 16 Neb. 341, 20 N. W. 393.

As against Knapp, there could be no forcible detainer by Reed, because Reed was not guilty of a forcible entry.

Beel v. Pierce, 11 Ill. 92; Steiner v. Prid-

dy, 28 Ill. 179; Saunders v. Robinson, 5 Met. 343; Chambers v. Irish, 132 Iowa, 319, 109 N. W. 788; Willis v. Eastern Trust & Bkg. Co. 109 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347; Burgett v. Bothwell, 86 Ind. 149; Whitney v. Dart, 117 Masa. 153; Kiphart v. Brennemmen, 25 Ind. 152; Johnson v. West, 41 Ark. 535; Tarpenning v. King, 60 Neb. 213, 82 N. W. 621; Jarvis v. Hamilton, 16 Wis. 574; Maxham v. Stewart, 133 Wis. 525, 113 N. W. 972; People ex rel. Ainslee v. Howlett, 76 N. Y. 574; Benjamin v. Benjamin, 5 N. Y. 383; Steele v. Bond, 28 Minn. 267, 9 N. W. 772.

An action of forcible entry and detainer cannot be maintained upon a "scrambling possession."

Streeter v. Rolph, 13 Neb. 388, 14 N. W.

274; Chamberlain v. Chamberlain, 12 Jones & S. 116; Johnson's Appeal, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36; Lacy v. Hall, 37 Pa. 360; Keech v. Sandford, 1 White & T. Lead. Cas. in Eq. 3d series, 59.

In Palmer v. Young, 1 Vern. 276, it is held that where one of three that held a lease under a dean and chapter surrenders the old lease and takes a new one to himself, it shall be a trust for all.

In Alder v. Fouracre, 3 Swanst. 489, 19 Revised Rep. 256, where a deceased partner contracted in his own name for a lease of premises to be employed in the partnership trade, the court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner.

In Betts v. June, 51 N. Y. 274, an action brought to recover for an alleged breach of covenant contained in a lease, it was said: "This lease was partnership property. The right to renew a lease is frequently a very valuable property, and as such when it belongs to a firm is part of the partnership assets. It has frequently been held that if one partner takes a renewal lease in his own name when the right to the renewal belonged to the firm, he can be compelled to account for its value to his copartner; so, if, after the death of his copartner, he should seek to appropriate to his own benefit the value of a renewed lease, he could be compelled to account for it to the creditors of the firm and the representatives of the deceased partner, for whom, in a certain sense, he acts as trustee."

The last case cites Holridge v. Gillespie, 2 Johns. Ch. 33, which holds that if a mortgagee, executor, trustee, tenant for life, etc., having a limited interest gets any advantage, by being in possession or otherwise, in obtaining a new lease, he is not allowed to retain it for his own benefit, but must hold it for the mortgagor or *cestui que trust*. This general principle is quoted and applied in Mitchell v. Reed, 61 N. Y. 123: 19 Am. Rep. 252, to the case of a renewal

lease taken by a partner to begin at the expiration of the partnership term.

And in Featherstonhaugh v. Fenwick, 17 Ves. Jr. 299, 11 Revised Rep. 77, it is held that a partner who takes a renewal lease to the firm in his own name holds it for the firm, and that even though the lessor has refused to renew the lease with the old lessees. In this case it is said that one partner cannot treat privately and behind the backs of his copartner, for the lease of the premises where the joint trade is carried on, for his own benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership. The principle of this case was applied in Lacy v. Hall, 37 Pa. 360, an action of ejectment involving the question of the effect of a partner's purchase of lands to promote the partnership business.

In Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526, it seems that when a partnership lease has expired, but for the renewal of which negotiations are pending, there is nothing wrong in one of the partners arranging with the lessor for his own continuance as lessee in case the partnership should come to an end by dissolution or by death of the other partner. Cooley, J., says that this case differs from Featherstonhaugh v. Fenwick and Mitchell v. Reed, supra, in that the pivotal fact on which all such cases turn is that there has been underhand and secret dealing by one of the partners in fraud of the other, whereby he has obtained a special advantage to himself during the continuance of the partnership, which fair dealing required that he should have taken for the benefit of the firm; and equity takes notice of the fraud and declares him trustee for the firm. This pivotal fact is entirely wanting in Chittenden v. Witbeck. What the separate negotiations in that case contemplated was not that the partnership should be deprived of the advantages of a new lease, but that complainant should have a new lease in the event that the partnership, without the fault of either, should come to an end, and for that reason no longer be able to take it.

166; *Voll v. Butler*, 49 Cal. 74; *Bowers v. Cherokee Bob*, 45 Cal. 495; *Berry v. Hubbard*, 5 Ind. App. 401, 32 N. E. 331; *Blake v. McCray*, 65 Miss. 443, 4 So. 339; *Delmonica Hotel Co. v. Smith*, 112 Iowa, 659, 84 N. W. 906; *Johnson v. West*, 41 Ark. 535; *De Graw v. Prior*, 60 Mo. 56; *Lobdell v. Keene*, 85 Minn. 90, 88 N. W. 426; *Conroy v. Duane*, 45 Cal. 597.

The mere unseen purpose, without an overt act, or its equivalent in the form of a threat, is insufficient to constitute force.

Ferrell v. Lamar, 1 Wis. 8; *Winterfield v. Stauss*, 24 Wis. 398; *Beel v. Pierce*, 11 Ill. 92; *Steiner v. Priddy*, 28 Ill. 179; *Saunders v. Robinson*, 5 Met. 343; *Larned v. Clarke*, 8 Cush. 29; *Jarvis v. Hamilton*, 19 Wis. 188; *Carter v. Van Dorn*, 36 Wis. 289;

Steinlein v. Halstead, 42 Wis. 422; *Com. v. Dudley*, 10 Mass. 403; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101; *Blaco v. Haller*, 9 Neb. 149, 1 N. W. 978; *Smith v. Reeder*, 21 Or. 541, 15 L.R.A. 172, 28 Pac. 890; *Pharis v. Gere*, 110 N. Y. 336, 1 L.R.A. 270, 18 N. E. 135; *Meador v. Stone*, 7 Met. 147; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Com. v. Shattuck*, 4 Cush. 141; *Kiernan v. Linnehan*, 151 Mass. 543, 24 N. E. 907; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Willis v. Eastern Trust & Bkg. Co.* 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347; *Burgett v. Bothwell*, 80 Ind. 149; *Whitney v. Dart*, 117 Mass. 153; *Johnson v. West*, 41 Ark. 535; *Tarpenning v. King*, 60 Neb. 213, 82 N. W. 621; *Pike v. Witt*, 104 Mass. 595; *Archey v. Knight*,

Where the property in the lease is in one partner solely, and not in the firm, he may renew for his own benefit. *Phillips v. Reed*, 18 N. J. Eq. 95, 11 Mor. Min. Rep. 419.

In *Leach v. Leach*, 18 Pick. 68, it was held that a partner who takes a new lease in his own name, of the store in which the partnership business is transacted, for a term extending beyond that of the copartnership, must account to his copartner for the profits, if any, arising from this new lease.

Where new term commences after expiration of partnership.

In *Mitchell v. Reed*, supra, which is set out at length in the opinion in *KNAPP v. REED*, it is held that one member of a copartnership cannot, during its existence, without knowledge of his copartner, take a renewal lease for his own benefit of premises leased by the firm, although the term of the renewal lease does not begin until after the copartnership has expired by its own limitations. Such a lease, it is held, inures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value.

So, where a partner, after dissolution of the firm and prior to the expiration of the lease, containing no provision for renewal, obtains a renewal without his partner's consent, he must account to the latter for the value of the expectancy of renewal which pertains to the old lease. *Johnson's Appeal*, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36.

In *Speiss v. Rosszog*, 63 How. Pr. 401, affirmed in 96 N. Y. 661, it is held that where partnership leases are renewed after dissolution, by a partner in his own name and in the name of a new partner, the expectation of the renewal of the leases remains, with power of disposition of the good will of the business. Neither can sever such expectancy from his own interests after dissolution. *Sedgwick*, Ch. J., said: "The fact in this case which the learned counsel 32 L.R.A. (N.S.)

for the respondents argues distinguishes it from those cases in which the partner taking a renewal of the partnership leases has been held a trustee of the firm is that the defendant, Constantine Rosszog, obtained them after the firm was dissolved. This dissolution did not annul or change those relations between the parties which are the basis of the obligation in such cases. After the dissolution the original leases remained partnership property for the purpose of liquidation. The obligation of each partner to deal with them, not for his individual benefit, but for the common or joint interest, remained. The trust as to the use of the partnership property remained attached to these leases, as part of their value was the so-called expectation of renewal. This is deemed so actual and vital that when a new lease is had it is considered to be a graft upon the old."

And in *Clegg v. Edmondson*, 8 De G. M. & G. 787, 26 L. J. Ch. N. S. 673, 3 Jur. N. S. 299, where managing partners of a mining partnership at will, after giving notice of dissolution to the rest, obtained a lease for their own exclusive benefit, but the excluded partners were precluded by laches from obtaining any relief, it is said: "Although it cannot be laid down that in no case can a partner during the partnership contract for a new lease to himself exclusively of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere intimation to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest although the partnership is at will."

And where two partners sell their interest in the firm business and assets to a third partner after canceling a partnership lease, and, without his knowledge or consent, renew it in their names for their individual benefit, such third partner becomes the owner of the lease. In such a case, they hold the lease so taken in trust for the partnership. *Sneed v. Deal*, 53 Ark. 152, 13 S. W. 703.

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61 Ind. 311; Wood v. Phillips, 43 N. Y. 152; Willard v. Warren, 17 Wend. 257; Jarvis v. Hamilton, 16 Wis. 574; Ainsworth v. Barry, 35 Wis. 136; Castro v. Tewksbury, 69 Cal. 562, 11 Pac. 339; Latimer v. Woodward, 2 Dougl. (Mich.) 368; Hoffman v. Harrington, 22 Mich. 52; Hendrickson v. Hendrickson, 12 N. J. L. 202; Davis v. Ingersoll, 2 Dougl. (Mich.) 372; Brick v. Middleton, 12 N. J. L. 266; Dudley v. Chanfrau, 2 Edm. Sel. Cas. 128; Townsend v. Little, 45 Cal. 673; State v. Johnson, 18 N. C. (1 Dev. & B. L.) 324; Harrington v. Scott, 1 Mich. 17; Seitz v. Miles, 16 Mich. 456; Berry v. Williams, 21 N. J. L. 423; Butts v. Voorhees, 13 N. J. L. 13, 22 Am. Dec. 489; Evill v. Conwell, 2 Blackf. 133, 18 Am. Dec. 138; State, Hildreth, Prosecutor, v. Camp, 41 N. J. L. 306; Polack v. McGrath, 25 Cal. 54; Brown v. McJunkin, 99 Ga. 91, 24 S. E. 855; Benedict v. Hart, 1 Cush. 487; Davis v. Woodward, 19 Minn. 174, Gil. 137; Foster v. Kelsey, 36 Vt. 199, 84 Am. Dec. 676; Tribble v. Frame, 7 J. J. Marsh. 599, 23 Am. Dec. 439.

Reed is possessed of an interest in the premises in dispute based on the partly performed oral contract for the renewal of a leasehold estate. That is an interest in real estate.

Campfield v. Johnson, 21 N. J. L. 83; Grosso v. Lead, 9 S. D. 165, 68 N. W. 310; Dunster v. Kelly, 110 N. Y. 558, 18 N. E. 361; Grohousky v. Long, 20 Neb. 362, 30 N. W. 257; Gilmore v. Asbury, 64 Kan. 383, 67 Pac. 864; Chicago, B. & Q. R. Co. v. Skupa, 16 Neb. 341, 20 N. W. 393; Dawson v. Dawson, 17 Neb. 671, 24 N. W. 339; Streeter v. Rolph, 13 Neb. 389, 14 N. W. 166; Pettit v. Black, 13 Neb. 154, 12 N. W. 841; Malloy v. Malloy, 24 Neb. 766, 40 N. W. 285; Myers v. Koenig, 5 Neb. 419; Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143.

When Knapp obtained the renewal lease for the premises in question, the good will of which had become valuable, and enhanced the rental value, largely by the efforts of Reed, the lease so obtained inured to their firm.

Mitchell v. Reed, 61 N. Y. 126, 19 Am. Rep. 252; 1 McAdam, Land. & T. 3d ed. § 159; Struthers v. Pearce, 51 N. Y. 357; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298, 11 Revised Rep. 77; Leach v. Leach, 18 Pick. 68; Mitchell v. Read, 84 N. Y. 556; Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; Johnson's Appeal, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36.

Messrs. Morning & Ledwith, for appellee:

There was sufficient tenancy to uphold this action.

Hendrickson v. Beeson, 21 Neb. 61, 31 N. W. 266; Smith v. Kaiser, 17 Neb. 184, 22 32 L.R.A. (N.S.)

N. W. 368; Russo v. Yuzolino, 19 Misc. 28, 42 N. Y. Supp. 482; Wetterer v. Soubirous, 22 Misc. 739, 49 N. Y. Supp. 1043; Anderson v. Ferguson, 12 Okla. 307, 71 Pac. 225.

A lessee entitled to possession may maintain the action.

2 Underhill, Land. & T. 677; 10 Cyc. Law & Proc. p. 1140; Ish v. Morgan, 48 Ark. 413, 3 S. W. 440; McDonald v. Hanlon, 79 Cal. 442, 21 Pac. 861; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794; Thomasson v. Wilson, 146 Ill. 384, 34 N. E. 432; Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454; Tucker v. McClenney, 103 Mo. App. 318, 77 S. W. 151; Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212; Capital Brewing Co. v. Crosbie, 22 Wash. 209, 60 Pac. 652; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Ball v. Chadwick, 46 Ill. 28; Hildreth v. Conant, 10 Met. 298; Furlong v. Leary, 8 Cush. 409; Burton v. Rohrbeck, 30 Minn. 393, 15 N. W. 678; Casey v. King, 98 Mass. 503.

The agreement for lease to the firm was invalid.

Bigler v. Baker, 40 Neb. 325, 24 L.R.A. 255, 58 N. W. 1026; Lewis v. North, 62 Neb. 552, 87 N. W. 312; Steger v. Kosch, 77 Neb. 150, 108 N. W. 165, 110 N. W. 983; Spalding v. Conzelman, 30 Mo. 177; Mahana v. Blunt, 20 Iowa, 142; Armstrong v. Kattenhorn, 11 Ohio, 265; Railsback v. Walke, 81 Ind. 409.

Sedgwick, J., delivered the opinion of the court:

The plaintiff and defendant had occupied the premises in controversy as a partnership in the name of Reed & Knapp under a lease from the owner. In the year 1908, while so occupying the premises, owing to a disagreement between them, it was found that the partnership must be dissolved, and each of the parties attempted to procure from their landlord a lease of the premises. The plaintiff, having procured such lease executed to him individually, served notice to the defendant to quit the premises, and he having neglected to do so, the plaintiff brought this action of forcible entry and detainer. The case, having been tried in justice court and appealed to the district court, was there tried with the jury, and verdict and judgment were directed in favor of the plaintiff. The defendant has appealed.

It appears that some time prior to the year 1906 the defendant had been engaged in the real estate, brokerage, and insurance business, and had occupied the premises under a lease with the owner. About the 1st of December, 1907, the plaintiff and defendant formed a partnership in the firm name of Reed & Knapp to continue said business, and as such partnership they leased the premises in question for the term of one

year from the 1st day of December, 1907. In the spring of 1908 their landlord agreed to repair the office room by putting a steel ceiling thereon, and to renew their lease for three years from the date at which it expired according to its terms. The plaintiff testified that this was upon condition that the partnership should paint the ceiling, and that they did perform this condition at the expense of the partnership of \$25. The defendant testifies that the painting of the ceiling was optional with the partnership, and that after it was put on the partnership did cause the ceiling to be painted at the expense of from \$12 to \$25. Soon afterwards disagreements arose between the parties, and before the termination of the lease it became apparent that a dissolution of the partnership was unavoidable. On the same day each of the parties applied to the landlord for a lease of the premises, and the plaintiff finally succeeded in obtaining such lease in his individual name. The landlord, knowing of the dissension between the parties and that each partner was desirous of obtaining the possession of the premises, proposed to execute a lease to the one who would pay the largest rental. The plaintiff offered a larger rental than had been contemplated in the promise for the renewal of the lease, and he procured the lease in his own name. The landlord, for his further protection, inserted the following provision in the lease which he executed to the plaintiff: "It is understood and agreed that the premises in question are now occupied by John S. Reed and Charles T. Knapp, under a written lease from the lessor herein, which expires December 1, 1908, said lease running to John S. Reed and Charles T. Knapp, partners as Reed & Knapp; and it is also understood by the lessee herein that said John S. Reed is claiming an oral extension of said lease to Reed & Knapp, for a further period from December 1, 1908, claiming a partial performance of an agreement to extend said lease by virtue of certain repairs which said Reed & Knapp placed in said room. It is understood between the lessor and the lessee herein that the lessee, Knapp, accepts this lease with full knowledge of the above claim on the part of Reed, and accepts the same with such possession as he, the said Knapp, now has, and at his own expense, and in his own name, agrees to take such steps as he may deem proper to secure full possession thereof. In event it should be determined by court that there is in existence a valid oral lease to the firm of Reed & Knapp, then this lease shall be null and void, and lessor shall not be liable in damages to lessee by reason of the making hereof."

1. It is first contended in the defendant's 32 L.R.A. (N.S.)

brief that the action of forcible entry and detainer cannot be maintained unless the relation of landlord and tenant exists, and the case of *Gies v. Storz Brewing Co.* 75 Neb. 698, 106 N. W. 775, is cited in support of that proposition. The first paragraph of the syllabus in that case is: "To authorize an action for forcible entry and detainer, the relation of landlord and tenant must be established between the plaintiff and defendant at the time the action is instituted." In that case the plaintiff was not the owner of the premises, and the question raised was whether the defendant was a tenant of the plaintiff or of the owner of the premises. It was recognized that that question must be determined as of the time when the action was begun, and the statement of the law in the syllabus has reference to the time of the existence of the relation. If the plaintiff obtained the right from the owner to lease the premises, and did lease them to the defendant, and so became the landlord of the defendant, and he relied upon that relation for his right to recover possession, it would be necessary for the plaintiff to prove that this condition existed at the time this action was instituted, and that was the thought that was inaccurately expressed in the paragraph of the syllabus quoted. It was not intended to say that the action of forcible entry and detainer could not be employed except between landlord and tenant. Sections 1019 and 1020 of the Code expressly provide for several distinct cases in which the action of forcible entry and detainer may be prosecuted and in which the relation of landlord and tenant does not exist. There is therefore no merit in the contention.

2. The controlling question in this case is as to the right of partners, upon the dissolution of a partnership, in the assets, privileges, and good will of the partnership business. The court instructed the jury to render a verdict for the plaintiff. If, therefore, there was evidence substantially conflicting upon a material issue, it must be considered that that issue is established by the evidence in favor of the defendant. For the purposes of this lease, then, we must consider that the partnership obtained the verbal agreement from the landlord to renew the lease for the further term of three years and to renew the ceiling, upon the condition that the partnership should pay a part of the expense of renewing the ceiling, and that the partnership complied with that condition at the expense of \$25. The right to the renewal of the lease then became a partnership right. It appears that this right was necessary to preserve the good will of the business, which is shown to have been valuable. The

partners had concluded to dissolve the partnership; but they had not separated, and there had not been any agreement between them in regard to the terms of the dissolution and the right to the good will of the business and the renewal of the lease. It is urged that this oral agreement to renew the lease for a term of three years was not valid so that it could be enforced as a legal right. It appears, however, that the landlord regarded it as valid, and was ready and willing to renew the lease as he had agreed to do. It was only because of the trouble between the parties, which enabled him to exact a higher rental, that the thought occurred to him to do so. Under these circumstances, could one of these parties accept a lease from the landlord for his individual use and so obtain the good will of the business and exclude the other party?

The defendant offered to prove that he established this business a good many years ago, and that in 1904 he employed the plaintiff, who had just finished his course in the law school, as clerk, and that later he gave the plaintiff a share of the profits of the business as compensation for his services, and still later took the plaintiff in partnership, giving him a third interest in the profits of the business, and, finally, formed a partnership with the plaintiff upon equal terms, and that during all of the time that the defendant had been in this business he had occupied the premises in question. This evidence upon objection was excluded by the court. In a proper action to try the rights of these parties, such evidence would appear to be material; but in this case it probably was unnecessary in view of the conditions shown by the evidence that was received. It appears that the rental of the premises had been continually \$65 per month. The landlord was anxious to continue the tenancy upon those terms. He proposed a renewal of the lease for five years and for three years at that rental. There is no evidence that the use of the premises was worth more than that amount. The plaintiff, to procure this renewal of the lease, agreed with the landlord upon the rental of \$1,000 a year, thereby paying a bonus of \$220 for the first year to obtain this advantage. This is convincing evidence that the lease and good will of the business were of substantial value. It must be conceded that equity would ordinarily require that the partners should have the benefit of this value. No doubt a court of equity would have secured this benefit for the partners in a proper action at the suit of either party. As an excuse for having taken this lease in his own name to the exclusion of the defendant, the plaintiff urges that the defendant had attempted to make a similar contract in his

own behalf. The defendant admitted this action on his part, and says that because of his having established this business, and having been the leading partner while they were together, he thought he was entitled to this preference. If he was mistaken in this as a matter of law, his attempt to take what belonged to both parties did not transfer his right in the partnership to the plaintiff. The relation between partners is one of trust and confidence, and it is always held that neither can take advantage of his possession as partner, to the prejudice of the partnership or any member thereof.

What, then, was the effect of the action of this plaintiff in taking this lease in his own name? This is the controlling question in this case, and we think that it is well settled by the authorities. The case of *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252, was twice before the court of appeals of the state of New York, was thoroughly considered, and reviews many of the authorities. From this case it appears that there is but very little, if any, conflict in the authorities upon the general principle which must control in the case at bar. Upon its first appearance in that court it was said in the syllabus: "A lease so taken by one partner in his own name inures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value. It is not material that the landlord would not have granted the new lease to the other partners or to the firm." The parties were copartners in conducting a hotel in the city of New York, under several leases which by their terms expired May 1, 1871. The copartnership also by its terms expired at the same time. Before the term expired the defendant in that case, "without any notice of his intent to apply therefor, and without the knowledge of plaintiff, procured renewal leases, in his own name, of the premises for terms commencing at the termination of the partnership leases and of the partnership, which, upon discovery thereof having been made by plaintiff, defendant claimed were his property exclusively, and refused to recognize or acknowledge that the partnership or plaintiff had any right or interest therein." It will be noticed that the new term began at the expiration of the partnership and the expiration of the existing term. The plaintiff brought an action in equity to have the leases obtained by the defendant declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership. The lower court found that the defendant was the sole owner of the leases executed to him, and the plaintiff had no right, title, or in-

terest in them. It appears from the extract of the brief printed in the report, that the plaintiff contended that the interest obtained in the lease by the defendant inured to the benefit of the firm, and that this right of the plaintiff did not depend upon whether the partnership had any right to a renewal of the lease.

The defendant contended that the lease constituted no part of the good will of the business of the partnership. The court stated the general rights of the partners in these words: "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm." And then stated the precise question before the court, in these words: "It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation; and whether this contention is well founded is one of the grave questions to be determined upon this appeal." After a full discussion of the matter, it was determined that the rule applied in such a case. Two opinions were written, both of them interesting, and, without repeating the reasoning at length, we will quote briefly a few of the principles announced in the opinions that are applicable to the case at bar: "It has long been settled by adjudications that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and, when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. . . . 32 L.R.A. (N.S.)

The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled.

. . . ' . . . It seems to be an universal rule that no one who is in possession of a lease or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock.' . . . I therefore conclude that it makes no difference that these leases were obtained, for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm owned the good will for a renewal, which ordinarily attaches to the possession. . . . The general rule is so well settled that it would be a waste of time to refer to authorities. The text writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. . . . The rule under consideration is not confined to Crown, church, or college leases, but embraces those of every kind. The same principle appertains to all. . . . Though this is termed a 'tenant right' as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is, the trustee shall not take it to himself; but, if it results in any substantial benefit, he shall hold it for his beneficiary. . . . On principle, in many cases it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common, the result is the same."

When the case was in court the second time (84 N. Y. 556), an additional point was stated in the syllabus, as follows: "The fact that a lease of premises used by a firm for copartnership purposes is to one of the copartners does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm." The principal question determined upon this second appeal of the case was whether, in an action brought by the partner who had been deprived of the benefit of the lease by the action of his copartner in taking a renewal lease in his own name, the plaintiff could recover the value of the good will and leases as a part of the damages, and the court held that these were proper elements of damages in

such an action. The following statements of law may be found in the opinion of the court: "It is said to be a universal rule that no one who is in possession of a lease, or a particular interest in a lease, which is affected with any sort of an equity in behalf of third persons, can renew the same for his own use only; but such renewal must be considered as a graft upon the old stock. . . . That there is such a thing as good will, which is a matter of value in such a business, is not to be denied; nor that it is a part of the assets of a copartnership in that business. Doubtless, some of it, as is suggested by the learned counsel for the defendant, grows from satisfaction of customers with the individuals composing the partnership. The manifestation of it is, however, so much attached to the place at which the business has been done, as that it enhances the value of the lease of the place to the partners jointly, or to any one of them. Hence it has generally been held that, where a lease is partnership property, the good will of the business enters into the value of the lease, and affects the amount of the purchase price. The good will of the business of the testator and the defendant was a valuable matter, in which they had a joint interest,—it was a part of their joint property. There could be no just and equitable division thereof between them without each got his share thereof. If his share was to be had by a sale of the joint assets, that good will must then be sold, or he would not have his share, and to reach its full value it must go with the lease of the place." The court then holds that the renewed lease for the term which carried the good will of the business with it ought to have been sold to the highest bidder, the partners being allowed to bid; and the court then used this language: "This is criticized, for that this suit proceeds on the ground that the defendant had no right to obtain the leases to himself to the exclusion of the testator, and that, if that ground be well taken, he would have no right to bid at the sale. Manifestly there is a difference between acquiring the leases from the landlord privily, to the wrong and harm of the cotenant and copartner, and publicly bidding at a judicial sale of them with the sanction of the court, and on no more than equal terms with all others interested. . . . It is claimed that the good will went with the sale and transfer of the property of the parties other than the leases. Grant that it is so. That does not preclude the plaintiff from an inquiry of what would have been its value had the leases accompanied the rest of the property."

We will not extend this opinion to refer to more than one other case of the many 32 L.R.A. (N.S.)

cited justifying this conclusion of the court. In *Johnson's Appeal*, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36, the law is declared in the syllabus as follows: "A tenant's right of renewal, although it may not be enforceable against the will of the landlord, is a property or asset, incident to an existing lease. When a lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership, in which all the partners have an interest. One partner in a firm cannot, therefore, take a new lease, or a renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it to the partnership. The dissolution of a partnership does not annul or change the relation of former partners in relation to the right of the renewal of a partnership lease. After the dissolution, the original leases remain partnership property, for the purpose of liquidation. The obligation of each partner to deal with them, not for his individual benefit, but for the common or joint interest, remains. Where, after the dissolution of a partnership, one of the partners secures for himself, without the permission of his copartner, a renewal of the premises in which the business of the partnership had been carried on, he will be compelled to account for the value of this renewal, in a settlement of the partnership business. If the parties fail to agree as to its value, it will be fixed by a master." It follows, then, that this new lease which the plaintiff took for these premises inured to the benefit of the partnership. A lease and possession constitute an interest in real estate. This was an equitable interest and gave the right of possession of the premises to both partners equally. Neither party could summarily remove the other until these rights were adjudicated. They were partnership rights, which are always held to be cognizable in a court of equity.

And, again, an action of forcible entry and detainer is a possessory action. The court must determine whether the plaintiff had the right to possession of the premises and to exclude the defendant therefrom. In *Dawson v. Dawson*, 17 Neb. 671, 24 N. W. 339, which was an action of forcible entry and detainer, this court said: "To maintain that action the contest is limited to the naked right of possession of the premises. If the testimony shows that the defendant has an equitable interest in the premises, one that can be protected only by a court of equity, the action will not lie." The rule is that a justice of the peace has no jurisdiction to adjudicate a right of possession that depends upon an equitable interest in the premises. This renewal lease being in equity the property of both parties, one par-

ty has as much right to possession as the other. A justice of the peace cannot partition the matter and assign the lease to either party; he cannot authorize a sale of the lease allowing these partners, if they desire, to bid at the sale, as a court of equity might do, nor apply in any way the general principles of equity to an adjustment of the controversy between the parties. In all of the cases cited, the actions were in equity to settle the rights of the contending parties. It is doubtful whether a case can be found where it was attempted to adjudicate such a question as was here presented in an action of forcible entry and detainer. The reason for this is plain. It is not necessary that a defendant should be able to establish by a preponderance of the evidence an equitable right to the possession of the premises in order to defeat the summary process of forcible entry and detainer. A justice of the peace cannot weigh and determine such evidence. It is sufficient if the defendant shows that he has in good faith an equitable claim of right of possession which it is the province of a court of equity to determine and which is necessary to determine in order to adjudicate the right of possession. If the justice of the peace was without jurisdiction, the district court could not obtain jurisdiction by appeal.

The judgment of the District Court is therefore reversed, and the cause remanded.

IDAHO SUPREME COURT.

EX PARTE EDGAR M. HEIGHO.

(18 Idaho, 566, 110 Pac. 1029.)

Manslaughter — statutory definition.

1. Under the provisions of § 6565, Rev. Codes, involuntary manslaughter is defined to be "the unlawful killing of a human being in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

Same — commission of unlawful act.

2. Under the statute of this state (§ 6565, Rev. Codes), an unlawful killing, though unintentional and involuntary, if accomplished by one while engaged in the commission of an unlawful act, is manslaughter, and the statute does not circumscribe the means or agency causing the death. This

Headnotes by AILSHIE, J.

Note. — As to whether one causing fright by unlawful act is guilty of homicide because death follows from the fright, see note to Com. v. Couch, 16 L.R.A. (N.S.) 327.

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statute covers and includes any and all means and mediums by or through which a death is caused by one engaged in an unlawful act.

Same — fright.

3. Under the statute of this state (§ 6565, Rev. Codes), a prosecution for manslaughter may be had where the death of a human being has been caused or accomplished through fright, fear, terror, or nervous shock produced by the accused while in the commission of an unlawful act, even though the accused made no hostile demonstration and directed no overt act at the person of the deceased. It would seem that, in some instances, force or violence may be applied to the mind or nervous system as effectually as to the body.

(October 1, 1910.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed on a charge of manslaughter. Writ quashed.

The facts are stated in the opinion.

Messrs. Harris & Smith and N. M. Ruick for petitioner.

Messrs. J. L. Richards, B. S. Varian, and Hawley, Puckett, & Hawley for the State.

Allshie, J., delivered the opinion of the court:

Petitioner was held by the probate judge of Washington county to answer the charge of manslaughter, and has applied to this court for his discharge on the ground that the facts of the case do not disclose the commission of a public offense. The evidence produced at the preliminary examination has been attached to the petition. This court cannot weigh the evidence on habeas corpus, but, if it wholly fails to disclose a public offense for which a prisoner may be held on preliminary examination, then the petitioner would be entitled to his discharge. Re Knudtson, 10 Idaho, 676, 70 Pac. 641.

The facts disclosed by the evidence are in substance as follows: On the 4th day of August, 1910, at Weiser, Washington county, the petitioner, Edgar M. Heigho, hearing that one J. W. Barton had made remarks derogatory to petitioner's character, called one of his employees, Frank Miller, and requested him to accompany petitioner to the residence of Barton. Heigho and Miller went to Barton's residence about 7 o'clock in the evening, ascended the front porch, and Heigho rang the doorbell. Mrs. Sylvia Riegleman, the mother-in-law of Barton, was living at the Barton residence, and was in a bedroom at the front of the house, and immediately off from and adjoining the

reception room or hallway, at the time the doorbell rang. Barton responded to the call, and, as he passed through the front room and was about to open the front door, Mrs. Riegleman, who was then near him, exclaimed, "Oh, he has a gun." Barton stepped out at the door and found Heigho standing on the front porch with a gun, commonly called a revolver or pistol, hanging in a holster or scabbard which was strapped about his body. Miller stood by the side of Heigho. Heigho asked Barton some questions as to the statements Barton had been making about him, and, upon Barton asserting that he had not told anything that was not true or not common talk in the town, Heigho struck him in the face with his fist, and Barton staggered back, and fell into the wire netting on the screen door. Barton did not rise for a few seconds, and in the meanwhile his wife came and assisted him to arise. Heigho and Miller backed off the porch and stood in front of the doorway. Barton advanced on Heigho and struck him a couple of blows, whereupon they clinched, and the wife interfered and separated them, and ordered Heigho and Miller off the premises. Mrs. Riegleman was at this time at the door crying, and had been heard to say a time or two, "He will kill you," or "He has a gun." Barton and wife immediately mounted the porch where Mrs. Riegleman was on her knees, resting against or over the banister, apparently unable to rise. She remarked to Barton that she was dying, and again repeated something about "him having a gun." She began spitting a bloody froth and rattling in the chest. A physician was called, and was unable to give her any relief, and she died inside of about thirty minutes from the time of the appearance of Heigho on the front porch. The physician who attended her made a post mortem examination, and testified that she had an aneurism of the ascending aorta, and this had ruptured into the superior vena cava and caused her death. He said that excitement was one of three principal causes that will produce such a result. Heigho was thereafter arrested on the charge of manslaughter in causing the death of Mrs. Riegleman by terror and fright while he was engaged in the commission of an unlawful act not amounting to felony.

We are now asked to determine whether, under the statute of this state, a person can be held for manslaughter where death was caused by fright, fear, or nervous shock, and where the prisoner made no assault or demonstration against the deceased, and neither offered nor threatened any physical force or violence toward the person of the deceased. In the early history of the common law a homicide, to be criminal, must have

resulted from corporal injury. Fright, fear, nervous shock, or producing mental disturbance, it was said, could never be the basis of a prosecution for homicide. East, in his *Pleas of the Crown*, vol. 1, chap. 5, § 13, says: "Working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, is not such a killing as the law takes notice of." An examination of the ancient English authorities fully corroborates and establishes this to have been the early English rule. *1 Hale, P. C. 425-29*; *Stephen's Digest of Crim. Law*, art. 221. This rule appears, however, to have been gradually modified and greatly relaxed in modern times by most of the English courts. So, in later years, we find the court holding a prisoner for manslaughter where his conduct toward his wife caused her death from shock to her nervous system. *Reg. v. Murton, 3 Fost. & F. 492*. And in *Reg. v. Dugal, 4 Quebec L. R. 352*, the Canadian court held the prisoner guilty of manslaughter where, with violent words and menaces, he had brandished a table knife over his father, and the latter became greatly agitated and weakened from the fright, and died in twenty minutes thereafter of syncope.

In *Reg. v. Towers, 12 Cox, C. C. 530*, decided in 1874, the defendant struck a twelve-year-old girl who was holding a small child in her arms, and the child became frightened and went into convulsions, and lingered for about six weeks and died, and the court held the facts sufficient to go to the jury on a charge of manslaughter. That is the only reported case that counsel have cited or we have been able to find where death resulted from fright, and the cause of fright had not been directed by the accused at the deceased, but had, on the contrary, been directed at some third party. That case is in principle so nearly parallel with the one at bar that we quote at length from the opinion. Justice Denman said that "he should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be in the nature of accident. This case was different from other cases of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child. . . . It might be that in this case, unusual as it was, on the principle of common law, manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child,—i. e., that the child would not have died but for that assault,—they might find the prisoner

guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury, and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for, to commit a murder, a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong or so violent as to cause that person to die. Therefore, mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidations had been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed. Then did, or did not, this principle of law apply to the case of a child of such tender years as the child in question? For the purposes of the case, he would assume that it did not. For the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act,—whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that, upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething, he said that, even though the teething might have had something to do with it, yet, if the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If, therefore, the jury thought that the act of the prisoner in assaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death, and not manslaughter." Counsel for petitioner seeks to distinguish the Towers Case from the one at bar on the ground that the child was not a rational agent, and was not capable of understanding that the attack on its nurse was not meant for it. The reasoning of the opinion, however, led the learned judge to the conclusion that the question for the jury to decide would be

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"whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that, upon all the circumstances of the case;" and that "if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter."

The only case dealing with this question decided by the courts of this country, and to which our attention has been called, is that of *Cox v. People*, 80 N. Y. 500, decided in 1880. That was a case where the defendant assaulted and bound the deceased, and left her in that condition, and it was supposed that she died from fright. In considering an instruction given by the trial court on the subject of death from fright, Mr. Justice Andrews, speaking for the New York court of appeals, said: "The prisoner's counsel excepted to the charge that 'if the deceased died from fright, and if the fright was caused by the violence of the prisoner, he is as responsible, and can as properly be convicted under this indictment of murder in the first degree as if the immediate result of his act was suffocation.' It is claimed that this charge was erroneous for the reason that it was not charged in the indictment that the killing was by fright superinduced by the acts of violence of the accused. The indictment charges in some counts that the prisoner choked, smothered, stifled, and suffocated the deceased, and in others that he assaulted the deceased and killed her by means and instruments to the jurors unknown. It was not necessary, in order to convict the prisoner, that it should appear that his actual personal violence was the sole and immediate cause of the death of the deceased. If his violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner's act was in law the cause of her death. We are of opinion that the prisoner was properly convicted under the counts charging an assault, and that the prisoner 'in some way and manner, and by the use of some means and instruments, to the jury unknown,' deprived the deceased of her life if the jury found that the deceased died from fright superinduced by the prisoner's violence."

As to whether a death caused from fright, grief, or terror, or other mental or nervous shock, can be made the basis for a criminal prosecution, has been touched upon but lightly by the text writers, and none have ventured to enunciate a modern rule on the subject. Such comments and observations as the text writers have made are valuable as indicating the personal views of the writ-

ers touching this matter. Sir James Stephen, in his note to article 221 of his Digest of Criminal Law, commenting on the old rule, says: "Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life, or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear, 'Your wife is dead,' intending to kill, and killing him,—why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct gradually 'breaking a man's heart' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be murder?" The author of the text in 21 Am. & Eng. Enc. Law, 2d ed. p. 98, speaking of the reason for the old rule and the modern trend of authority, says: "A hint of the reason for this exclusion may be gathered from Lord Hale's assertion that 'secret things belong to God,' upon which Sir James Stephen comments that he suspects the fear of encouraging prosecutions for witchcraft was the real reason. In default of a better explanation it would seem, therefore, that the rule has no firmer foundation than the ignorance and superstition of the time in which it was formulated. Hence the courts have, in some later cases, shown a tendency to break away from the old rule where substantial justice required it. It will be observed, however, that in all these cases the death has been caused by shock of terror produced by an assault, so that the question in many of its aspects may still be regarded as unsettled. Yet, on principle, there is no reason why a death from nervous irritation or shock should not be as criminal as any other. It certainly entails greater difficulty in the matter of proof, but this is purely a question of fact, and, if the prosecution is able to establish its case by evidence satisfactory to a jury, there seems to be no sufficient reason why the law should forbid a conviction." Clark & Marshall on the Law of Crimes, 2d ed. p. 314, says: "It is no doubt very true that the law cannot undertake to punish as for homicide when it is claimed that the death was caused solely by grief or terror, for the death could not be traced to such causes with any degree of certainty. Working upon the feelings and

fears of another, however, may be the direct cause of physical or corporeal injury resulting in death, and in such a case the person causing the injury may be as clearly responsible for the death as if he had used a knife." The statute of this state (§ 6565, Rev. Codes) defines manslaughter as follows: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: (1) Voluntarily upon a sudden quarrel or heat of passion; (2) involuntary—in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Manslaughter has, perhaps, in the variety of its circumstances, no equal in the catalogue of crimes. An unlawful killing, though unintentional and involuntary, if accomplished by one while engaged in the commission of an unlawful act, is defined by the statute as manslaughter, and this statute does not circumscribe the means or agency causing the death. The law clearly covers and includes any and all means and mediums by or through which a death is caused by one engaged in an unlawful act. The statute has the effect of raising the grade of the offense in which the party is engaged to the rank of manslaughter where it results in the death of a human being.

With such aid as we get from the foregoing authorities and the independent consideration we have been able to give the matter, we reach the conclusion that it would be unsafe, unreasonable, and often unjust for a court to hold as a matter of law that under no state of facts should a prosecution for manslaughter be sustained where death was caused by fright, fear, or terror alone, even though no hostile demonstration or overt act was directed at the person of the deceased. Many examples might be called to mind where it would be possible for the death of a person to be accomplished through fright, nervous shock, or terror as effectually as the same could be done with a knife or gun. If the proof in such a case be clear and undoubted, there can be no good reason for denying a conviction. If A, in a spirit of recklessness, shoot through B's house in which a sick wife or child is confined, and the shock and excitement to the patient cause death, the mere fact that he did not shoot at or hit anyone, and that he did not intend to shoot anyone, should not excuse him. It should be enough that he was at the time doing an unlawful act, or was acting "without due caution and circumspection." It would seem that in some instances force or violence may be applied to the mind or nervous system as effectually as to the body (1 Russell,

Crimes, p. 489). Indeed it is a well-recognized fact, especially among physicians and metaphysicians, that the application of corporal force or violence often intensifies mentally and nervously the physical effects that flow from the use and application of such force or violence.

We express no opinion whatever and refrain from any comment on the evidence in this case. That is a matter to be passed on by a jury. They should determine from all the facts and circumstances whether the accused was the direct and actual cause of the death of the decedent. As was said by Justice Denman in the *Towers Case*, it would be "laying down a dangerous precedent for the future" for us to hold as a conclusion of law that manslaughter could not be committed by fright, terror, or nervous shock. The fair and deliberate judgment of a jury of twelve men can generally be relied upon as an ample safeguard for the protection of one who should in fact be acquitted. The dangers of unwarranted prosecutions for such causes are no greater or more imminent than from any other cause, while, on the other hand, the proofs will generally be more difficult. The difficulty of making proofs, however, should never be considered as an argument against the application of a rule of law.

The writ is quashed and the prisoner is remanded to the custody of the sheriff of Washington county.

Sullivan, Ch. J., concurs.

NORTH DAKOTA SUPREME COURT.

SARAH MESSENGER, Respt.,

v.

VALLEY CITY STREET & INTERURBAN RAILWAY COMPANY, Appt.

(— N. D. —, 128 N. W. 1023.)

Carrier — relation of passenger — necessity of ticket.

1. The relation of carrier and passenger may exist while the passenger is entering the car or vehicle, and before he is seated therein. The fact that no ticket has been purchased does not necessarily prevent such relation arising. An implied acceptance may arise without the purchase of a ticket, or other acceptance in express terms.

Same — safe approaches.

2. It is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night.

Trial — jury — question of negligence.

3. The question of defendant's negligence and plaintiff's contributory negligence is,

generally, for the jury, and, when passed upon by it, will not ordinarily be disturbed.

(November 19, 1910.)

A PPEAL by defendant from a judgment of the District Court for Barnes County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Herman Winterer and David S. Ritchie, for appellant:

Before one can become a passenger, he must place himself in some conveyance by virtue of contract, express or implied, with the carrier.

Bricker v. Philadelphia & R. R. Co. 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983; *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341; *Farley v. Cincinnati, H. & D. R. Co.* 47 C. C. A. 156, 108 Fed. 14; *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294; *Foster v. Seattle Electric Co.* 35 Wash. 177, 76 Pac. 995; *Woolsey v. Chicago, B. & Q. R. Co.* 39 Neb. 798, 25 L.R.A. 79, 58 N. W. 444; *Hicks v. Union P. R. Co.* 76 Neb. 496, 107 N. W. 798; *Fremont, E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 4 L.R.A. (N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 A. & E. Ann. Cas. 1096; *Strong v. North Chicago Street R. Co.* 116 Ill. App. 246; *McFeat v. Philadelphia, W. & B. R. Co.* 6 Penn. (Del.) 513, 69 Atl. 744; *Hogner v. Boston Elev. R. Co.* 198 Mass. 260, 15 L.R.A. (N.S.) 960, 84 N. E. 464.

The relation of carrier and passenger did

Note. — Duty of street railway as to condition of approaches to cars.

Places under control of company.

It is generally held that a street railway company must keep platforms and approaches to its cars in a condition reasonably safe for its passengers; and this duty applies not only to such approaches as may have been constructed and owned by the company, but to those constructed and owned by the city, if constantly and notoriously used by the passengers as a means of approach. *Schlessinger v. Manhattan R. Co.* 49 Misc. 504, 98 N. Y. Supp. 840.

In *Joyce v. Metropolitan Street R. Co.* 219 Mo. 344, 118 S. W. 21, it is held that a street railway company must exercise ordinary and reasonable care in the construction and maintenance of its station platform and railings, including a railing extending from the end of a platform, parallel with the track, across a viaduct; and the company is liable to a passenger for injury received by being caught be-

not exist, for the reason that the plaintiff did not in any manner place herself or her body in the custody of the carrier.

Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; Mitchell v. Rochester R. Co. 77 Hun, 607, 28 N. Y. Supp. 1136; Southern R. Co. v. Smith, 40 L.R.A. 746, 30 C. C. A. 58, 52 U. S. App. 708, 86 Fed. 292; Hicks v. Union P. R. Co. 76 Neb. 496, 107 N. W. 798; Fremont, E. & M. Valley R. Co. v. Hagblad, 72 Neb. 773, 4 L.R.A.(N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 A. & E. Ann. Cas. 1096; Foster v. Seattle Electric Co. 35 Wash. 177, 76 Pac. 995; O'Donnell v. Chicago & N. W. R. Co. 106 Ill. App. 287; June v. Boston & A. R. Co. 153 Mass. 79, 26 N. E. 238;

tween the car and such railing by the starting of the car before he was safely aboard, unless the passenger negligently attempted to board the car after it had started. In this case plaintiff was held a passenger where it appeared that the car was standing at the usual place to receive passengers, and he had a transfer entitling him to be carried as such, which he intended to tender in payment of fare.

But in Lucas v. St. Louis & Suburban R. Co. 174 Mo. 270, 61 L.R.A. 452, 73 S. W. 589, it was held that a street car company did not maintain the stump of an electric light pole in its platform, so as to render it liable for injuries thereby caused to a person attempting to board its car, where, for the accommodation of its passengers, it merely built in a public street a platform around the stump, which had been left there by an electric light company, and which it had no right to remove.

And in Finseth v. City & Suburban R. Co. 32 Or. 1, 39 L.R.A. 517, 51 Pac. 84, it was held that a street car company which, to facilitate its own business and accommodate passengers, constructed a platform along a street temporarily submerged during a freshet, was required to make such walk reasonably safe, but not to make it "as reasonably safe as possible;" and was not, as a matter of law, required to provide a light for such walk at night.

In Beverley v. Boston Elev. R. Co. 194 Mass. 450, 80 N. E. 507, an elevated street railway was held liable to a passenger for injury received by being crowded off from the station platform, which was too small to accommodate the large number of passengers accustomed to assemble thereon at certain hours.

And in Murphy v. Suburban Rapid Transit Co. 28 Jones & S. 9, 15 N. Y. Supp. 837, the company was held liable where a passenger was injured by being tripped up by a loose plank in a footway approach to its bridge; and in Jarvis v. Brooklyn Elev. R. Co. 40 N. Y. S. R. 825, 16 N. Y. Supp. 98, where a passenger was injured by walking off a platform by reason of its being unguarded.

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Reiten v. Lake Street Elev. R. Co. 85 Ill. App. 657; Missouri, K. & T. R. Co. v. Williams, 91 Tex. 255, 40 S. W. 350, 42 S. W. 855; Merrill v. Eastern R. Co. 139 Mass. 238, 52 Am. Rep. 705, 1 N. E. 548; Bricker v. Philadelphia & R. R. Co. 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983; Gaffney v. St. Paul City R. Co. 81 Minn. 459, 84 N. W. 304.

Plaintiff was guilty of such negligence as would bar her from recovering.

Hanrahan v. Manhattan R. Co. 53 Hun, 420, 6 N. Y. Supp. 395, 24 N. Y. S. R. 790, 130 N. Y. 658, 29 N. E. 1033; Graham v. Pennsylvania Co. 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151; Becker v. Lincoln Real Estate & Bldg. Co. 174 Mo. 246, 73 S. W. 581;

In Foley v. Manhattan R. Co. 89 Hun, 606, 69 N. Y. S. R. 21, 34 N. Y. Supp. 1040, the company was held not liable for injuries caused by the defective condition of the rubber covering on its stairs, where the defect did not exist long enough before the accident to charge the owner with knowledge thereof.

In Lycett v. Manhattan R. Co. 12 App. Div. 326, 42 N. Y. Supp. 431, the company's negligence was held a question for the jury where a passenger was injured by tripping over a man kneeling in the station passageway while engaged in putting up a poster on a signboard.

In Kuhlen v. Boston & N. Street R. Co. 193 Mass. 341, 7 L.R.A.(N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815, where a passenger was injured by the pushing and struggling of a crowd at the depot, the company was held liable for failure to employ sufficient hands to protect passengers from a danger that should have been anticipated.

A railway company must see that the space between the car and platform is not such as to render it dangerous for a passenger to alight.

In Fox v. New York, 5 App. Div. 349, 39 N. Y. Supp. 309, a company was held negligent in failing adequately to light the space between the platform and the car steps, into which a passenger fell and was injured. On a former appeal of this case (70 Hun, 181, 24 N. Y. Supp. 43), a judgment for plaintiff was reversed, the court holding that the mere existence of the opening between the platform and the car was not, of itself, negligence.

In Ryan v. Manhattan R. Co. 49 Hun, 609, 17 N. Y. S. R. 998, 1 N. Y. Supp. 899, the company was held liable to a passenger injured, while attempting to get aboard, by stepping into a space nearly 15 inches wide, between the car and platform, it appearing that plaintiff was without fault, and that a crowd of passengers was around her at the time, so that she could not see below.

But in Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646, a street railway company was held not guilty of

Bradley v. Grand Trunk R. Co. 107 Mich. 243, 65 N. W. 102; Gulf, C. & S. F. R. Co. v. Hodges, — Tex. Civ. App. —, 24 S. W. 563; Wallace v. Wilmington & N. R. Co. 8 Houst. (Del.) 529, 18 Atl. 818; Seymour v. Chicago, B. & Q. R. Co. 3 Biss. 43, Fed. Cas. No. 12,685; Galena & C. Union R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 386; Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; Downey v. Chesapeake & O. R. Co. 28 W. Va. 732; South & North Ala. R. Co. v. Schanfler, 75 Ala. 136; Jacksonville Street R. Co. v. Chappell, 21 Fla. 175; Clark v. Metropolitan Street R. Co. 68 App. Div. 49, 74 N. Y. Supp. 267; Savannah, F. & W. R. Co. v. Flaherty, 110 Ga. 335, 35 S. E. 677;

Missouri, K. & T. R. Co. v. Turley, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369; Little v. Hackett, 116 U. S. 371, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Johnston v. New Omaha Thomson-Houston Electric Light Co. 78 Neb. 24, 17 L.R.A. (N.S.) 435, 110 N. W. 711, 113 N. W. 526; Evansville Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N. E. 549; Haase v. Morton, 138 Iowa, 205, 115 N. W. 921, 16 A. & E. Ann. Cas. 350; Anderson v. Wilmington, 6 Penn. (Del.) 485, 70 Atl. 204; Miller v. Chicago, St. P. M. & O. R. Co. 135 Wis. 247, 17 L.R.A. (N.S.) 158, 128 Am. St. Rep. 1021, 115 N. W. 794; Central R. Co. v. Clay, 3 Ga. App. 286, 59 S. E. 843; Mitchell v. Chicago & A. R. Co. 132 Mo. App. 143, 112 S. W. 291.

negligence where a passenger was injured by stepping into a space of 15 inches between the car and the platform, it appearing that if she had seen the platform, she could have stepped over to it by taking an extra long step, and if she had looked more closely, would, perhaps, have seen the space into which she fell, and thus have avoided the accident.

In Boyce v. Manhattan R. Co. 118 N. Y. 314, 23 N. E. 304, the company was held liable to a passenger injured by falling into a space between the car and platform. No negligence was imputed to the company for the existence of the opening; the station being built on a curve, the space was a necessity in the practical operation of the railroad; but negligence was predicated of the omission properly to guard and light it. This case is distinguished from Ryan v. Manhattan R. Co. supra, where the negligence rests upon the existence of the opening itself as being wider than prudence permitted or necessity required.

In Willworth v. Boston Elev. R. Co. 188 Mass. 220, 74 N. E. 333, and Field v. Boston Elev. R. Co. 188 Mass. 222 note, 74 N. E. 334, the company was held not negligent in having a space between the car and platform of from 3 to 4 inches in width, whereby a passenger was injured by having his foot caught.

In Windels v. Interborough Rapid Transit Co. 49 Misc. 646, 98 N. Y. Supp. 854, the negligence of the company in failing to guard or warn passengers of a space a foot wide between the platform and the car, into which a passenger fell and was injured, was for the jury.

And in Wertheimer v. Interborough Rapid Transit Co. 52 Misc. 540, 102 N. Y. Supp. 706, the company was held to have sufficiently discharged its duty to warn passengers of such a space where the guard said, "Watch the step," in such a manner that a person paying ordinary attention to what was going on about her would naturally have heard him. The trial court held that the defendant was not negligent because of the mere existence of the space.

Street railway companies must guard 32 L.R.A. (N.S.)

against their platforms, etc., becoming dangerous by reason of snow and ice. Consequently a railway company is liable to a passenger injured by slipping upon an icy platform. Weston v. New York Elev. R. Co. 73 N. Y. 595; McGuire v. Interborough Rapid Transit Co. 104 App. Div. 105, 93 N. Y. Supp. 316; Timpson v. Manhattan R. Co. 52 Hun, 489, 5 N. Y. Supp. 685.

And by slipping on icy stairs leading to its station. Ainley v. Manhattan R. Co. 47 Hun, 206; Foster v. Old Colony Street R. Co. 182 Mass. 378, 65 N. E. 795.

But in Rusk v. Manhattan R. Co. 46 App. Div. 100, 61 N. Y. Supp. 384, an elevated railway was held not negligent in failing to put sand, ashes, or sawdust on an icy platform, there being no such obvious danger to passengers that the company was bound to anticipate that injury might be sustained.

So, in Kelly v. Manhattan R. Co. 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383, where a passenger was injured by slipping on the icy station steps, the company was held not negligent in failing to put ashes or sawdust on the steps during the continuance of a heavy fall of sleet and snow, or to clean them off within two hours after the termination of the storm, the steps being provided with rubber tips and hand railing, and the passenger being aware of the storm and its effects.

If a street railway company has provided any portion of its roadbed as a place for passengers to alight, it must exercise reasonable care to keep that particular place safe for the purpose. So, where a passenger was injured in alighting, by reason of a defective roadbed, the company was held liable. Flack v. Nassau Electric R. Co. 41 App. Div. 399, 58 N. Y. Supp. 839.

Places not under control of company.

In Conway v. Lewiston & A. Horse R. Co. 90 Me. 199, 38 Atl. 110, holding that no liability attached to the company for injury to a passenger, sustained by stepping upon a rolling stone, the court said that "in determining the question of the

Messrs. Page & Englert, for respondent:

The jury was justified in finding that the plaintiff was a passenger, and the fact that she had no ticket was not material.

Albin v. Chicago, R. I. & P. R. Co. 103 Mo. App. 308, 77 S. W. 153; McCarty v. St. Louis & S. R. Co. 105 Mo. App. 596, 80 S. W. 7; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; Ahern v. Minneapolis Street R. Co. 102 Minn. 435, 113 N. W. 1019; Grimes v. Pennsylvania Co. 36 Fed. 72; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201; McFeat v. Philadelphia, W. & B. R. Co. 6 Penn. (Del.) 513, 60 Atl. 744; Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; McDonough v. Metropolitan R. Co. 137 Mass. 210; North Chicago Street R. Co. v. Williams, 140 Ill. 275,

20 N. E. 672; Allender v. Chicago, R. I. & P. R. Co. 37 Iowa, 264; Phillips v. Southern R. Co. 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388; Texas & P. R. Co. v. Jones, — Tex. Civ. App. —, 39 S. W. 124; Galveston, H. & S. A. R. Co. v. Fink, 44 Tex. Civ. App. 544, 99 S. W. 204; Gordon v. West End Street R. Co. 175 Mass. 181, 55 N. E. 990; Hall v. Terre Haute Electric Co. 38 Ind. App. 43, 76 N. E. 334.

One becomes a passenger of a street car as soon as he has a foot on the running board, in the act of getting into the car, after it has stopped for him.

Gaffney v. St. Paul City R. Co. 81 Minn. 459, 84 N. W. 304; Citizens' Street R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Gordon v. West End Street R. Co. 175 Mass. 181, 55 N. E. 990; Butler v. Glens Falls, S. H. & Ft. E. Street R. Co. 121 N. Y. 112,

defendant's negligence, it is proper to consider that the company 'could not select the places in the street where its track should be laid or its cars run. It could not construct nor control any places at which passengers were to step on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the center, sides, and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car.' On a former trial of this case (87 Me. 283, 32 Atl. 901), it was held that a street railroad company, having no control over the street, is not an insurer of the safety of any place at which it stops a car for passengers to alight; and if the company exercises proper care in its selection of a place, it is not liable if the place proves unsafe.

It is said in Sweet v. Louisville R. Co. 113 Ky. 15, 67 S. W. 4, where a passenger was injured because of a hole in the street, that a different duty attaches to street railway than to steam railway operators in respect to furnishing safe places for discharging their passengers. The latter must furnish such, while the former is under no obligation, but discharges its passengers at convenient points along the streets it traverses. And whether a hole in the street was the cause of the passenger's injury, and was such a defective place for discharging passengers as to render it obviously unsafe, were held questions of fact for the jury.

A street railway company is bound to know that the place at which its cars stop to let off passengers is a reasonably safe place, and the passenger has a right to assume that it is a reasonably safe place to alight, unless it is obviously dangerous. Thus, the company has been held liable to a passenger injured in alighting: 32 L.R.A. (N.S.)

—by stepping into a depression or hole in the street. Mobile Light & R. Co. v. Walsh, 146 Ala. 290, 40 So. 559, 9 A. & E. Ann. Cas. 852; Tilden v. Rhode Island Co. 27 R. I. 482, 63 Atl. 675; Holzhauser v. Brooklyn Heights R. Co. 43 Misc. 145, 88 N. Y. Supp. 269; Indiana Union Traction Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325; Maxwell v. Fresno City R. Co. 4 Cal. App. 745, 89 Pac. 367; Stewart v. St. Paul City R. Co. 78 Minn. 85, 80 N. W. 854; Spangler v. Saginaw Valley Traction Co. 152 Mich. 405, 116 N. W. 373; Ft. Wayne Traction Co. v. Morvilius, 31 Ind. App. 464, 68 N. E. 304; Call v. Portsmouth, K. & Y. Street R. Co. 69 N. H. 562, 45 Atl. 405;

—by falling over lumber piled near the track. Montgomery Street R. Co. v. Mason, 133 Ala. 508, 32 So. 261;

—by falling into an excavation. Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404 (the court says the action against the defendant is not founded upon negligence in allowing the excavation to remain without proper safeguards or lights, but it arises out of the duty which every carrier of passengers is under, not to expose his passengers to any danger in alighting which can be avoided by the exercise of extreme care and caution);

—by falling over a grass-covered spur track placed by the company in that portion of a street which it was bound to keep free from obstructions. White v. Lewiston, A. & W. Street R. Co. — Me. —, 78 Atl. 473;

—where a passenger was discharged at a dangerous place, and he was injured by a switching engine. Franklin v. Southern California Motor Road Co. 85 Cal. 63, 24 Pac. 723;

—by falling over rails negligently placed in the street by the company. Wells v. Steinway R. Co. 18 App. Div. 180, 45 N. Y. Supp. 864;

—by stepping into hole between tracks which the passenger was obliged to cross to reach her destination. Mahinke v. New

24 N. E. 187; Phillips v. Southern R. Co. 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388.

It was the duty of the defendant to keep its approaches to its car reasonably and properly lighted at night, for the safety and accommodation of its passengers.

Grimes v. Pennsylvania Co. 30 Fed. 72; Hiatt v. Des Moines, N. & W. R. Co. 96 Iowa, 169, 64 N. W. 766; Fordyce v. Merrill, 49 Ark. 277, 5 S. W. 329; Cross v. Lake Shore & M. S. R. Co. 69 Mich. 303, 13 Am. St. Rep. 309, 37 N. W. 361; 6 Cyc. Law & Proc. pp. 605-609; Chicago, R. I. & P. R. Co. v. Stepp, 22 L.R.A.(N.S.) 350, 90 C. C. A. 431, 164 Fed. 785.

Whether the plaintiff was in the exercise of such care as a reasonably prudent person would be expected to exercise under the like circumstances was properly left to the jury.

Pendroy v. Great Northern R. Co. 17 N.

D. 433, 117 N. W. 531; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Chicago & J. Electric Co. v. Wanic, 230 Ill. 530, 15 L.R.A.(N.S.) 1167, 82 N. E. 821; Butler v. Glens Falls, S. H. & Ft. E. Street R. Co. 121 N. Y. 112, 24 N. E. 187.

Morgan, Ch. J., delivered the opinion of the court:

On the 3d day of December, 1906, the plaintiff was injured while attempting to board a street car belonging to the defendant company. The complaint alleges that the injury was caused by the failure of the defendant to cause the approach to said street car to be properly lighted, and its failure to have guards or rails placed at such approach. The defendant runs a street

Orleans City & L. R. Co. 104 La. 411, 29 So. 52;

—by falling down declivity concealed by tall grass. Topp v. United R. & Electric Co. 99 Md. 630, 59 Atl. 52, 1 A. & E. Ann. Cas. 912;

—by stepping into trench, the company being negligent either in stopping the car opposite an open trench, and impliedly inviting plaintiff to alight, without notice or warning, or in not properly guarding the trench. Wolf v. Third Ave. R. Co. 67 App. Div. 605, 74 N. Y. Supp. 336;

—by alighting in a place "disturbed, uneven, and insecure." Senf v. St. Louis & S. R. Co. 112 Mo. App. 74, 86 S. W. 887;

—by alighting, on a dark night, at a dangerous place, beyond the usual stopping place. The court said: "We do not think the law calls upon a passenger to watch the course of a car, or to notice in what direction it is going. He has a right to rely upon the conductor's putting him off where he directs him to. It would simply be impracticable for passengers on a street car to rely upon their own observations, especially upon a dark night, which it was shown this was." Henry v. Grant Street Electric R. Co. 24 Wash. 246, 64 Pac. 137;

—by falling into a gully as a consequence of the car running beyond the place selected by the passenger to alight. Macon R. & Light Co. v. Vining, 120 Ga. 511, 48 S. E. 232. In this case the court lays down the rule that "if the passenger selects the place to alight, and the employees acquiesce in such selection by stopping the car at the place chosen, and the passenger be well acquainted with the place, or the danger of attempting to alight there be apparent to him, and he is injured while alighting, as a consequence of the character of the place, and without fault on the part of the employees, the company would not be liable. If, however, the passenger selects a place which is reasonably safe, and the car has stopped, and, on ac-

count of the darkness, the passenger cannot determine whether the car has stopped at the place designated, and the conductor in charge of the car permits the passenger to attempt to alight without informing him that the place selected has not been reached, and also without informing him as to the dangers incident to alighting at the place at which the car has actually stopped, then the company would be liable if the passenger is injured in alighting, as a consequence of a danger of which he was not aware, and which, on account of the darkness, was not apparent to him at the time he attempted to alight, or, after having stepped from the car, attempted to proceed along what would have been a safe way in the event the car had stopped at the place selected." As to liability of street railway company for stopping car at improper place for passenger to alight, see note to Melton v. Birmingham R. Light & P. Co. 16 L.R.A.(N.S.) 467.

And following Macon R. & Light Co. v. Vining, supra, it is held in Turner v. City Electric R. Co. 134 Ga. 869, 68 S. E. 735, where a passenger was injured in alighting, that generally the duty which the law imposes upon an ordinary railroad company to provide and maintain a safe place for landing its passengers is not applicable to a street car company operating its line along a public street of a city, and not stopping at regular places selected by it, or providing places for passengers to get on and off its cars, but stopping such cars at street crossings or various intermediate places, upon signal from a passenger. And that, under such circumstances, it is the duty of the company, and its agents or employees representing it, to use due diligence to select a reasonably safe place for landing its passengers, and to make selection with reference to getting off the car while at rest.

So, in Stewart v. St. Paul City R. Co. 78 Minn. 110, 80 N. W. 855, where a passenger was injured in alighting by step-

car line in Valley City, and runs its cars so as to make connections with all passenger trains of the Soo Railway Company at the depot of said railway company. At the depot or station the railway track is used by the street railway company. Except as to this distance, at the station, the street railway company maintains its own tracks. The street railway company carries passengers to and from said depot, and the car remains at the depot until the arrival of the incoming passenger trains, and until the incoming passengers enter the street car. The approach from the depot platform to the car is made on a plank 4 feet long and about 2 feet wide, resting on the depot platform and the steps of the car, about 18 inches from the ground. The space between the

depot platform and the car steps is about 30 inches. At about 8 o'clock on the evening of said 3d day of December, plaintiff was a passenger from the South on said railway, and left the train at Valley City, and immediately proceeded towards the street car. She had been a passenger on the street car at prior times, and knew where it stood. She had stepped on the plank with one foot, and was about to take another step thereon when she fell to the ground and was injured. Whether she slipped, or failed to step on the plank, does not clearly appear. At this time other passengers were entering the car, and some were in the car, waiting for it to start. It started in a few minutes thereafter. She was not directed to the car at that time by any one of the servants or

ping in the nighttime into a hole in the street, it was held that while a street car company is not responsible for the condition of the streets on which it operates its cars, it is bound to exercise reasonable care to stop its cars to discharge its passengers in a safe and proper place for that purpose.

In *Lee v. Boston Elev. R. Co.* 182 Mass. 454, 65 N. E. 822, the company was held not liable to a passenger injured by falling into a trench as the result of walking toward the trench instead of toward the sidewalk, which she could have done in safety. It was also held that a person alighting from a street car is not a passenger while passing from the car to the sidewalk.

So, in *Conroy v. Boston Elev. R. Co.* 188 Mass. 411, 74 N. E. 672, the company was held not liable to a passenger injured by falling over a track in a reserved space of grass which she was crossing, the company having no control over the space, and she ceasing to be a passenger after leaving the car.

In *Sowash v. Consolidated Traction Co.* 188 Pa. 618, 41 Atl. 743, the company was held liable to a passenger injured while so transferring, by reason of a defective way.

In *Colorado Springs & C. C. D. R. Co. v. Petit*, 37 Colo. 326, 86 Pac. 121, the company was held liable where a passenger, in transferring from one car to another, was injured by stepping into a trolley-pole hole which the company had negligently left unguarded.

And in *Walger v. Jersey City, H. & P. Street R. Co.* 71 N. J. L. 356, 59 Atl. 14, the company's negligence was held a question for the jury where a passenger, after alighting, was injured while transferring, by the car which he had just left, swinging around a curve.

But in *Rose v. Boston & N. Street R. Co.* 194 Mass. 415, 80 N. E. 580, the company was held not liable to a passenger injured while transferring, by reason of the ground sinking as she was alighting, there being nothing to show that the conductor should have known the ground was defective.

In the three preceding cases it was held 32 L.R.A. (N.S.)

that a person, while in the act of transferring from one car to another, still continues to be a passenger.

In *Greenan v. International R. Co.* 139 App. Div. 863, 124 N. Y. Supp. 360, it is held that while a street railway company must not only furnish a suitable place for a passenger to alight, where he is required to transfer from one car to another, but must also furnish a reasonably safe way to make the transfer, it is not liable to a passenger injured while transferring by being struck by the overhang of a car rounding a curve, where he selected a hazardous route instead of one perfectly safe and available.

In *Leveret v. Shreveport Belt R. Co.* 110 La. 399, 34 So. 579, a company was held liable to a passenger for injury because of a defective plank in a pavilion used as a station, although erected by real-estate agents for the accommodation of persons visiting property offered for sale. The court said: "The defendant company does not controvert the principle of law announced in numerous decisions of this court, that a railroad company is required to keep the stations and platforms used by passengers in getting on and off its cars in good condition, and is responsible for damages for neglect to keep them in proper condition . . . [but denies liability on the ground that] the defendant company had nothing whatever to do with placing the platform in the street."

A ferry company which habitually permits its foot passengers to use a part of the roadway designed for vehicles must keep such roadways in a reasonably safe condition for their use; and consequently is liable for injuries sustained by a passenger while crossing such roadway by her shoes catching in splinters, as a result of the company's failure to repair. *Wolf v. Brooklyn Ferry Co.* 54 App. Div. 67, 66 N. Y. Supp. 298.

A railroad company which expressly or by implication invites its passengers to use a stile over a wire fence in leaving its grounds is bound to use at least ordinary care in seeing that it is fit for the purpose

employees of the street car company, and was actually escorted to the car by her son, who carried her baggage. No servants or employees of the company were at the car when she attempted to enter it. The lights had not been turned on in the car, but it was lighted to some extent by a lantern placed on the inside of the car. She brought this action, and bases her right to recover upon the alleged negligence of the company in failing to provide lights at the place where the street car is entered, and for its failure to provide a proper railing or guard where the plank is placed. The defendant, in its answer, alleges that the relation of carrier and passenger did not exist between the plaintiff and the defendant at the time of the injury, and that if she was a pas-

senger at that time, her injury was caused through her own contributory negligence. The jury found a verdict in her favor for the sum of \$200. The defendant has appealed from a judgment entered upon that verdict, and relies upon these two assignments for a reversal of the same.

The appellant's contention is that the relation of carrier and passenger is not created as a matter of law until the passenger enters some conveyance by virtue of a contract, express or implied, and has been expressly or impliedly received as a passenger by the servants of the carrier. The plaintiff had not purchased a ticket for the trip, and there was no place at the station for the purchase of tickets, and the custom prevails to pay the fare to the conductor while

intended, although the stile was not erected by it, and the defective part is not on its property, but where it has no right to go to make inspection or repairs. *Cotant v. Boone Suburban R. Co.* 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115.

And in *Vasele v. Grant Street Electric R. Co.* 16 Wash. 602, 48 Pac. 249, the company was held liable where a motorman, when signaled, stopped an electric car about 20 feet beyond the crossing, at an elevated portion of the road, dangerous because unfenced and unlighted, whereby a passenger approaching with the intention of boarding the car fell and was injured. The court said that stopping and keeping the car at that place was an implied invitation to the passenger to board it there. As to effect of signaling car to make one a passenger, see note to *Karr v. Milwaukee Heat, Light & Traction Co.* 13 L.R.A. (N.S.) 283.

In *Sweet v. Detroit United R. Co.* 141 Mich. 650, 105 N. W. 132, where there was a smooth path across a street being paved, except for a rail about which the pavement had not been laid, and plaintiff, with full knowledge of the situation, crossed to take a car at this point, slipped, and fell over such rail, the company was held not negligent in failing to build a platform or a crossing on a level with the rails, to afford the public access to its cars.

In *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170, 3 N. E. 65, the company was held liable where a passenger about to board a car was injured by slipping on a ridge of snow thrown up by defendant's snow plows.

And where a passenger, in alighting from a car, slipped on the snow and ice, and was injured, it was held a question for the jury whether the stopping place was reasonably safe, as plaintiff was assured by the conductor. *Speck v. International R. Co.* 133 App. Div. 802, 118 N. Y. Supp. 71.

In *Maverick v. Eighth Ave. R. Co.* 36 N. Y. 378, the company was held liable where the conductor stopped the car, and invited

a passenger to alight at a place where she was struck by the ladder on a passing fire wagon.

In *Lynch v. St. Louis Transit Co.* 102 Mo. App. 630, 77 S. W. 100, it is held that where a street car is run beyond the stopping place requested, and a passenger, in alighting, is injured, the company is not liable, if it has selected a safe landing place.

In *Bigelow v. West End Street R. Co.* 161 Mass. 393, 37 N. E. 367, it is held that street car employees may assume that a passenger, in alighting from a car in broad daylight, will notice an excavation in the street, caused by the removal of paving blocks; and the company is not chargeable with negligence because of stopping the car near the excavation, or because of failing to warn the passenger as to the condition of the street.

It is said in *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391, where a person, immediately after alighting from one car, was killed by stepping in front of another, that the street is in no sense a passenger station, for the safety of which a street railway company is responsible, and that a person, on leaving the car, ceases to be a passenger, and becomes merely a traveler upon the highway.

This statement was reiterated in *Bigelow v. West End Street R. Co.* supra.

It is a question for the jury whether or not the unevenness of the ground at a point used by passengers in alighting from a car is such as to constitute negligence on the part of the carrier. *Poole v. Consolidated Street R. Co.* 100 Mich. 379, 25 L.R.A. 744, 59 N. W. 390.

In *Thompson v. Gardner, W. & F. Street R. Co.* 193 Mass. 133, 118 Am. St. Rep. 459, 78 N. E. 854, the company was held not liable to a passenger injured by alighting in a gutter, although the conductor failed to give warning of the gutter. The court said the plaintiff knew she was alighting from the car upon the sidewalk side, and the conductor may well have as-

on the car. There is no custom shown that the servants of the street railway company were to give any actual permission or consent before the passengers could rightfully enter the car. The doors of the car were not locked, and the car was lighted as before stated. From these facts it is to be determined whether the plaintiff was a passenger as a matter of law when the injury occurred.

It is beyond question that she stepped upon the plank, intending to become a passenger, and that the car started on its trip in a very short time thereafter. When injured she was using one of the appliances provided by the company for entering the car. The contention that the plaintiff was not a passenger for the reason that she had not paid fare or bought a ticket when injured cannot be upheld. The car was at the station to receive passengers, and that fact may be deemed an invitation for passengers

to enter, under the circumstances of this case. There is no dispute in the evidence as to the circumstances under which she entered the car, and from such circumstances we think she became a passenger as a matter of law, and defendant owed her the duty to provide safe approaches to the car. The plank had been placed there for use by those desiring to enter, and, as a matter of law, this should be deemed an invitation for those wishing to enter as passengers to do so. The company having impliedly invited passengers to enter the car without payment of fare, impliedly accepts those entering pursuant to such invitation for the purpose and with the intention of being carried as passengers. No formal acceptance is necessary, nor payment of fare previous to entering. The acts of the officers in permitting passengers to use the appliances for entering provided by the company, as in this case, just before the car started, with-

sumed that she was familiar with the existence of gutters, and would govern herself accordingly.

And in *Quinlan v. Newton & B. Street R. Co.* 191 Mass. 58, 77 N. E. 486, the company was held not liable where a woman passenger was injured by falling into a gutter, as a consequence of her negligent manner of alighting.

Nor was the company liable in *Bland v. Roxborough, C. H. & N. R. Co.* 13 Pa. Super. Ct. 93, nor in *Scanlon v. Philadelphia Rapid Transit Co.* 208 Pa. 195, 57 Atl. 521, where a passenger injured in alighting knew the location well, but, without suggestion or invitation from any source, elected to adopt a landing place involving risk, instead of one perfectly safe and available.

In *Grissinger v. International R. Co.* 128 N. Y. Supp. 63, it was held that the depression into which a passenger stepped on alighting from a car was not of such a character as to charge defendant with negligence.

In *MacKenzie v. Union R. Co.* 82 App. Div. 124, 81 N. Y. Supp. 748 (affirmed in 178 N. Y. 638, 71 N. E. 1134), stopping a car, and calling to a person to "come on," was held not to render the company liable to a passenger for injuries caused by his falling into a ditch in the street, the conductor's call being no invitation to the person to proceed along the roadway rather than along the sidewalk, and the conductor having no reason to suppose that the person could not or did not see the light guarding the excavation.

In *Joslyn v. Milford, H. & F. Street R. Co.* 184 Mass. 65, 67 N. E. 866, the company was held liable for failure to warn a passenger of the yielding nature of gravel recently deposited upon its own roadbed, where she was injured while alighting, on invitation of the company.

Where a passenger in alighting was in-

jured by stepping upon a stone in the highway, an instruction that plaintiff could recover damages if the place selected by defendant for her to leave its car was not a safe one for that purpose was erroneous because it did not submit to the jury the question of the defendant's negligence, which was the gravamen of the action. *Foley v. Brunswick Traction Co.* 66 N. J. L. 637, 50 Atl. 340.

It is the duty of an interurban railroad company stopping its car for the accommodation of a passenger, who desires to alight at a highway crossing, to exercise at least reasonable care to enable her to alight, with as little danger as possible; and if the car is stopped and she is invited to alight at a place more hazardous than that at which the car might have been conveniently stopped, and she is injured, the carrier is liable. *McGovern v. Interurban R. Co.* 136 Iowa, 13, 13 L.R.A. (N.S.) 476, 125 Am. St. Rep. 215, 111 N. W. 412.

So, a passenger on such a car may reasonably assume that she is invited to alight at the point where the car stopped, unless warned of danger; and she is not conclusively negligent in accepting the invitation to alight at that place, although it is in fact unsafe. *Ibid.*

For other cases involving the duty of interurban road with respect to accommodations for boarding or leaving car at country crossings, see *McGovern v. Interurban R. Co.* 13 L.R.A. (N.S.) 476.

In *Bass v. Concord Street R. Co.* 70 N. H. 170, 46 Atl. 1056, where a car ran beyond the regular stopping place, and a passenger, in alighting, was injured by falling into a hole in the highway, an instruction that the defendant had a right to presume that plaintiff, in alighting from a car in broad daylight, would notice any defect in the street which was open to ordinary view, was properly refused.

J. D. C.

out any warning not to do so, or any objection, should be presumed to be acquiesced in by the company, where no rule of the company is violated. The following statement of the rule is well sustained by the authorities: "The relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier furnishes." 6 Cyc. Law & Proc. p. 536, and cases cited. "The previous purchase of a ticket is not essential to the beginning of the relation of passenger and carrier, where it is not by the rules or known usage of the company made a condition precedent to the acceptance of the passenger. If there is an intent to pay fare, or do whatever else is required to entitle the person to transportation, he becomes a passenger by implied acceptance, although his fare has not yet been paid or his ticket called for." 6 Cyc. Law & Proc. p. 537, and cases cited.

In *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 17 N. Y. S. R. 565, 2 N. Y. Supp. 72, the court said: "It does not seem reasonable to assume, as matter of law, that a person who, in an orderly way, attempts to enter a street car as a passenger, is to be regarded a trespasser until a special contract has been made with the conductor, based upon the payment of the required fare."

In *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388, the court said: The "party coming to the railroad station with the intention of taking . . . [its] next train becomes, in contemplation of law, a passenger on . . . [its] road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger it is not necessary that he should have purchased his ticket."

The question of defendant's negligence is not seriously denied. That question was submitted to the jury. Having found for the plaintiff under proper instructions, there is no legal ground or reason, based upon the evidence, for disturbing the verdict. The defendant, therefore, must be held to have violated a legal obligation devolving upon it, as a carrier, to provide the approaches to the car with proper light for the safety of those about to enter it. See 6 Cyc. Law & Proc. p. 609, and cases cited.

Defendant insists that plaintiff was guilty of such contributory negligence as to bar her right to any recovery. Its claim is based on the alleged fact that the plaintiff entered the car without any invitation, and before the servants of the defendant gave permis-

sion to enter the car, and before the time when passengers could properly enter it; that she unnecessarily attempted to walk on the plank in the dark, knowing the danger. It is sufficient to say on this subject that the jury was correctly instructed on the law of contributory negligence, and found in plaintiff's favor. We think that this verdict finally settles the question as to the plaintiff's contributory negligence, under the evidence. There is no warrant for saying, as a matter of law, that there was contributory negligence fatal to a recovery.

There is a dispute as to whether there was a light at or near the plank. Plaintiff testifies that it was dark, and that she could just see the plank. Defendant testifies that it was not dark, and that surrounding lights threw some light on the location. The jury has passed on the question of the contributory negligence of the plaintiff. The verdict is sustained, and no reason appears for disturbing it. That the questions of negligence and contributory negligence are for the jury, ordinarily, has frequently been held by this court, and in the recent cases of *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960.

It follows that the order appealed from should be affirmed, and it is so ordered.

All concur.

ALABAMA SUPREME COURT.

MAURICE ADLER et al., Impleaded, etc.,
Appts.,
v.

MARY ELLA PRUITT.

(— Ala. —, 53 So. 315.)

Nuisance — joint liability — operation.

1. One who has contracted for the output of a sewage purification plant, in consideration of his furnishing the money to construct and operate it, is liable as a joint tortfeasor in case the plant is operated so as to constitute a nuisance to neighboring property, and he actually par-

Note. — Connection with or participation in nuisance essential to render one responsible therefor.

Scope.

This note is limited to cases involving liability at common law for the nuisance, and does not cover injunctions, contempt, or criminal cases. It is also confined to cases in which the condition complained of

ticipates in such operation, and it is immaterial that the public authorities retain control of such manner of operation.

Proximate cause — nuisance — sewage plant.

2. The proximate cause of a nuisance to neighboring property, caused by the manner of operation of a sewage purification plant, is such manner of operation, and not the construction of the plant and turning the sewage into it.

Pleading — nuisance — liability — sufficiency.

3. The absence of a categorical averment in an action to recover damages for maintenance of a nuisance, that the nuisance was maintained by defendant, is not fatal if the Code contains forms of pleading in which such averments are not found, and the pleading could be construed as intended to state a cause of action against the persons sued.

Evidence — opinion — presence of odors.

4. A witness familiar with the conditions

is held or assumed to constitute a nuisance, and the question of liability is treated from that view point. It therefore does not include cases in which liability is discussed from the point of view of negligence only, although the condition may be substantially similar to that which is treated by other cases as a nuisance. The following questions, though within the scope of the subject, have also been excluded because they involve considerations to some extent peculiar to themselves, and have already been annotated as distinct questions:

Liability of one who succeeds to the title of property on which a nuisance exists. (See note to *Chicago, R. I. & P. R. Co. v. Martin*, 27 L.R.A. (N.S.) 164, as to necessity of notice to make an owner of property liable for continuing a nuisance created by his predecessor.)

Liability of one creating a nuisance upon his land for continuance of same after he has parted with the title, see note to *Mansfield v. Tenney*, 25 L.R.A. (N.S.) 731.

Liability of a landlord to a third person for the condition of premises in the possession of a tenant, see note to *Lee v. McLaughlin*, 26 L.R.A. 197.

Liability of an employer for a nuisance created by an independent contractor, see notes to *Salliotte v. King Bridge Co.* 65 L.R.A. 620 (general rule); *Thomas v. Harrington*, 65 L.R.A. 751 (nuisance direct result of work contracted for); *Jacobs v. Fuller & H. Co.* 65 L.R.A. 835 (work contracted for dangerous unless certain precautions observed); *Anderson v. Fleming*, 66 L.R.A. 146 (employer's absolute duty to see that no nuisance is created or maintained); and *Louisville & N. R. Co. v. Tow*, 66 L.R.A. 948 (employer's failure to remove a nuisance).

The question as to the liability of a master for a nuisance created by a servant, or of a municipality for a nuisance created by its officers, is also beyond the scope of this note.

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may be permitted to state his opinion as to whether or not odors from a sewage purification plant could be smelled at the residence of a complaining property owner, although he could not give such evidence as an expert, because the subject was within the knowledge of all men of common observation and experience.

Appeal — rejection of evidence — saving error.

5. The appellate court will not, to save error in refusing to admit opinion evidence, assume facts which would go merely to its weight, and might have been developed on cross-examination.

Evidence — nuisance — use of sewage plant.

6. Evidence of the spreading of the solid matter from a sewage purification plant over the adjoining ground is admissible under a complaint for operating the plant in such a manner as to constitute a nuisance to neighboring property, where such use of it is part of the common purpose of those

Failure of municipality to abate nuisance — under absolute legal duty.

A large number of the cases involving the question as to what connection with or participation in a nuisance is essential to render one civilly responsible therefor are those involving the liability of a municipality for injury resulting from a nuisance which it permits to exist within its jurisdiction. As to the duty of a municipality to abate or suppress a public nuisance, the court said, in *McDade v. Chester*, 117 Pa. 414, 2 Am. St. Rep. 681, 12 Atl. 421: "When a legal duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from neglect of that duty; in such case it stands on the same footing in respect to negligence as a purely private corporation or an individual. . . . But the duty imposed must be absolute or imperative; not such as, under a grant of authority, is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character."

The statutory duty of a municipality most frequently involved in cases of this kind is the care of its streets; and for a failure to use due care in keeping streets free from nuisances, the municipality seems to be uniformly held responsible for resulting injuries, except in cases holding it not liable for failure to prevent coasting on a public street, in reference to which its duty is classed rather as a governmental one, to be performed through its police, than as a duty to be performed in the care of its highways.

Thus, in *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101, 44 S. E. 830, the court said: "In this state, where the nuisance is

operating the plant, and it is immaterial that the owner of the plant, which was in possession of a lessee, reserved the right to change or enlarge it at any time it saw fit. Same — opinion — value of property.

7. One who disclaims familiarity with the price of property cannot give an opinion as to its value.

Trial — objection to evidence — sufficiency.

8. If the answer to a question is made so soon after the question is propounded that there is no fair opportunity to state an objection before it is given, the court should entertain an objection afterwards, if it is promptly made.

(July 6, 1910.)

A PPEAL by defendants Maurice Adler et al., from a judgment of the City Court

in or near a public street, the municipality is liable to one who uses the streets and thereby suffers special damage from the existence of the nuisance, and on account of the failure of the municipality to abate the same. . . . The doctrine that the municipality will be liable for failing to abate a nuisance in or near a public street grows out of the well-established rule in this state that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that the failure to perform this duty constitutes a breach of a ministerial duty, and renders the municipality liable to one who is injured by the failure. In such a case the municipal corporation is not held liable for a failure to perform the judicial duty of abating a nuisance, but for the failure to keep its streets and sidewalks free from obstructions which are dangerous to the traveler. . . . But it seems to be well settled that there can be no action for damages where the nuisance is maintained by a private individual upon private property, and the maintenance of the nuisance in no way amounts to an obstruction of a public street, or in any way imperils the safety of the travelers upon the street."

Under its duty to keep its streets in reasonably safe condition for use, it was held in *Decatur v. Hamilton*, 89 Ill. App. 561, that where a city has granted franchises to a street railway company and a telephone company, under which the companies operate, respectively, an electric street railway and telephone lines within the city, and the city knows that the trolley wires and telephone wires are constructed in a defective manner and cross each other without insulation, guards, or other protection, and that the telephone wires are rusted and rotten and liable to fall upon the trolley wire, rendering it dangerous to persons on the street, and constituting a nuisance, and with such knowledge permits such conditions to continue, it is liable for injuries to a child on the street, caused by a broken telephone wire, charged with electricity from the trolley wire.

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of Birmingham in plaintiff's favor in an action brought to recover damages alleged to have been caused by the creation and maintenance of an alleged nuisance. Reversed.

Statement by Sayre, J.:

Having in view the construction and maintenance of main or trunk lines of sanitary sewers for the purpose of carrying away the sewerage of municipalities and thickly populated communities in the county of Jefferson, the legislature, by its act of February 23, 1901 (Local Acts 1900-01, p. 1702), created a public corporation known as the Jefferson County Sanitary Commission, with powers ample for the need in view. Section 5 of the act provided that the commission should act and be held to

And where a lumber dealer in a city, with the knowledge and consent of the municipal authorities, has erected and maintained piles of heavy timber within the limits of a public street, so as to constitute a public nuisance, "the municipal corporation, having implied power to prevent or remove the nuisance, is equally liable with the creator of it for any injury that may result therefrom." *Smith v. Davis*, 22 App. D. C. 298.

So, where a city is required by statute to keep its streets open and free from nuisances, it is liable to one using a street for injuries resulting from his being struck by a performer falling from a wire which the city has permitted to be suspended for the purpose of an acrobatic exhibition, from the top of a building on one side of the street, to a pole near the ground on the other side, constituting a nuisance. *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

And a municipal corporation which, with notice, negligently permits a public street to be obstructed by a building erected and maintained therein by an individual for his private use, and which constitutes a nuisance, is liable, in the absence of contributory negligence, to one whose horse, while running away, comes in contact with such building, whereby such person is thrown to the ground and injured. *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N.S.) 190, 116 N. W. 470.

A city required by statute to provide for keeping its streets in proper repair, in the manner and to the extent it may deem best, and empowered to pass laws for abating or preventing nuisances of any kind, is liable for injuries resulting to one using the streets with due care, from a collision between his wagon and an obstruction unnecessarily erected in the street by a railway company, where the city has permitted such obstruction to remain an unnecessary length of time. *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548.

And a city which has notice of an excavation at the edge of a highway, which

act for the county of Jefferson, and that no member thereof should be held personally liable for any act of said commission, or for any act done by him as commissioner, while acting in pursuance of the powers and authority conferred. Proceeding in accordance with the purpose and authority of the act, the commission procured the construction of a system of sanitary sewers suitable for the drainage of large areas in Jefferson county, including parts of the cities of Birmingham and Bessemer. Section 8 of the act authorized the commission to erect purification plants at points where sewerage might be concentrated, "and do everything necessary or needful for the purification or destruction of the sewerage," and empowered the commission to acquire by gift,

purchase, or condemnation any lands deemed necessary for the construction of sewers and stations for the disposal or purification of sewerage. At the outlet of the sewer the commission acquired a tract of land, and upon it constructed a purification plant. The plant consists of a series of tanks, covering something less than an acre, through which the sewerage slowly flows by gravitation, depositing its sand and grit in the first of the series, known as the grit chamber; while in succeeding tanks the organic matters rise to the surface in the form of a thick scum, which, after fermentation during some weeks, is removed at intervals and used to fertilize the surrounding tract of land. The water, thus freed of the grit and in large measure of the offensive

renders travel dangerous, and fails in its duty to protect the public against the danger therefrom, is liable for an injury to one using the highway, and, without contributory negligence, falling into such excavation. *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446.

A municipality is liable, jointly with the owner and occupants of a building located therein, for injuries to one rightfully using a public street, resulting from a nuisance in such street, consisting of a long ladder, placed with the lower end resting in the gutter outside the sidewalk, and the upper end against such building, where it remained, with the knowledge of all the parties, for some weeks and at least thirteen days after all necessity for its use had passed, before blowing down and causing such injury. *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880.

And a city whose officers and agents knowingly and carelessly authorize and sanction an exhibition of two large bears on one of its principal streets, obstructing the street and creating a nuisance, is liable for damages occasioned thereby to one whose team is frightened by the bears, and becomes unmanageable while he is traveling on the street, resulting in injury to his wife. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435.

Where a contractor, in constructing a sewer in a city, so piled dirt upon and about private premises as to constitute a nuisance, the city is liable for the resulting damages, as negligence is not a necessary element of nuisance, and the city's control over the public streets and its right of supervision over the work in question charged it with the duty not to permit the continuance of a nuisance erected by such contractor. *Frick v. Kansas City*, 117 Mo. App. 488, 93 S. W. 351.

And, similarly, a city which, over the protests of an owner of abutting property, permits individuals to use as a dumping ground a street condemned and vacated for street purposes, but not graded or improved or open to public travel, whereby an embankment is formed which collects

and retains surface water, constituting a nuisance, is liable to such owner of abutting property for damages to his property caused by such embankment breaking during a rain storm, and precipitating onto his premises the contents of the dam formed thereby. *Brown v. Scruggs*, 141 Mo. App. 632, 125 S. W. 537.

Where a city, after a fire, discovers, or, by the exercise of ordinary care, could have discovered, that a wall of a burned building standing on the side of a street is so unsafe as to endanger the lives or persons of those passing over and along the street, and fails within a reasonable time, either to remove it or to make it safe and secure, it is liable for injuries occasioned by its falling upon one rightfully in the street. *Grogan v. Broadway Foundry Co.* 87 Mo. 321.

And a city having full power and authority to keep its highways in good order, and to remove any obstruction or nuisance, is liable for damages resulting from its failure to abate a nuisance consisting of an insecure two-story brick wall of a house which had been burned, which wall stood upon private property immediately upon the edge of the sidewalk. *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486.

—mere failure to exercise power to abate.

On the other hand, where a city, having been notified, and knowing that a high brick wall of a burned building, standing on the line of a public alley, is dangerous and likely to fall, permits such wall to remain unsupported, it is not liable for damages resulting to an adjacent property owner from the falling of such wall upon his building. *Anderson v. East*, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726. The court in this case said: "A municipal corporation owes a duty to those who use its streets, to exercise ordinary care to make them safe for passage. . . . They are, however, liable only to one to whom they owe that duty, and to him only when the duty concerns something over which that duty extends."

organic matter, issues from the plant in a condition suitable for manufacturing and certain commercial purposes, and valuable for such purposes at that point.

Prior to the construction of the purification plant, the sanitary commission entered into a contract with the appellants by which the latter, in consideration of a lease of so much of the tract of land as may not be needed for the purification plant, and of the exclusive right to have and use the separated products of the plant for a term of ninety-nine years, bound themselves to pay the cost of its construction—a large sum—and the cost of its maintenance from year to year, of which accounts are kept by the county. The plant was constructed for

the county by its own agents and contractors; the cost being paid by appellants, according to the agreement. The county stipulated for the exclusive and absolute control of the purification of the sewerage, and the right to judge of the means to be used and the degree to which the sewerage is to be purified. Section 7 of the contract provided as follows: "The party of the first part is willing for the party of the second part to operate and maintain the septic tanks, filter beds, and such other means and devices for purifying said sewerage as the party of the first part may construct and put in use, paying the cost and expense of such operation and maintenance, directly; instead of reimbursing the party of the first part for such cost and expense, as herein provided. Pro-

So, where the walls of a burned building standing on private property on the line of a public street in a city have been left two or three months in an unstable or dangerous condition, with the knowledge of the city, the city, while being under a duty to keep the street in a reasonably safe condition for persons traveling thereon, is not liable for the death of one in an adjoining house on private property, caused by the falling of such walls upon said house and into the street, as it is not liable for injuries resulting to a person merely from its failure to abate a nuisance on private property, not created by it in the prosecution of some public work. *Kiley v. Kansas City*, 87 Mo. 103, 36 Am. Rep. 443.

And in *Howe v. New Orleans*, 12 La. Ann. 481, it was held that a city is not, by reason of its failure to remove a nuisance consisting of a wall of a burned building standing upon private property, liable for an injury caused by the falling of such wall upon one, walking upon a public street.

In *Cain v. Syracuse*, 95 N. Y. 83, it is held that a city whose common council has power under its charter to pass ordinances to raze or demolish any building which, by reason of fire, may become dangerous, and by resolution to compel the owners or occupants of any wall or building within the city, which may be in an unsafe or ruinous condition, to render the same safe, or to take it down or remove it, and also power to prohibit such erections, and to require the summary removal or abatement of all nuisances, is not thereby rendered liable, by reason of its neglect of any duty, for the death of one killed by the fall of a wall of a burned building, a week after the fire, where such wall stood on private property and threatened only adjacent property, and endangered the lives of only the adjoining occupants, and not of the public, and there was no such notice of the dangerous character of the wall as to make the omission to act negligence.

Except in Maryland, it seems well settled that, by a mere failure to exercise its power 32 L.R.A. (N.S.)

to abate a nuisance on private property, for which it is not otherwise responsible, a municipality is not rendered liable for injuries resulting therefrom. Thus, in *McDade v. Chester*, 117 Pa. 414, 2 Am. St. Rep. 681, 12 Atl. 421, it was held that a city merely having power and authority to abate nuisances, but not being under any absolute statutory duty to do so, is not liable, in case it fails to abate the manufacture or suppress the sale of fireworks as a common nuisance, for a personal injury received by one assisting in extinguishing a fire, from an explosion of fireworks.

And where a hotel owner in a city, with the consent of the municipality, has constructed and maintains a sewer on private property from the hotel to a ditch near his property, by reason whereof foul matter has accumulated in the ditch, creating a nuisance to one living near by, the city is not liable to the latter for its failure to abate the nuisance, although it took from the hotel owner, at the time the sewer was constructed, a contract of indemnity against damages resulting from its construction and from its becoming a nuisance, and has adjudged it to be a nuisance. *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101, 44 S. E. 830.

As said in *Leonard v. Hornellsville*, 41 App. Div. 106, 58 N. Y. Supp. 266, appeal dismissed without opinion in 166 N. Y. 590, 59 N. E. 1125: "No case has been called to our attention which in any way conflicts with the broad proposition that a municipality is not liable for injuries sustained by an individual by reason of its failure to suppress nuisances upon private property. The proposition would seem to be supported not only by authority, but by reason as well."

And in *Miller v. Newport News*, 101 Va. 432, 44 S. E. 712: "The failure of a city to exercise its charter power to abate nuisances not rendering its streets unsafe does not give persons injured by such failure a private action against the city, nor does a failure to make or enforce ordinances prohibiting nuisances give them such action against the city."

vided, however, that the party of the first part shall have the exclusive right at all times to direct the mode and manner of such operations and maintenance, and shall have at all times the exclusive control over employee or employees working in any way in and about such operation and maintenance. And the party of the first part may, at any time it sees fit, take the entire matter of the operation and maintenance of the septic tanks, filter beds, or other devices or means for the purification of the sewerage out of the custody of the party of the second part, the party of the first part paying the cost and expense thereof, and requiring reimbursement for such cost and expense from the party of the second part, as herein provided." Appellants have ex-

ercised their option and are operating the plant, paying the cost thereof directly. Ordinarily this involves nothing more than the service of one man for less than an hour a day. The plant operates automatically in large measure, and needs only that a coarse screen, arranged to catch matters of some bulk and foreign to sewerage, be kept clear, so as not to interrupt the flow of the sewerage into the tanks. At such time as it is necessary, employees of appellants go there under the orders of the commission's engineer, and do what is necessary about the operation of the plant. These men are employed and paid by appellants, but act under the direction of the engineer. Plaintiff (appellee) owned and lived upon a small but well-improved and well-ordered

So, in each of the following cases a municipality has been held not liable for injuries resulting from a nuisance on private property merely by reason of its failure to exercise its power to abate: *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545 (building accidentally burned down by sparks of fire from steam engine on adjoining lot); *Wilmington v. Vandegrift*, 1 Marr. (Del.) 5, 25 L.R.A. 538, 65 Am. St. Rep. 256, 29 Atl. 1047 (coasting on a public street); *James v. Harrodsburg*, 85 Ky. 191, 7 Am. St. Rep. 589, 3 S. W. 135 (blasting adjacent to public street); *Butz v. Cavanaugh*, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104 (excavation near city street); *Arnold v. St. Louis*, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 900 (pond adjacent to unopened public street); *Leonard v. Hornellsville*, 41 App. Div. 106, 58 N. Y. Supp. 266 (shooting gallery adjacent to public street); *Rogers v. Binghamton*, 101 App. Div. 352, 92 N. Y. Supp. 179 (bicycle riding on sidewalk); *McCrowell v. Bristol*, 5 Lea, 685 (disorderly conduct in a saloon); *Miller v. Newport News*, 101 Va. 432, 44 S. E. 712 (filthy matter discharged from private property into a natural drain); *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342 (coasting on a public street).

Likewise, where an embankment has been constructed by a fair association across a stream outside the limits of a city, with an insufficient culvert to carry off the water, so that it constitutes a nuisance, and thereafter the city extends its limits beyond the locality of the stream and embankment, and the embankment becomes a part of a public street, the city is not liable for damages caused by backwater resulting from the maintenance of the nuisance, if it has not assumed control of the street at that point, although it has been notified of the obstruction of the stream by the embankment, and requested to enlarge the outlet for the passage of the water. *Hedrick v. St. Joseph*, 138 Mo. App. 396, 122 S. W. 375.

And a city which has no power whatever to allow an encroachment of a building over

the street line, and is under no statutory duty to abate a nuisance created by such an encroachment, is not liable in damages to an owner of property on a street for having permitted the creation of a nuisance prior to his purchase of such property, by merely failing to prevent a building on the adjoining lot from being constructed so as to project 8 or 9 inches beyond the street line, and partially obstruct the view of the building subsequently erected upon the proper line on the lot in question. *Montreal v. Mulcair*, 28 Can. S. C. 458.

A city which passed ordinances for the suppression of nuisances is not civilly liable for damages to one injured by a nuisance erected and maintained on private premises, without any license from or consent of the city, in case the city merely omits to enforce such ordinance. *Hull v. Roxboro*, 142 N. C. 453, 12 L.R.A. (N.S.) 638, 55 S. E. 351.

And a city which has passed an ordinance prohibiting the erection of wooden buildings within certain limits, and declaring such buildings to be a public nuisance, is not liable for the damages resulting to a property owner, if it merely fails to enforce such ordinance, and does not prevent the erection of a wooden building on an adjoining lot. *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102.

Where a city has by ordinance prohibited all persons from engaging in dangerous sports upon its streets, it is not legally bound to prevent or abate a nuisance consisting of coasting by large crowds upon a public street, and is not liable for an injury to one rightfully on the street by being struck by a sled. *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1.

And in *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571, it is held that a city, having full control over its streets, does not, by designating and setting aside a certain street as one of a number of public streets which may be used for coasting, render itself liable in damages for injuries resulting to one driving along the street, and struck by a bob used in coasting.

farm about one half a mile from the purification plant.

Messrs. Percy, Benners, & Burr, for appellants:

A qualified witness should be permitted to express an opinion as to whether an odor with which he was familiar could be smelled under conditions and circumstances with which he was familiar.

Southern R. Co. v. Bonner, 141 Ala. 517, 37 So. 702; *McVay v. State*, 100 Ala. 110, 14 So. 862; *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 45, 7 So. 813; *Cox v. State*, 76 Ala. 66; *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134, 15 So. 508.

A witness should not be permitted to testify as to a fact which he does not know,

So, a municipality is not liable, merely by reason of a failure of its police to prevent citizens from creating a nuisance by assembling and unlawfully firing a cannon in the public streets, for injury resulting therefrom to one lawfully upon the street. *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771.

And a city which, having passed a duly authorized by-law forbidding the setting off of fireworks on the public streets, makes no attempt to enforce it on special holidays, or on occasions of civil or political demonstrations, but has never, by means of a license or otherwise, expressly sanctioned its being disregarded, is not liable in damages for an injury to one struck in the eye by a Roman candle on such occasion. *Brown v. Hamilton*, 4 Ont. L. Rep. 249.

—Maryland rule.

In Maryland, however, as above noted, an exceptional rule seems to obtain. As said in *Cochrane v. Frostburg*, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703: "Whatever may be the law elsewhere, it is well settled in this state that a corporation having such powers [to prevent nuisances] must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damages therefrom, who is not himself in fault." And it was accordingly held in that case that a city having power to pass and enforce ordinances to prevent stock from running at large is liable for injuries inflicted on one rightfully on a public street by a cow running at large, where it has not exercised ordinary and reasonable care and diligence to prevent cattle running at large so as to constitute a nuisance.

In the leading Maryland case of *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, characterized in *Faulkner v. Aurora*, supra, as "exceptional and without support," it was held that a city having statutory power to prevent and remove nuisances is liable to one injured by falling on an accumulation of ice on a public street amounting to a nuisance, if it has not used due care and diligence to prevent and re-

move such nuisance; and the passage of an ordinance providing for the removal of ice and snow from the streets does not relieve the city from such liability unless it has further used vigilance and energy in the endeavor to enforce such ordinance.

White v. Anniston, 161 Ala. 662, 49 So. 1030; *Clausen v. Tjernagel*, 91 Iowa, 285, 59 N. W. 277.

Neither the act of defendants in entering into a contract with the county by which they obtained the right to use the constituents of the sewage in consideration of their paying the cost of erecting and operating the purification plant, nor their act in paying such cost and in furnishing the labor necessary to operate the plant, constituted either the proximate or efficient cause of the wrongs of which plaintiff complained. The *causa causans* of any injury done was the act of turning the sewage into the

move such nuisance; and the passage of an ordinance providing for the removal of ice and snow from the streets does not relieve the city from such liability unless it has further used vigilance and energy in the endeavor to enforce such ordinance.

And in *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027, it was held that where a city having charter powers to prevent nuisances has not used ordinary and reasonable care and diligence to prevent a nuisance consisting of coasting on a public street, it is liable for injuries to one rightfully on such street, and struck by a sled of a coaster.

So, in *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832, a city having power to prevent, remove, and abate all nuisances or obstructions in or upon its streets was held liable for injuries sustained by one who, while crossing a public street and using due care, fell on ice caused by the freezing of water emptied into the street through a pipe leading into a saloon, or from buckets, or both, from day to day, for a long time, with the knowledge of the city, which ice constituted a nuisance which the city had not used reasonable care to prevent or abate.

It may be noted that these Maryland cases all involve liability for nuisances existing in a public street; but the decision in each is clearly based on the law as quoted from *Cochrane v. Frostburg*, supra, and not on the ground of failure to perform an absolute legal duty to abate the nuisance.

Liability of municipality licensing nuisance.

Where a municipality goes farther, and licenses or directs the creation or maintenance of a nuisance, its liability for damages resulting therefrom seems clear. Thus, a city whose mayor, acting under an ordinance of the common council, grants a permit for a discharge of fireworks, constituting a public nuisance, is liable for an injury resulting therefrom to private property. *Speir v. Brooklyn*, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727.

And in *Landau v. New York*, 180 N. Y.

sewers and purification plant. With this act defendants had nothing to do.

Moore v. Langdon, 2 Mackey, 127, 47 Am. Rep. 262; State v. Holman, 104 N. C. 861, 10 S. E. 758; Joyce, Nuisances, § 476; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Carmichael v. Texarkana, 94 Fed. 561; 8 Am. & Eng. Enc. Law, pp. 571, 572; Brimberry v. Savannah, F. & W. R. Co. 78 Ga. 641, 3 S. E. 274; Com. v. Western U. Teleg. Co. 112 Ky. 355, 57 L.R.A. 614, 99 Am. St. Rep. 299, 67 S. W. 59; Levi L. Brown Paper Co. v. Dean, 123 Mass. 267.

The mere fact of concurrence of the defendants' act in producing the injury is not alone sufficient to charge them, for everything which induces or influences an acci-

dent does not necessarily, in a legal sense, cause it.

8 Am. & Eng. Enc. Law. pp. 571, 572.

It is incumbent on the plaintiff, in an action because of a nuisance, to show that defendants' acts were the preponderating cause thereof.

Brimberry v. Savannah, F. & W. R. Co. 78 Ga. 641, 3 S. E. 274.

Messrs. Bowman, Harsh, & Beddow, for appellee:

Nonexperts can give their opinion upon values, the proper predicate being that the witness was acquainted or familiar with the thing to be valued.

Tennessee Coal, Iron & R. Co. v. McMillion, 161 Ala. 130, 49 So. 880; Hodge v. Rambo, 155 Ala. 179, 45 So. 678; Southern

48. 105 Am. St. Rep. 709, 72 N. E. 631, where a city, by resolution of its board of aldermen, had in effect granted a license or permit to political parties and associations, during a campaign, to create nuisances by the discharge of fireworks in the public streets of the city, although the action of the board was beyond their powers, the city was held liable for injuries resulting from an explosion of fireworks in a street, for consenting in advance to the existence of a nuisance in its streets, whereby it placed itself under the same liability as if it had created the nuisance itself.

So, a city which, by resolution of its board of aldermen, suspends an ordinance making unlawful the discharge of fireworks within its limits, so as to permit, under the direction of its police authorities, a display by a church organization, at a certain time, just inside the sidewalk, on a private lot, surrounded by inhabited houses, which display constitutes a public nuisance, is liable for an injury resulting therefrom to one making a neighborly call at a house across the street from the place of display, and not present for the purpose of seeing the fireworks. Walker v. New York, 107 App. Div. 351, 95 N. Y. Supp. 121.

But in Lincoln v. Boston, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329, it was held that a city was not liable for damages resulting from the firing of cannon on a common held by it for the public benefit, and not for emolument or as a source of revenue, although such firing was licensed by the mayor, pursuant to ordinance.

Where a city, by resolution of the city council, has granted to a certain organization "the privilege of the streets" for a celebration, it becomes in legal effect the creator of a nuisance erected by such organization, and is liable as such for an injury resulting therefrom to one in the street. Wheeler v. Ft. Dodge, 131 Iowa. 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

And likewise, a city which grants permission to an association to erect in the public streets a large platform constituting a public nuisance, and fails to abate such 32 L.R.A. (N.S.)

nuisance and keep the streets free from obstruction, is liable for injuries caused to one using the streets by the giving way of a part of the railing of such platform, although it had no legislative authority to grant the permit, and its doing so was *ultra vires*. Richmond v. Smith, 101 Va. 161, 43 S. E. 345.

Where a city, without a pretense of authority, and in direct violation of a statute, assumes, for a money consideration, to grant to a grocer a permit to keep his wagon, day and night, when not in actual use in the transaction of his private business, in the public street in front of his store, the city must be regarded as itself maintaining a nuisance, and it is liable in damages for an injury to one rightfully passing along the street, caused by his being struck by the falling thills of such wagon, when it is struck by a passing vehicle. Cohen v. New York, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700.

A municipal corporation which has constructed and controls a sewer and an open ditch into which it empties, for the sole purpose of carrying off surface water from certain streets, is liable for damages resulting to the owner and occupant of a dwelling house on the street in which such open ditch is located, where the municipality authorizes and permits certain owners of property adjacent to the sewer and its branches to connect their cesspools therewith, creating a nuisance. Champaign v. Forrester, 29 Ill. App. 117.

And a city which directs private persons to construct sewer connections into a stream, whereby a nuisance is created to a lower riparian owner, is liable to the latter for resulting damages. McBride v. Akron, 12 Ohio C. C. 610, 6 Ohio C. D. 739.

So, a city which licenses certain persons to use a manhole of a sewer, with perforated top, for the purpose of dumping garbage and all kinds of filth into the sewer, causing foul vapors and creating a nuisance, is liable to one living in the neighborhood, for injuries produced thereby. Kolb v. Knoxville, 111 Tenn. 311, 76 S. W. 823.

And a city is liable for damages result-

R. Co. v. Morris, 143 Ala. 631, 42 So. 17; Montgomery-Moore Mfg. Co. v. Leith, 162 Ala. 246, 50 So. 214.

The doctrine that anyone who aids or abets, or in any material way participates in, a tort, is responsible for all the proximate consequences of that tort, is applicable in full, if not extraordinary, force, where the aiding and abetting, or participation in the act or condition, has helped to pollute the atmosphere of a home.

Joyce, Nuisances, §§ 38, 85, 136, 157, 158, 160, 161, 283, 284; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; Cameron v. Kenyon-Connell Commercial Co. 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201,

38 Atl. 631; Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 474; Grady v. Wolaner, 46 Ala. 382, 7 Am. Rep. 593; State v. Bell, 5 Port. (Ala.) 380; Dukes v. Eastern Distilling Co. 51 Hun, 605, 4 N. Y. Supp. 562; Isham v. Broderick, 89 Minn. 397, 95 N. W. 224; Pierce v. German Sav. & L. Soc. 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478; Jacksonville v. Dean, 145 Ill. 23, 33 N. E. 878.

Mr. Pinkney Scott also for appellee:

Sayre, J., delivered the opinion of the court:

Plaintiff sued the Jefferson County Sanitary Commission, Jefferson county, and Adler & Company, in two counts, the one as for the creation, the other as for the

ing from a nuisance of which its mayor has notice, and which was created by the deposit of garbage and refuse matter on private property within the city by private scavengers, licensed by the city, and acting under the direct control and authority of the city's superintendent of scavengers, acting within the scope of his authority. San Antonio v. Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33.

Likewise, where a city scavenger, intrusted by the city with the removal of dead animals, garbage and other filth, has for many months and even years negligently and repeatedly deposited the same near a private residence on the land of a nonresident, instead of on the dumping ground provided by the city, beyond its corporate limits, the city is liable for the damages resulting from the nuisance thereby created. Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833.

But a city which merely grants a license to carry on a shooting gallery within its corporate limits is not liable for resulting damages in case the licensee, by an abuse of his license, erects and maintains the gallery at an improper place and in an improper manner, creating a public nuisance, whereby one using an adjacent street is struck and injured by a ball fired from a gun in the gallery. Hubbell v. Viroqua, 67 Wis. 343, 58 Am. Rep. 866, 30 N. W. 847.

And a city whose employees have put in a sewer leading from private property and causing a nuisance is not liable for damages therefrom, arising solely by reason of the use made of such sewer by the owner of such private property. Barger v. Hickory, 130 N. C. 550, 41 S. E. 708.

Active contribution to creation or maintenance of nuisance.

As to the character and extent of liability of several persons who contribute to the creation or maintenance of a nuisance by independent acts of the same character, see notes to Day v. Louisville Coal & Coke Co. 10 L.R.A.(N.S.) 167, and Gibboney Sand Bar Co. v. Pulaski Anthracite Coal Co. 24 L.R.A.(N.S.) 1184. 32 L.R.A.(N.S.)

Where several oil companies, acting independently of each other, have laid pipe lines in an open ditch along a public street, together creating a nuisance by obstructing the flow of surface water, and after rain falls causing it to overflow, carrying and depositing upon adjacent premises oil which has leaked from the pipes into the ditch, each company is liable only for the injuries caused by itself, and can be sued therefor only in a separate action. Sun Co. v. Wyatt, 48 Tex. Civ. App. 349, 107 S. W. 934.

And where a nuisance results from the operation of a gin plant, in itself lawful, together with the independent operation of several other plants, all contributing to certain injuries to an owner of near-by property, the owner of the first plant is not relieved from liability by the fact that the others so contribute to the injury, but he is liable only to the extent of the injury inflicted by his own wrong, and can be assessed only for the damages caused by him. Neville v. Mitchell, 28 Tex. Civ. App. 89, 66 S. W. 579.

A landlord who maintains in a building a water closet for the use of tenants on the upper floors, and allows it to remain in such condition as to be a nuisance, is liable for damages resulting therefrom to a lower tenant, although the damage was directly caused by the acts of the upper tenants. Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170.

(As to the general question of liability of landlord for injury to tenant by escape of water, see note to Brennan Constr. Co. v. Cumberland, 15 L.R.A.(N.S.) 545. As to liability of landlord for injury done by one tenant to the goods of another through negligence in the maintenance of the property, see note to Lebensburger v. Scofield, 12 L.R.A.(N.S.) 1025).

Similarly, a railroad company which has delivered loaded cars, consigned to city authorities, upon a side track in front of private property, creating a nuisance, is liable for the damages resulting both from the placing and the continuing of the cars in that place, although it so placed them un-

maintenance, of the purification plant as a nuisance, charging that it emitted foul and sickening odors and noxious gases which caused plaintiff and her family to be sick, and greatly impaired the value of her property. Rulings of the trial court having resulted in the elimination of the county and the commission as parties defendant, the cause proceeded to judgment against Adler & Company. The question of leading interest is presented by appellants' contention that the act of municipal authority, as a result of which the sewerage was caused to flow through the sewer and into the filtration or purification plant, must be taken and considered as the sole proximate and efficient cause of the injury which thereby resulted to the plaintiff; and, along the

same line, that neither the act of their employees in removing from time to time obstructions to the flow of sewerage into the plant, under the circumstances detailed in the statement of facts, nor their own immediate act of reimbursing the county for the cost of the plant, nor these acts collectively, can in law be considered as the proximate cause of the presence of the sewerage at that place, any more than the act of the capitalist who lent the money with which to build the sewer, or the engineer who designed, or the contractor who executed, it. In this connection, it may be well enough to note that the sewerage system which had its outlet into the purification plant was an artificial system, and while doubtless it was constructed along the line

der the instructions of the city authorities, and thereafter had no control over the cars or the track upon which they were located, and although they were continued there by the city, which owned the track upon which they were placed. *Houston & T. C. R. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768.

And one who, in delivering certain timbers to a purchaser thereof at a place directed by the latter, places an obstruction in a public street, and thereby creates a nuisance, which the purchaser unreasonably maintains, is, liable for any damage occasioned thereby during the continuance of the obstruction, although he may have no interest in its maintenance after its creation. *Wilson v. West & S. Mill. Co.* 28 Wash. 312, 68 Pac. 716.

A manufacturer of commercial fertilizer is liable for injuries to property adjoining his factory, caused by a nuisance consisting of vapors generated therein, although the injuries alleged are in part the result of other causes. *Frost v. Berkley Phosphate Co.* 42 S. C. 402, 26 L.R.A. 693, 46 Am. St. Rep. 736, 20 S. E. 280.

So, where a railroad company has created a nuisance by permitting water to stand and become stagnant on its right of way near a private residence, and a nuisance of like character exists at the same time, not on the company's right of way, to the creation and existence of which no act of the company has contributed, and the two combined result in injuries to the owner of such residence, the company is liable only for the portion of the injury which results from the nuisance created by it. *McFadden v. Missouri, K. & T. R. Co.* 41 Tex. Civ. App. 350, 92 S. W. 989.

And a company operating a plant solely for the manufacture of salt, to which plant a railroad owns and operates a spur track from its main line to receive the product of the plant for shipment, is not liable for injury suffered by an owner of near-by property from the acts of the railroad company in operating engines over such spur track, contributing to a nuisance caused by the operation of the salt plant together 32 L.R.A. (N.S.)

with such running of engines. *Southern Salt Co. v. Robertson*, — Tex. Civ. App. —, 97 S. W. 107.

But in *Graver v. Dodson Coal Co.* 20 Pa. Co. Ct. 529, it was held that where numerous parties engaged in the mining, preparing, and shipping of coal on or near a river severally deposited therein culm, coal dirt, and other refuse, creating a nuisance to lower riparian owners by raising the bed of the river, and causing it to overflow their premises, one bill in equity may be maintained against all of them, and the amount of damages proven be assessed against each, in proportion to his contribution to the injury caused.

Where a continuous brick wall of uniform height and thickness stands adjacent to a public street in the city, and forms the front of three brick stores, owned in severalty and separated from each other by brick partition walls extending from the foundation to the roofs, and interlocked with the front wall, and such front wall, after a fire destroying the remainder of the three stores, except a part of the partition walls, begins to lean toward the street, so as to constitute a public nuisance, and thereafter falls and kills one in the street, it was held in *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911, that the three several owners of the stores are jointly and severally liable therefor, the carelessness and negligence of each severally, in not removing or supporting the wall on his own lot, uniting and directly causing the fall.

And where the contributors have acted jointly in creating or maintaining a nuisance, they may be jointly or severally sued for the entire damage. Thus, where a turnpike company has constructed a drain to carry off in one channel waters which would otherwise remain stagnant or evaporate or gradually flow off, and with the consent of the owner of adjoining property has continued the drain across his property to carry off the water which, but for his previous act in grading and filling a natural gully, would have been cast upon his lot, and especially where such owner

of least difficulty,—that is, in general conformity with the natural drainage of the territory it served,—it does not appear that without it there would have been any natural concentration of offensive matter in hurtful proximity to plaintiff's property. In the absence of express statutory provision to that effect, it cannot be assumed that it was intended to legalize an act which would necessarily result in a nuisance, nor can it be assumed that the sewer would have been constructed to discharge a great volume of sewerage at a point where it would seriously interfere with plaintiff's right to enjoy pure and wholesome air in connection with her use of her property, but for the provision for its treatment in the purification plant. The plant was authorized, and there

is no doubt that it was designed and expected to render the sewerage innocuous. The evidence went to show that the plant was constructed according to the latest and best scientific principles governing the disposal of sewerage by purification or filtration plants, and that there was no lack of judgment and care in its operation. Much of the evidence also conduced to the conclusion that the plant was not a nuisance in fact; but as to that there was such weight of opposing testimony as clearly required the submission of that question to the jury. It must, therefore, on the evidence which tended to support plaintiff's theory of the case, and in the state of our knowledge of the subject, be assumed that the plant was inherently unequal to the com-

has paid part of the cost of such drain, both the company and such private owner are jointly liable for a nuisance thereby created by casting the drainage upon the property of another, to his injury. *Magee v. Pennsylvania Schuylkill Valley R. Co.* 13 Pa. Super. Ct. 187.

And a municipality which has connected its sewers, ditches, and drains with drains constructed by private persons, and flows its sewerage through these private drains, is liable as a joint tortfeasor for the whole damage resulting from the discharge of poisonous sewerage from such drain upon private lands. *Kewanee v. Ladd*, 68 Ill. App. 154.

Where the owner of a powder magazine situated within the limits of a city, and constituting a nuisance, has leased it to a powder manufacturing company for the storage of powder for a term of five years, at an annual rental, and the magazine is used by or for the benefit of a firm, which holds the keys and sells powder on commission, such owner, lessees, and occupant are all jointly liable for an injury resulting from the explosion of the magazine, caused by lightning. *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761.

And where a powder magazine constituting a nuisance was built for a powder company on its land, in pursuance of authority from certain of its agents, and under the immediate direction of other agents, who have since had control of it, all the parties thus participating in creating and maintaining the nuisance are liable for the damages resulting therefrom to neighboring property. *Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556.

Likewise, where an owner of land across which another had a private right of way created a nuisance by building a fence across such way, and thereafter leased the premises, and then assigned the lease, and the lessee sublet the premises while the fence remained, the lessee, the sublessee, and the assignees of the lessor are all jointly liable for continuing the nuisance. *Rogers v. Stewart*, 5 Vt. 215, 26 Am. Dec. 298.

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Permitting nuisance on one's premises.

One is not responsible for a nuisance which he cannot himself physically abate without legal action against another for that purpose, nor is he liable for a nuisance created by a stranger upon his premises, of which he has no knowledge, though if he knowingly permits the creation or maintenance of a nuisance on premises of which he has control, he is liable. Thus, an owner of land upon a declivity, who has no control of the property lying above his own, nor over the people who occupy it, is not liable to the owner of property next below his own for damages ensuing from offensive matter thrown, without any fault of his, upon the upper lot, and flowing naturally across his premises onto the lot below. *Brown v. McAllister*, 39 Cal. 573.

And where a turnpike company has constructed a drain, into which an owner of land through which it flows, without the knowledge or consent of the company, turns foul matter, causing a nuisance and damage to another upon whose premises the drainage is cast, such landowner contributing the foul matter is alone liable for the resulting damage. *Magee v. Pennsylvania Schuylkill Valley R. Co. supra*.

So, a railroad company through whose ditch alongside its track polluted water flows into a pond on adjacent premises, depositing therein garbage and filth, and constituting a nuisance, is not liable to the owner of such premises for resulting damages, where such pond is the natural outlet of the water originally flowing through the ditch, and the increase of flow after the building of the railroad and ditch, and the pollution of the water, is caused by drains, ditches, and embankments on the land of others, over which the company has no control. *Brimberry v. Savannah, F. & W. R. Co.* 78 Ga. 641, 3 S. E. 274.

But an owner of land burdened with the lateral support of an adjacent road, who suffers a nuisance thereon by permitting others to blast and remove rock therefrom so near the line of the road that the latter caves, subsides, and falls down, is liable

plete accomplishment of the end in view. If so, and if the result of the construction and maintenance was a material interference with plaintiff's comfortable use and enjoyment of her property, and her health, there was an actionable nuisance, and there can be no reason for saying that the plaintiff must have suffered though the plant had not been constructed, nor any occasion to speculate as to the consequences of a different arrangement, for, if it had been determined that the arrangement should be different in any respect, it is impossible to know in what respect, and with what different result it would have been different. On plaintiff's evidence the plant as operated was a nuisance, working peculiar and special injury to her.

We are not now concerned with the materiality of any distinctions which may be drawn between the county and its official agents, the sanitary commission, on the one hand, and the defendants, on the other, in respect to their responsibility for the injury alleged in this cause. In view of the responsibility of the county for consequential injuries done to property in the exercise of the right of eminent domain (*Dallas County v. Dillard*, 156 Ala. 354, 18 L.R.A.(N.S.) 884, 47 So. 135), that might involve questions of some difficulty. The question presented is whether the defendants were joint tortfeasors with the county and its commission in creating and maintaining the nuisance. Those are joint tortfeasors who contribute to the tort with

for the damages resulting therefrom. *Hudson County v. Woodcliffe Land Improv. Co.* 74 N. J. L. 355, 65 Atl. 844.

Authorizing nuisance.

In *Simpson v. Stillwater Water Co.* 62 Minn. 444, 64 N. W. 1144, an action for damages for the flooding of plaintiff's premises, caused by the stoppage of a catch basin constructed by a city on defendant's premises by his consent and authority, although it was held that there was no evidence that the basin created or constituted a nuisance, the court said that if it actually constituted a nuisance, defendant was just as responsible for the consequences as if he had constructed and maintained the catch basin himself.

Adopting nuisance.

One merely adopting a previously existing nuisance is liable for its continued maintenance. Thus, a street railway company which puts its tracks upon and maintains an embankment across a stream, with a culvert of insufficient size to carry off the water, constituting a nuisance, is liable for damages caused by backwater therefrom, although it had nothing to do with the erection of the embankment, and its own acts had no effect in causing the backing up of the water. *Hedrick v. St. Joseph*, 138 Mo. App. 396, 122 S. W. 375.

And trustees of tenants in possession of property, and receiving the benefit thereof, are liable for damages caused by their premises being out of repair so as to constitute a nuisance by discharging water from a gutter onto adjoining premises. *Murray v. Archer*, 52 Hun, 613, 1 Silv. Sup. Ct. 366, 5 N. Y. Supp. 326.

So, where an owner of premises created thereon a nuisance, and leased the premises with such nuisance on them, a purchaser thereafter, with full knowledge of the nuisance and of the tenancy, who receives the rent from the tenant in possession, becomes thereby liable for the damages sustained by an adjoining owner in consequence of such nuisance, subsequent to his 32 L.R.A.(N.S.)

purchase. *Pierce v. German Sav. & L. Soc.* 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478.

And a corporation which carries on business on premises built partly on one side of a railroad track, and partly on the other side, connected by a low bridge over the track, which bridge constitutes a dangerous nuisance, is liable for an injury to a brakeman, free from fault, who is hit by such bridge, although it did not construct the bridge, and does not own the premises. *Dukes v. Eastern Distilling Co.* 51 Hun, 605, 4 N. Y. Supp. 562.

Miscellaneous—connection or participation held sufficient.

The president and general manager of certain companies operating works for mining and cleansing iron ores, who have long known that the operation of these works has been continually causing injury to the property through which flows a stream by which clay and dirt separated from the ores are carried off, are liable jointly with such companies for damages resulting from the nuisance thus created and maintained, although they were acting only as officers, and not as individuals. *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L.R.A. 421, 29 S. W. 361.

And a director of a corporation dealing in giant powder, whose unexplained non-execution of duty results in the creation and maintenance of a continuing nuisance by the corporation, by its keeping an unlawfully large amount of powder in a frame warehouse in a city near a railroad depot and other buildings, is liable for the death of a fireman, caused by an explosion of such powder. *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358.

Where a railroad company has contracted with a compress company for a certain price to take cotton delivered at certain sheds in common bales to another place for compression, and by such agreement and by a general course of business has made such sheds a receiving station

common intent,—in this case, not, of course, the intent to work injury to the plaintiff, but the intent to maintain the purification plant which did result in injury. If it be assumed for a moment that the defendants co-operated with private individuals, as they did with the county and its commissioners, it would seem to be clear that they thereby became liable with those individuals as joint tortfeasors, not because defendants furnished the money with which to build the plant, nor because they contracted to receive the valuable separated constituents of the sewerage, but because they actively participated in the daily operation of the plant. Not everyone who furnishes money for the construction of a plant lawful in itself, or who bargains for its lawful output, is

chargeable with knowledge or purpose that it will become a nuisance. An independent cause must intervene—the actual operation of the plant—to decide whether its operation shall become a nuisance; such intervening cause becoming thereby the proximate cause of the resulting nuisance. The injury may be traceable in a way to his contribution, for plants may not be operated without money with which to build them, and it may be assumed that purchasers for their product are ordinarily essential; but that connection is, in the common phrase, too remote. Common judgment approves this conclusion, and, if it seems vague, it is because, as an able writer has observed, in the analysis made necessary by the separation of findings of fact from con-

for cotton to be sent by anyone to the compress company at the latter place for compression, and has agreed to carry all cotton so received, and upon request has given bills of lading for cotton delivered at such sheds for transportation by it, but has failed to transport the cotton thus received, and suffered it to accumulate at such sheds and in an adjacent public highway until it becomes a public nuisance and is set on fire in such street, the railroad company is liable for the resulting loss of such cotton. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643, reversed without opinion, the grounds for reversal not appearing, 154 U. S. 515, 38 L. ed. 1081, 14 Sup. Ct. Rep. 1152.

The proprietors of a livery stable, under contract with the owner of a wagon to take care of such wagon when left with them, are liable for the death of a pedestrian, caused by his being struck by the thills of such wagon, which fell upon him as he was passing, when the wagon was struck by another wagon, while stored in a public highway under the direction of the employee in charge of the stable, and constituting a public nuisance, although such proprietors had no personal knowledge of the instructions given by such employee to the driver of the wagon, whereby it was thus left in the street. *Sullivan v. McManus*, 19 App. Div. 167, 45 N. Y. Supp. 1079.

A father, with whose knowledge, consent, and encouragement a minor son discharges a rocket in a public street in a city, creating thereby a nuisance, is jointly liable with the son for an injury to one seated in the window of his dwelling, across the street from the place of discharge, who is struck by the rocket. *Cameron v. Heister*, 10 Ohio Dec. Reprint, 651.

—connection or participation held insufficient.

A part owner of a sawmill, who has no interest in a lath mill erected within the sawmill by the other owners of the latter, 32 L.R.A. (N.S.)

is not liable for a nuisance created by such other owners by throwing into the river lath edgings, which float down and obstruct another mill. *Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228.

And a purchaser of property who permits one in possession at the time of a sale to remain in sole and exclusive possession, paying no rent, and the former requiring none to be paid, is not liable for the wrongful erection by such possessor, without his knowledge, of a dam constituting a nuisance and resulting in injury to adjacent property. *Pettibone v. Burton*, 20 Vt. 302.

Where a city, under legislative authority, has constructed a sewer system, and by proper ordinance has compelled its inhabitants to connect their residences therewith, such inhabitants are not individually liable for damages resulting from the nuisance created by the city in so constructing the sewer system that in its operation the filth and putrid matter of the city is carried by the sewer system, and deposited near a private residence, in a stream which runs through the premises owned in connection with such residence, inflicting serious damage. *Carmichael v. Texarkana*, 94 Fed. 561, affirmed in 58 L.R.A. 911, 54 C. C. A. 179, 116 Fed. 845.

And where by ordinance the servants of a city have full power and control over duly established dumping grounds for the deposit and burial of dead animals, and it is the duty of them alone to bury dead carcasses there, a railroad company which lawfully removes and deposits on the dumping grounds animals which have died in shipment to such city is not liable for damages resulting from a nuisance created, with its knowledge and mere permission, by the negligence of the city employees in failing to bury, or sufficiently to bury, such carcasses. *Parsons v. Ft. Worth*, 26 Tex. Civ. App. 273, 63 S. W. 889.

Where a property owner, pursuant to the requirements of a water company, paid all expense of conducting water through the street main to his premises, including the cost and installation of a stop box constructed in the sidewalk, the water com-

elusions of law, the common law "has grappled more closely with the inherent vagueness of facts than any other system." Pollock, Torts, 33. But defendants did more than furnish money and bargain for the output. They participated actively in the operation of the plant, in order that they might get for themselves the benefit of that operation, and that operation resulted in a nuisance. Having the option to take the products of the plant in consideration of reimbursing the county for the money advanced to construct it, and the expense of operating it, or "to operate and maintain the septic tanks, filter beds, and such other means and devices for purifying said sewerage as the party of the first part may construct and put in use, paying the cost and expense of such operation and maintenance directly," as the contract provided, they elected to operate and maintain the plant, and to do what was necessary to that end, whether much or little. The law deals with things as they are, and we are not permitted, in the administration of justice, to speculate as to what different results might have flowed in law or in fact, from a different set of facts. Nor was their responsibility for consequences changed by the fact that the county and its commission re-

tained control of the manner in which the plant was to be operated. Defendants, none the less, contributed proximately and efficiently to the flow of the sewerage into the tanks, and thereby to the creation and maintenance of a nuisance by its detention there. To this situation the remark of Goldthwaite, J., in *State v. Bell*, 5 Port. (Ala.) 365, is pertinent: "Human laws must necessarily attach immediately on those who do, or omit, the act; and although the director, instigator, aider, and abetter can in most cases be also reached by the same law, the actual offender can in no case avoid the consequences of his unlawful act or omission." As for anything now appearing, defendants must be held responsible to plaintiff for whatever injury flowed to her from the operation and maintenance of the plant.

Appellants lay stress in argument upon some cases which do not seem to impair what force there may be in what we have had to say of the case here. Without indulging extended comment, we think a brief statement of the most important of them, in very nearly the language of the headnotes, will suffice to distinguish them. Thus, in *Levi L. Brown Paper Co. v. Dean*, 123 Mass. 267, it was held that an agent, who merely carries on a mill for the owner's

pany is not liable for injury to a pedestrian caused by his falling over such stop box, after it has been allowed to become a nuisance, although the company required the consumer, as a prerequisite to furnishing him water so to pay for and construct such stop box in the sidewalk, under the supervision and control of the company, through its licensed plumbers and under its rules, and retained the key to the stop box, and the exclusive right to use it in turning water on or off. *Fisher v. St. Joseph Water Co.* 151 Mo. App. 530, 132 S. W. 288.

A property owner who has laid out land in large building lots for suburban residences, fronting upon streets in which he has laid down main sewers, is not liable for the resulting damages, after he has sold such lots to different persons, entirely parting with the use and control of the sewers, if the grantees erect houses upon the lots, and connect them by drains with these main sewers, and discharge offensive matter through the drains and sewers onto private property, creating a nuisance. *Moore v. Langdon*, 2 Mackey, 127, 47 Am. Rep. 262.

Under a statute providing that any fence necessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a nuisance, help given by one in lawfully building a fence on his wife's land does not, of itself, make him liable therefor, whatever his motives, and does not tend to prove that he maintains the fence. *Ride-2 L.R.A. (N.S.)*

out v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.

Persons who aid and abet another in procuring a license to retail intoxicating liquors are not liable for damages in a civil action at the suit of an individual, in case the licensee so conducts his place and the sale of liquors therein as to create a nuisance and injury to such individual. *McCrowell v. Bristol*, 5 Lea; 685.

Where the care and control of all public-school property in a city is vested in the board of education, a city, although it holds title to lands upon which a public school is located, cannot be held liable for damages resulting from the creation or maintenance of a nuisance thereon, consisting of leaky water pipes from which water flows onto neighboring premises. *Terry v. New York*, 8 Bosw. 504.

A board of health which has charge of a smallpox hospital which becomes a nuisance is not liable therefor unless its members are personally guilty of misfeasance in its maintenance. *Barry v. Smith*, 191 Mass. 78, 5 L.R.A. (N.S.) 1028, 77 N. E. 1099, 6 A. & E. Ann. Cas. 817.

And an agent who is merely employed to carry on a business for the owners of a tannery and permanent dam used in connection therewith is not liable for a nuisance created by the maintenance of such dam at such height that its backwater causes injury to mills on adjacent property above, no change in the height of the dam being made by such agent. *Levi L. Brown Paper Co. v. Dean*, 123 Mass. 267.

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benefit, was not liable for the maintenance of its dam at too great a height, whereby water was set back, to the injury of another mill owner; the dam being a permanent structure, which had not been changed during the time complained of, and the defendant having neither ownership, possession, nor such control as would authorize him to change it. In *Moore v. Langdon*, 2 Mackey, 127, 47 Am. Rep. 262, the owner of land laid it off into lots and streets, sewerd the streets, and sold the lots with an easement in the sewers, retaining no control. The grantees and others voluntarily connected their premises with the sewers, and thus created a nuisance. The grantor was held not liable. But it was said that other facts might put a different complexion upon the case; as, for instance, if the defendants had warranted the right to use the sewers to the lot holders, or retained control over them, and knowingly permitted them to be used offensively, or other equivalent facts which would connect them directly with the use complained of. And in *State v. Holman*, 104 N. C. 861, 10 S. E. 758, defendants maintained a dam which had been erected about seventy-five years before, and had not been raised since its erection. Persons owning land higher up the creek made changes which caused sand and mud to be washed into the defendant's pond, and the water to become stagnant and to emit unpleasant odors. The ruling was that the nuisance complained of was entirely the result of agencies and causes for which the owners were not responsible. In each of these cases the finding was that the defendant had not contributed proximately to the nuisance complained of; but the reasoning by which that conclusion was reached is not understood to be out of line with what we have said in reaching a different conclusion in the case at bar.

Coming now to those specific assignments of error which have been argued, we state our conclusion that count 2 of the complaint adequately sets forth a cause of action. The count "claims of the defendants the further sum of \$25,000 as damages for the maintenance of a nuisance;" and then describes the nuisance in such way as to inform the defendants, the jury, and the court of the facts on which plaintiff relied as a cause of action. The specific objection urged is that there is no categorical averment that the nuisance was maintained by the defendants. Section 5321 of the Code of 1907 commands brevity in pleading, but brevity consistent with perspicuity and such an intelligible statement of facts as that a material issue in law or fact can be taken by the adverse party. 32 L.R.A. (N.S.)

The Code also contains a number of forms of complaint which have the force of law, and provides, in § 5322, that any pleading which conforms substantially to the schedule of forms is sufficient. In *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538, a complaint on a policy of life insurance, confessedly insufficient at the common law, was sustained because it was in substantial conformity to the analogous forms prescribed by the Code for complaints on policies of marine insurance and on dependent covenants or agreements. Several of the Code forms are open to the objection taken by the appellants' demurrer to the count in question. Thus, in the complaint for slander there is no averment in terms that the defendant did falsely and maliciously charge, etc. So, likewise, in the forms for deceit in the sale of chattels, and for trespass in taking goods. Most of them, however, are above criticism in that respect. Keeping in line with the policy of the statute, we do not think the count should be construed as intending to state a cause of action against the defendants for the act of others not sued, as the appellants too narrowly construe it, but rather that it must be held to adequately state a cause of action against the parties sued, and that without trenching upon the right of parties defendant to be informed of the cause of action which they are summoned to answer.

McCartie was, from his observation and study of septic tanks or purification plants, entitled to consideration as an expert on that subject. But while his study and experience of, and connection with, sanitation, would probably have led him to a closer observation of the odors emitted from the tanks, and may thereby have added weight to his testimony as to that, as an expert he could not give a mere opinion on a subject within the knowledge of all men of common experience and observation. But in many cases the opinions of ordinary witnesses are received from necessity, and where the nature of the subject is such that it cannot be stated or described in language which will accurately inform the judgment of the jury. The books abound in examples, and there are a number of cases in our reports which illustrate the relaxation of the general rule against the reception of nonexpert opinions. For example, it was held in *McVay v. State*, 100 Ala. 110, 14 So. 862, that a witness might answer, "It was a still night, and in my opinion they could have heard it." In *Rollings v. State*, 136 Ala. 126, 34 So. 349, a witness was allowed to testify that in his judgment females were near enough to hear certain language; this being

considered to be the statement of a collective fact based on a knowledge of the manner of the utterances and of the situation of the females. And in *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813, it was said that "while it would be a matter of common knowledge how far one could ordinarily see an object as large as a horse, and therefore not the subject of an opinion, the jury being as competent to judge of this fact as a witness, this inquiry assumed a different aspect when applied to the particular locality on the railroad track, or right of way, going from the depot towards the scene of the injury. It may have been impracticable to lay before the jury all the details upon which such a collective fact was founded. The soundness of the conclusion could be tested by the right of cross-examination." It was of vital importance in this case that the jury should know whether odors issued from the tanks in such volume and intensity as to affect plaintiff's well-being and the value of her property, one-half a mile away, or on the public road on which the plaintiff lived. The witness was shown to be familiar with the plant, having visited it a number of times under different weather conditions and at different seasons. In our judgment it was harmful error to deny to defendants an answer by this witness to their question: "State whether or not, in your opinion (asking here nothing different from his judgment, based upon known circumstances [*McVay v. State*, *supra*]), under any wind conditions or weather conditions, you (here used impersonally to indicate anyone, though that is not of controlling consequence) could smell odors from that plant up there on the public road." This was one way, and a natural and legitimate way, in our judgment, of demonstrating the volume and intensity of the odors which came from the tanks; and on the facts shown, we will not go to the length of assuming that the witness had not a normal sense of smell, or that the wind blew away from him on those occasions when he was at the plant, or that he would have undertaken to speak of a situation with which he was unacquainted, or that the testimony of experts is notably unreliable, or that the jury were so well informed as to the facts that they would not have believed him in any event, as it is variously suggested we might do in order to save error. Those considerations went to the weight of the evidence sought, and so far as they involved facts, as distinguished from plaintiff's theory of general unreliability, might have been developed by cross-examination.

After stating that the sewerage was col-

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lected in the tanks and was fermented there for weeks or months, which testimony was confessedly within the issues presented, the witness Bainter testified that it was then hauled out and distributed over the ground. There was no error in refusing to exclude this last as unresponsive and irrelevant. The complaint did not specifically charge that defendants had added to the alleged nuisance of the purification tanks by spreading the solid matter separated from the sewerage as a fertilizer over the surface of the ground connected therewith. Her injuries were attributed in general terms to the creation and maintenance of the purification plant. We do not assume that a farm for utilizing the solid product of a purification plant is inherently a part of such a plant, for that product may as well be used in remote places. But here the evidence showed a common purpose and contrivance on the part of those concerned in the building of the plant, as well as those concerned in its operation, that the solid product should be used on the adjacent tract, and its use accordingly. The tract was in fact a part of the plant, and this is not changed by the further fact that the lessor reserved the right to change or enlarge the plant from time to time, as it might see fit. Under the circumstances shown, the spreading of the solid product of the plant over the surface of the ground connected therewith was a part of the operation of the plant, and was provable under the complaint.

In respect to those assignments of error which relate to rulings on the testimony of the witness Martin, we think it safe to say that a witness who disclaims familiarity with the price of property should not be permitted to give his opinion as to its value. The witness who undertakes to speak in regard to the value of a piece of land need not be an expert, if one who has given special attention to land values, and has had uncommon occasion to know them, may be so denominated, though that would affect the weight of his testimony, but should be able to say at least that he thinks he knows the value of lands in the neighborhood; and, obviously, he should be required to show that he has had some means of knowledge. It would be idle, or worse, to allow witnesses to give their opinions in evidence unless they appear to have better means of knowledge than the jury may be supposed to have in common with all other persons. See *Jones on Evidence*, § 363, and authorities there cited. The trial court does not appear to have observed this rule.

Of other exceptions reserved in connec-

tion with the testimony of this witness, we do not find it necessary to say more than that, while a party waives an objection to evidence for irrelevancy, not made in due season, which means, in general, before the question calling for the testimony is answered, if the question is put and the answer given in such rapid succession that the party objecting has not fair opportunity to state his objection, it is the duty of the court to entertain the objection when thereafter promptly made. In the nature of things, the management of such occasions rests in the discretion of the trial court.

We think the judgment below should be reversed, and the cause remanded for another trial.

Dowdell, Ch. J., and Simpson and McClellan, JJ., concur.

NORTH CAROLINA SUPREME COURT.

PHILIP LEVIN et al., Appts.,
v.
M. GLADSTEIN.

(142 N. C. 482, 55 S. E. 371.)

Foreign judgment — full faith and credit — fraud.

1. The requirements of the Federal Constitution that full faith and credit shall be given in one state to judgments obtained in another will not prevent the courts of the former, in which legal and equitable

rights and remedies are administered in one court and in one form of action, from permitting an equitable defense against a judgment obtained by fraud in the latter, where the courts of the state where the judgment was rendered would enjoin its enforcement if obtained by fraud.

Justice of the peace — jurisdiction — equitable remedy.

2. A justice's court has jurisdiction, in an action upon a former judgment, to permit the interposition of the equitable defense of fraud in obtaining it.

(November 7, 1906.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Durham County in defendant's favor in a proceeding to enforce a judgment. Affirmed.

Statement by Connor, J.:

This was a suit upon a judgment obtained in the superior court of Baltimore city, Maryland. Personal service was had upon defendant while in Baltimore. Action was instituted upon said judgment before a justice of the peace of Durham county, and from a judgment therein, defendant appealed to the superior court. At the beginning of the trial in the superior court, counsel for defendant stated that he admitted the regularity of the judgment sued upon, and withdrew all pleas and defenses to said action, save and except that the judgment upon which the action was brought was procured by a fraud practised by plaintiffs upon the defendant, and that he insisted upon that plea alone. Thereupon the plaintiffs moved

Note. — Right to resist judgment of sister state on the ground of fraud.

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I. Scope of note.

The scope and limit of a note on the right of resisting, on the ground of fraud, a judgment rendered in one or another of the United States, is clearly indicated by the selected title. The subject being altogether one of American constitutional law, only American cases can possibly be in point, and of these only those that have dealt with domestic judgments are of use. Judgments that have been rendered in state and questioned in Federal courts, or *vice versa*, come, of course, within the scope of the note, but judgments which have been challenged upon jurisdictional grounds alone, unconnected with any alleged fraud, lie outside the field of investigation.

The subject presents itself naturally in three aspects: (a) The existence of the

for judgment for that the judgment rendered by the court of Maryland was not open to attack in this action for fraud. Motion overruled, and plaintiffs excepted. His Honor held that the burden of proof was upon the defendant, and he proceeded to introduce testimony. Mr. Gladstein testified that he was the defendant in the case; that he knew Philip Levin and Simon Levin, and had bought goods of them; that some time prior to his going to Baltimore he bought a bill of goods of plaintiffs, but had shipped some of them back to Baltimore because they were not up to the sample; that plaintiffs had refused to take the goods out of the depot in Baltimore; that upon his visit to Baltimore, summons was served upon him in the action brought there by the

plaintiffs, but after said summons was served upon him, and before the return day, he saw one of the plaintiffs and had an interview with him at the store of L. Singer & Son, during which interview plaintiffs agreed with him to withdraw said suit and return the goods to him at Durham, provided he would, upon their receipt, pay the plaintiffs a sum of money, which they agreed upon, to wit, \$133, and freight and storage not to exceed \$3; that, relying upon this agreement, he returned to Durham, and made no defense to the action. Plaintiffs never returned the goods to him at Durham. That the first time he knew of the judgment was when called upon by attorneys for plaintiffs to pay said judgment. There was testimony contradicting defendant. After hearing tes-

right to resist in one state, on the ground of fraud, a judgment of a sister state; (b) the right being granted, the character of the fraud enabling it to be exercised; and (c) the methods of exercising the right. The cases which follow present the judicial views of these three questions.

The reader will find it to his advantage to read again, in association with this note, the following previously published notes in the L.R.A. reports:

The note to *Dunstan v. Higgins*, 20 L.R.A. 668, on the conclusiveness of a judgment rendered in a foreign country.

The note to *Benton's Succession*, 59 L.R.A. 135, on conflict of laws on the subject of divorce; especially the 7th division thereof, beginning on p. 183.

The note to *Forrest v. Fey*, 1 L.R.A. (N.S.) 740, upon the subject of the conclusiveness of decrees of divorce outside of the states in which they were rendered, where it appears that there was jurisdiction to make such decrees.

The note to *State ex rel. Ruef v. District Ct.* 6 L.R.A. (N.S.) 617, on the conclusiveness of foreign probate as affecting real property.

The note to the case of *Tootle v. McClellan*, 12 L.R.A. (N.S.) 941, upon the right to question judgment of court of sister state upon the ground that defendant was induced by a fraud to go within its jurisdiction.

II. The right.

a. The written law.

The Constitution of the United States (art. IV. § 1) requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." It has, at the same time, empowered the Congress of the United States to prescribe by general laws the manner in which shall be proved, and the effect of, such public acts, records, and judicial proceedings, to entitle them to the required full faith and credit.

In conformity thereto, Congress, by the 32 L.R.A. (N.S.)

act of May 26, 1790 (chap. 11), prescribed the mode of authenticating state public acts, records, and judicial proceedings in order for them to receive in sister states full faith and credit, and enacted that such records and judicial proceedings, when thus authenticated, should have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state whence the said records are or shall be taken. The provisions of this act, by a supplemental act (March 27, 1804), were extended to the records and courts of the respective territories and countries subject to the jurisdiction of the United States.

b. Status of judgments of sister states.

Judgments, both domestic and foreign, standing upon a like footing, import verity, and public policy forbids their indirect and collateral contradiction or impeachment. *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841.

A judgment rendered by a foreign court having jurisdiction of the person and the cause stands upon an equal footing with a judgment rendered in a domestic court, but with a distinction as to the mode of enforcing it. Execution does not issue directly upon it, but a suit must be instituted and a new judgment obtained in the domestic court. *Stanton v. Embry*, 46 Conn. 65, 595.

The courts in one state are bound to consider a judgment fairly and regularly obtained in another state as full and conclusive evidence of the matter adjudicated. *Andrews v. Montgomery*, 19 Johns. 162, 10 Am. Dec. 213.

When a court in one state duly acquired jurisdiction of the persons of the parties to an action over the subject of which it has jurisdiction, its adjudication upon the merits of the controversy is conclusive upon the parties in the courts of a sister state. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

Under the Constitution and acts of the Congress of the United States, passed pur-

timony from both parties, the court submitted the following issue to the jury: "Was the alleged judgment rendered for \$143, bearing date April 27, 1904, in the superior court of Baltimore city, in favor of Philip Levin and Simon Levin, copartners, trading as P. Levin & Company, against M. Gladstein, obtained by the fraud of plaintiffs?" To which the jury responded "Yes." Judgment was thereupon rendered that the plaintiffs take nothing by their action, and that the defendant go without day, etc. Plaintiffs excepted and appealed.

Messrs. Biggs & Reade for appellants.
Messrs. Winston & Bryant for appellee.

Connor, J., delivered the opinion of the court:

Two questions are presented upon the plaintiffs' appeal: First, Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? Second, If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the Constitution of the United States, art. 4, § 1, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," earnestly contend that the defense is not open to the courts of this state;

suant thereto, the judgment of a court of record of competent jurisdiction in one state, obtained where the defendant had personal notice of the action, is conclusive between the parties in any other state in which an action upon it is brought. *Holt v. Alloway*, 2 Blackf. 108.

A judgment of a state court may not be impeached collaterally in the courts of another state, or in a United States court, on the ground of fraud. *Barbee v. Shannon*, 1 Ind. Terr. 199, 40 S. W. 584.

When a trial court has jurisdiction, not fraudulently procured, over the person of a resident of another state, the judgment that it renders in the action against him is conclusive in sister states upon the merits of the controversy. *Longueville v. May*, 115 Iowa, 709, 87 N. W. 432.

Ever since the case of *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411, the doctrine is well settled, declared the court in *Lawrence v. Jarvis*, 32 Ill. 304, that if the court of another state, having jurisdiction over the subject and the parties, has rendered a judgment, such judgment will bind the party against whom it has been rendered, and he shall not be permitted to look into the transaction which brought on the judgment, in order to show that it should not have been pronounced.

The doctrine that a judgment of a court of record of a sister state, where the parties appear or are duly summoned, imports absolute verity, and may not be impeached at law, according to the court in *Ward v. Quinlvin*, 57 Mo. 425, is too well settled to need illustration or citation of authorities.

When a court in one state, in rendering a judgment or decree, has jurisdiction of the person of the party against whom it is rendered, obtained by personal service of its process, such judgment is not open to a collateral attack in another state, for fraud in obtaining it; and the fact that the person against whom it was rendered was out of the jurisdiction of the court at the time of its rendition is immaterial. *State ex rel. Giroux v. Giroux*, 19 Mont. 149, 47 Pac. 798.

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A judgment apparently rendered by a court of general jurisdiction, properly authenticated, as required by the Federal statutes, is presumed, until the contrary is proved, to have been rendered by a court which had lawful jurisdiction over the subject-matter and the parties. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

A judgment rendered in one state of the Union, when proved in the courts of another, differs from a judgment recovered in a foreign country in no other respects than that of not being open to re-examination upon the merits, or subject to be impeached for fraud in obtaining it, if rendered by a court which had jurisdiction of the cause and the parties to the suit. *Ibid*; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

A decree rendered by a court having jurisdiction of the subject-matter and of the persons of the parties to it, valid and effectual according to the laws and adjudications in the state where it was rendered, has elsewhere in the United States, under the Constitution and laws thereof, the same effect which it has in its own state. *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

By the settled construction given by the United States Supreme Court to those provisions of the Federal Constitution and statutes relating to the faith and credit of judgments of any state in the other states, a judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or an absent defendant's property, lawfully attached, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

The rule that a judgment of a court of competent jurisdiction in one state shall have in every other court of the United States, under the Constitution thereof and

that the remedy for the fraud in procuring the judgment, if any, must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one state based upon a judgment obtained in a sister state." When a judgment rendered by the court of one state becomes the cause of action in the court of another state, and the transcript, made in such state, duly certified, as prescribed by the act of Congress, is produced, it imports verity, and can be attacked for only one purpose. The defendant may deny that the court had jurisdiction of his person or of his subject-matter, and

for this purpose may attack the recitals in the record. *Bailey*, Jurisdiction, §§ 198, 199. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of *nil debet*. This was held in *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411; and has been uniformly followed by both state and Federal courts. 2 Am. Lead. Cas. (Hare & W.) 538. In *Christmas v. Russell*, 5 Wall. 290, 16 L. ed. 475, Mr. Justice Clifford said: "Substance of the second objection of the present defendant to the fourth plea is that, inasmuch as the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of

the acts of Congress passed pursuant thereto, the same faith and credit as it has in the state court which rendered it, applies in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defense. *Christmas v. Russell*, 5 Wall. 290, 16 L. ed. 475.

The essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment to examine into the validity of the claim), from ascertaining whether the claim is really one which it is authorized to enforce. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

When an action is brought in a court of one state upon a judgment recovered in a court of another state, and the court which rendered such judgment is shown to have had jurisdiction of the subject-matter of the action and of the person against whom the judgment was rendered, such judgment is conclusive upon all other matters. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

Where jurisdiction of the subject and of the person has been acquired, and judgment rendered in the court of a sister state, without any fraud, no inquiry thereafter may be made into the facts proved or the law applied to such facts, by which the court rendering the judgment was governed. *Rocco v. Hackett*, 2 Bosw. 579.

A record legally authenticated of a judgment rendered by a court of competent jurisdiction in any of the United States is conclusive evidence in the courts of its sister states to show that the person against whom it stands is legally obligated to pay the amount recovered against him, provided always it is not shown that such judgment was fraudulently or collusively

obtained. *Buford v. Buford*, 4 Munf. 241, 6 Am. Dec. 511.

After a court has acquired jurisdiction, its findings are conclusive in all collateral proceedings, and a decree rendered by it has the same effect in every other state as in the state where it was rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened. *Forrest v. Fey*, 218 Ill. 165, 1 L.R.A. (N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789.

The Constitution of the United States requires full faith and credit to be given in every state as much to a decree in equity which is final, and directs the payment of a specific sum of money, as to a judgment rendered in an action at law. *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

A decree of divorce awarding alimony is a judgment of record, and when rendered in any state in the United States, by a court having jurisdiction of the subject and of the parties, will be carried into judgment in any sister state, to have the same binding force that it has in the state in which it was originally given. *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

While for many purposes the judgment of a court of another state is conclusive in an action brought upon it, it is not so for all purposes. *Rogers v. Gwinn*, 21 Iowa, 58.

A judgment rendered in one state, and sued upon in a sister state, in respect of the defenses which may be interposed to the action, is to be treated as a domestic judgment. *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841.

Such a judgment has the force of a domestic judgment, and no greater. *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

It is at least doubtful, according to the chancellor of New York, in *Bicknell v. Field*, 8 Paige, 440, whether any court in this state has any right or power to inquire into the regularity of a judgment recovered in one of the superior courts of a sister state after a personal service of the process upon the party against whom such

fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee* was whether *nil debet* was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the state court from whence it was taken, and that *nil debet* was not a good plea to such an action." The learned justice proceeds to say: "Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be

done directly by writ of error, petition for new trial, or by bill in chancery." It will be found upon careful examination of *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242, 59 Md. 239, 43 Am. Rep. 554, that the question under consideration here was not involved. It is true that in the discussion Mr. Justice Gray uses the language cited by counsel, which excludes the right of the defendant to impeach the judgment "for fraud in obtaining it." So, in *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, Chief Justice Fuller, after quoting the language of the Constitution, says: "This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right

judgment was obtained. And, in the chancellor's opinion, it certainly would not be giving full faith and credit to the record of a judgment in a sister state, duly authenticated in the manner prescribed by the law of the United States, if the one against whom that judgment purported to have been obtained should be permitted to allege and show, in the courts of another state, that no such judgment was in fact given, or authorized to be entered, in the court, but that the record was made up and filed fraudulently, without authority, by the clerk of the court.

A decree of a court of one state, in so far as it relates to real property in another state, can have no extraterritorial effect; but, if valid where rendered, it binds personally those who were parties to it, and can be enforced in the *situs rei* by proper proceedings conducted there for that purpose. *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

The Federal courts are bound to give to the judgments of state courts the same faith and credit which the courts of their sister states are required by the Constitution and acts of Congress to accord to them. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 47 U. S. App. 1, 76 Fed. 429.

c. Impeachment on jurisdictional grounds.

In dissenting from the judgment of the court in *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411, holding the plea of *nil debet* not good in an action in one state upon a judgment rendered in another, Mr. Justice Johnson took the opportunity to say: "There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of these is that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits." 32 L.R.A.(N.S.)

A decree of a court of competent jurisdiction, which discloses upon its face no intrinsic nullity, is subject to attack in another state only upon proof of extrinsic facts undermining the jurisdiction. *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248; *Benton's Succession*, 106 La. 494, 59 L.R.A. 135, 31 So. 123.

It is only when jurisdiction is admitted that full faith and credit must be given to the judgments of the courts when sued upon in sister states. *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539.

A decree rendered by a court without jurisdiction is void. And a void decree is no decree. Its validity may be contested in any court where the pretended adjudication is pleaded. *Beeman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171.

If there is an absence of jurisdiction in a court to render a judgment or decree, it is absolutely void, and open either to direct or collateral attack. *Forrest v. Fey*, 218 Ill. 165, 1 L.R.A.(N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789.

There can be no question, according to the court in *Field v. Field*, 215 Ill. 496, 74 N. E. 443, but that all judgments and decrees rendered by a court without jurisdiction of the subject matter and of the parties are void, and have no binding effect upon the parties aggrieved.

The judgment of a court of one state has no binding effect in a sister state unless the court which rendered it had jurisdiction of the subject-matter and of the parties. Want of jurisdiction may always be set up against a judgment when it is sought to be enforced or when any benefit is claimed from it, and, if established, renders the judgment a mere nullity. *Kerr v. Kerr*, 41 N. Y. 272.

Jurisdiction of a court of another state which has rendered a judgment is always open to inquiry in the courts of New York; and, if the court which rendered it exceeded its jurisdiction, or did not obtain jurisdiction of the parties, the judgment is void. *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

In a suit on a foreign judgment, the rec-

of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory." The learned chief justice relies upon the same line of cases cited by Judge Gray. Neither of them were discussing the question here presented, nor was it presented by the record in those cases. The case of *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 162, was cited in *Cole v. Cunningham*, and, as we shall see later, was approved. In *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564, the court simply reiterated the doctrine

announced in *Mills v. Duryee*, supra, that the plea of *nil debet* could not be interposed in an action upon a judgment. *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 86; *Bailey*, Jurisdiction, 191, 192. This court, in *Miller v. Leach*, 95 N. C. 229, by Ashe, J., said that the judgment of a sister state was put by the Constitution upon the same footing as domestic judgments, precluding all inquiry into the merits of the subject-matter, "but leaving the questions of jurisdiction, fraud in the procurement, and whether the parties were properly brought before the court, open to objection,"—citing *Mills v. Duryee*, supra. See also *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555. It is elementary learning that this plea was not proper in actions founded upon a specialty or a record.

ord of jurisdictional facts is open to collateral attack. *Pond v. Simons*, 17 Ind. App. 84, 45 N. E. 48, rehearing denied in 17 Ind. App. 90, 46 N. E. 153.

A judgment of one state can only be conclusive in another as to matters with respect of which the court rendering the judgment had jurisdiction; and this is the meaning which has uniformly been given to the constitutional provision of the United States respecting giving full faith and credit in each state to the public acts, records, and judicial proceedings of every other state. *State ex rel. Ruff v. District Ct.* 34 Mont. 96, 6 L.R.A.(N.S.) 617, 115 Am. St. Rep. 510, 85 Pac. 866, 9 A. & E. Ann. Cas. 418.

We think it clear, said the court in *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 597, that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the 4th article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

The provisions of the Constitution and statutes of the United States, whereby the judgments of the courts of any state are to have full faith and credit given them in the courts of other states, establish a rule of evidence rather than of jurisdiction. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

While the provisions of the Federal Constitution and acts of Congress concerning the giving of full faith and credit to the judgments of a state in her sister states make the record of a judgment conclusive evidence in other courts, state or Federal, of the matter adjudged, they do not affect the jurisdiction either of the court which rendered the judgment, or the court in which it is offered in evidence. *Ibid.*

It is the settled doctrine of this court, it was declared in *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369, that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other 32 L.R.A.(N.S.)

states does not preclude inquiry into the jurisdiction of a court in which a judgment is rendered over the subject-matter or the parties affected by it, nor into the facts necessary to give such jurisdiction.

Notwithstanding the provision of the Federal Constitution requiring full faith and credit to be given to the judicial proceedings of each state in the other states of the Union, and the statute passed to give it effect, the jurisdiction of the state court whose judgment is brought in question in another state is always open to inquiry. *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714.

The courts of one state may inquire into the proceedings, judgments, and decrees of a court of another state, to determine whether that court had jurisdiction of the subject-matter and of the parties. *Field v. Field*, 215 Ill. 496, 74 N. E. 443, affirming 117 Ill. App. 307.

A judgment of a court of general jurisdiction, rendered in a sister state, and coming under the constitutional provision and act of Congress in regard to the faith and credit to be given such judgments, may be collaterally attacked for want of jurisdiction of the subject-matter or of the persons, regardless of the recitals in the judgment or the record. *Wood v. Wood*, 78 Ky. 625; *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429.

The Constitution of the United States, in requiring full faith and credit to be given in each state to the judicial proceedings of every other state, does not shut off the inquiry whether the judgment obtained in another state was rendered by a court having jurisdiction of the cause and of the parties. *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733.

As far back as the case of *The Marshalsea*, 10 Coke, 68, the doctrine was settled, according to the court in *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365, that no adjudication can be valid unless the court has jurisdiction of the cause and the parties; and this principle applies with full force in an action on a foreign judgment. For in such

Shipman, Common Law Pleading, 196. But, if plaintiff, in an action on a record, instead of demurring to the plea, accepts it and joins issue, the defendant is at liberty to prove any and every special matter of defense which might be proved under the same plea in debt. For the plaintiff, by accepting the plea, founds his demand solely upon the defendant being indebted, and thus waives the estoppel, or conclusive evidence of the fact, etc. Overman v. Clemmons, 19 N. C. (2 Dev. & B. L.) 185; Gould, Pleadings, 287. Hence we find that in all of the cases in which the plea of *nil debet* was entered, the plaintiff demurred and the decision was on the demurrer, which was uniformly sustained. Mills v. Duryee, and Maxwell v. Stewart, *supra*; Benton v. Burgot, 10 Serg.

& R. 240; Carter v. Wilson, 18 N. C. (1 Dev. & B. L.) 362; Knight v. Wall, 19 N. C. (2 Dev. & B. L.) 125. In Allison v. Chapman, 19 Fed. 488, Nixon, J., says: "This subject is fully discussed . . . and the conclusion is reached that the allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state." This conclusion is fully supported by all of the authorities, and in this we concur with the learned counsel for the plaintiff. Notwithstanding the well-settled rule that the judgment, when sued upon in another state, cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that, upon sufficient allegation and proof, de-

case, although there may be a record, yet, under the circumstances, it is the record of a nullity, without any legal force whatever.

It is well settled that the judgment of a court of a sister state has no binding effect in New York unless the court which rendered it had jurisdiction of the subject-matter and of the persons of the parties; and the want of jurisdiction may always be set up against a judgment when it is sought to be enforced, or when any benefit is claimed for or under it. *Re Kimball*, 155 N. Y. 82, 49 N. E. 331.

We take it to be now well settled in this commonwealth, said Chief Justice Shaw, in delivering the opinion of the court in *Carleton v. Bickford*, 13 Gray, 591, 74 Am. Dec. 652, that although the judgment of a court of one state of the Union against a citizen of another state is *prima facie* evidence both of the jurisdiction of the court and of the merits, and notwithstanding the United States statute of 1790, providing that full faith and credit shall be given in each state to the judicial proceedings of another, yet such judgment is not conclusive, but it is competent for the defendant, when suit is brought against him on such judgment, to show by proof that the court which rendered the judgment in the original suit in point of fact had no jurisdiction over the persons of the parties and the subject-matter of the controversy.

A judgment of one state, sued on in another state, is conclusive as to all matters going to the merits of the controversy, but not as to the facts conferring jurisdiction on the court to render it. *Rose v. Northwest F. & M. Ins. Co.* 67 Fed. 439.

A defendant called on in an action to answer to a judgment rendered against him in the court of another state may prove any facts tending to show that the court had no jurisdiction over him so as to render such judgment. *Carleton v. Bickford*, *supra*.

A judgment rendered in one state and sued upon in a sister state may be impeached by plea that the defendant continually resided out of the state in which 32 L.R.A. (N.S.)

it was rendered, and had no notice of the commencement of the suit. *Bigger v. Hutchings*, 2 Stew. (Ala.) 445.

A final judgment recovered in a court of one state, upon which an action is brought in a court of a sister state, is open to inquiry and adjudication in the latter court, upon the question of jurisdiction of the person against whom the judgment was rendered. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

A judgment rendered in one state without any personal service of process upon the defendant, or any appearance by such defendant, where the defendant is not a resident of such state, is void in his home state for want of jurisdiction. *Pawling v. Willson*, 13 Johns. 192; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225.

A decree of divorce, rendered in a state in which the parties do not reside, without personal service of process, or an appearance by the defendant, is a nullity, and void for want of jurisdiction, in every state in which it is relied upon to defeat the marital rights of the spouse against whom it was rendered. *People v. Karlsruhe*, 1 App. Div. 571, 37 N. Y. Supp. 481.

A decree of divorce obtained by a wife who left her husband in the home state, and went to reside in the state in which the decree was granted, where the husband was neither personally served with process nor appeared in the action, is without jurisdiction and void in the state of the husband's domicile, and the courts of that state will treat it as a nullity. *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669.

A decree of divorce granted in a state in which neither the husband nor the wife resides, without any service of process upon or appearance by the defendant, and without any actual acquisition of residence by the plaintiff, is an absolute nullity, useless for any purpose in the home state. *People ex rel. Public Charities & C. Comrs. v. Smith*, 13 Hun, 414.

In an action on a judgment rendered in a suit brought in a sister state, the defendant, notwithstanding the record shows a sheriff's return of personal service of the

fendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.

Pearce v. Olney, 20 Conn. 544, was "a bill in chancery praying for an injunction against the further prosecution of an action at law." Defendant sued plaintiff in the superior court of New York city, and obtained service upon him. Plaintiff saw and made an arrangement with defendant's attorney by which it was agreed that no further action would be taken in the case until plaintiff should receive further notice from him. Relying upon said agreement, plaintiff did not employ any counsel, and did not appear before said court, believing that said suit was to be no further prosecuted against him. Defendant,

in violation of said agreement, procured judgment against plaintiff. Defendant, some time thereafter, brought suit in the court having jurisdiction in Connecticut, and at the time of filing the bill, said suit was pending in said court. Defendant relied upon the constitutional provision, insisting that to enjoin him from prosecuting his action on the judgment would be to deny "full faith and credit to the judicial proceeding" in New York. The court said: "It is insisted that, under the Constitution of the United States . . . it is not competent for the court to impeach the judgment of the superior court of New York; it being shown that that court had jurisdiction of the cause, by the regular service of process on the defendant in that

process upon him, may show that he was never in fact served, and that the court never acquired jurisdiction of his person. *Rose v. Northwest F. & M. Ins. Co.* 67 Fed. 439.

It is a familiar doctrine in Iowa, that one sued upon a foreign judgment may show that he was not, in fact, served with process, and that the court had no jurisdiction of his person. *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129.

A corporation against which a judgment was rendered in a state court without jurisdiction over its person by any proper or legal service of its process may stand upon its rights and attack the judgment for want of jurisdiction wherever and whenever it is sought to be enforced against it. *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259.

A judgment rendered in one state against a person not served with process, and who did not appear or authorize an appearance in the action, is lacking in jurisdiction, and is open to attack in other states. *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646.

In an action brought in any court on a judgment of a court of another state, the jurisdiction of the court to render the judgment may be attacked collaterally by proof that the defendant was not served or did not appear in the suit, or, if an appearance for him by an attorney was entered, such appearance was unauthorized; and this even where the proof directly contradicts the record. *First Nat. Bank v. Cunningham*, 48 Fed. 510.

A judgment of a court of general jurisdiction, rendered in one state, may be collaterally attacked in another on the ground that it was procured by a fraud, in that the return of the service of its process upon the defendant was false, because the service of process had not been made at all. *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429.

It was at first the rule, particularly in the Federal courts, that in suits upon judgments rendered by the superior state courts, jurisdiction, at least of the person, was

not questionable. Thus, in *Field v. Gibbs*, Pet. C. C. 155, Fed. Cas. No. 4,766, one of the defendants in a suit upon a judgment pleaded that he had never been served with process, neither had he authorized any attorney to appear for him. A demurrer to this plea was sustained because the record of the judgment showed service of process upon a codefendant, and a general appearance of an attorney to defend for both. The general rule of law, to which I know of no exception, said Washington, J., is that nothing can be assigned for error, nor can any averment be admitted, which contradicts a record.

And the final result of the litigation in *Amory v. Amory*, in which the district and circuit judges disagreed, reported in Fed. Cas. No. 333, 3 Biss. 266, Fed. Cas. No. 334, and 6 Biss. 174, Fed. Cas. No. 335, was a decision that a decree of divorce obtained in a state court, and which had been the subject of controversy in the courts of another state, and there held conclusive, could not be attacked and overthrown by a bill in equity in the Federal courts, upon the alleged ground that it had been fraudulently obtained by the unauthorized appearance of an attorney for the defeated party, employed and paid for by the successful one.

This is so no longer. It is now settled doctrine, both in the Federal and state courts, according to the cases of *Rogers v. Gwinn*, 21 Iowa, 58, and *Dunlap v. Cody*, 31 Iowa, 261, 7 Am. Rep. 129, that a person sued upon a judgment of a sister state may successfully defend by showing that the attorney who entered an appearance for him had no authority to do so. The statement is borne out by several decisions.

It is too late now, said Holmes, J., speaking for the court in *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221, to deny the right collaterally to impeach a decree of divorce made in another state by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party.

In a suit brought upon a judgment ren-

suit; and cases are cited to sustain this position. This doctrine is correct enough, no doubt, properly understood and applied, but it has no application here. There is no attempt to impeach the validity of the New York judgment. In granting an injunction against proceedings at law, whether in a foreign or domestic court, there is no difference. The court of equity does not presume to direct or control the court of law, but it considers the equities between the parties, and acts upon the person, and restrains him from instituting or prosecuting an action." A perpetual injunction was granted. The case had a further history. The defendant in the equity suit and plaintiff in the judgment, assigned the judgment to one Dobson, who

brought suit on it in the superior court of New York, against Pearce, the defendant in the judgment. Defendant set up, by way of defense, the record of the equity suit in Connecticut, and the injunction granted therein. Dodson sought to avoid the injunction. The cause was ably argued and carefully considered by the court. It was said: "So, fraud and imposition invalidate a judgment as they do all acts; and it is not without semblance of authority that it has been suggested that at law the fraud may be alleged whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, the fruits of his fraud. . . . But whether this is so or not, it is unquestionable that a court of chancery has power

dered in another state, the defendant may answer in defense that he was not served with process, and that the appearance entered in his behalf was fraudulent, notwithstanding such allegations contradict the recitals in the record. *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

A judgment rendered in another state may successfully be resisted in a sister state, upon the ground that it was rendered upon an unauthorized and fraudulent appearance of an attorney for the defendant, and that, in consequence, the court which rendered it never had jurisdiction of his person, notwithstanding affirmative recitals to the contrary in the record of the judgment. *Eager v. Stover*, 59 Mo. 87.

A person sued upon a judgment rendered in another state may show in defense that the appearance of attorneys for him was without his knowledge, authority, or consent; and therefore that the judgment was rendered without jurisdiction of his person. *Hays v. Merkle*, 67 Mo. App. 55.

The unauthorized appearance of attorneys representing a defendant who has never been served with process, and over whose person no jurisdiction has ever been otherwise obtained, in a divorce suit in a state in which such person does not reside, is a fraud both upon the party and the court; and a decree granted against such person is a nullity for want of jurisdiction. *Kerr v. Kerr*, 41 N. Y. 272.

A judgment of one state, sued upon in a sister state, may be impeached upon plea and proof that it was fraudulently obtained without service of process upon the defendant, by collusion on the part of the plaintiff and a person representing himself as the defendant's agent to accept service of process. *Rose v. Northwest F. & M. Ins. Co.* 67 Fed. 439.

It is, said the court in *Dunham v. Dunham*, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841, clear that it is the duty of the applicant in an *ex parte* proceeding for divorce, on pain of obtaining an invalid decree, to avoid practising any deception on the court in any matter affecting its jurisdiction or its discretion to proceed or not to the final determination of the cause. 32 L.R.A. (N.S.)

When a judgment or decree rendered by a court of one state is offered in evidence in a court of another state, and is properly authenticated, it is open to inquiry upon the ground of fraud affecting the jurisdiction of the court to render it, or the discretion of the court to exercise its jurisdiction. *Forrest v. Fey*, 218 Ill. 165, 1 L.R.A. (N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789.

A judgment or decree rendered by a court which has not obtained jurisdiction over the parties, or by a court whose jurisdiction has been fraudulently invoked against a nonresident who fails or refuses to appear in the action, is void. *Beerman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171.

The fact that a judgment sued on is the judgment of a sister state can make no difference when the attack upon the judgment is made upon the ground that jurisdiction to render it was obtained by fraud. *Abercrombie v. Abercrombie*, 64 Kan. 20, 67 Pac. 539.

It has long been a rule of this court, it was said in the opinion of *Abercrombie v. Abercrombie*, *supra*, that where jurisdiction of a defendant has been obtained by fraud or wrong, he may appear in the action, showing such fraud, and the court will always grant relief. If this is true, can there be any well-defined distinction between permitting him to appear in the action to show fraud, and in allowing him to set up such fraud in an action brought upon a judgment rendered in a case where jurisdiction over him was obtained by fraud? And it answered its own question in the negative.

A person sued in his own state, upon a judgment recovered against him in another state, is entitled to show that such judgment was fraudulently obtained, or that the court which rendered it had no jurisdiction of his person. *Andrews v. Montgomery*, 19 Johns. 162, 10 Am. Dec. 213.

d. Impeachment for fraud.

There are perhaps, said the court in its

to grant relief against judgments when obtained by fraud." [Dobson v. Pearce, 12 N. Y. 165, 62 Am. Dec. 152.] The court proceed to say that, under the judiciary system in New York, permitting equitable defenses to be set up in the answer, whether the fraud could have been pleaded or not in an action at law, it could be set up, as an equitable defense to defeat a recovery upon a fraudulent judgment. The court held that the injunction granted in Connecticut established the fraud, and that plaintiffs could not recover. As we have seen, this case was cited with approval in *Cole v. Cunningham*, supra. It is cited with approval by the chancellor in *Davis v. Headley*, 22 N. J. Eq. 123, in which it is said: That the "courts of equity will set

aside judgments of their own state and of other states on this ground [for fraud practised in procuring them]. . . . It will not lend its aid to enforce a judgment obtained by fraud, when that fraud is shown. The complainant must come with clean hands in the matter on which relief is sought." The doctrine is well stated in *Payne v. O'Shea*, 84 Mo. 129 (cited in *Black, Judgm. § 919*): "A proceeding in the nature of a bill in equity will lie to enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other states, when sued on in this state. . . . The fraud, however, for which a judgment will be enjoined, must be in the procurement of the judg-

opinion in *Baker v. Palmer*, 83 Ill. 568, few questions of evidence upon which the decisions have been more conflicting than the effect which should be given to a foreign judgment as evidence. Some courts have held it conclusive; some that it is prima facie evidence of the finding; in some again, that it is no evidence to prove anything. All seem to be agreed that if the foreign court had no jurisdiction, then the judgment is not binding, and that the want of jurisdiction may be averred and proved; and it has been held also that it may be shown, to invalidate the judgment in the forum in which it is questioned, that it was obtained by fraud or mistake.

Fraud and imposition invalidate a judgment as they do all acts. *Dobson v. Pearce*, 12 N. Y. 166, 62 Am. Dec. 152.

There is no question of the general doctrine, declared the court in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, that fraud vitiates the most solemn contracts, documents, and even judgments.

A judgment which itself has been procured by fraud stands upon the same footing as any contract fraudulently obtained, and may be set aside or annulled in the same way. *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891.

Judgments rendered in one state, and made the basis of legal proceedings in a sister state, may be impeached for fraud on the part of the party obtaining them; but this must be done on the same grounds as would be required to enjoin a judgment rendered in the state of the forum. *Turley v. Taylor*, 6 Baxt. 376.

It is a rule well settled, declared the court in *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, that every judgment may be impeached for fraud; and that rule applies as well to judgments of our own state as to those of other states or of foreign countries.

Courts of equity, according to the chancellor of New Jersey, in *Davis v. Headley*, 22 N. J. Eq. 115, will set aside judgments of their own states and of other states on the ground that they are void for fraud.

I cannot doubt, said the chancellor, in 32 L.R.A. (N.S.)

Fletcher v. Rapp, Smedes & M. Ch. 374, that when the plaintiff in a judgment rendered in a sister state comes here to enforce it, it is entirely competent for the defendant to show that such judgment was obtained by fraud. Fraud vitiates the most solemn proceedings and makes them utterly void. . . . A judgment obtained by fraud would not be enforced by the court where it was rendered, and doubtless any plea which would avoid the judgment there would avoid it here.

The power of a court of equity to afford relief against fraudulent judgments is not limited to judgments recovered in the courts of the same state, but may be exercised in respect of judgments recovered in the courts of other states, whenever they are sought to be made the foundation of an action or a defense. *Doughty v. Doughty*, 27 N. J. Eq. 315, affirmed in 28 N. J. Eq. 581.

The books abound in *dicta* recognizing and in a general way affirming that judgments rendered in other states are open to impeachment on the ground of fraud. In expressing themselves to this effect, judges have not always made clear precisely what they meant by fraud in such an association, and often it is difficult to disentangle from their language questions of fraud from questions of jurisdiction. The following cases will confirm this observation: *Thompson v. State*, 28 Ala. 12; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Dunham v. Dunham*, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841; *Forrest v. Fey*, 218 Ill. 165, 1 L.R.A. (N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789; *Beeman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171; *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539; *Dumont v. Dumont*, — N. J. Eq. —, 45 Atl. 107; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Armory v. Armory*, Fed. Cas. No. 333, 3 Biss. 266, Fed. Cas. No. 334 and 6 Biss. 174, Fed. Cas. No. 335; *Rose v. Northwest F. & M. Ins. Co.* 67 Fed. 439.

When a judgment is brought collaterally before a court as evidence, said McLean,

ment." Nor does the constitutional provision stand in the way of such proceeding. Usually, the power of a court of equity to interfere in the enforcement of judgments obtained by fraud is invoked to restrain the plaintiff in such judgments from issuing or enforcing execution. The theory was, as we have seen, that the court of equity did not call into question the integrity of the judgment, but by its decree operated in *personam* upon the plaintiff, enforcing the decree by punishing for contempt disobedience to it. But when the judgment, as in *Pearce v. Olney*, supra, was made the cause of action at law, equity enjoined the plaintiff, shown to be guilty of the fraud, from prosecuting the action. Our equity reports contain many illustrations of the

practice. *Hadley v. Rountree*, 59 N. C. (6 Jones, Eq.) 107. The underlying principle is that the judgment of a sister state will be given the same faith and credit which is given domestic judgments.

It is contended, however, and with force, that the "faith and credit" to be given such judgment is measured by the law of the state in which it is rendered. We find, upon examining the decisions made by the Maryland court, that in that state a court of equity will enjoin the enforcement of a judgment obtained by fraud. We had no doubt that such was the law in that state. In *Little v. Price*, 1 Md. Ch. 182, the chancellor says: "The object of an injunction to stay proceedings at law, either before or after judgment, is to prevent the

J., for the court in *Webster v. Reid*, 11 How. 437, 13 L. ed. 761, it may be shown to be void upon its face by a want of notice to the person against whom judgment was entered, or for fraud.

It is competent for the defendant to show, when sued in one state upon a judgment rendered in a sister state, according to the court in *Warren Mfg. Co. v. Etna Ins. Co.* 2 Paine, 501, Fed. Cas. No. 17,200, that the judgment was obtained by fraud, or that the court which rendered it had no jurisdiction in the cause.

If the defendant sued in one state upon a judgment rendered in another succeeds in establishing that such judgment was fraudulently obtained, or that the court in rendering it had no jurisdiction of his person, or had no jurisdiction of the subject-matter of the action, such judgment is entitled to no credit, and the party claiming under it is driven to his suit on the original cause of action. *Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689.

The doctrine of the case of *Mills v. Dur- yee*, 7 Cranch, 481, 3 L. ed. 411, said the court in *Bimeler v. Dawson*, 5 Ill. 536, 39 Am. Dec. 430, is to be understood as applying to judgments in *personam*, and to those with the qualifications that the defendant may impeach the judgment by showing that it was fraudulently obtained, or that the court which rendered it had no jurisdiction of his person or of the subject-matter of the suit.

If a court renders a judgment without having jurisdiction of the parties or of the subject-matter, or if that judgment has been obtained by fraud, then, in the opinion of the court in *Holt v. Alloway*, 2 Blackf. 108, should an action be brought in another state upon that judgment, the judgment debtor must be permitted to plead the fraud or want of jurisdiction in bar of the suit.

A judgment obtained in one state has the force of a domestic judgment in another; yet it may be impeached in that other for fraud, and the jurisdiction of the court which rendered it over its subject and the persons of the parties to it may

be questioned and adjudicated. *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

A defendant may show in bar of an action on the record of a judgment rendered in another state that such judgment was fraudulently obtained, or that the court pronouncing it lacked jurisdiction either of his person or of the subject-matter of the action. *Welch v. Sykes*, supra.

A judgment obtained by fraud, or rendered without jurisdiction, is no judgment, and will be adjudged void when the fact is established, whether in the state in which the judgment was rendered or in a sister state where an action upon it is brought. *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

The permissible defenses to a foreign judgment in a suit brought upon it are fraud in obtaining it, want of jurisdiction in the trial court, satisfaction and discharge of it, or that it is barred by limitation. *Longueville v. May*, 115 Iowa, 709, 87 N. W. 432.

The act of Congress of May 26th, 1790, to give effect to the full faith and credit clause of the Federal Constitution, does not exclude defenses which inquire into the jurisdiction of the court in which a judgment was rendered, or the right of the state itself to exercise authority over the person or subject-matter of the suit in which it was rendered, or that the judgment has been released, paid, or barred by limitation, or that it was obtained by fraud. *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

While the full faith and credit provision of the Federal Constitution, and the act of Congress to give it effect, have been the subject of more or less diversity of judicial opinion, said the court in *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 51 Am. St. Rep. 650, 34 Atl. 10, it is now entirely settled that the only grounds upon which a judgment of a court of general jurisdiction may be disregarded in another state are: (1) Where the adjudging tribunal had no jurisdiction over the person against whom judgment was pronounced, or over the subject-matter of the

party against whom it issues from availing himself of an unfair advantage resulting from accident, mistake, fraud, or otherwise, and which would therefore be against conscience. In such cases the court will interfere, and restrain him from using the advantage which he has improperly gained,"—citing Story Eq. § 855, et seq. In *Wagner v. Shank*, 59 Md. 313, it appears that, when the complainants were summoned in the original actions, they employed counsel to defend them. The counsel saw plaintiff in the actions, and he concluded to dismiss the cases, and executed an agreement to do so. Counsel notified his clients of the agreement, and "they supposed the matter was finally disposed of, and gave themselves no further con-

cern about it." The plaintiff, without notice to counsel or parties, had the magistrate to enter judgments, in 1,296 cases, amounting to \$127,836, and \$2,386, costs. Miller, J., after reciting the facts, says: "These facts alone make a plain case for relief in equity. . . . As to the jurisdiction of a court of equity to pass the decrees appealed from, we entertain no doubt. There are prayers in most of these bills, not only that these judgments may be perpetually enjoined, but that they may be canceled." After citing authorities sustaining the right of complainant to have the relief prayed, he concludes: "And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also

litigation; and (2) where the adjudication of the foreign tribunal has been obtained by fraud.

While it is undeniably true, said the court in *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 54 Mo. App. 147, affirmed in 127 Mo. 242, 27 L.R.A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010, under the Constitution of the United States, and the acts of Congress passed to give effect thereto, that the record of judicial proceedings of the state, duly authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state whence such record shall be taken, this does not preclude an inquiry into the jurisdiction of the court in which a judgment was rendered to pronounce it, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for, fraud in its procurement.

And similar language is found in *Re Kimball*, 155 N. Y. 62, 49 N. E. 331.

When a court has power to make a decree, it can be impeached only for fraud in the party who obtains it. *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283.

"It is an axiomatic proposition," said Swayne, J., speaking for the court in *McNitt v. Turner*, 16 Wall. 366, 21 L. ed. 348, "that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error."

Chief Justice Fuller, in delivering the opinion of the majority of the court in *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, after citing the provisions of the Constitution and statutes of the United States respecting the according in each state of full faith and credit to the public acts, records, and judicial proceedings of every other state, said: "This does not prevent an inquiry into the jurisdiction of the court in which a judg-

ment is rendered to pronounce the judgment . . . nor whether the judgment is founded in, and impeachable for, a manifest fraud."

And that rule was recognized in *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122; *Glass v. Blackwell*, 48 Ark. 50, 2 S. W. 257; *Stanton v. Embury*, 46 Conn. 65, 595; *Sharman v. Morton*, 31 Ga. 34; *Jones v. Warner*, 81 Ill. 343.

We are not to be understood to admit, declared the court in *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526, that the immunity against collateral attack which a foreign judgment sued upon enjoys in the second jurisdiction includes an exemption from assault, where, although jurisdiction of the person was obtained, there has been a fraud upon the person against whom the judgment was rendered, in the circumstances of taking the same, and for which collateral relief could have been granted in the jurisdiction in which the judgment was rendered.

The judgment of a sister state, in the opinion of the court in *S. Dwight Eaton Co. v. Kelly*, 45 Ill. App. 533, may be impeached for fraud and circumvention in obtaining it.

It is the recognized law of the state of Iowa, according to the court in *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129, that, when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defense to an action brought here upon it.

A court of equity may refuse to give effect to the judicial proceedings of a sister state which have been procured by fraud, or which are the product of fraud, whether such proceedings are put forward as the foundation of an action, or as the ground of a defense. *Supreme Council, R. A. v. Carley*, 52 N. J. Eq. 642, 29 Atl. 813.

A court of one state may, when it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state. *Gray*

preventive of injustice." Concluding a very able opinion, he says: "The strong arm of a court of equity has protected them, and the decrees in their favor will be affirmed." It is thus apparent that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the courts of this state; and in giving the defendant relief, we are giving the judgment the same "faith and credit" which it has in that state. Mr. Bailey, in his work on Jurisdiction, §§ 202, 203, notes the language of Judge Gray in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242, and Fuller, Ch. J., in *Cole v. Cunningham*, 133 U. S. 107, 33 L.

ed. 538, 10 Sup. Ct. Rep. 269, saying: "However, it should be conceded, whatever may have been the rule in the court prior to the decision in *Cole v. Cunningham*, that the rule there stated must be taken as the present doctrine of that court." He notes the diversity in the several states, saying that in Maryland the court has not followed the rule in *Cunningham's Case*, citing *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121. In that case the question was whether in that state the judgment rendered in Virginia could be collaterally attacked for fraud. That is not the question here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud; and, as we have seen, it may be. We are not seeking to know

v. *Richmond Bicycle Co.* 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663, reversing 40 App. Div. 506, 58 N. Y. Supp. 182.

It is well settled, according to the court in *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056, reversing 67 Misc. 267, 122 N. Y. Supp. 401, that a judgment rendered in our own or in a sister state, or in a foreign country, may be attacked collaterally for want of jurisdiction or for fraud perpetrated upon the court or upon one of the parties to the action.

By virtue of the Constitution of the United States, and the acts of Congress in pursuance thereof, judgments of sister states stand upon the same footing as domestic judgments, and are conclusive of all questions involved in them except fraud in their procurement, and whether the parties were properly before the court. *Marsh v. Atlantic Coast Line R. Co.* 151 N. C. 160, 65 S. E. 911.

A decree rendered by a court in a sister state, having jurisdiction both of the parties and of the subject-matter, when pleaded in the courts of another state, either as a cause of action or as a ground of defense, must be regarded as conclusive of all the rights which were adjudicated and settled therein, "unless," it was significantly said in *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621, and without any allusion whatever to the decision in *Anderson v. Anderson*, 8 Ohio, 108, "it be impeached for fraud."

There was set up in the case of *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122 (which was an action pending in the state of Alabama with respect of a railroad lease), a judgment rendered in Tennessee by a court having jurisdiction both of the parties and the subject-matter in a suit begun while the Alabama suit was pending, which was relied upon as *res judicata* in the Alabama case. The Tennessee decree, it was said in the opinion, was not attacked as fraudulent or collusive. If it had been fraudulent or the result of collusion, it would, of course, according to the Alabama court, have exerted no influence upon the pending 32 L.R.A. (N.S.)

litigation in Alabama. This statement was merely a *dictum*, as the question was not presented in the case.

If a judgment rendered in another state was procured by a fraud upon the legal rights of the person against whom it was rendered, it may be questioned for that reason collaterally in the courts of New York. *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

In *Gray v. Richmond Bicycle Co.* 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663, reversing 40 App. Div. 506, 58 N. Y. Supp. 182, both parties conceded that a judgment recovered in a sister state through the fraud of one party in procuring the appearance of the other is not binding on the latter when an attempt is made to enforce such judgment in New York; and noting that fact, the court proceeded without further discussion to consider the question whether the evidence would have authorized a jury to find the defendant guilty of fraud in procuring the judgment set up; and having reached the conclusion that there was sufficient evidence of fraud to carry the cause to the jury, decided therefore, that the direction of the trial court of a verdict in favor of the defendant was error, and required a new trial to be granted.

The fraud in procuring a judgment, which may be invoked to impeach a judgment rendered in a sister state, is one that should and does include all such facts and circumstances as would induce and enable the courts of equity, or courts having jurisdiction of the matter in the state where the judgment was rendered, to interfere to prevent the enforcement of an unconscionable recovery. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

e. Judgments vulnerable at home.

There is nothing in the language of the Constitution and acts of Congress requiring the judgments of the respective states to have in sister states any other force or effect than they have where they are rendered. If, then, a judgment may be re-

what the courts of Maryland would permit to be done if a North Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon and attacked for fraud. The plaintiff says, however this may be, the defendant can have this relief only in Maryland; that he must go into that state, and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that, in bringing an action in another

state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states. . . . It is true that two of the decisions of the Supreme Court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment—[citing] *Christmas v. Russell*, supra, and *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564. We apprehend, however, that these decisions were inapplicable

sisted at home on the ground of fraud, it may be resisted on the same ground in another state.

A judgment conclusive in the state where it was rendered is equally conclusive everywhere in the courts of the United States. *Christmas v. Russell*, 5 Wall. 302, 18 L. ed. 478; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

When a suit is brought in one state upon a judgment rendered in another state, such judgment is to be given the same force and effect that it has in the state where it was rendered. *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

When a decree rendered by a court in a sister state, having jurisdiction of the parties and of the subject-matter, is offered in evidence or pleaded as the foundation of a right in any action in the courts of another state, it is entitled to the same force and effect which it had in the state where it was pronounced. *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

The doctrine of *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411, was, according to the court afterwards in *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378, that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced; and whatever pleas would be good to a suit thereon in such state, and no others, could be pleaded in any other court in the United States.

The effect of the decision of the Supreme Court of the United States in the case of *Mills v. Duryee*, supra, it was said in the opinion of the court in *Bimeler v. Dawson*, 5 Ill. 536, 39 Am. Dec. 430, was to place judgments of other states on the footing of domestic judgments, and to give them the same dignity and conclusive effect when sued on in a sister state that they had in the state where they were rendered. That decision, it was added, has been acquiesced in and followed by the state tribunals, and may now be regarded as the settled law of the country.

Under the Constitution and laws of the 32 L.R.A. (N.S.)

United States, the judgments in *personam* of the several states are placed on the footing of domestic judgments in sister states, and are to receive the same credit and effect when sought to be enforced in any state as by law or usage they have in the particular state where rendered. *Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689.

It is settled law, according to the court in *First Nat. Bank v. Cunningham*, 48 Fed. 510, that under the constitutional provision requiring full faith and credit to be given in each state to the judicial proceedings of any other state, and the act of Congress passed in pursuance thereof, that a judgment rendered in one state shall have the same credit, validity, and effect in any other state of the United States which it had in the state in which it was rendered; and that whatever pleas would be good in a suit upon it in one state, and none other, can be pleaded in defense to a suit thereon in any other court within the United States.

The effect of a judgment of a state court, when pleaded in a Federal court, or a court of a sister state, in support of a plea of *res judicata*, is to be determined by the law or usage of the state in which the judgment was rendered. *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561.

In an action brought in one state upon a judgment rendered in another, exceptions to it may be taken which would be admissible in the jurisdiction where the judgment was rendered. *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

The full faith and credit provision of the Constitution of the United States does not give greater force to the judgment of a sister state than that which a judgment of the same state has in it. *White v. Reid*, 70 Hun, 197, 24 N. Y. Supp. 290; *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555; *Rogers v. Gwinn*, 21 Iowa, 58; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225.

The Federal Constitution and act of Congress, it was said in *Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995, require nothing

cable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law." Freeman, Judgm. § 576. If those states in which equitable remedies were administered only by courts of equity enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court and one form of action, the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by the case of *Gray v. Richmond Bicycle Co.* 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663. The action was brought on a note

which the court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured by fraud. Vann, J., said that it was admitted that "even a foreign judgment may be successfully assailed for fraud in its procurement. . . . It was not necessary for the plaintiff to go into the state of Indiana and obtain relief from the judgment through its courts, for, as we have held, 'a court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state.' . . . The assertion of the foreign judgment as a bar

more than that a judgment shall be given precisely the same effect in other states that it has in the state in which it was rendered; and neither these nor any rule of comity requires courts of one state to shield a judgment of a sister state from attacks that might successfully have been made upon it in its own state. The decision in that case was reversed in 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614, but no condemnation of the statements mentioned is to be implied from such reversal.

It is clear, according to the court in *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728, that it was not the purpose of the Federal Constitution to give to the judgments of a state court a more conclusive effect, when sought to be enforced in a sister state, than they would be entitled to in the state where rendered.

In determining the effect of a judgment sued upon in another state, and how far it may be re-examined, and what relief, if any, may be granted, a court is to act and decide precisely the same as the courts of the state in which the judgment was rendered would do were the same questions presented there. *Brown v. Parker*, 28 Wis. 21.

If a defense to a judgment would be good in the state in which the judgment was rendered, it is equally valid and available against such judgment in a sister state. *Ibid.*

When fraud is an available defense at law against a judgment in the state where the judgment was rendered, it may be set up as a defense in an action or proceeding in another state, founded upon such judgment, and such defense is no more a collateral attack upon the judgment than a direct action in equity would be. *Warrington v. Ball*, 33 C. C. A. 609, 62 U. S. App. 413, 90 Fed. 464; *Ball v. Warrington*, 47 C. C. A. 447, 108 Fed. 472; *American Nat. Bank v. Supplee*, 52 C. C. A. 293, 115 Fed. 657.

If, in a suit upon a judgment in the state in which it was rendered, a party can avail himself of the defense that it was 32 L.R.A. (N.S.)

recovered by fraud, the same defense is available to him in a suit upon such judgment in a court of a sister state. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

A judgment rendered in a probate court of a state whose statutes declare such a judgment void if obtained by means of any fraud practised upon the court or the heirs, and that void judgments are mere nullities, and may be so held in any court when it becomes material to the interests of the parties to consider them, may be impeached for fraud in another state, since the Federal Constitution only requires that judgments are to be given the same force and effect in sister states that they have in their own. *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555.

Wherever, without fraud or neglect on the part of a person against whom a judgment has been rendered, there has been a fraud successfully practised in procuring such judgment amid circumstances that would authorize the courts of the state where it was rendered to interfere and stay the enforcement of an unconscionable recovery, the same defense may, in some way, be made available when the judgment is the basis of an action in another state. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

No doubt can exist, according to the court in *Coffee v. Neely*, 2 Heisk. 304, that if it were clearly shown in the proper court of any state where a judgment has been rendered, that it was obtained by fraud, it would be set aside; and where an action is brought upon it, it can have no more force or effect in the state where the suit is brought than in the state where the judgment was rendered.

A judgment of one state, sued upon in another, may be impeached for want of jurisdiction of the person of the party against whom it was rendered, and for fraud in procuring it, in any case where such a defense would have been good, or the facts upon which it is founded would have been effectual, to prevent the enforcement of such judgment in the state in which it was rendered. *Bank of Chadron*

in this action was an attempt to enforce it indirectly; and it was the duty of the trial court to send the case to the jury with the instruction that, if they found the judgment was procured by fraud, it could not be asserted as a bar in this state." *Davis v. Cornue*, 151 N. Y. 172, 179, 45 N. E. 449. The same rule is laid down by *Black*.

In some of the states, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now,

when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense; for if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the Constitution does not require. *Black*, Judgm. § 918. That the defense made by defendant may, under our Code, be set up by way of answer, is well settled. The cases in point are collected in *Clark's Code*, 3d ed. p. 238.

The remaining question is whether the defense is available to defendant in a justice's court. It is said that the remedy of defendant being an injunction against proceeding with the action, resort must be had to the superior court, having equitable

v. Anderson, 6 Wyo. 518, 536, 48 Pac. 197, 49 Pac. 406, on second writ of error, 7 Wyo. 441, 53 Pac. 280.

Whenever it becomes necessary for a court of one state, in order to give a judgment rendered in another state full faith and credit, to ascertain the effect which it has in its home state, the law of that state must be proved like any other fact. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

When a judgment at law, recovered in one state, is sued upon in another state, for the purpose of collecting it, a subsequent decree in equity, rendered in the state in which the judgment was obtained, annulling it for fraud, and enjoining altogether proceedings under it, is a complete and conclusive defense to the action in the second state. *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152.

The case of *Dobson v. Pearce*, *supra*, while affirming the general proposition that fraud in obtaining it vitiates a judgment not only in the state in which it was rendered, but in other states in which it is sought to be enforced, and that its collection or enforcement may be restrained in equity in the one state as well as in the other, nevertheless simply decided that a judgment at law, recovered in a sister state, and upon which action was brought, which had been annulled for fraud by a court of chancery in the state in which it was rendered, could not be enforced outside of that state, and that the record of the decree in chancery, annulling it for fraud, when duly authenticated, was as effective and as conclusive as the original judgment had been while it stood.

An action in one state is not maintainable upon a judgment recovered in a sister state, where, by the laws of that state, the judgment was stayed by the giving of a bond for a new trial as a matter of right, by statute, notwithstanding it is alleged that a second trial never took place, but was prevented by a fraudulent and collusive compromise and entry of the judgment thereon. *Gilpin v. Baltimore & O. R. Co.* 44 N. Y. S. R. 298, 17 N. Y. Supp. 520. 32 L.R.A. (N.S.)

f. In respect of parties.

There is one class of litigants always and everywhere entitled to attack a judgment on the ground that it is fraudulent,—those who were not parties or privies to the action in which the judgment was rendered. A judgment is conclusive only upon those who were parties to the suit in which it was pronounced, or who stand in privity to such parties, and it is conclusive upon no one else. In dealing with an attack in one state upon a judgment of a sister state, alleged to be tainted with fraud, the difficulty of the court, so far as parties are concerned, arises in determining the question of privity.

What may constitute a fraud sufficient to vitiate a judgment, who can object to the judgment as fraudulent, and in what circumstances fraud can be set up to avoid a judgment, are material questions in every case in which a judgment is alleged to be vitiated by fraud. *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.

A domestic judgment obtained by fraud or collusion is open to attack in a subsequent proceeding in the state in which it was rendered, by any party against whom it is alleged to be conclusive, who was not a party or a privy to the suit in which it was rendered. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

The constitutional rule requiring full faith and credit to be given to the judicial proceedings of the courts of a sister state does not preclude a litigant from impeaching collaterally, on the ground of fraud, a decree rendered by a court of another state, in an action which was not between the same parties. *Mussina v. Belden*, 6 Abb. Pr. 165.

Although a third person acquiring an interest in property without notice of the fraudulent character of a judgment affecting such property may attack it for fraud in a collateral proceeding, the parties and their privies can obtain relief from a fraudulent decree only by a direct proceeding for that purpose, and in the court which made it, either by a writ of error or by

jurisdiction. The question is not free from difficulty. It would seem, however, that, in view of the frequent decisions of this court that, while a justice's court has no jurisdiction to administer or enforce an equitable cause of action, a defendant may interpose an equitable defense in that court, his Honor correctly submitted the issue raised by the defense. In *Lutz v. Thompson*, 87 N. C. 334, the defendants sought to prevent a recovery upon a bond by showing that it had been executed in accordance with certain agreements, and that by reason thereof it would be inequitable to enforce one part of it and leave the other part unfulfilled. The objection was made that this defense, being equitable in its character, could not be interposed in a jus-

tice's court. Ruffin, J., said: "Whenever such a court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination; . . . and though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense." In *McAdoo v. Callum*, 86 N. C. 419, originating in a justice's court, for the purpose of ousting defendants, tenants of the plaintiff, the defendants set up by way of defense a contract for a renewal of the lease, etc. To the objection that the justice had no jurisdiction to hear such defense, Smith, Ch. J., said: "While this provision for renewal is not itself a re-

some other means invoked to set aside the judgment. *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

Judgments presented as claims in a Federal court against a bankrupt's estate are open to attack collaterally from other creditors, upon the ground that they represent no real indebtedness, but were fraudulently and collusively confessed and entered, pursuant to a scheme to defraud other creditors. *Chandler v. Thompson*, 57 C. C. A. 230, 120 Fed. 940.

A judgment recovered by the administrator of an intestate negligently killed by a railroad company, and paid by the defendant in one state, may not, if valid and binding upon its face, be successfully attacked for fraud in a subsequent action by another administrator, appointed in the state in which the intestate was domiciled at the time of death, and brought for the same cause. *Richmond & D. R. Co. v. Gorman*, 7 App. D. C. 91.

A judgment of divorce rendered in another state is not subject to an attack in a sister state, by a second spouse of the successful litigant, upon the ground that it was procured by fraud and collusion. *Ruger v. Heckel*, 85 N. Y. 483.

An action brought in one state by a trustee or receiver of an insolvent corporation of another state, against a stockholder, to recover an assessment upon the stock, or a part of the subscription price, is not open to the defense that the judgment or decree against the corporation under which the plaintiff's rights accrued was procured by collusion with one of the resident directors. *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115, and 72 Md. 351, 20 Atl. 121.

Inasmuch as the supreme court of Kansas, according to the court in *Warrington v. Ball*, 33 C. C. A. 609, 62 U. S. App. 413, 90 Fed. 464, has decided that a suit by a judgment creditor of a corporation of that state, against a stockholder, to enforce the statutory liability of the defendant, is founded upon the judgment against the

corporation, and that the defendant may impeach such judgment for fraud or want of jurisdiction, an allegation by a defendant in the Federal courts, that such a judgment entered in Kansas was fraudulent and collusive, states a good defense to the action, because the same faith and credit, and no more, is given to the judgment in other courts to which it is entitled, and which would be given to it, in the state of Kansas.

The same ruling was made in *Ball v. Warrington*, 47 C. C. A. 447, 108 Fed. 472, and *American Nat. Bank v. Supplee*, 52 C. C. A. 293, 115 Fed. 667.

A debtor who has been garnished in another state in an action against his creditor, and who, under the compulsion of legal process in that action, has paid the garnished debt, is protected by such payment upon production of the exemplified judgment in a subsequent action by his creditor to recover the debt, notwithstanding irregularities and defects in the foreign proceedings against the creditor which would have been fatal had such creditor appeared and contested the action in his own behalf before judgment. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484.

A judgment rendered against a garnishee in one state, upon regular proceedings had in a court invested with jurisdiction of the cause and the parties, without any collusion between the plaintiff and the garnishee, is binding and conclusive in every other state, and constitutes a complete defense to the garnishee when sued for the same debt by his original creditor. *S. Dwight Eaton Co. v. Kelly*, 45 Ill. App. 533.

It was contended in *S. Dwight Eaton Co. v. Kelly*, supra, that a judgment rendered against the defendant in another state as garnishee of the debt sued for, and the payment of such judgment, furnished no defense to an action to recover the garnished debt by the original creditor in another state, because it was alleged to have been obtained by fraud and collusion of the parties; but the court held that no sufficient

newal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejectment of the defendants." *Hurst v. Everett*, 91 N. C. 399. We can see no good reason why the defendant may not set up, by way of defense, the facts which show that the judgment, plaintiff's cause of action, was obtained by fraud practised upon him. *Bell v. Howerton*, 111 N. C. 73, 15 S. E. 891; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Vance v. Vance*, 118 N. C. 865, 24 S. E. 768. These and other cases in our reports illustrate the rule of practice, that equitable defenses may be set up in the court of a justice of the peace. In *Earp v. Minton*, 138 N. C. 202, 50 S. E. 624, the suit was not upon a judgment, but the judgment in an action between the plaintiff and another party, one Cranor, was offered in evidence to sustain plaintiff's title. The judgment, when so offered, could not be attacked collaterally, as shown both upon reason and the authorities cited. In our case, the defendant, if in the superior court, would have pleaded the fraud in bar of

plaintiff's recovery, just as if the suit had been upon a bond under seal obtained by fraud. We can see no good reason why he may not, for the same purpose, set it up in the justice's court. It would be incompatible with our conception of remedial justice under the Code system to require the defendant to submit to a judgment, and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the Constitution and the adoption of the Code practice. We but follow the line marked by *Ruffin, J.*, when he announced the general principle in *Lutz v. Thompson*, *supra*.

We find no error in the ruling of his Honor in regard to the burden of proof or probative force of the testimony required to establish the defense. We have examined the authorities cited by plaintiffs' counsel, and while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority, and those best sustained by reason.

There is no error.

evidence was presented, establishing either fraud or collusion; and therefore that the judgment was conclusive.

III. The fraud.

a. In general.

The cases above cited are certainly sufficient to show the existence of the abstract right of resisting in one state, on the ground of fraud, a judgment rendered in another state. There are not many legal propositions that command a greater number of supporting authorities. And yet, in almost as many cases, there are to be found statements by the judges apparently directly to the contrary. The following are illustrative examples of such cases:

A judgment rendered in one state by a court which had jurisdiction is conclusive between the parties in another state, and not to be impeached for fraud in obtaining it in a suit brought upon it. *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148.

When a court has jurisdiction of the subject-matter of an action, and has acquired jurisdiction of the persons of the parties to such action, its judgment may not be enjoined in another state, either on the ground that the cause of action had no existence, or because of fraud in obtaining the judgment. *Smedes v. Ilsley*, 68 Miss. 590, 10 So. 75.

When it appears that, in a suit at law in another state, a defendant was personally served with process, and duly appeared and made his defense, and that the court

had jurisdiction of the subject-matter of the suit, the validity of the judgment rendered in such suit cannot be questioned in the courts of a sister state; neither will the courts of a sister state look into the transaction upon which the judgment is founded, for the purpose of ascertaining whether it ought or ought not to have been rendered. *Black v. Smith*, 13 W. Va. 780.

A judgment rendered in the District of Columbia by a court having jurisdiction of the subject-matter of the action, and after a regular appearance and trial by the parties, is conclusive when sued upon in any one of the United States, and is not open to impeachment for fraud, irregularity, or other vice or defect in its rendition. *Johnson v. Dobbins*, 12 Phila. 518.

In *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067 (a controversy between partners, in which a decree for dissolution and accounting, rendered in another state, was set up in bar), it was contended that the decree had been obtained by fraud, and that the proceedings under it were fraudulently conducted. But the court, in reply, said that there were no allegations in the pleadings pointing out what acts of fraud were complained of, but even if the pleading had been sufficient to admit that proof, the judgment of the sister state could not be collaterally attacked upon that ground.

It is well settled, according to the court in *Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. 609, that to an action in one state, on a judgment obtained in another state, an alleged fraud in obtaining the judgment by means of a collusive arrangement be-

tween the plaintiff and the representatives of the defendant is not allowed to be pleaded as a defense.

A person against whom a judgment has been rendered in one state by fraud, collusion, and conspiracy cannot maintain an action against the alleged conspirators in another state for damages sustained by him in the recovery and execution of such judgment. *Engstrom v. Sherburne*, 137 Mass. 153.

The conflict of opinion indicated is seeming rather than real. The explanation is that in the opposing expressions, the differing jurists had in mind different sorts of fraud.

It is not true that a judgment may be impeached for any and every fraud perpetrated in obtaining it, and it is true that it may be avoided for some frauds which were instrumental in getting it.

Where a defendant has been duly served with process, and a judgment has been recovered against him, the kinds of fraud for which such judgment can be attacked are very few. *Trebilcock v. McAlpine*, 62 Hun, 317, 42 N. Y. S. R. 238, 17 N. Y. Supp. 221.

As a general rule, no judgment can be impeached for fraud by one who is a party or a privy to such fraud. *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

Thus, notwithstanding a decree of divorce obtained in a state in which the parties were not bona fide residents was obtained by the fraudulent conduct of one of them, it is still conclusive upon the other in the home state, if such other party appeared in the suit, and countenanced or participated in the fraud. *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.

b. Relating to the cause of action.

In its effect upon a judgment, there is a wide difference between fraud which may be a defense to the action in the first instance, and a fraud practised in procuring the judgment. *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891.

The court was of the opinion, in *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 47 U. S. App. 1, 76 Fed. 429, that if it should be conceded that the facts alleged and proved to impeach a judgment of a state court, there pleaded as a bar to the plaintiff's claim, would disclose a legal fraud, it was not such a fraud as could be set up in a collateral attack upon the judgment.

When, in a state in which a judgment has been obtained, the judgment or decree of a court of competent jurisdiction is by law final not only as to the subject-matter actually determined by it, but as to every other matter which the parties to the cause might have litigated and had decided, a defense to such judgment when sued upon in a sister state, that it was obtained by fraud, is not good. *Barras v. Bidwell*, 3 Woods, 5, Fed. Cas. No. 1,039.

A party who has been duly served with

process, and who has appeared in the original action, cannot, when sued in another state upon the judgment obtained in such action, attack such judgment on account of any matter of which he might have availed himself in the original suit, when there is no proof of fraud or surprise. *Weir v. Vail*, 65 Cal. 466, 4 Pac. 422.

A judgment rendered in one state is conclusive in every sister state as to all defenses that were made or might have been made in contesting the cause of action upon which the suit was brought. *Leathe v. Thomas*, 109 Ill. App. 434, affirmed in 218 Ill. 246, 75 N. E. 810, 4 A. & E. Ann. Cas. 79.

No defense is available to a person sued upon a judgment rendered in another state, which was open to him in the action in which the judgment was rendered. *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115, and 72 Md. 351, 20 Atl. 121.

The whole current of authorities, declared the court in *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203, speaking, however, with reference to a domestic judgment, seems to recognize the principle that where a cause has been instituted in a proper open forum, where all matters of defense were open to the party sued, the judgment is conclusive until reversed by a superior court which has jurisdiction of the same cause on a writ of error. In that case, the judgment, it was alleged, had been procured by a gross fraud.

A fraud perpetrated anterior to a judgment, or rather, to the inquiry which resulted in the judgment, and which, by proper effort, might have been set up to defeat the recovery of such judgment, is not such a fraud as will prevent the judgment from being conclusive upon the parties, both in the state in which it was rendered and any sister state where proceedings upon it may be taken. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

Fraud which entitles an injured party to enjoin and annul a judgment against him, whether domestic or foreign, must be a fraud in procuring the judgment, and not merely one which vitiated the cause of action. *Payne v. O'Shea*, 84 Mo. 129; *Crim v. Crim*, 162 Mo. 544, 54 L.R.A. 502, 85 Am. St. Rep. 521, 63 S. W. 489.

The rule is that where a judgment is impeached on the ground of fraud, such impeachment can be successful only when satisfactory evidence is offered that the fraud was perpetrated in the very conception and procurement of the judgment. *Hudson-Kimberly Pub. Co. v. Young*, 90 Mo. App. 505.

The well-established doctrine that fraud vitiates everything into which it enters applies as well to a judgment as to a contract, provided the fraudulent act is so connected with obtaining the judgment as to enter into it, or form the basis upon which it stands, and by which it was procured. *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891.

A fraud which goes only to a cause of action, and which may be pleaded as a defense thereto, is adjudged when a judgment

is rendered by a court having jurisdiction of the subject-matter and of the person of the parties, and is conclusively disposed of by the rendition of the judgment. *Ibid.*

A judgment rendered by a court in one state may be impeached upon the ground of fraud in a suit brought upon it in another state only when the fraud alleged was one in procuring the judgment itself, and not one in concocting and supporting the cause of action. *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306.

The fraud in obtaining a foreign judgment which will warrant a court of equity in enjoining it does not relate to the cause of action or the evidence adduced before the foreign court, but to deceit and positive fraud in procuring jurisdiction, or in preventing the defendant from making defense. *Wilson v. Anthony*, 72 N. J. Eq. 836, 66 Atl. 907.

A person against whom a judgment has been rendered cannot impeach it unless he can show that it was obtained by the fraud of the other party; for it is the obtaining of the judgment that is complained of, and not the question of an independent defense that might be made to the original cause of action, had no such judgment been rendered. *Turley v. Taylor*, 6 Baxt. 376.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court, and not frauds in the matter on which the judgment or decree was rendered. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929.

A judgment recovered in one state, and sued over again in another, is conclusive; and the defendant cannot retry the merits of the case by alleging that the judgment was fraudulently obtained. *Brainard v. Fowler*, 119 Mass. 262.

When the merits of a case have been fairly submitted to a court having jurisdiction of the subject and of the parties, even upon an *ex parte* hearing, a court of equity will not, upon an allegation of fraud, enter upon a retrial of the merits, and weigh, adjust, and reconcile evidence to see whether or not, in its opinion, the original tribunal pronounced a correct judgment. *Doughty v. Doughty*, 27 N. J. Eq. 315, affirmed in 28 N. J. Eq. 581.

The rule is that, in order to impeach a judgment for fraud, there must be proven facts showing it to be against conscience to execute the judgment, and which the injured person could not have availed himself of by proving in a court of law, or which he was prevented from presenting by fraud on the part of his adversary, without any fraud or negligence in himself or his agents. *Kinnier v. Kinnier*, 45 N. Y. 635, 6 Am. Rep. 132.

It is not, of course, denied, said the court in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, that there may be such fraud upon a 32 L.R.A. (N.S.)

tribunal and upon the opposite party in judicial proceedings as to vitiate a judgment, but the fraud in such case is made up of the same constituents as is fraud in any other case, and the same state of facts must appear which is required in other cases. There must be fraudulent allegations and representations, designed and intended to mislead, with knowledge of falsity, and resulting in damaging deception.

In *Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71, a bill in chancery had been filed for the purpose of enjoining the enforcement of a judgment of the Federal court, on the ground that it was obtained by fraud, but had been dismissed, because the fraud alleged was not extrinsic or collateral to the issues tried in the action, but was properly available as a matter of defense if it existed; and the court, upon appeal, affirmed the dismissal of the bill, but coupled it with the statement that it had no doubt of the jurisdiction of a state court to entertain a bill to restrain the enforcement of a decree or judgment of a Federal court, on the ground that it had been procured by fraud, because that was an independent right of action, but did not involve a retrial of the issues disposed of in the Federal court.

c. False testimony.

A court of equity will not take jurisdiction to set aside the probate of a will, or a grant of letters of administration, on the ground of fraud, mistake, or forgery, because this is within the exclusive jurisdiction of the probate court. *Broderick's Will* (*Kieley v. McGlynn*) 21 Wall. 503, 22 L. ed. 599; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

A decree rendered in one state by a court of competent jurisdiction, in the settlement of the estate of a deceased person, cannot be voided in another state upon allegations that it was obtained by fraud, misrepresentation, and gross and wanton negligence and mistake of the defendants. *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484.

An allegation that a judgment rendered by a court of competent jurisdiction having jurisdiction over the parties, in another state, was procured by fraud, is not sustained by specification that it was rendered in a suit brought upon a promissory note to which the signature was forged, and which was therefore false and fraudulent, since this is a defense going to the merits of the cause of the action. *Packer v. Thompson*, 25 Neb. 688, 41 N. W. 650.

The doctrine is well settled that a judgment will not be annulled because founded upon a fraudulent instrument, perjured testimony, or other matters which were actually before the court, and passed upon in rendering such judgment. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929.

When a transcript of a decree of divorce rendered by a court of one state, duly au-

thenticated, is offered in evidence in a court in a sister state, no questions are open to inquiry except those of jurisdiction. Whether a person suing for a divorce has any legal ground for it, or whether the allegations of his bill of complaint or the proofs offered to sustain them are true or false, does not affect the validity of the decree entered in the suit, if the court had jurisdiction to grant it. *Forrest v. Fey*, 218 Ill. 185, 1 L.R.A. (N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789.

In a suit upon a judgment of another state, an answer setting up irregularity in the proceedings in the court of record which rendered such judgment, averring the rendition thereof upon testimony known to be perjured and false, is bad on demurrer. *Riley v. Murray*, 8 Ind. 354.

A decree of divorce obtained by a husband against his wife, in a state of which he is an actual resident, although he has not resided there a sufficient length of time, as required by the law of such state, to justify the granting of the decree, but falsely testifies that he has, is upon the same footing as any other decree obtained by false testimony, and is conclusive everywhere until directly attacked and set aside in the state in which it was rendered. *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017.

A bill in equity to obtain an injunction against the suing or enforcing in the state in which the bill is filed, of a judgment rendered in another state, is not maintainable on the ground that such judgment was procured by the false and fraudulent testimony of the prevailing party. *Metcalf v. Gilmore*, 59 N. H. 417, 47 Am. Rep. 217.

Although the case of *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148, laid down the broad proposition in the opinion that the judgment of another state could not be impeached for fraud in obtaining it, in a suit brought upon it in a sister state, the plea against it was that it was obtained by false and fraudulent testimony, which is, of course, not quite sufficient to justify so broad a statement as was made in the opinion.

A judgment of one state is not open to attack in another state collaterally, upon the ground of fraud, which is alleged to consist in false and perjured testimony of witnesses in the action in which the judgment was rendered. *El Capitan Land & Cattle Co. v. Lees*, 13 N. M. 407, 86 Pac. 924.

The court in *El Capitan Land & Cattle Co. v. Lees*, supra, referred to the contention of counsel, that equitable defenses might be set up in actions at law, and that the defense of fraud might be set up in an action upon a foreign judgment, and said: These propositions of law may be conceded to be correct in a proper case, but the question still remains whether or not the case at bar is one in which the relief sought may be granted upon the facts stated; and then decided that false testimony from witnesses in the trial of the action in which the judgment was rendered was not such

fraud as laid the judgment open to collateral attack.

When a judgment has been procured by means of ordinary perjury, without more, it is very generally held that it does not present a case for the interference of a court of equity to restrain the enforcement of or annul the judgment. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

It was contended in *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983 (a suit in chancery by the alleged widow of a decedent, to recover dower in his estate), that a decree of divorce which had been granted in a sister state, in favor of the deceased, upon substituted service, was without force and effect, because the deceased had untruthfully and fraudulently claimed to be a resident when he was not; but the court held the decree effectual upon the ground that the proceedings were regular, and that residence had been duly alleged and found to be a fact by the court which granted the decree.

That a judgment was rendered under a mistake as to facts, and that false testimony was given by a witness before the court which rendered it, does not establish that the judgment was obtained by fraud, since all this may be consistent with good faith in the party who recovered the judgment, or be due to negligence upon the part of his adversary. *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124.

When a nonresident defendant in an action at law in a state court appears and defends, and thereafter prosecutes an appeal from the judgment against him which is affirmed, and subsequently prosecutes a suit in equity in the same state, to set aside the judgment and enjoin its enforcement, on the ground that it was procured by fraud and perjury, and is refused a preliminary injunction, the Federal court is justified in declining to interfere in his behalf to restrain the collection of the judgment. *Bailey v. Willeford*, 69 C. C. A. 226, 136 Fed. 382.

d. Upon the law of the forum.

Whenever an act is done in *fraudem legis*, it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed. *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225.

It is an established principle that the citizens of a state are bound by its laws, and not permitted to do any act to evade or counteract their operation, the effect of which would be to deprive other citizens of rights which those laws are intended to secure. *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 54 Mo. App. 147, affirmed in 127 Mo. 242, 27 L.R.A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010.

In *Baltimore & O. S. W. R. Co. v. McDonald*, 112 Ill. App. 391, there was a suit begun before a justice of the peace to recover wages which were, under the statute of Illinois, exempt from garnishment,

and which, by statute, were recoverable from the employer notwithstanding the service of any writ of garnishment. The company set up in defense that it had been subjected to garnishment in the state of Kentucky, and compelled to pay the plaintiff's claim, by a judgment rendered in the Kentucky court. It appeared that the judgment had been recovered by an assignee of a creditor of the plaintiff, who resided in the state of Illinois, and also that there was a statute in Illinois which made a transfer of claims for the purpose of having them collected out of wages by means of an attachment or garnishment a misdemeanor, punishable by fine. The court held that the judgment afforded the railroad company no protection against the plaintiff's demand for wages, but it was careful to say that, inasmuch as, in the state of Illinois, garnishment proceedings against an employer for wages due from him to his employee stood in a class alone, clearly differentiated from all other garnishment proceedings, therefore, whatever might be said in its opinion in the case must be understood as applying not to the subject in general, but to the particular class of garnishment proceedings within which the case fell; and that the real question before it was not, shall full faith and credit be given to the judgment set up by the company? but that, when full faith and credit had been given to it, what the effect of the judgment was upon the controlling issues in the case; and thereupon it laid down the proposition that the law of comity forbids the use of the courts of one state to perpetrate a fraud upon a citizen of another state. Hence, that a judgment in garnishment, where the creditor, debtor, and the garnishee all resided and did business in Illinois, rendered in another state, was without force and effect when contrary to the domestic statutes, and when no jurisdiction of the person of the debtor had been obtained in the garnishment proceedings.

The principle just stated has been applied by the courts more frequently and more consistently in controversies between husbands and wives respecting decrees of divorce granted in states other than those in which the parties were domiciled. When a court having unquestioned jurisdiction of the subject and parties in matrimonial actions decrees a divorce, its judgment demands and is accorded in sister states the same faith and credit it is entitled to at home, as if it were a judgment of a different character.

A judgment of divorce, granted in one state by a court having jurisdiction of the subject of the action and of the parties to it, for a cause authorized by the laws of such state, must be given full faith and credit in other states, whether the local laws do or do not recognize a similar cause as a ground of divorce. *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056, reversing 67 Misc. 267, 122 N. Y. Supp. 401.

A decree of divorce granted to a hus-

band actually domiciled and a bona fide resident of the state in which it was rendered, although made without personal service upon his wife, and in a proceeding after she had left him and come into the state of Massachusetts to live, is conclusive upon trial in a subsequent action brought by her in Massachusetts, to obtain a decree of divorce for herself, and is not open to attack upon her part by evidence that it was obtained by fraud, and granted for a reason not a cause for divorce in Massachusetts. *Hood v. Hood*, 11 Allen, 196, 87 Am. Dec. 709.

A decree of divorce rendered in one state is open to attack in another upon questions of jurisdiction, among which is good faith in acquiring a domicile within the state in which the decree was granted. *Benton's Succession*, 106 La. 494, 59 L.R.A. 135, 31 So. 123.

The Constitution of the United States, in providing that full faith and credit shall be given in each state to the public acts, records, and proceedings of every other state, prevents the judgment of a court of one state, having jurisdiction of the cause and of the parties, from being impeached for fraud or on any other ground in another state, according to the court in *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; but it was added, when, for any reason, the court had no jurisdiction, its judgment is void, and the recital in its record of facts necessary to give jurisdiction is not conclusive. It is therefore competent to show that a decree of divorce granted by a court of another state, although appearing on its face to be valid, is in fact void, because the party obtaining it fraudulently, and in evasion of the law of his own domicile, procured the court to exercise jurisdiction over the case.

It is accepted doctrine, according to the court in *Bidwell v. Bidwell*, 139 N. C. 402, 2 L.R.A. (N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55, that actions for divorce deal with the status of the parties, and that jurisdiction in such actions depends upon the domicile of the parties at the time the decrees are rendered. But where neither party has a domicile in the state of the forum, the courts have no jurisdiction of the subject-matter of the controversy, and a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court.

The full faith and credit clause of the Constitution of the United States, and the Federal legislation enacted to make it effective, do not constrain a state to recognize and give effect to a decree of divorce between its own citizens, procured by one of the spouses, in fraud of its laws and public policy, from a court in another state of the Union. *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237.

A judgment of divorce granted in one state, in an action fraudulently instituted and prosecuted by a party domiciled in another state, can be attacked and impeached for the fraud when it is set up as a bar to a subsequent action between the same parties for a divorce in the state where they are, and, during the entire proceedings, have been, domiciled. *Strait v. Strait*, 3 MacArt. 415.

A decree of divorce rendered in a state in which the parties were not domiciled, in favor of a man who went to such state for the express purpose of obtaining a divorce from his wife, and who, in doing so, concealed his actions from her, and practised a fraud upon the court in falsely stating that he did not know her actual place of residence, is fraudulent and void, and these facts deprive the court which made it of jurisdiction to render it, so that it is open to impeachment in the state where the parties are domiciled. *Field v. Field*, 215 Ill. 496, 74 N. E. 443, affirming 117 Ill. App. 307.

A husband who leaves the state in which he is domiciled, and proceeds to another state, with the intent and purpose of there procuring a decree of divorce against his wife, is guilty of such a fraud that the decree that he obtains in the other state is a nullity, and without force and effect against his wife, in the home state. *Bee-man v. Kitzman*, 124 Iowa, 86, 99 N. W. 171; *Litowitch v. Litowitch*, 19 Kan. 451, 27 Am. Rep. 145.

A decree of divorce rendered in a state in which neither the husband nor the wife had theretofore ever resided or visited, and in which neither of them had an intention or expectation of residing, procured by one spouse without notice to or the knowledge of the other, is void in the state in which both were domiciled at the time, and, if regular upon its face, may be proved void by extrinsic evidence. *Litowitch v. Litowitch*, supra.

One who goes into another state for the mere purpose of obtaining a decree of divorce against his wife, without acquiring any domicile there, commits a fraud both upon the court and his spouse and the law of his own state, when he obtains the decree upon grounds which would not entitle him to it in the state of his domicile, and such decree is therefore open to attack and void in his home state. *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299.

A court has no jurisdiction to decree a divorce between persons who do not reside within the state, and have their domicile in another state, and who do not both appear in the suit, and a decree, if one is rendered, is open to attack at any time in their own state. *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720.

A decree of divorce obtained in a state other than that in which the husband and wife are both domiciled, by the action of one spouse in proceeding to such other state for the express purpose of obtaining

a decree, is void in the home state, because procured in evasion of the laws of the domicile of the parties. *Jackson v. Jackson*, 1 Johns. 424.

A decree of divorce granted in another state than that in which the parties to it were domiciled will not be recognized in the home state if it appears that, in applying for such decree, the applicant fraudulently misstated or suppressed facts within his knowledge which would, if the truth had been known, have adversely affected the judgment rendered, or if it appears that the applicant knew where the other spouse resided, and yet gave no actual notice of the pendency of the suit. *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535.

When a husband leaves the state of his domicile and visits another state, without the slightest intention of remaining there and making it his home, but for the sole purpose of obtaining an apparent residence, in order to institute a divorce suit against his wife, and continues to remain, during all the proceedings taken in such suit, a bona fide resident of his own state, it is manifest that a decree obtained by him, divorcing him from his wife, must have been procured either by intentionally withholding from the court which granted it the real truth concerning his domicile, or by submitting to that court false testimony in relation to his residence; and in either case, the conduct of the husband is fraudulent, and absolutely destroys in his home state the validity of the decree. *Magowan v. Magowan*, 57 N. J. Eq. 322, 73 Am. St. Rep. 645, 42 Atl. 330; *Dumont v. Dumont*, — N. J. Eq. —, 45 Atl. 107.

A divorce granted in one state, and set up in another, in a proceeding for the probate of a will or the administration of an estate, in order to establish the legality of a subsequent marriage upon which the validity of the claims of a party to the proceedings depends, may be impeached by evidence that it was obtained by fraud and perjury, and is therefore a nullity. *Baker's Will*, 2 Redf. 179.

A decree of divorce obtained in one state by a person domiciled in another, upon grounds not permitted by the law of his own state, where the state in which the decree was granted was resorted to by him solely for the purpose of obtaining such decree, and where no jurisdiction of the person of the other spouse was obtained, is to be treated as a nullity and void in the home state. *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203.

This proposition was reaffirmed in *Chase v. Chase*, 6 Gray, 157; and was said to be the law of that commonwealth by virtue of statute, even where the spouse had appeared and answered in the divorce suit.

The same rule was laid down in *Smith v. Smith*, 13 Gray, 209, 74 Am. Dec. 631, and approved in *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091.

Whenever, said Chief Justice Thompson

in *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225, a litigant seeks to avail himself of any benefit from a decree of divorce rendered in another state, procured by his own fraudulent conduct, although brought in collaterally, it would seem to me competent to allege this fraud; otherwise he would be permitted to derive a benefit from his own misconduct,—a position altogether inadmissible.

We have no hesitancy in saying, said the court in *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539 (a case in which a decree of divorce granted in Colorado was asserted to be conclusive), that the defendant was induced by fraud and misrepresentations to enter his appearance in the Colorado court. The courts will not sanction such conduct, or aid one in securing the fruits of an advantage thus obtained.

In *Dormitzer v. German Sav. & L. Soc.* 23 Wash. 132, 62 Pac. 862, the court refused to give effect to a decree of divorce theretofore granted in the state of Kansas, on the ground that, from the extrinsic evidence before it, and that appearing on the record of the divorce itself, the Kansas court had no jurisdiction to enter the decree, and that the decree was fraudulent and void, and no bar to the property rights of the divorced wife. The fraud in that particular case consisted in the falsity of the allegations of residence to confer jurisdiction upon the Kansas court, and of the service of the process upon the wife, which was never in fact made.

I have come to the conclusion, declared the surrogate in an opinion adopted on appeal in the case of *Stanton v. Crosby*, 9 Hun, 370, that the Ohio court failed to obtain jurisdiction of the defendant in the proceedings for divorce, for want of such service of the summons and petition on her as was required by law in cases where the residence of the defendant is not unknown. But if the proof made to the court was sufficient to confer jurisdiction, it was based on falsehood and fraud practised on the court toward the defendant, which entitles her and calls on this court to treat the decree obtained thereby as a nullity. It is true, as a general rule, that fraud in obtaining a judgment cannot be set up in a collateral proceeding by a party or one representing or in privity with him. But this rule only relates to fraud which involves the merits of the judgment. It does not govern the case of jurisdiction fraudulently attempted to be obtained.

To warrant a court in one state in refusing to recognize the validity of a judgment rendered by a court in another state, upon the ground that it was fraudulent, because the cause of action set up was wholly fictitious and groundless, the proof to demonstrate the fraud must be so clear and strong as to render it certain that the plaintiff knew, at the time he brought his suit, he had no cause of action, and was without any expectation of obtaining a judgment unless he could succeed in preventing the defendant from making his de-

fense. *Doughty v. Doughty*, 27 N. J. Eq. 315, affirmed in 28 N. J. Eq. 581.

I think, said the chancellor in *Doughty v. Doughty*, 27 N. J. Eq. 315, the complainant has a right to impeach the Illinois judgment by showing that the cause of action on which it purports to rest was fabricated; and I am of opinion that it is clearly shown that it was fabricated. It must therefore be declared void against the complainant.

The chief justice of New Jersey, in delivering the opinion of the court of errors and appeals, in *Doughty v. Doughty*, 28 N. J. Eq. 581, which affirmed unanimously the decision of the chancellor in 27 N. J. Eq. 315, in holding void for fraud a decree of divorce procured in the state of Illinois, said: "I am satisfied that the appellant went to the state of Illinois for the purpose of getting rid of this marriage. His conduct in leaving this state and putting himself under a foreign jurisdiction is to be interpreted by the light of his subsequent conduct. Judged by the proofs made in this cause, the case set up by him in the court of Illinois was a pure fabrication. He knew that it was such. The published notice of the pendency of the suit did not correctly state the name of the respondent. It is the reasonable conclusion, in view of the fact that the entire scheme was a fraud, that this was a contrivance to diminish the risk of the publication which was necessary to give jurisdiction to the tribunal. For this reason, also, I am not willing to give any effect whatever to this foreign judgment."

The court, in *Vischer v. Vischer*, 12 Barb. 640, in which was involved the validity of a decree of divorce obtained in the state of Michigan, where the husband had gone to procure it, said: Admitting that the defendant had his domicile bona fide in Michigan, I do not see how the divorce granted there can be sustained by all courts. It is invalid both on the ground of fraud and want of jurisdiction. Fraud because the allegation of desertion was not true; and want of jurisdiction because there was no service of process upon or any appearance of the wife. If *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225, is law, it decides both of these points against the defendant.

In view of the provision in the Federal Constitution requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, the judgment or decree of a court of general jurisdiction in a sister state should not be held void on the ground that such court was deceived and misled as to the existence of jurisdictional facts, and assumed to exercise jurisdiction when it had no right to do so, unless the evidence is of such satisfactory character as to exclude any other reasonable conclusion. *Knowlton v. Knowlton*, 155 Ill. 153, 39 N. E. 595, reversing 51 Ill. App. 71.

In the case of *Knowlton v. Knowlton*, 155 Ill. 153, 39 N. E. 595, an action between persons formerly husband and wife, in

which suit was brought by the wife for separate maintenance, but a decree of divorce in favor of the husband, in a sister state, was set up in bar, and in reply to which the claim was made that the order for publication of the notice of the beginning of the divorce action and the decree of divorce rendered (there having been no personal service) were obtained by false and fraudulent statements respecting the nonresidence of the wife,—the court held that the evidence upon that branch of the case was entirely too conflicting and unsatisfactory to justify a judicial decision that the decree of divorce was void on the ground that it had been obtained by fraud, whereby the court rendering it was given merely a colorable, and not a real, jurisdiction of the person of the wife.

c. Upon the parties.

1. Betrayals and impositions.

The courts are in the constant habit of relieving, upon equitable terms, persons from judgments rendered against them in consequence of the fraudulent acts of their successful adversary or his attorney. *Rogers v. Gwinn*, 21 Iowa, 58.

A reference to a few adjudged cases, said the court in *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129 (which it proceeded to cite), will show the extreme jealousy with which courts have ever guarded their process, and how uniformly they have recognized the doctrine that no legal right can be founded upon an act of fraud or oppression.

If a defendant never had knowledge of a suit in which a judgment was rendered against him, and was kept in ignorance of it by the acts of his adversary, the fraud is such that a new suit lies to set aside and annul the judgment. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

If a defeated litigant has been prevented from exhibiting fully his case by fraud or deception practised upon him by his opponent (as, for example, by keeping him away from court, or a false promise of a compromise), a new suit will lie to set aside and annul the judgment or decree. *Ibid*.

The general rule, which makes a judgment conclusive, and prevents repeated litigation between the same parties, respecting the same subject of controversy, is subject to an exception in cases where, by reason of something done by the successful party, there was in fact no adversary trial or decision of the issue. *Ibid*.

A judgment recovered in one state without service of process or other notice to the defendant, upon an appearance and confession by an attorney, without the defendant's authority, is not conclusive in a subsequent action brought upon such judgment in another state, but the defendant may show in avoidance of it the facts above mentioned. *Sherrard v. Nevius*, 2 Ind. 241, 32 L.R.A. (N.S.)

52 Am. Dec. 508; *Boylan v. Whitney*, 3 Ind. 140.

To an action brought upon a judgment of another state, the equitable defense that it was procured by fraud, in that the judgment debtor at the time was a nonresident, and had a good defense to the action in which the judgment was rendered, and a positive agreement with the judgment creditor that the latter had no cause of action, and that the suit should be dismissed, upon which he relied, and returned to his own home, and in fraud of which the judgment creditor proceeded to judgment in his action, is good, and if established will defeat the action. *Rogers v. Gwinn*, 21 Iowa, 58.

When, in an action, a defendant settles the cause of it, and receives assurances from his adversary of the satisfaction and abandonment of further proceedings, the subsequent entry of judgment in that action without the knowledge of the defendant is such a fraud as will nullify the judgment, not only in the state in which it was rendered, but in any other state in which proceedings are brought to enforce it. *Davis v. Headley*, 22 N. J. Eq. 116.

A defendant in an action brought in the state of New York, upon a judgment recovered in another state, may attack and avoid the judgment on the ground of fraud, in that the plaintiff, by false representations and fraudulent assurances that such action would be discontinued, induced him to abandon his defense and no further to appear in the action notwithstanding he had originally appeared and set up a defense. *White v. Reid*, 70 Hun, 197, 24 N. Y. Supp. 290.

The rule is that a court of chancery will not relieve against a judgment at law, on the ground that it is contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, unmixed with negligence on his part. *Turley v. Taylor*, 6 Baxt. 376.

It is well settled, it was said in *Baldwin v. Rice*, 44 Misc. 64, 89 N. Y. Supp. 738, affirmed in 100 App. Div. 241, 91 N. Y. Supp. 1086, by an unbroken line of decisions, that a judgment may be impeached even collaterally for a fraud practised in the procurement or concoction of the judgment itself, by which the defendant was prevented from availing himself of his defense; but an examination of the cases holding that doctrine will show that the fraud referred to is one practised on the defendant in the judgment.

In *Coffee v. Neely*, 2 Heisk. 304, an action upon a judgment rendered against the defendant in Kentucky, brought in Tennessee, the defendant pleaded among other defenses that the plaintiff "fraudulently combined with the citizens of Kentucky, by force and threats, to keep him from making his defense, and took judgment against

him by default, well knowing" that he did not owe him anything. The circuit court sustained a demurrer to this plea, and it was insisted for the plaintiff in error that this action was erroneous; and we hold, said the court, upon reason and the weight of authority, that this position is well taken.

We are aware, said the court in *Coffee v. Neely*, supra, after holding that a plea against a judgment of a sister state, that it had been obtained in consequence of a fraudulent conspiracy on the part of the plaintiff, by force and threats to prevent the defendant from making his defense, was good, that a contrary doctrine has been held in some of the states. But such a view of the law gives to the judgment an extra-territorial operation which it does not possess in the state where rendered, and which was not contemplated by the act of Congress, and is not generally conceded by the states.

It is the established doctrine that a fraud which is complained of to restrain the enforcement of or to annul a judgment must be some matter extrinsic to the issues decided by the judgment; such, for example, as keeping the unsuccessful party away from court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where his attorney fraudulently connives at his defeat, or corruptly sells out his client's interest. *Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71.

In *Norwood v. Cobb*, 15 Tex. 505, a suit upon a judgment of another state, the court remarked that it was universally admitted that fraud in obtaining the judgment would vitiate it, and that if the sheriff returned the subpoena sued out to the defendant in the suit as executed upon the defendant, when in truth and in fact it had not been executed, it was not only a fraud on the parties, but it was also a fraud upon the court. This fraud cannot be established, it was added, unless proof is received of the fact of a false return of the sheriff. Formerly there was much discussion in the courts and a great diversity of opinion on the question of going behind the judgment and reviewing it on the merits; but the more recent decisions establish this position; that if the judgment is successfully assailed upon the grounds of want of jurisdiction, or fraud in obtaining it, it cannot be made the foundation of an action, because, if not assailable upon the grounds of want of jurisdiction, or fraud, it is conclusive of the subject-matter adjudicated; and if it is subject to either of the vices just named it is absolutely void. The result in that case was a reversal and a remand for a new trial; and when the case came up again in 20 Tex. 588, it was again reversed, the court well holding that it was improper to re-examine the questions determined upon the former appeals. It added that the evidence by which the defendants had undertaken to impeach the judgment for fraud in obtaining it did not conduce in

any degree to establish the affirmative of that issue, and was rightly excluded.

An affidavit of defense to a suit upon a foreign judgment is sufficient when it denies any personal service of process upon the defendant, and any appearance by him, except after the judgment had been rendered, and then only for the special purpose of moving to set it aside on the ground of fraud, and that such judgment was in fact fraudulent. *Wissler v. Herr*, 162 Pa. 552, 29 Atl. 862.

Many cases have occurred in our own state, said the court in *White v. Reid*, 70 Hun, 197, 24 N. Y. Supp. 290, where the validity of judgments has been attacked on the ground of fraud, and where the defendant has been deprived of his defense by the fraud of the plaintiff, with the connivance of his attorneys, and we are somewhat surprised that the jurisdiction of the court in this respect should be questioned.

One against whom a judgment has been rendered by reason of his attorney having corruptly sold out to the other side, and connived at his defeat, may maintain suit to annul the judgment on account of fraud. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

An answer is good on demurrer to a suit by the assignee of a judgment rendered in another state, on default against the defendant, which pleads that the defendant had neither notice nor knowledge of the suit, was not liable to the judgment plaintiff on any cause of action, and that said plaintiff, his assignee, and the officer who made the return of service of process upon him, had fraudulently conspired to make and procure a false return of service of process. *Brown v. Eaton*, 98 Ind. 591; *Anthony v. Masters*, 28 Ind. App. 239, 62 N. E. 505.

When officers constituting a special tribunal conspire to obtain, by means of fabricated documents presented with their judgment to those who have appellate and supervisory authority over their action, confirmation or affirmance of such judgment, and thus impose upon their superiors a fictitious proceeding as one that has actually been had, the fraud is extrinsic and collateral to the judgment, and makes it liable to be annulled in a suit brought for the purpose. *Moffat v. United States*, 112 U. S. 32, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

A judgment entered on confession by an attorney, pursuant to authority given in a judgment note, after such note has been fully paid and satisfied, is void for fraud, and may be successfully attacked in another state than that in which the judgment was rendered. *First Nat. Bank v. Cunningham*, 48 Fed. 510.

When a judgment is entered without suit or process, and as if by confession, upon a promissory note containing a power of attorney to the payee to take and enter such a judgment, the judgment is no more conclusive than was the note, and is open to the same defenses; and therefore if such note was void for want of consideration,

and because obtained by duress, the judgment is void also for the same reasons, and is open to attack when the attempt is made to enforce it in another state. *Trebilcox v. McAlpine*, 62 Hun, 317, 42 N. Y. S. R. 238, 17 N. Y. Supp. 221.

2. Decoying within jurisdiction.

The mere fact that a defendant leaves his home state and enters another, upon business of his own, even though that be the attendance as a party or a witness in a then pending litigation, and while there is served with process in another action, is not such a fraud upon him as will afford him a defense to a judgment recovered against him in such action, when sued over again in his home state. *Longueville v. May*, 115 Iowa, 709, 87 N. W. 432.

To induce one to come into another state to take depositions in a cause pending in his own state, in order that he may be served with legal process in the foreign state, is not such a fraud upon the part of his adversary as will warrant the courts of his own state in refusing to give full faith and credit to a judgment rendered against him by a court of competent jurisdiction in the foreign state, upon personal service of process within such state. *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614, reversing, 69 Neb. 4, 94 N. W. 995.

The ground taken by the Supreme Court of the United States in *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614, to reverse 69 Neb. 4, 94 N. W. 995, was that where a party does nothing save what he has a legal right to do to bring his adversary from another state, within the reach of the process of the local courts, as, for instance, giving notice of the taking of depositions in a pending litigation, and gets service by lawful means when the adversary comes, the judgment he afterwards recovers cannot, in any just sense, be said to have been obtained by a fraud.

It is no defense to an action at law upon a judgment recovered in another state, to prove that the defendant was inveigled into the jurisdiction of the court which rendered the judgment, fraudulently, for the purpose of obtaining personal service of process upon him. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

A judgment of a court of competent jurisdiction against a nonresident defendant personally served with its process while within its reach, for the purpose of taking the deposition of a witness in an action concerning the same subject, to which he was a party, is entitled to full faith and credit in sister states when the question of the validity of such judgment has been submitted to and determined by the court which rendered it. *Tootle v. McClellan*, 7 Ind. Terr. 64, 12 L.R.A.(N.S.) 941, 103 S. W. 766.

In the opinion of the Arkansas supreme court, a suit in equity lies to restrain the 32 L.R.A.(N.S.)

enforcement of and to set aside a judgment upon the ground that the defendant was fraudulently induced to come within the jurisdiction of the court, for the purpose of serving him with process in the suit in which the judgment was rendered, and such suit may be maintained either in the state in which the judgment was rendered, or in a sister state in which an attempt is made to enforce it, provided there are alleged and proven adequate reasons excusing the defendant for not having applied to the court which rendered the judgment to set it aside, or to set aside the service of the process. *Peel v. January*, supra.

The defendant, in an action in his home state, brought upon a judgment rendered in a sister state, may defend on the ground that he was induced to submit himself to the jurisdiction of the court of such sister state by a fraud on the part of the plaintiff. *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539.

In an action upon a personal judgment, rendered by a court of a sister state, it is competent to plead and prove in defense that the defendant was decoyed within the jurisdiction of the court which rendered the judgment, by fraud and false representation on the part of the plaintiff, and taken advantage of to be served with process, for such a defense is not within the rule which forbids the collateral impeachment of judgments, but is, in legal effect, a direct attack upon the judgment, and tends to establish a void service of process, and a consequent lack of jurisdiction over the person of the defendant. *Pilcher v. Graham*, 18 Ohio C. C. 5, 9 Ohio C. D. 825.

If a litigant by fraud induces his adversary to go within the jurisdiction of a court in another state, for the purpose of obtaining service of process upon him, and the court does thus obtain jurisdiction of his person, and thereafter renders judgment against him, the defendant is not obliged to appear in the foreign court and show the abuse of its process, but may set up such fraud as a defense to an action brought in his own state, and upon the judgment recovered in the other state. *Duringer v. Moschino*, 93 Ind. 495.

Although the court in *Duringer v. Moschino*, supra, expressed the opinion that a judgment rendered against a nonresident defendant who had been induced by the fraud of his adversary to come within the jurisdiction of the court might successfully be defended when sued upon in his own state, upon the ground of such fraud, it nevertheless held that the facts proven in that case fell short of establishing the fraud.

It is a fraud to decoy, under false pretense or representations, a person residing in one state, into another, for the purpose of obtaining personal service of process upon him for the commencement of an action in the latter jurisdiction, and such a fraud in obtaining jurisdiction over his person will vitiate the judgment, and constitute a good defense to it when suit is brought against

him in his own state, upon such judgment. *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129.

In *Dunlap v. Cody*, supra, the defendant to a judgment recovered against him in the state of Illinois, for a money debt upon which the statute of limitations had fully run in his own state, pleaded, by way of defense, that he had been decoyed into the state of Illinois in order that service of process might be obtained upon him there for the recovery of such judgment, and set forth the facts which showed the fraudulent character of the transaction. In discussing the case, Day, Ch. J., said that the question whether the means used to obtain jurisdiction of the person of the defendant, in the courts of Illinois, amounted to a fraud, would seem scarcely to need discussion. Fraud, said he, consists in the *suggestio falsi* or the *suppressio veri*. Both exist here. . . . Counsel representing plaintiff in this court, and who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it "smells somewhat of fraud." The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a "pious fraud," in which "the end justifies the means." We do not think that it is entitled even to that small measure of charity.

The court, in *Dunlap v. Cody*, supra, besides holding that false and fraudulent representations by means of which the defendant had been decoyed into a sister state for the purpose of serving process upon him constituted such a fraud as to afford him a good defense when sued upon the judgment recovered in that action in the sister state, adverted to a further consideration as a tenable ground for holding the judgment to be fraudulent in his home state. It was that the debt in the action in which the judgment was rendered had outlawed in the home state by operation of the domestic statute of limitation at the time the suit was begun in the sister state, and that therefore the judgment might be impeached for the further fraud that it was obtained for the purpose of evading the force and effect of the laws of the state in which the action upon it was brought; invoking the general principle that whenever an act is done in fraud of the law, it cannot be the basis of a suit in the courts of a country whose laws are attempted to be infringed.

A plea to a suit upon a judgment of a sister state, alleging simply that the defendant was decoyed into such state for the purpose of being sued, without alleging any defense to the cause of action, is bad. *Luckenbach v. Anderson*, 47 Pa. 123.

The Pennsylvania supreme court in *Luckenbach v. Anderson*, supra, which was a suit upon a judgment rendered in New York, held an affidavit of defense averring that the defendant had been decoyed into

the state of New York for the purpose of being sued upon the debt for which such judgment was rendered insufficient, because the plea did not contain any additional averment of a meritorious defense to the claim upon which the judgment was based; but it added that if the judgment had been fraudulently obtained, that would have been something, and, if coupled with an allegation of defense against the original claim, might have constituted a good affidavit.

IV. The methods.

a. Defense of actions of debt.

The plea of *nil debit* is not good in an action brought in one state upon a judgment rendered in another, after personal service of process upon the judgment debtor. *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411.

The case of *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378, according to Chief Justice Marshall, who delivered the opinion of the court, was precisely the same case as that of *Mills v. Duryee*, supra; and the court could not distinguish the two cases.

A plea to an action upon a judgment rendered in a court of competent jurisdiction in a sister state, in a suit contested by the defendant, alleging that the judgment was procured by the fraud of the plaintiff, is bad on demurrer. *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

It was afterwards said in *Maxwell v. Stewart*, 21 Wall. 71, and 22 Wall. 77, 22 L. ed. 564, that it had been held in *Christmas v. Russell*, 5 Wall. 304, 18 L. ed. 479, "that fraud could not be pleaded to an action in one state upon a judgment in another." "With this," it was added, "we are satisfied."

This doctrine was accepted and followed again in *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

In an action at law for debt in one state, upon a judgment rendered in a sister state, a plea that such judgment was obtained by fraud is no defense. *Allison v. Chapman*, 19 Fed. 488.

It is a well-settled rule in the Federal courts that a judgment rendered in one state cannot be impeached in a collateral proceeding in another, for fraud in obtaining it. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 47 U. S. App. 1, 76 Fed. 429.

To an action at law in a court of one state, upon a judgment of a court of another state, a plea that the judgment was obtained by fraud is not allowed. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

A plea of fraud in obtaining a judgment rendered in another state, in a suit upon such judgment in a sister state, is bad on demurrer. *Benton v. Burgot*, 10 Serg. & R. 240.

In debt on the record of a judgment re-

covered in a sister state, a plea that it was entered fraudulently by a deputy clerk, in pursuance of a conspiracy with the plaintiff, is bad on demurrer, and may be stricken out on motion. *Lucas v. Copeland*, 2 Stew. (Ala.) 151.

A court of one state is bound to respect the judgment of a court of another state in a litigation between the same parties, and to hold such judgment conclusive, notwithstanding such decree is alleged or even proved to have been made by mistake. *Hassell v. Hamilton*, 33 Ala. 230.

A judgment recovered in one state and sued upon in another cannot be defeated in the latter state under an issue of *nil debit*, by proof that it was obtained by fraud and misrepresentations. *M'Rae v. Mattoon*, 13 Pick. 53.

In an action in one state upon a judgment rendered in another, a plea that such judgment was obtained by fraud is not good unless it would be good in the courts of the state where the judgment was rendered. *Barras v. Bidwell*, 3 Woods, 5, Fed. Cas. No. 1,039.

The prevailing doctrine is, asserted the court in *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841, that a plea of fraud is not admissible in an action on a judgment of a sister state, where there is jurisdiction of the person and of the subject-matter, unless it can be set up in the courts of the state where the judgment was rendered.

The general rule is that the judgment of a state court may not be impeached collaterally in a court of another state, on the ground of fraud, unless fraud in procuring it could be set up as a defense in the state where the judgment was rendered. *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

In *Lucas v. Copeland*, supra, the court, while holding bad on demurrer a plea in an action of debt upon a judgment of a sister state, that such judgment had been entered fraudulently by a deputy clerk, pursuant to a conspiracy with the plaintiff, said: It is not intended on this occasion to decide in the abstract that, in all cases where suit may be brought on a judgment from another state, the plea *per fraudem* is in admissible, for the proposition, to that extent, is unnecessary to the decision of this case, and it is conceived improper to embarrass a subject of this importance by anticipating questions that may necessarily arise for future discussion.

In *Lucas v. Copeland*, supra, Collier, J., concurred in the opinion of the court, that the plea in that case was insufficient, and therefore that the judgment pronounced should be affirmed; but, said he, "In the opinion of the court, just expressed, it is intimated that the judgment of a sister state, when sued on in the court here, cannot be avoided by pleading that it was obtained by fraud, when it appears from the record that the defendant was served with process there. With entire respect, I must be permitted to maintain the converse of 32 L.R.A. (N.S.)

that proposition." And Perry, J., took pains to say that he agreed with the views of Judge Collier.

b. The need of seeking relief in the states where the judgments were rendered.

In many cases, particularly the earlier ones, it was esteemed necessary for a person against whom a judgment had been obtained by fraud to apply for relief to the court which rendered it, or at least to go into the jurisdiction where it was rendered, and seek a remedy. The courts of other states deemed themselves either powerless to give relief, or bound by comity to refuse it.

A judgment rendered by a court of competent jurisdiction may be impeached for fraud only in a direct proceeding, brought for the purpose, in the court in which it was rendered. *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148.

After holding bad a plea in a suit on a judgment of a state court, alleging that the defendant had neither been served with process nor had authorized any attorney to appear for him, *Washington, J.*, in *Field v. Gibbs*, Pet. C. C. 155, Fed. Cas. No. 4,766, said: "But what, it may be asked, is to be done if the judgment has been obtained against a person residing out of the state, who was never served with process, or even notified of the existence of the suit in which it was rendered? I answer that his remedy is the same . . . as would be open to him if the suit had been brought in the state where the judgment was rendered. The court in which the judgment was given would, upon motion, accompanied by sufficient proof, stay the execution and set aside the judgment."

If a party has been overreached and a judgment rendered against him, the law furnishes him an ample remedy to avoid the consequences of fraud in the court and jurisdiction where the judgment or decree against him was rendered. *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841.

If, said the court in *Ambler v. Whipple*, supra, appellant sought to take judgment (meaning the foreign judgment involved in that case) contrary to his representations and assurances, appellee might have appeared in that court, by himself or solicitor, and prevented its consummation; or if, by the fraud of appellant, he was prevented from interposing his defense before the decree was entered, he might and should have applied to that court to vacate it, and to be let in to defend on the merits. We are aware, it was added, that some of the earlier cases in this state seem, in effect, to hold the contrary, but the rule stated is, we think, as applicable to the courts of law, supported by the weight of authority.

When a court has the jurisdiction of the parties to a litigation and of the subject-matter thereof, it has power to determine

judicially the questions involved, and to incorporate its determination in a decree fixing the rights of the parties, which decree will, unless attacked for fraud, be held valid and conclusive upon the parties and their privies until reversed or set aside in the jurisdiction in which it was rendered. *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628.

If a judgment rendered by a state court having jurisdiction of the cause and the parties is obtained by fraud, or is founded upon a fraudulent transaction, it is entirely competent for the injured party to file his bill in equity in the state in which the judgment was rendered, to obtain relief against it; but this he may not do in another state, because a foreign court may not take jurisdiction, and has no power to vacate the judgment. *Sims v. Talbot*, 27 Miss. 487.

If a judgment upon which suit is brought in another state was fraudulently entered by the clerk of the court, without authority, the proper remedy of the litigant against whom such judgment was rendered, according to the chancellor of New York in *Bicknell v. Field*, 8 Paige, 440, appears to be to apply to the court in which the judgment purports to have been rendered, to set it aside, and take the spurious record from the files of the court.

The doctrine that a citizen against whom a fraud has been perpetrated in procuring a judgment against him in another state can have no relief from the courts of his own state when their aid is sought by his adversary, to secure the fruits of the fraud, because comity to the courts imposed upon requires that they should first be appealed to, does not withstand the assaults of reason, and no longer prevails; at least, in several jurisdictions.

It is not necessary for one against whom a judgment has been obtained by fraud in another state, when sued in his own state upon such judgment, to go into the state where the judgment was rendered and seek relief, but he may have appropriate relief in his own state. *Gray v. Richmond Bicycle Co.* 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663, reversing 40 App. Div. 506, 58 N. Y. Supp. 182.

A citizen is not driven to a foreign state to protect his rights if he has a legal right, or has been subjected to a wrong. He may look for protection to the tribunal having jurisdiction in his own state, when his adversary has put himself within its reach. *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

When a judgment is rendered by a state court against a corporation of another state, without any proper or legal service upon it, it is not bound to appear and move to set aside the service, but it may stand upon its rights, and attack the judgment wherever and whenever an attempt is made to enforce it. *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259.

If a litigant seeks a benefit under a judgment or decree of a court of a sister state, in an action where it cannot be pleaded, 32 L.R.A. (N.S.)

he may offer it in evidence; and inasmuch as his adversary has had no opportunity to attack it by a direct proceeding in the courts of his home state, and should not be required to go into the foreign state to attack it in the court where it was rendered, he may attack and impeach it by evidence of a want of notice or of fraud in procuring it, notwithstanding such decree or judgment may, by its recitals, appear to be regular and to show jurisdiction. *Murray v. Murray*, 6 Or. 17.

In reply to the suggestion that the remedy of the defendant sued upon a foreign judgment was not to set up fraud in its recovery by way of defense, but to proceed to the state in which the judgment was rendered, and there bring suit in equity to set it aside, the court in *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129, said, if a bill in equity could be sustained in the courts of the state which rendered the judgment, and yet the facts which would entitle a defendant to affirmative relief in the equity suit in that state do not constitute a defense to the judgment here, it follows that a judgment of a court of a sister state is entitled to greater faith and credit here than would be conceded to it in the state in which it was rendered. This the Constitution and acts of congress do not require. It seems clear, either that the defendant would be entitled to no relief in the foreign state, or that he is entitled to the same relief here. And, as we entertain no doubt that a court of that state would, if the facts alleged here were proved, perpetually enjoin the collection of the judgment, we are clearly of the opinion that the defense here interposed should bar a recovery upon it in our own courts.

In answer to the contention that a defendant who had been decoyed by false pretension and representation into another state in order to serve process upon him should have appeared in that state, and there moved the court to dismiss the proceedings in consequence of fraud, and that, if he did not do so, judgment was conclusive upon him when sued in his home state, the court in *Dunlap v. Cody*, supra, replied: It may well be doubted whether such appearance, even for the purpose of objecting to the service, would not have placed him within the jurisdiction of the court for all purposes connected with the trial. Such, certainly, would be the effect of such appearance in this state. But conceding that he would not be visited with such consequences in the courts of Illinois, and that there he might be relieved from the effects of an insufficient service, such relief, in this case, could be predicated only upon the fraud of plaintiff in procuring the service. Why drive a defendant to the necessity of traveling, it may be a thousand miles, to put in an appearance at court, and suggest to the court that it has no jurisdiction in consequence of the fraudulent act of plaintiff in procuring service? Under such a construction, it

would, in many cases, cost more to make defense than to allow judgment to be taken and permit the fraud to triumph; and if the fraud be conceded, why is it not a good defense to an action upon the judgment?

In *Beeman v. Kitzman*, 124 Iowa, 80, 90 N. W. 171, an equitable action to set off a widow's share in lands, the defense pleaded was a decree of divorce rendered in a sister state in favor of her husband, which, if valid and binding upon the widow, required the dismissal of the action. The defendant contended that the court which rendered the decree, being a court of competent jurisdiction to entertain and try actions for divorce, such decree must be given full faith and credit in the suit until it had been set aside by some appropriate method of direct attack. If this be correct, said the court in reply, then a husband may leave his wife, go to a distant state, and there, by gross fraud, obtain a decree of divorce, which, being regular upon its face, will serve all purposes of a decree honestly and properly obtained, and bar the wife thus wronged of all her marital rights, unless she takes upon herself the trouble and expense of going to the jurisdiction where the fraudulent divorce was granted, and, by appropriate proceedings in that court, have the same set aside or annulled. The proposition is not supported by the authorities, and, moreover, is manifestly unjust.

c. The necessity of resorting to equity.

The only method of impeaching a judgment rendered in another state, when sued upon in a sister state, is by a bill in chancery. It is not open to the defense that it was obtained by fraud. *Anderson v. Anderson*, 8 Ohio, 108.

A party sued in one state for debt upon a judgment rendered in a sister state, who desires to impeach the judgment for fraud or covin in obtaining it, must invoke the aid of the court upon the equity side, which alone has the power to grant relief in a case of that character. *Allison v. Chapman*, 19 Fed. 488.

If a litigant wishes to impeach a judgment obtained against him for fraud or covin in obtaining it, he must invoke the aid of a court of equity, whose peculiar province it is to grant relief in cases of that sort; he cannot have relief by way of defense in a court of law. *Allison v. Chapman*, 7 N. J. L. J. 55.

Under the rules laid down by the Supreme Court of the United States, fraud in obtaining a judgment in a state court cannot be taken advantage of collaterally in a proceeding in the Federal courts, but only by a direct attack in equity upon the judgment itself. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 47 U. S. App. 1, 78 Fed. 429.

Under the rules of the common law, a judgment rendered by a court of competent jurisdiction cannot be called in ques-

tion collaterally, but can be attacked only directly by a writ of error, an application for a new trial, or a bill in chancery.

The only remedy the defendant has against a suit in a court of one state upon a judgment of a court of another state is by a bill in chancery. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

A direct suit may be maintained in a proper case to set aside and annul the judgment of any court and all proceedings under it for fraud in procuring it; but until such a suit is brought and a decree of avoidance is rendered, a judgment of a state court which had jurisdiction of the subject-matter and of the parties is conclusive upon the merits of the controversies determined by that judgment between the parties and their privies in every court of the United States, and cannot collaterally be impeached for fraud. *Peninsular Iron Co. v. Fells*, 15 C. C. A. 189, 32 U. S. App. 348, 68 Fed. 25.

It is a general principle, prevailing in nearly all the states as well as in England, that courts of law exercise an equitable jurisdiction over judgments entered by confession upon warrant of attorney, and will, for cause shown, open, vacate, or modify them and stay proceedings upon them, or direct an issue and trial upon the merits. *Brown v. Parker*, 28 Wis. 21.

d. Direct attacks.

A court of chancery has unquestionable power to grant relief against judgments obtained by fraud. *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152.

It is a general principle of equity, which may be said to exist in nearly if not all the states of the Union, according to the court in *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728, that a judgment at law which was procured by the fraudulent conduct of the plaintiff, having the effect to deprive the defendant of a meritorious legal defense which he was guilty of no negligence in not urging, may be enjoined, and the plaintiff restrained from enforcing it.

A judgment, whether domestic or foreign, may be impeached for fraud or mistake, in a direct proceeding brought for the purpose. *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

There can be no doubt, said the chancellor of New Jersey in *Doughty v. Doughty*, 27 N. J. Eq. 315, that a court of equity has power to look into the judgments of other courts, and if it appears they are infected with fraud, to give relief against them. Affirmed in 28 N. J. Eq. 581.

In the granting of an injunction against proceedings at law, there is no difference between actions pending in a foreign or in a domestic court. *Pearce v. Olney*, 20 Conn. 544.

In every case where a litigant has by accident, mistake, or fraud obtained an unfair advantage in a proceeding at law which must necessarily make the court an

instrument of injustice, a court of equity will interfere and restrain him from using the advantage thus improperly gained, whether it be obtained in a foreign or a domestic court. *Stanton v. Embry*, 46 Conn. 65, 595.

The power and jurisdiction of a court of equity to enjoin a litigant who has obtained a judgment by fraud, and to protect his adversary against it, are the same whether the judgment is a domestic or a foreign one. *Ibid.*

A judgment of a court of law, based upon the judgment of a court of law of another state, may be enjoined by an injunction of a court of equity for equitable causes and equities which would authorize such an injunction in equity against an original judgment of the domestic court. *Black v. Smith*, 13 W. Va. 780.

A court of chancery in a state in which the parties are domiciled has the jurisdiction to restrain one of such parties from enforcing the collection of a judgment obtained by him against the other in a court of another state, for any cause which makes it unconscionable to enforce such judgment. *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573.

A judgment may be good at law, and yet equity may deem it against conscience for the plaintiff to stand upon his legal rights. In such a case it is because the judgment is good at law that equitable relief is granted. *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 N. E. 714.

While it is true that fraud in procuring it is no defense at law to an action on a judgment, it is nevertheless an equitable bar to its enforcement alike in the case of a foreign and a domestic jurisdiction. *Ibid.*

A court of equity will not permit a party over whom it has acquired jurisdiction to avail himself of the law of a foreign state to do a gross injustice. *Engel v. Scheuerman*, *supra*.

Conceding the principle that a judgment of a court which had jurisdiction both of the subject-matter of the action and the persons of the parties is conclusive in a subsequent action at law, brought upon it in another state, it was deemed very clear to the court in *Ward v. Quinlivan*, 57 Mo. 425, that in equity all judgments, whether foreign or domestic, might be adjudicated void for fraud in actions brought to enforce them in the state of Missouri.

In the state of Missouri a proceeding in the nature of a bill in equity lies to enjoin and avoid a domestic judgment obtained by fraud, and the same remedy exists and may be resorted to against judgments obtained in other states when sued on in that state. *Payne v. O'Shea*, 84 Mo. 129.

The existence of the general principle of equity which authorizes restraining a judgment procured through fraud in the state where the judgment was originally rendered is authority for legal procedure in 32 L.R.A. (N.S.)

the courts of the different states where it is afterwards sought to be enforced. *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728.

A court of equity of a state in which the attempt is made to enforce a judgment rendered in another state has the power and jurisdiction to restrain the enforcement of such judgment, where the allegations and proof establish the fact that it was recovered by a fraud practised upon the judgment debtor, notwithstanding the provision of the Constitution of the United States that requires full faith and credit to be given to the judicial proceedings of sister states. *Pearce v. Olney*, 20 Conn. 544.

If a judgment was entered in the state in which an action upon it is brought, or in which it is set up in bar of an action brought, the power of a court of equity to afford the person against whom such judgment was rendered any aid or protection which the facts of the case authorize or require is, in the opinion of the supreme court of Wisconsin, in *Brown v. Parker*, 28 Wis. 21, beyond a doubt, and the same rule applies in the case of a judgment rendered in a sister state.

Whether or not fraud in obtaining a judgment in one state may be available as a strictly legal defense to a suit upon such judgment in another state, it is established that such judgment is entitled to no greater faith and credit in such suit than it would have by the law and usage of the state where it was rendered; and it is subject to the principle of equity which gives relief against judgments when obtained by fraud. *Babcock v. Marshall*, *supra*.

Any fact which clearly proves it to be against conscience to execute a judgment, and of which an injured person could not have availed himself at law, or was prevented from doing so by fraud, unmixed with any fraud or negligence of himself or his agents, justifies interference by a court of equity. *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152.

Fraud in obtaining a judgment in another state may be set up as a matter of defense against the judgment, as well as made the ground of a suit to set it aside or to restrain proceedings under it. In a court of equity, this makes no difference. Equity will not lend its aid to enforce a judgment obtained by fraud, when that fraud is shown. *Davis v. Headley*, 22 N. J. Eq. 115.

It is competent for a court of equity, upon allegations that a judgment granted in a sister state is founded in fraud, to inquire whether the cause of action spread upon the record was wholly fictitious and groundless, and also whether the plaintiff fraudulently withheld from the court pronouncing the judgment any fact which, if disclosed, would have shown he had no cause of action. *Doughty v. Doughty*, 27 N. J. Eq. 315, affirmed in 28 N. J. Eq. 581.

The chancellor of New Jersey, in the case of *Davis v. Headley*, *supra*, held a judgment rendered in Kentucky void for two

reasons: 1st, that the court which rendered it had attempted to try and determine title to land in New Jersey, and therefore had no jurisdiction of the subject-matter of the action; and 2d, that the judgments were void for fraud in obtaining them. That fraud will avoid a judgment of another state, said he, is laid down by Story (Commentaries on the Conflict of Laws, § 609) and many other authorities.

The case of *Pearce v. Olney*, 20 Conn. 544, was commented upon by Dillon, J., in delivering the opinion of the court in *Rogers v. Gwinn*, 21 Iowa, 58, as follows: The suit "was to restrain an action in Connecticut, on a New York judgment, in which there had been personal service on the defendant therein; he had a defense, and was assured by the plaintiff's attorney that nothing further would be done without notice; but the attorney, disregarding his promise, took judgment against him without notifying him of an intention to do so. In this respect the case is very similar to the one at bar. The judgment was sent to Connecticut and an action of debt brought upon it there. The court of chancery in Connecticut, upon proof of the above facts, enjoined the collection of this judgment, because it was obtained by a surprise, which was tantamount to fraud. . . . After this decree in Connecticut, a new action of debt was brought on the original New York judgment in the superior court of New York city, in which it was rendered, and it was held: 1st. That the fraud in procuring it was a good defense. 2d. That the decrees in Connecticut was conclusive evidence of fraud." The case last referred to is reported *sub nom* *Dobson v. Pearce*, 1 Duer, 144, "and was affirmed by the court of appeals in 12 N. Y. 165, 62 Am. Dec. 152; the latter court distinctly holding that under the Code of that state (the same as our Revision in this respect), a defendant in an action on a judgment may allege and prove as a defense that it was obtained by fraud."

According to Chief Justice Fuller, in the opinion of the majority of the court in *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, the New York court of appeals in the case of *Dobson v. Pearce*, 12 N. Y. 165, 62 Am. Dec. 152, held that while a judgment rendered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked [directly] upon the ground of want of jurisdiction, or of fraud or imposition.

A court of equity in one state, having jurisdiction of the parties, may determine the question whether a judgment between them, rendered in a sister state, was obtained by fraud; and if the fraud is established, it may grant an injunction against the enforcement of such judgment, although the subject-matter is situated in the other state. *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449.

A suit in chancery to restrain, upon the ground of fraud, the enforcement of a foreign judgment, is strictly a proceeding *in personam* to prevent a person from making the foreign court of law the instrument of a wrong. *Stanton v. Embry*, 46 Conn. 65, 595.

In restraining a person by injunction from enforcing an unconscionable demand based upon a judgment he has recovered in a sister state, the courts of equity act upon his conscience *in personam*, and not upon the courts of the state which gave him a judgment. *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573.

When a court of equity interposes to prevent the enforcement of a foreign judgment obtained by fraud, it does not impugn the validity of the judgment, but adjudicates upon the equities subsisting between the parties to the suit, and acts upon them personally, restraining the one and protecting the other. *Pearce v. Olney*, 20 Conn. 544.

Equity acts upon the person; and where the owner of a domestic judgment which was obtained by fraud in the courts of this state seeks to enforce it, they will, in a proper case, where the complainant has not been guilty of laches, interpose their remedial relief by injunction, and restrain the person guilty of the fraud from consummating his wrong; and in cases of this character, it is upon the person of the wrongdoer that equity fastens its restraining power; and if the courts of this state have the power to restrain the fraudulent owner of a domestic judgment from enforcing it, a like power could be exercised to restrain one who comes into the courts of this state, and seeks to enforce the judgment of another state. *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728.

An action may be maintained for conspiracy against two or more persons by one who was fraudulently induced by them to leave his home in another state, and come into theirs, in order that he might be arrested and compelled to settle a disputed claim; and such action is not barred because, after his arrest, pursuant to the conspiracy, he submitted to the jurisdiction of the court without pleading the illegality and conspiracy in abatement. *Cook v. Brown*, 125 Mass. 503, 28 Am. Rep. 259.

In *Engstrom v. Sherburne*, 137 Mass. 153, the plaintiff charged the defendants with a conspiracy in obtaining a judgment against him in the state of Nevada; but it appeared that the court which rendered such judgment had jurisdiction not only of the subject-matter, but of the plaintiff, who had appeared and answered, and afterward defaulted in the action, and the court held that the suit was not maintainable while the judgment remained in full force and had been executed in part by a sale of the property in the state which rendered it.

In any case where a court of equity is asked to deny to the judicial proceedings of a sister state, on the ground of fraud, the full faith and credit which the Constitution and the Federal statute command to be given to them, the truth of the

charge, to make it successful, must be established by the most satisfactory and convincing evidence; because the court is bound by its fealty to the Constitution and interstate law, as well as by a proper respect for the tribunal whose action is assailed, to make every presumption in favor of the validity and justice of the proceedings. *Supreme Council, R. A. v. Carley*, 52 N. J. Eq. 642, 29 Atl. 813.

Relief will not be granted in equity against a judgment recovered at law in another state upon any ground which might have been interposed as a defense in the suit in which the judgment was rendered. *Black v. Smith*, 13 W. Va. 780.

An allegation in a bill in equity brought to restrain a suit upon a foreign judgment, that such judgment was entered fraudulently and without authority, by the clerk of the court which purported to have rendered it, is insufficient to support the bill. *Bicknell v. Field*, 8 Paige, 440.

e. Where legal and equitable jurisdiction are united.

In states where common law and equity are administered by the same courts, and in which the distinctions between actions at law and suits in equity have been abolished, and where the forms and procedure are alike for all cases, any defense, legal or equitable, may be pleaded to an action brought upon a judgment of another state which would be sufficient to avoid that judgment in the state where it was rendered, or to avoid a judgment of the state of the forum. *Rogers v. Gwinn*, 21 Iowa, 58; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

Among these defenses is that of fraud and imposition in procuring the judgment. *Dobson v. Pearce*, 12 N. Y. 106, 62 Am. Dec. 152; *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

When a plaintiff in a judgment fraudulently obtained in one state comes into another to enforce it, the courts of the latter state may redress the fraud according to the system of practice prevailing there; that is, by an injunction, if law and equity are kept distinct, or by an equitable defense, if the two systems are united. *Trebilcox v. McAlpine*, 62 Hun, 317, 42 N. Y. S. R. 238, 17 N. Y. Supp. 221.

We are unable to perceive, said the court in *Coffee v. Neely*, 2 Heisk. 304, any valid reason why the defenses may not be made by plea, in a court of law, to an action upon a judgment from another state, especially under the provisions of the Code; and we hold that the judgment of the court below was erroneous in sustaining the demurrer to the plea of fraud.

In states where only one form of action is recognized, and law and equity are administered in the same forum, whenever a final judgment is sued upon, and the answer properly pleads fraud impeaching the judgment, the proceeding is to be considered a direct and proper attack upon such judgment; and if, on the hearing, it is shown that the judgment, although ren-

dered in another state, was procured by fraud, and in circumstances which would enable the courts of such state, by an independent action, to arrest its enforcement, the defense will be sustained, and the defendant afforded the proper relief. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 240.

Some of the appellate courts of our sister states, said the court in *Mottu v. Davis*, supra, have held that the plea of fraud is never available as a defense to a judgment rendered by the courts of another state, when such courts had jurisdiction of the cause and the parties, basing such ruling upon decisions of the Supreme Court of the United States construing article 4, § 1, of the Federal Constitution, as in *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484, citing and relying on *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564; *Hanley v. Donoghue*, 116 U. S. 1-4, 29 L. ed. 535-537, 6 Sup. Ct. Rep. 242; *Simmons v. Saul*, 138 U. S. 439-459, 34 L. ed. 1054-1062, 11 Sup. Ct. Rep. 369. Undoubtedly, if the cases referred to correctly interpret the decisions of the Supreme Court of the United States, they must be followed here and elsewhere; for such decisions are final and controlling on the question presented; but, while there are many expressions in the opinions of our highest court which seem to sanction the position contended for, we are of opinion that no authoritative decision of that tribunal directly so holds, and that the great weight of well-considered authority is to the effect that in states such as ours, where all distinctions between actions at law and suits in equity have been abolished and relief is administered in one form of action, fraud in the procurement of a judgment, when properly pleaded, is available as a defense to an action on a judgment recovered in a sister state, though such state may have had jurisdiction of the cause and the parties.

If it were admitted, according to the court in *Lucas v. Copeland*, 2 Stew. (Ala.) 151, that in a state where there is no special chancery jurisdiction, and the courts of law must afford all the relief in any case that can be sought from the judiciary, the truth of the record of a judgment may be impeached by a plea at law, it does not follow that the same can be done in states which have distinct chancery jurisdiction more adequate to investigate frauds, accidents, or mistakes.

The difference between law and equity has been directly recognized and maintained in the Federal courts; hence, if a remedy be in equity, the Federal courts will not allow it to be asserted at law, and *vice versa*. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 27 U. S. App. 1, 76 Fed. 429.

f. Failures in pleading and proof.

In several cases resistance upon the

ground of fraud has been offered to judgments of sister states unsuccessfully, because the courts held that the pleadings were insufficient to admit the proof, or that the facts proved were insufficient to establish the fraud. The following were cases of this kind: *Conway v. Ellison*, 14 Ark. 360; *Weir v. Vail*, 65 Cal. 466, 4 Pac. 422; *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911; *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526; *Morrison Mfg. Co. v. Rimmerman*, 127 Iowa, 719, 104 N. W. 279; *Malcolm v. Malcolm*, 100 Ky. 310, 38 S. W. 141; *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Miller v. Lowell*, — Tex. Civ. App. —, 40 S. W. 835.

In regard to the plea setting up fraud in obtaining the foreign judgment sued upon in the case of *Lawrence v. Jarvis*, 32 Ill. 304, it is sufficient to say, said the court in this opinion, that such a defense may be interposed, but it is incumbent upon him who sets it up to prove it,—which he has failed to do in this case.

It was contended, in the case of *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, that a decree of divorce which had been granted in Louisiana had been obtained by a fraud upon the plaintiff, and was void for that reason, and for want of jurisdiction; but to that contention the court replied: "We do not think that the allegation of fraud is maintained."

The effect of the provisions of the Federal Constitution, requiring full faith and credit to be given to the judicial proceedings of any state in the other states, is that the judgment of a court of one state is not impeachable in a sister state, except for fraud or want of jurisdiction, said the court in *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434; adding, however, that neither of these was suggested in that case.

An allegation and proof that a decree rendered in another state was procured by fraudulent representations made by the plaintiff and his attorney to the defendants, with respect of their rights, and as to the purpose or effect of the suit in which the decree was rendered, without any allegations that the defendant did not have ample notice of the existence of the suit, and an opportunity to defend it, are insufficient to impeach such decree in another state. *Peninsular Iron Co. v. Eells*, 15 C. C. A. 189, 32 U. S. App. 348, 68 Fed. 25.

An objection to the record of a foreign judgment that certain missing papers were fraudulently abstracted is not supported by their mere absence from the record, since the presumption is, in the absence of any positive proof to the contrary, that the missing papers were lost or destroyed accidentally, rather than fraudulently abstracted or suppressed. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484.

A judgment cannot be said to have been obtained by fraud merely because one of the attorneys who assisted in obtaining it

had previously been employed in the same manner by the person against whom the judgment was rendered, and violated professional ethics, and used the knowledge he had obtained from the client to procure the judgment. *Cox v. Barns*, 45 Neb. 172, 63 N. W. 394.

An affidavit of defense to a judgment recovered in another state against a corporation, and based upon a certificate of service upon a person named as president, residing within the jurisdiction of the court, which denies that such person was president, and alleges that the judgment was obtained by fraud, without going further, and denying the authority of the attorney who appeared in the action, is insufficient. *Wyoming Mfg. Co. v. Mohler*, 1 Monaghan (Pa.) 622, 17 Atl. 31.

V. Conclusion.

An examination of the cases leads to the conclusion that the right to resist in one state, on the ground of fraud, a judgment rendered in another state, is no longer disputed, but that only frauds of certain kinds are adequate to make resistance effective. The frauds which hitherto have been recognized as sufficient to impeach judgments of sister states have been such as (1) went to the jurisdiction (either with respect of the subject-matter or of the person) of the court to render the questioned judgment; or, (2) constituted a fraud upon the law of the forum; or, (3) operated to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. Frauds, no matter how gross (forgery and perjury, for examples), in the conduct of the litigation, or fabrication of the cause of action, which the defendant might have met and counteracted, are unavailable. The manner of resisting, on the ground of fraud, judgments of sister states, is necessarily governed by the law and practice of the forum; but whether law and equity are or are not there separately administered, it is always to the equity side of the courts that a litigant should apply, either by original direct bill or equitable defense to his adversary's action, for relief against a fraudulent judgment. J. B. G.

COLORADO SUPREME COURT.

MARY J. HOUCK, Impleaded, etc., Plff. in Err.,

v.

LA JUNTA HARDWARE COMPANY.

(— Colo. —, 114 Pac. 645.)

Husband and wife — family expense — buggy — liability of wife.

A buggy purchased by a man for the use of his family is within a statute making the husband and wife liable for family ex-

penses, although upon one occasion he refused to permit her to use it, and they separated a short time after its purchase.

(April 3, 1911.)

ERROR to the Otero County Court to review a judgment in plaintiff's favor in an action brought to recover the balance of the purchase price of a buggy sold by plaintiff to defendants. Affirmed.

The facts are stated in the opinion.

Mr. Earl W. Haskins for plaintiff in error.

Mr. O. G. Hess for defendant in error.

Campbell, Ch. J., delivered the opinion of the court:

The action is by the La Junta Hardware Company against J. T. Houck and Mary J. Houck, husband and wife, to recover for the value of goods and merchandise sold to them, one of them. It is based in § 3021, Rev. Stat. 1908, which makes expenses of the family chargeable upon the property of both husband and wife or either of them, and they may be sued thereon, either jointly or separately. The buggy, for the balance of the purchase price of which recovery is asked, was sold and delivered by plaintiff to the husband, and the only question is whether it constitutes a family expense. There are no pleadings; the case having been begun before a justice of the peace and afterwards taken to the county court. The judgment was for plaintiff against the wife at both trials. The only errors she assigns are the ruling denying the motion for a nonsuit and the alleged failure of the entire

Note. — What constitute "family expenses" within statute rendering wife or her property liable therefor.

The cases defining "family expenses" as the term is used in statutes making them chargeable upon a wife's property are collected in notes to Dodd v. St. John, 15 L.R.A. 717 and Vose v. Myott, 21 L.R.A. (N.S.) 277.

In addition to the holding in *HOUCK v. LA JUNTA HARDWARE CO.* that a buggy purchased by a husband for family use was a family expense within the meaning of the statute, it has been held since the above notes were written that wages of a domestic servant are a family expense for which a wife is liable under statutory provision making both husband and wife liable for such expenses. *Campbell v. Heuer*, 139 Ill. App. 631.

And hospital expenses and medical attendance furnished a wife were recognized as constituting a family expense "chargeable upon the property of both husband and wife or either of them" as provided by statute in *Re Skillman*, — Iowa, —, 125 N. W. 343. *W. A. S.*
32 L.R.A. (N.S.)

evidence to show that the buggy was a family expense.

In *Perkins v. Morgan*, 36 Colo. 360, 85 Pac. 640, it was said, quoting from *Gilman v. Matthews*, 20 Colo. App. 170, 77 Pac. 366: "What should be included in the term 'family expenses' must be determined by the facts and circumstances of each case, subject to the limitation that an article or articles must have been purchased for, and used in or by, the family, or some member thereof." It is not claimed that the buggy was not a family expense, if it was purchased for and used in or by the family. The claim that it was not a family expense is said to be established by the fact that defendants were not, at the time of the purchase, living together as husband and wife, though they were then married, and the wife did not use, and was not permitted to use, the buggy. The evidence is amply sufficient to show that at the time of the purchase defendants were living together as husband and wife in the same house upon their farm.

The argument of plaintiff in error as to this point is based on the mistaken assumption that the buggy was bought in June, 1904, and that she and her husband were not then, and, since the spring of that year, when they separated, had not been, living together as husband and wife. The evidence is uncontradicted that the purchase was in 1903, about one year before the separation, and then defendants were living in the same house as one family. There is testimony that on one occasion the husband did not permit the wife to use the buggy; but it was purchased for the family, and used by him and others of its members, while defendants were living together.

The findings of the court below are sustained by the evidence. Indeed, there is no substantial conflict.

The judgment is affirmed.

Gabbert and Hill, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MECHANICS' INSURANCE COMPANY
OF PHILADELPHIA et al., App'ts.,

v.

C. A. HOOVER DISTILLING COMPANY
et al.

(97 C. C. A. 400, 173 Fed. 888.)

Equity — coinsurers — action to apportion claims.

1. Equity has no jurisdiction on the

ground of the necessity of an accounting, of a suit by several insurers having policies on the same property, each of which provides for a liability proportional to the loss, to enjoin the insured from proceeding at law upon the policies, and to ascertain the amount of loss and fix the sum which each complainant should contribute thereto, although if the actions were tried separately by different juries the amount of loss might be fixed differently so that some policies would have to pay a greater proportion of their face value than others.

Same — multiplicity of suits — jurisdiction.

2. Several insurance companies having policies providing for proportional liability on property in which a loss has occurred cannot join in a bill in equity to enjoin the assured from maintaining actions at law, and to adjust the amount of their respective losses in one suit, on the theory that they will thereby save a multiplicity of suits.

Same — fraud — adjustment of loss.

3. That the proofs of loss upon an insurance policy have placed a fraudulently excessive valuation on the property destroyed will not give equity jurisdiction of a suit to enjoin the assured from maintaining an action at law and to secure an adjustment of the loss.

(September 9, 1909.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the Southern District of Iowa, dismissing a bill filed to enjoin defendants from maintaining actions at law and to secure an adjustment of their loss. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Carland and Pollock, District Judges.

Messrs. A. C. Parker, Charles B. Obermeyer, N. T. Guernsey, and W. E. Miller for appellants.

Messrs. John F. Lacey, William McNett, James A. Devitt, W. C. Burrell,

and W. R. Lacey, for appellee Distilling Company:

The fifteen cases pending in the United States circuit court can all be tried at law at one time and by the same jury, so that there is no question of multiplicity of suits involved.

Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; Gainesville v. Dean, 124 Ga. 750, 53 S. E. 183; Bispham, Eq. 3d ed. § 417.

The mere fact that multiplicity of suits at law may be prevented is no ground for equitable interference, where the party who must bring the suits does not complain, and where each of the other parties can be sued but once.

Turner v. Mobile, 135 Ala. 73, 33 So. 132; Scottish Union etc. Ins. Co. v. J. H. Mohlman Co. 73 Fed. 66; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; Tribette v. Illinois C. R. Co. 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; High, Inj. 4th ed. §§ 62, 63; Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905; Douglass v. Boardman, 113 Mich. 618, 71 N. W. 1100; Travelers' Protective Assn. v. Gilbert, 55 L.R.A. 538, 49 C. C. A. 309, 111 Fed. 269; Story, Eq. §§ 450-453; 3 Pom. Eq. § 1421; Thomas v. Council Bluffs Canning Co. 34 C. C. A. 428, 92 Fed. 422; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Barnes v. Beloit, 19 Wis. 93; Deweese v. Reinhard, 165 U. S. 386, 41 L. ed. 757, 17 Sup. Ct. Rep. 340; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426.

Mr. H. H. Sheriff for appellee Insurance Companies.

Carland, District Judge, delivered the opinion of the court:

The C. A. Hoover Distilling Company, an Iowa corporation doing business at Oskaloosa, in said state, on May, 15, 1908, suf-

Note. — Jurisdiction of equity to adjust losses between concurrent insurance policies on same property.

The mere fact that several concurrent policies of insurance issued upon the same property are entitled, under the contract of insurance, to an apportionment of losses thereunder in the proportion the amount issued by each policy bears to the whole insurance does not, in event of a liability or claimed liability upon such policies, afford any ground for equitable interposition to enjoin actions at law upon each of the policies in order that the question of liability thereon, or the proportion of loss payable by each policy, may be determined. Each contract of insurance although containing such a clause is entirely separate and independent of the other, the effect of

the clause being merely to individualize the risks of the several insurers, making their respective liabilities depend upon the amount of the loss proportioned upon the aggregate amount of the policies. Spring Garden Ins. Co. v. Amusement Syndicate Co. 102 C. C. A. 29, 178 Fed. 519; Scruggs v. American Cent. Ins. Co. — L.R.A. (N.S.) —, 100 C. C. A. 142, 176 Fed. 224; Rochester German Ins. Co. v. Schmidt, 99 C. C. A. 296, 175 Fed. 720; MECHANICS' INS. CO. v. C. A. HOOVER DISTILLING CO.; Hartford F. Ins. Co. v. Ledford, 151 Ill. App. 413.

Scottish Union, etc. Ins. Co. v. J. H. Mohlman Co. 73 Fed. 66, holds the fact that there are several policies of insurance upon the same property, and that a liability is claimed against each policy to which there is a common defense, presents no

ferred a loss of property by fire. On the property destroyed were insurance policies to the amount of \$85,500, distributed among different insurance companies as follows:

On August 25th the Distilling Company commenced actions at law in the district court of Iowa in and for Mahaska county, against each of said insurance companies to recover the loss caused by said

| No. of Policy. | Name of Company. | Amount of Policy. |
|----------------|--|-------------------|
| 608206 | Mechanics' Insurance Company of Philadelphia..... | \$3,000 00 |
| 2833 | The Home Insurance Company of New York..... | 5,000 00 |
| 2309 | The Home Insurance Company of New York..... | 5,000 00 |
| 25069 | Buffalo German Insurance Company of Buffalo..... | 2,000 00 |
| 1272 | St. Paul Fire & Marine Insurance Company of St. Paul..... | 5,000 00 |
| 2505 | Phenix Insurance Company of Brooklyn, N. Y..... | 3,000 00 |
| 2551 | Phenix Insurance Company of Brooklyn, N. Y..... | 3,000 00 |
| 104 | Royal Insurance Company of Liverpool..... | 5,000 00 |
| 1390 | German American Insurance Company of N. Y..... | 5,000 00 |
| 1378 | German American Insurance Company of N. Y..... | 2,500 00 |
| 1557 | The Insurance Company of North America of Philadelphia..... | 4,000 00 |
| 5237659 | North British & Mercantile Insurance Company of London and Edinburgh..... | 3,000 00 |
| 5239476 | North British & Mercantile Insurance Company of London and Edinburgh..... | 2,500 00 |
| 1243 | The Rochester German Insurance Company of Rochester..... | 1,500 00 |
| 51604 | The Rochester German Insurance Company of Rochester..... | 3,000 00 |
| 62049 | The Phoenix Insurance Company of Hartford, Conn..... | 3,000 00 |
| 62052 | The Phoenix Insurance Company of Hartford, Conn..... | 2,000 00 |
| 3885018 | Fire Association of Philadelphia..... | 2,500 00 |
| 3885038 | Fire Association of Philadelphia..... | 4,000 00 |
| 6004 | City of New York Insurance Company of New York..... | 3,000 00 |
| 22087 | Security Insurance Company, New Haven, Conn..... | 2,500 00 |
| 2360 | Ætna Insurance Company of Hartford..... | 3,000 00 |
| 2383 | Ætna Insurance Company of Hartford..... | 2,500 00 |
| 26105 | Milwaukee Mechanics' Insurance of Milwaukee..... | 2,000 00 |
| 62501 | Milwaukee Fire Insurance Company of Milwaukee..... | 1,500 00 |
| 1675 | Commercial Insurance Company of Buffalo, N. Y..... | 2,000 00 |
| 2990150 | The London Assurance Corporation, United States Branch, New York City..... | 5,000 00 |

ground for equitable aid in behalf of the insurance company to enjoin an action at law in order to avoid a multiplicity of suits. Considering this question the court said: "The system of jurisprudence and procedure which is known to courts and lawyers as 'equity' is a good thing, but justice and fair dealing are better. If a court of chancery has the power, it should be slow to exercise its discretion to hale into its own jurisdiction an individual who, having rights under different independent contracts, is seeking to enforce them against independent defendants in the courts appropriate to pass upon them, simply because these separate defendants may think it more convenient or more expedient to combine forces against him in a single suit. Each of these insurers, independently of all the others, has entered into a contract with the assured which entitles the latter to come into the Federal court in a common-law action, and submit all issues between them to its arbitration, and the Constitution of the United States secures to him a trial of those issues by a jury. It might well be inferred from the present application that there is some aversion to face such a tribunal, and that it is expected the chances of success will be greater if the testimony be taken according to the invariable practice in equity in this district by written deposition when the

court never sees the witness, nor has the benefit of observing how his testimony is given and noting his demeanor under cross-examination. If the present application were successful, we might, no doubt, expect to see all such insurance litigation promptly transferred to the equity side of the court. Most persons insure against fire in more than one company, and if a dozen companies can, by combining as complainants have, take the assured out of the common-law courts, there is no good reason why a half dozen or even less should not go and do likewise."

And see also *Manchester Fire Assur. Co. v. Stockton Combined Harvester & Agri. Works*, 38 Fed. 378, wherein the court denied the right of several insurance companies to invoke the aid of equity on the ground that they had entered into an adjustment with an insured under their policies of insurance, which covered the same property, as to the amount of the loss thereunder, and that the said adjustment was procured by misrepresentation of facts, and fraud on the part of the insured, and that he was about to sue the complaining company upon the adjustment for its share of the loss. In this case, the equitable relief was denied on the ground that a multiplicity of suits was not thereby avoided.

The question squarely arose in *Rochester*

fire. Subsequently the defendants in each of said actions at law, where the amount in controversy was sufficient, removed said actions to the United States circuit court for the southern district of Iowa. The removal proceedings brought fifteen actions to the United States circuit court and left four actions pending in the state district court. October 15, 1908, the fifteen insurance companies which had removed the cases against them filed a bill in equity in said United States circuit court against the Distilling Company and the four insurance companies who did not remove their cases from the state court, wherein complainants prayed that the Distilling Company be enjoined from prosecuting any of said actions at law either in the state or Federal court; that the court ascertain what, if any, sum is due from any of the insurance companies to the Distilling Company on the policies of insurance issued by them; and that it be decreed accordingly,

but, if no sum should be found due, that said policies be decreed to be delivered up and canceled. The bill stated the foregoing facts, and also alleged that each of the policies issued to the Distilling Company by the insurance companies contained the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property."

The Distilling Company demurred to the bill for want of equity, and for the reason that complainants had an adequate remedy at law. The circuit court sustained the demurrer and dismissed the bill, but continued a temporary injunction pending an appeal to this court. There are many legal conclusions and matters of argument stated in the bill, but the facts upon which the

German Ins. Co. v. Schmidt, 99 C. C. A. 296, 175 Fed. 720, which reversed the same case, 126 Fed. 998, cited in *MECHANICS' INS. CO. v. C. A. HOOVER DISTILLING CO.* In this case the complainants based their right to invoke the aid of equity to restrain the prosecution of different suits by policy holders against different companies, on the ground that they had a common defense and a multiplicity of suits would thereby be avoided. While the cause of action arose in South Carolina as did the cause of action in *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 1, and in the lower court the latter case was followed and the jurisdiction of equity sustained, yet on appeal a distinction was pointed out between the two cases, and it was held that the jurisdiction of equity in the case of *Virginia-Carolina Chemical Co. v. Home Ins. Co.* rested upon the ground that, under the statutes of South Carolina and the insurance policies in question, the companies were liable for the loss sustained under the different policies upon property, the valuation of which had been fixed according to these policies and the statute of that state referred to, and that this valuation had, by the insured, been fraudulently over estimated or appraised. Among other things it was sought to have the policies reformed so as to state the true value of the property, thus raising an entirely independent and different ground of equitable interposition than the mere prevention of a multiplicity of suits. In the *Rochester German Ins. Co.* Case the court pointed out that the policies therein involved did not contain this valuation feature, and the only ground for equitable interposition was the prevention of a multiplicity of suits and the claim that the exact amount which each insurance company should pay might not be equitably fixed by separate actions at law. Neither of these grounds was held 32 L.R.A. (N.S.)

to be sufficient to entitle the insurance companies to invoke the aid of equity, and the suit was dismissed.

In *Tisdale v. Three Ins. Cos.* 84 Miss. 709, 36 So. 568, it was held that equity had jurisdiction to enjoin actions at law upon three different insurance policies, merely on the ground that each company claimed to have a common defense and that the liability was concurrent. The court said that equity jurisdiction is maintainable on the ground of preventing a multiplicity of suits as well as upon the inadequacy of the remedy at law, that the very same principles of law and the very same facts must be shown in each case, and added; "Besides it is important to note that there could be but one true fixation of the actual amount of the loss, and yet each jury might put it at a different sum."

But where the insurance companies themselves seek the aid of equity to determine the question of the liability upon the concurrent policies of insurance upon the same property as well as the apportionment of the loss, they cannot thereafter claim that the remedy was at law and that equity had no jurisdiction. *Spring Garden Ins. Co. v. Amusement Syndicate Co.* 102 C. C. A. 29, 178 Fed. 519.

Upon a somewhat analogous question as to jurisdiction of equity upon ground of avoidance of multiplicity of suits to entertain suit for possession of separate parcels of land held adversely by different defendants claiming under a common source, see note to *Illinois Steel Co. v. Schroeder*, 14 L.R.A. (N.S.) 239.

And as to power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort, see note to *Southern Steel Co. v. Hopkins*, 20 L.R.A. (N.S.) 848.

A. G. S.

jurisdiction of the United States circuit court as a court of equity must depend have all been stated. If the bill in this case states a cause of action cognizable in equity, it is plain that the days of jury trial in insurance litigation are numbered. as there are extremely few insurance losses not covered by at least two or more policies in different insurance companies. In view of the great number of actions to recover losses upon policies of insurance heretofore triable at law, any decision which would strike down this jurisdiction and transfer the whole litigation to courts of equity ought to be founded upon the soundest reason, and declared only after careful consideration.

If we understand counsel for complainants their position is this: First. As each insurance company agrees to pay such a proportion of the total loss as the amount of its policy bears to the total amount of valid insurance on the property damaged or destroyed, the insurance policies become interdependent contracts, necessitating an accounting, so to speak, between the insurers and insured, in order to ascertain the amount due on each policy. Second. That by all insurance companies joining in the bill as complainants a multiplicity of suits will be saved.

In order to fully appreciate the position of complainants in the present action, it will be helpful to view their position standing alone. Thus viewed, each insurance company has a valid contract or contracts with the Distilling Company, upon each of which, according to the allegations of the bill, the Distilling Company may maintain an action at law for damages against each insurance company. There are no facts stated in the bill that show that any insurance company, standing alone, has any cause of action whatever, either legal or equitable, against the Distilling Company. The different insurance companies having no cause of action individually, so far as appears, against the Distilling Company, we are led next to inquire as to what cause of action of equitable cognizance in favor of complainants and against the Distilling Company has been created by joining in the bill filed in this cause, as appears from the allegations thereof.

We think it clearly appears that complainants have no more cause of action cognizable in equity in combination than if each stood alone. The method adopted by the parties to the insurance contracts for ascertaining the amount payable thereunder in case of loss does not make the contracts interdependent. No one insurance company has any interest in what any other insurance company shall pay under its 32 L.R.A. (N.S.)

policy. It is only interested in what it shall pay, and as a consequence in the value of the property destroyed. So far as the allegations of the bill are concerned, there is not a disputed question between any of the insurers and the insured, except as to the value of the property destroyed; and it is asked that a court of equity take jurisdiction of the case for the purpose of ascertaining this value, for the reason that different juries in actions at law might return different verdicts as to the value of this property, and thus the amount to be paid by one insurance company might be greater or less than that of some other company. If the peculiar and special duty of juries to pass upon property values in matters at law may be taken away and given to a chancellor, merely because different juries may render different verdicts upon like or similar facts, then trial by jury in civil actions no longer exists. The idea of handling these cases through a master in chancery, when the only question at issue is the value of the property destroyed, because there is no adequate remedy at law, shocks the legal mind.

But it is also urged that complainants have a right to file this bill in equity in order to save a multiplicity of suits. The phrase "multiplicity of suits," in connection with the jurisdiction of courts of equity, has often been carelessly used, but, it seems, never more so than in this proceeding. Each of these complainants were sued by the Distilling Company at law. In order to save the Distilling Company from prosecuting nineteen different suits at law, complainants urge that they may bring this action in equity. There are two reasons why the rule in regard to saving a multiplicity of suits as applied to matters of equity jurisdiction may not be invoked in this proceeding:

First. There can be no claim that any complainant is saved from a multiplicity of suits by the maintenance of this action in equity. The Distilling Company is not in court asking it to take jurisdiction of its suits against the insurance companies in order to save it, the Distilling Company, from a multiplicity of suits against it or by it. It does not rest with the complainants to urge as a foundation for their suit that the defendant, the Distilling Company, may thereby be saved a multiplicity of suits. *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

Second. The complainants, in our opinion, present no cause of action, either legal or equitable, against the Distilling Company by the allegations of their bill. The prevention of a multiplicity of suits is not,

considered by itself alone, an independent source of jurisdiction in equity, in such a sense that it can create a cause of action where none had ever existed. As is said in § 250, Pomeroy's Equity Jurisprudence: "In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff, invoking such jurisdiction, has not any prior existing cause of action, either equitable or legal,—has not any prior existing right to some relief, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise."

If we are right in saying that the complainants have no cause of action against the Distilling Company, then they have no right to ask a court of equity to save anyone from a multiplicity of suits. In support of the provision that the bill in this case states a cause of action cognizable in equity, the case of *Home Ins. Co. v. Virginia-Carolina Chemical Co.* 109 Fed. 681, is cited. This case was affirmed on appeal in 51 C. C. A. 21, 113 Fed. 1. The case arose in the circuit court for the district of South Carolina and was followed by the same court in *Rochester German Ins. Co. v. Schmidt* (C. C.) 126 Fed. 998, and also in *Tisdale v. Three Ins. Cos.* 84 Miss. 709, 36 So. 568. We have carefully examined the opinions in those cases, and, if those opinions are to the effect that the bill in this case states a cause of action of equitable cognizance, then we must say that they are not persuasive and are a distinct departure from what has heretofore been recognized as the law in regard to equity jurisdiction.

Without entering into a detailed discussion as to when a court of equity will or will not entertain jurisdiction of a cause, we are clearly of the opinion that the case now before us is not one of equitable cognizance. Amendments to Constitution of the United States art. 7; U. S. Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583; *Deweese v. Reinhard*, 165 U. S. 386, 41 L. ed. 757, 17 Sup. Ct. Rep. 340; *Thomas v. Council Bluffs Canning Co.* 34 C. C. A. 428, 92 Fed. 422; *Scottish Union, etc., Ins. Co. v. J. H. Mohlman Co.* (C. C.) 73 Fed. 66; 1 High, Inj. 4th ed. § 63a; (disapproving *Tisdale v. Three Ins. Cos.* 84 Miss. 709, 36 So. 568); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; *Travelers' Protective Asso. v. Gilbert*, 55 L.R.A. 538, 49 C. C. A. 309, 111 Fed. 269; *Youngblood* 32 L.R.A.(N.S.)

v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; *Barnes v. Beloit*, 19 Wis. 93; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Gormley v. Clark*, 134 U. S. 339, 33 L. ed. 910, 10 Sup. Ct. Rep. 554; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633; *Buzard v. Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Tribette v. Illinois C. R. Co.* 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; *Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 905; *Douglass v. Boardman*, 113 Mich. 618, 71 N. W. 1100.

We do not wish to base our decision upon the proposition that complainants have an adequate remedy at law because the cases pending in the Federal court may be consolidated for the purpose of trial. Still this may be done. *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909, U. S. Rev. Stat. § 295, U. S. Comp. Stat. 1901, p. 176. There is an allegation in the bill filed by complainants in regard to the presentation of proofs of loss by the Distilling Company, in which the value of the property destroyed is fraudulently excessive. This kind of fraud, if it existed, can form no basis for equitable jurisdiction, as it has nothing to do with the insurance contracts themselves; and, furthermore, such a fraud is just as easily disposed of in an action at law as in an action in equity. *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

We see no error in the ruling of the trial court upon the demurrer, and its judgment is therefore affirmed.

NEW YORK COURT OF APPEALS.

FRANCES M. SCIOLARO, Respt.,
v.

JOSEPH ASCH, Impleaded, etc., Appt.

(198 N. Y. 77, 91 N. E. 263.)

Evidence — lease — elevator service — action by tenant's servant.

1. A lease obligating the landlord to furnish elevator service to his tenants is admissible in evidence in an action by a serv-

Note. — Responsibility of owner or occupier of building where operation of elevator is let to independent contractor.

The scant authority disclosed upon the point here considered is in accord with the decision in *SCIOLARO v. ASCH* in holding that the owner or occupier of a building is not relieved from responsibility for injuries resulting from the operation of

ant of the lessee against the landlord, to recover for injury received by the operation of the elevator.

Elevator — liability of contractor — liability of owner.

2. The owner of a building the floors of which are leased to different tenants cannot relieve himself from responsibility to employees of the tenants for the unsafe operation of the elevator by letting such operation to an independent contractor.

(March 4, 1910.)

A'PEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a trial term for New York County, Part 10, in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Edward P. Mowton, with Messrs. Nadal, Carrère, & Jones, for appellant:

Before an owner can be made liable for injuries sustained by persons upon his premises, it must be established that he was guilty of negligence.

Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Martin v. Pettit (Wasson v. Pettit) 117 N. Y. 118, 5 L.R.A. 794, 22 N. E. 566; Eaton v. New York C. & H. R. R. Co. 195 N. Y. 267, — L.R.A. (N.S.) —, 88 N. E. 378; Burke v. Ireland, 166 N. Y.

an elevator located in the building, by showing that the operation of such elevator was let to an independent contractor.

Thus, a grantee of leased premises who took the premises subject to the lease existing between her grantor and the lessee, which provided that the lessor should furnish "steam heat and elevator service," cannot absolve herself from liability for an injury to an employee of a tenant through the fall of an elevator by showing a contract made by the original lessor, and adopted and ratified by the grantee, whereby the heat and electricity of the building were furnished by a third party. Wagner v. Welling, 84 N. Y. Supp. 979. The court said: "The theory of an independent contractor cannot, however, be invoked in this case. If the lessor was bound by the terms of the lease to provide the necessary elevator service, he cannot relieve himself from liability for negligent performance by delegating the duty."

Where a landlord undertook the alteration of a dumbwaiter for the accommodation of his tenants, and a child of one of them was injured by reason of the negligent splicing of the rope, it was held that it was immaterial whether the man who

305, 59 N. E. 914; Stevens v. Armstrong, 6 N. Y. 435; McInerney v. Delaware & H. Canal Co. 151 N. Y. 411, 45 N. E. 848; Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37.

The court erred in admitting the lease as a measure of the landlord's obligation to the plaintiff.

Frank v. Mandel, 76 App. Div. 413, 78 N. Y. Supp. 855; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925.

Mr. Herbert J. Hindes, for respondent:

The defendant Asch is responsible for negligence of the elevator employee.

Shearm. & Redf. Neg. § 167; Thomp. Neg. 661; Althorf v. Wolfe, 22 N. Y. 355; Simons v. Monier, 29 Barb. 419; New York v. Bailey, 2 Denio, 433; Suydam v. Moore, 8 Barb. 358; Wellman v. Miner, 19 Misc. 646, 44 N. Y. Supp. 417; Spencer v. McManus, 5 Misc. 267, 27 N. Y. Supp. 896; Kilroy v. Delaware & H. Canal Co. 121 N. Y. 22, 24 N. E. 192; Hill v. Sheehan, 48 N. Y. S. R. 410, 20 N. Y. Supp. 529; Anderson v. Boyer, 13 App. Div. 260, 43 N. Y. Supp. 87; Lauro v. Standard Oil Co. 74 App. Div. 7, 76 N. Y. Supp. 800.

Werner, J., delivered the opinion of the court:

This action was brought to recover damages for injuries sustained by the plaintiff while endeavoring to alight from a passenger elevator in a building owned by

made the alteration was a servant of the landlord or an independent contractor, and also immaterial whether the landlord had notice of the defective performance of the work. Blake v. Fox, 43 N. Y. S. R. 527, 17 N. Y. Supp. 508.

In Green v. Urban Contracting & Heating Co. 106 App. Div. 460, 94 N. Y. Supp. 743 (affirmed without opinion), an action to recover for injuries sustained by an employee of a tenant in consequence of the unexplained starting of the elevator was brought against the owner and a company under contract with the latter to operate the elevators, but the case was disposed of on the ground of contributory negligence and failure to prove negligence; and the question whether the contract would have relieved the owner if there had been negligence on the part of the contractor was not discussed.

For a note on liability for injury to elevator passenger, see note to Edwards v. Manufacturers' Bldg. Co. 2 L.R.A. (N.S.) 744.

For a note on liability of owner of elevator for injury to trespassers or licensees, see note to Davis v. Ohio Valley Bkg. & T. Co. 15 L.R.A. (N.S.) 402. J. T. W.

the appellant, Asch. The facts of the case are practically undisputed. The defendant Asch is the owner of a nine-story building in Washington place, in the city of New York, divided into lofts which are let out to tenants for various manufacturing purposes. Among these tenants was the firm of Reiter, Fruhauf, & Company, who were engaged in the manufacture of clothing, and by whom the plaintiff was employed as a piece worker. On the 23d day of December, 1905, at the close of the working day, the plaintiff stepped upon the elevator at the ninth floor, carrying in her arms a bundle of clothing, and took a place in the corner furthest removed from the door. A number of other persons entered, and the descent was made to the ground floor. The operator in charge stepped out of the car into the hall, and the other passengers had passed out when the plaintiff started to leave. While she was in the act of alighting the car started upward. She screamed and thus attracted the attention of the operator, who reached up and pulled her down to the floor of the hall, but not until after she had been caught and crushed between the floor of the ascending car and the upper part of the frame of the door or opening leading from the hall to the elevator shaft. Then the operator stopped the car. The elevator is described as a "combination" designed for passengers and freight, and was one of several of similar character used by the tenants, their patrons and employees. It was of a pattern in common use, moved by electric power, operated by means of a cable extended through the car and the length of the shaft. To raise the car, it was necessary to pull the cable downward about 12 inches, and to lower the car the process was reversed. The elevator and its appurtenances were apparently in good repair, and the cause of its starting upward at the time of the accident is wholly unexplained. The firm by whom the plaintiff was employed occupied the ninth floor or loft of the building under a lease which, with other privileges, included "steam heat and usage of passenger and freight elevators in common with other tenants of the building." Instead of operating these elevators through employees of his own selection, the owner had entered into a contract with the National Steam & Operating Company, under which the latter had engaged to take charge of and operate the steam and electric plant, including the elevators, and for that purpose to furnish competent engineers, firemen, and elevator attendants. This contract was continued from year to year, and was in force when the plaintiff was injured. Upon these facts this action was brought against

Asch, the owner of the building, and the National Steam & Operating Company. The complaint charges the defendants jointly with negligence in the operation and maintenance of the elevator, but the evidence failed to establish any structural defect or lack of repair, and the case went to the jury solely upon the theory that, if any negligence had been shown, it rested in the undisputed fact that the attendant or operator had left his car before all of the passengers had alighted. The jury rendered a verdict against both defendants, and from the judgment entered upon it the defendant Asch appealed to the appellate division, where there was an affirmance by a divided court. The case is now in this court upon the appeal of Asch alone.

The briefs of counsel and their oral arguments cover a much wider range of discussion than is warranted by the record. We are not concerned with the inquiry whether the elevator may have been out of repair, for there was no evidence upon that subject. Neither need we decide whether the case might have been submitted to the jury under the rule of *res ipsa loquitur*, since that rule was distinctly eliminated by the charge of the court. Upon both of these questions, the rulings were unequivocally favorable to the appellant. The only evidence tending to support the plaintiff's allegations of negligence in the operation of the elevator rested upon the undisputed fact that the operator had left the elevator before the plaintiff had alighted therefrom. This was the narrow ground upon which the case went to the jury under the instructions which elicited no exception from counsel for either party. These instructions are, therefore, the law of the case and the verdict of the jury is binding upon the appellant, unless he is right in his contentions (1) that it was error to receive in evidence the lease from him to the firm by which the plaintiff was employed; and (2) that it was error for the court to charge the jury that the appellant's contract with the National Steam & Operating Company did not relieve the former from the obligation to have the elevators in his building operated with reasonable care.

While the lease referred to may not measure or limit the rights of the plaintiff as an employee of the tenant, its covenants relating to the furnishing of elevator service by the appellant tended to establish the duty of the latter in respect to that service. The building was one occupied by a number of tenants, who were to have in common the use of the steam heat and the elevators. As to these things, which were to be furnished by the appellant, he had a general control and a corresponding duty. This control and

duty were reciprocal and inseparable. The right to control and manage carried with it the obligation to do so with reasonable care and prudence. This is the necessary implication to be drawn from the covenant of the lease, and that document was therefore competent as evidence tending to establish the appellant's duty in the premises.

The contract between the appellant and the National Steam & Operating Company did not relieve the former from the duty imposed upon him by the covenant of the lease between him and the plaintiff's employers. It was a duty which he could not delegate to another so as to relieve himself from the consequences of its nonperformance. His position was not essentially different from that of a landlord of a tenement or apartment house who reserves the control of the halls and stairways which are used in common by the several tenants. Although the landlord may employ servants to perform the duty which is inseparable from the right of control, he is legally responsible for any negligence on their part which results in injury to third persons who are free from fault and are lawfully upon the premises. There is no valid distinction between the landlord's duty in such a case and one where elevators are substituted for stairways as means of ingress and egress to and from the various parts of a building. The element of care involved in the operation of an elevator is not distinguishable from that which applies to stairs and halls, except in degree. Reasonable care in both cases is the measure of the landlord's duty and that depends in each case upon the degree of danger. The care of an elevator includes the element of prudent operation; and where that is a duty assumed by a landlord, it does not differ in principle from the obligation to keep halls and stairways in a reasonably safe condition. Quite apart from the provisions of the lease to which we have referred, the plaintiff's presence in the elevator was justified by the implied invitation which the appellant is deemed to have extended to all persons who might have business in his building. As to such persons the law imposed upon him as owner the duty of seeing that the premises were in reasonably safe condition for access and egress. *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; 2 *Shearm. & Ref. Neg.* § 704; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175. This was a personal duty which the appellant could not delegate. "One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which

he may make for its performance by another person. Therefore the fact that he may have used the utmost care in selecting an agent to perform this duty, or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it." *Shearm. & Redf. Neg.* 5th ed. § 14. If the appellant could relieve himself from the personal duty of having his elevators operated with reasonable care by making a contract with others to perform that duty for him, the same thing could be done by a hotel keeper who maintains elevators in his hotel; but in just such a case we have held that the duty of reasonable care which a hotel keeper owes to his guests in the management and inspection of an elevator is one which cannot be delegated. *Stott v. Churchill*, 15 Misc. 80, 36 N. Y. Supp. 476, affirmed in 157 N. Y. 692, 51 N. E. 1094. The same rule has been applied to those analogous cases in which masters have been held to owe to their servants the duty of providing safe and suitable machinery, tools, and implements and safe places in which to work. Cases of this class might be cited by the score, but a brief extract from a single one will suffice: "No duty belonging to the master to perform, for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance," *Pantzer v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24. Underlying all these relations of master and servant, innkeeper and guest, and landlord and tenant, there is the same fundamental principle that the master, the innkeeper, and the landlord assume certain duties which can only be delegated subject to the legal responsibility which inheres in the primary obligation. That is the rule by which the appellant's case must abide, and it follows that there was no error in the charge of the trial court instructing the jury that "the defendant Asch was obliged to furnish elevator service to the tenants of the building, including the plaintiff's employer, and that he could not relieve himself of that obligation by making a contract with a third party."

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Haight, Vann, and Hiscock, JJ., concur.

UTAH SUPREME COURT.

NIELS C. PETERSON, Appt.,
v.
MAE BENSON, Recorder, Respt.

(— Utah, —, 112 Pac. 801.)

Officer — de facto — right to compensation.

1. A *de facto* officer who has in good faith performed the duties pertaining to the office may, in the absence of a *de jure* claimant, enforce payment by the public of the compensation to which an incumbent of the office is entitled.

Same — increase of salary — holdover — change of office.

2. A statutory provision that the compensation of a public officer shall not be increased to take effect during the time for which he is elected does not apply to deprive of the increased compensation one who having been elected for a term of two years and until his successor is elected and qualified holds over after the expiration of the term, at which time the office was by statute changed from an elective to an appointive one and an increase of salary provided for, since he cannot be said to be holding under his former election.

(December 1, 1910.)

Note. — Right of de facto officer to salary of office.

As is stated in *PETERSON v. BENSON*, the decisions divide themselves into three natural groups or classes,—those cases in which the right to compensation is incident to the title and in which the *de facto* officer has few, if any, rights, forming one class; those cases in which the *de facto* officer who, while bona fide holding the office under color of title, performs the duties pertaining thereto, is allowed to recover therefor, provided there is no *de jure* claimant, forming another class; and those cases wherein it is held that the compensation is due the one who, acting in good faith, performs the duties incident to the office, although there was in fact another who was rightfully entitled to assume the office, forming a third class. Nearly all of the cases fall within the first two classes, and, as between these, the first claims a decided majority.

Those cases in which it has been held that upon mandamus to compel a ministerial officer to perform a purely ministerial duty, such as the paying of salaries and fees, the title to the office cannot be decided, and that a ministerial officer is bound to recognize and pay an incumbent holding by color of right, have been excluded as they rest on a different principle, being based upon rules of pleading appertaining to such proceedings. Cases involving the right, upon certiorari to review the proceedings of an auditor in rejecting or allowing claims of *de facto* officers to salary and fees, 32 L.R.A. (N.S.)

A PPEAL by applicant from a judgment of the District Court for Cache County dismissing his petition for a writ of mandate requiring defendant as city recorder to draw a warrant in his favor upon the city treasurer for a certain sum alleged to be due him for salary earned as city marshal. Reversed.

Statement by McCarty, J.:

Niels C. Peterson, appellant, applied to the District Court of Cache county for a writ of mandate requiring the recorder of Logan City to draw a warrant in his favor upon the treasurer of said city for the sum of \$83.33½ alleged to be due him for salary earned as marshal of Logan City during the month of February, 1910. An alternative writ of mandate was issued by the court. The recorder filed an answer to Peterson's petition, and the cause was submitted to the court for decision upon an agreed statement of facts, from which it appears that Peterson was duly elected to the office of marshal of Logan City on November 3, 1907, and that he duly qualified as marshal and entered upon the duties of the office January 6, 1908, and ever since has continued to and did during the month of February, 1910, perform the duties of the office.

to collaterally inquire into the title to the office, have also been excluded.

In accordance with the general rule, the following cases lay down the rule that an officer *de facto* cannot maintain an action for the salary of an office of which he has performed the duties, it being said that the salary incident to the office can only be claimed by one who can prove his legal title to such office, and that when an action for salary is brought the title is in issue and must be established: *Romero v. United States*, 24 Ct. Cl. 331, 5 L.R.A. 69; *Bennett v. United States*, 19 Ct. Cl. 379; *Stephens v. Campbell*, 67 Ark. 484, 55 S. W. 856; *Home Ins. Co. v. Tierney*, 47 Ill. App. 600; *Dolliver v. Parks*, 136 Mass. 499; *Phelon v. Granville*, 140 Mass. 386, 5 N. E. 269; *O'Brien v. St. Paul*, 72 Minn. 256, 75 N. W. 375; *Christian v. Gibbs*, 53 Miss. 314; *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715; *Vicksburg v. Groome*, — Miss. —, 24 So. 306; *People ex rel. Morton v. Tieman*, 30 Barb. 193, 8 Abb. Pr. 359.

And in the following cases the rule is stated in the form that the compensation attached to a public office is incident to the title to the office, and not to the functions or occupation and exercise thereof, and that therefore no recovery can be had for the discharge of the duties of an office by a *de facto* officer: *Pack v. United States*, 41 Ct. Cl. 414; *People ex rel. Dorsey v. Smyth*, 28 Cal. 21; *People ex rel. Stratton v. Oulton*, 28 Cal. 45; *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488; *State ex rel. Egan v. Schram*, 82 Minn. 420, 85 N. W. 155; *Sheri-*

Section 213, Comp. Laws 1907, provides, as far as material here, that "in addition to the mayor and city councilmen, there shall be elected . . . in cities of less than 12,000 inhabitants, a city marshal; provided, that in cities of less than 12,000 inhabitants the city recorded shall be *ex officio* city auditor, and shall perform the duties of such office. . . . All elective officers shall hold their respective offices for two years, and until their successors are elected and qualified."

Section 225 provides that "all officers of any city shall receive such compensation as may be fixed by ordinance, but the compensation of any such officer shall not be increased or diminished to take effect during

the time for which any such officer was elected or appointed."

In the year 1909 the legislature amended § 213 (Laws 1909, chap. 107). The section as amended, so far as material to the questions here involved, provides that "in cities of less than 12,000 inhabitants a city marshal shall be appointed by the mayor, subject to the confirmation of the city council, on the first Monday in January following a municipal election."

It appears from the statement of facts that Logan City is a city of the second class, having a population of less than 12,000 inhabitants; that the mayor of said city has failed and neglected to appoint a marshal for the city by and with the concurrence of the city council or otherwise; that Peterson

dan v. St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 A. & E. Ann. Cas. 480; Meagher v. Storey County, 5 Nev. 244; Darby v. Wilmington, 76 N. C. 133; State ex rel. Henry v. Newark, 8 Ohio Dec. Reprint, 344, 6 Ohio N. P. 523, State ex rel. Winn v. Wichgar, 27 Ohio C. C. 743; Com. ex rel. Bowman v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Riddle v. Bedford County, 7 Serg. & R. 386; Jones v. Easton, 4 Pa. Dist. R. 509.

In view of the cases subsequently cited which distinguish between a case where there was a *de jure* claimant to the office during the time the service was rendered and one where there was none, permitting recovery by the *de facto* officer in the latter case, it will be observed that in some of the cases already cited, applying the rule which denies the recovery by a *de facto* officer, it appears that there was no *de jure* claimant, although no point was apparently made of the fact, and the cases therefore cannot be regarded as expressly repudiating the distinction.

In Garfield Twp. v. Crocker, 63 Kan. 272, 65 Pac. 273, the rule that no action lies by an officer *de facto* to recover for salary was expressly held not restricted in its application to officers to the emoluments of which there are more than one claimant.

In People ex rel. Morton v. Tieman, 30 Barb. 193, 8 Abb. Pr. 359, the court stated the rule and the reasons therefor as follows: "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that the acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. . . . It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if 32 L.R.A. (N.S.)

he were an officer *de jure*. When an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."

In Dolliver v. Parks, 136 Mass. 499, where the contention was raised that it was sufficient, to enable one who performed services under *indicia* of authority to maintain an action for salary, that he was a *de facto* officer, and that the title to the office could not be raised in such a suit, the court said: "While the acts of an officer *de facto* are valid, so far as they concern the public or the rights of third persons who are interested in the things done, and his title to the office cannot be inquired into collaterally, yet when he sues in his own right to recover fees which he claims are due to him personally, by virtue of his office, his title to the office may be put in issue, and to recover he must show that he is an officer *de jure*. In such a suit no rights of the public or of third persons are concerned. The question of title to the office is directly raised, and he can recover no benefit to himself from an office he holds *de facto* only."

In Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168, where there was a *de jure* claimant, the court said: "The right to the salary and emoluments of a public office attach to the true, and not to the mere colorable, title; and in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation. . . . The right of the intruder to recover is denied not upon the ground of actual fraud on his part, for it often happens that he is in not only under a claim of right, but under a *prima facie* title, which he cannot or may not know to be

has not been duly or otherwise appointed to the office of marshal of the city in the year 1910; that he is exercising and performing the duties of the office of city marshal, and claiming the benefits, emoluments, and salary of the office by virtue of his election thereto in the year 1907, and that he has no right or claim to the office, except such as arises out of his election to the same in the year 1907. It further appears that at the time Peterson was elected, and at the time he entered upon the duties of the office mentioned, there was in force and effect an ordinance of Logan City fixing the salary of the office of city marshal at \$900 per annum, payable at the end of each month in equal instalments of \$75; that subsequently, on October 1, 1909, there was duly passed

by the city council, and approved by the mayor of Logan City, "an ordinance purporting to fix the annual salary attached to the office of marshal of Logan City for the term of two years beginning the first Monday in January, 1910, and ending the first Monday in January, 1912, at \$1,000 per annum" payable in monthly instalments of \$83.33 $\frac{1}{3}$ at the end of each month.

It is further stipulated that "the above-named defendant, Mae Benson, ever since January 3, 1910, has been, and now is, the duly elected, qualified, and acting city recorder of Logan City, and as such officer it was, and now is, the duty of such recorder to draw all warrants or orders for the payment of all funds due from said city to its officers on account of salary or otherwise

invalid; nor upon the ground that he is a mere volunteer, and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith, and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is, that the right follows the true title, and the courts will not aid the intruder by permitting him to recover the compensation which rightfully belongs to another." In connection with the foregoing case and *People ex rel. Morton v. Tieman*, supra, see *Deane v. Greene County*, 60 How. Pr. 461, where, in a mandamus proceeding to compel a board of supervisors to cancel the audit and allowance of salary to a *de facto* officer who had served under color of title in good faith, it was held that mandamus would not issue at the suit of a taxpayer, on the grounds, first, that as the services were valuable and legal because performed under color of title, there was no illegality or impropriety in paying therefor, and that as the *de jure* officer could not recover from the county because he could not truly swear that he had rendered the services, the granting of mandamus would exempt the county from payment for lawful services of which it had had the full benefit; and, second, that as the *de jure* officer could not obtain an allowance of the same bill from the county, but that his remedy, if any, was against the *de facto* officer, there was no property or money of the county to be wasted, in which case, the relator, as a taxpayer, would have no standing to maintain the proceeding. This case, however, in view of the facts and the nature of the proceeding, can hardly be regarded as authority for the proposition that a *de facto* officer, in a direct action for salary, could recover same.

And in *People ex rel. Culbertson v. Potter*, 63 Cal. 127, an officer *de facto*, even though acting in good faith, was held not entitled to the compensation incident to the office to the exclusion of the officer *de jure*.

And of course the law will not aid one to recover salary who has entered knowingly

into the place of another by force or fraud, as justice and good policy could not stand in aid of such a wrongdoer to recover compensation belonging to the office usurped. *Meehan v. Hudson County*, 46 N. J. L. 276, 50 Am. Rep. 421.

And this is the rule where the *de facto* officer knew that his rights to the office were merely disputed. *Eubank v. Montgomery County*, 127 Ky. 261, 128 Am. St. Rep. 340, 105 S. W. 418, 16 A. & E. Ann. Cas. 483.

And in *Yorks v. St. Paul*, 62 Minn. 250, 64 N. W. 565, where claimant, who, although ineligible, had been appointed as policeman, was dismissed without notice to and the concurrence of the city council, which, under the charter, were necessary to render a removal effective, and another officer appointed in his place, it was held that he could not recover salary from the time of his dismissal up to the time of the subsequent ratification thereof, although the claimant, though not performing any duties, had held himself in readiness to act as patrolman.

But after services have been rendered by *de facto* officers, the legislature may direct that compensation for such services be paid, although the officers could not have recovered therefor in the absence of such a statute. *Morris v. People*, 3 Denio, 381; *People ex rel. Kingsland v. Bradley*, 64 Barb. 228; *Mellick v. Williamsport*, 162 Pa. 408, 29 Atl. 917.

And it has been held that the legislature may provide that the salary attached to a public office shall be an incident, not to the title of the office, but to its occupation and exercise. *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671, and *Merkley v. Williams*, 3 Cal. App. 268, 84 Pac. 1015, construing act of 1881, amending § 936 of the California Political Code.

And a salary which has been paid to a *de facto* officer cannot be recovered back by the government, at least where he has actually rendered the services for which he was paid. *Badeau v. United States*, 130 U. S. 439, 32 L. ed. 997, 9 Sup. Ct. Rep. 579; *Palen v. United States*, 19 Ct. Cl. 389; *Bennett v.*

payable out of the treasury of Logan City; that petitioner duly demanded that the defendant draw a warrant in his favor upon the treasurer of Logan City for the sum of \$83.33½ in payment of his salary as marshal earned in the month of February, 1910; . . . that the recorder refused and still refuses to draw a warrant for said sum or any sum except said amount of \$75; . . . that the recorder tendered to the petitioner a warrant drawn on the treasurer of Logan City for the sum of \$75," which Peterson, the petitioner, refused to accept; that defendant deposited with the clerk of the district court of Cache county at the time she filed her answer said warrant for \$75 for the use and benefit of Peterson; and that defendant has at all times been ready, willing, and able to issue and deliver to

Peterson a warrant for \$75. It was also stipulated that "the petitioner has no plain, speedy, or adequate remedy at law."

The court found on the issues in favor of the recorder, and rendered judgment dismissing the petition for a writ of mandate. To reverse the judgment, Peterson has brought the case to this court on appeal.

Mr. A. A. Law for appellant.

Messrs. H. G. Nebeker and Charles H. Hart, for respondent:

An elective officer of a city is elected to said office to serve until his successor is elected and qualified.

People ex rel. Melony v. Whitman, 10 Cal. 44.

The salaries of city officers cannot be in-

United States, 19 Ct. Cl. 379. In these latter cases, however, the decisions are upon the ground that money paid under a mutual mistake cannot be recovered back.

The rule laid down in *PETERSON v. BENSON*, namely, that a *de facto* officer who has in good faith performed the duties pertaining to the office is, in the absence of a *de jure* claimant, entitled to the compensation to which an incumbent of the office is entitled and which is mentioned in that case as the "intermediate course," has been announced in the following cases: Behan v. Davis, 3 Ariz. 399, 31 Pac. 521; Adams v. Insane Asylum, 4 Ariz. 327, 40 Pac. 185; Cousins v. Manchester, 67 N. H. 229, 38 Atl. 724; Erwin v. Jersey City, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732, reversing 59 N. J. L. 282, 35 Atl. 948; Brinkerhoff v. Jersey City, 64 N. J. L. 225, 46 Atl. 170; Toole v. Ogden, 39 Misc. 581, 80 N. Y. Supp. 584 (see, however, Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168, and People v. Tieman, 30 Barb. 193, 8 Abb. Pr. 359 supra); Blackburn v. Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708; Reg. v. Cambridge, 12 Ad. & El. 702, 4 Perry & D. 294, 10 L. J. Q. B. N. S. 25; Seymour v. Bennet, 2 Atk. 482.

This rule, however, is based on the fact that here is no *de jure* claimant, and of necessity would be inapplicable were there such a claimant. In fact in Behan v. Davis, 3 Ariz. 399, 31 Pac. 521, which is a leading and much cited case, the court expressly recognized the doctrine that the emoluments of an office are incident to the title to the office, and discussed the reason and necessity thereof as follows: "It is almost elementary that the right to the emoluments of an office are incident to the title to the office; that, as between an officer *de facto* and one *de jure*, notwithstanding the *de facto* officer may have performed all the duties of the office, the *de jure* officer is entitled to the legal compensation, and the reason is obvious. A usurper of any office should not be permitted to avail himself of his own wrongful act of usurpation to deprive him who is rightfully entitled to the 32 L.R.A. (N.S.)

office of his emoluments. The contrary rule would directly encourage usurpation of office. . . . The question here presented, however, is essentially different. There is in this case no dispute as to the title to the office; no adverse contestant for it. There is no *de jure* officer. There can be but one *de facto* officer, and he is here asking the process of this court to secure his compensation of superintendent of the territorial prison from April 9, 1889, to the date of the appointment and qualification of his successor by the governor."

And in Cousins v. Manchester, 67 N. H. 229, 38 Atl. 724, it was said that this rule would not apply where the claimant has held the office, knowing that he was a usurper and that the office belonged to another, who claimed it.

In Houston v. Albers, 32 Tex. Civ. App. 70, 73 S. W. 1084, it was held that a policeman who remained in the service of the city after the term for which he had been appointed expired, without reappointment, and continued to act and be recognized by the city in his official capacity, was, as a *de facto* officer, entitled to compensation for services rendered the city and accepted by it.

In Reg. v. Cambridge, 12 Ad. & El. 702, 4 Perry & D. 294, 10 L. J. Q. B. N. S. 25, it was said that, in order to warrant recovery, it is sufficient that the officer be holding office and performing the duties.

In Havird v. Boise County, 2 Idaho, 687, 24 Pac. 542, it was held that a *de facto* sheriff in possession of all the *indicia* of office would be entitled, were it not for a statute (Rev. Stat. § 380) preserving the salary for the *de jure* officer and forbidding the issuance of a warrant pending a suit contesting the title to an office, to receive both the salary and fees pertaining to the office by virtue of his *prima facie* right to exercise the duties thereof even as against the *de jure* officer, it being said that a distinction must be drawn between a mere usurper and a person in possession of a certificate duly certifying his election.

G. J. C.

creased or diminished to take effect during the time for which they are elected.

Hulaniski v. Ogden City, 20 Utah, 233, 57 Pac. 876; Meissner v. Boyle, 20 Utah, 316, 58 Pac. 1110; Kendall v. Raybauld, 13 Utah, 226, 44 Pac. 1034; People ex rel. Murphy v. Hardy, 8 Utah, 68, 29 Pac. 1120.

The holdover period is a part of the original term.

People ex rel. Parsons v. Edwards, 93 Cal. 153, 28 Pac. 831; Baker City v. Murphy, 30 Or. 405, 35 L.R.A. 88, 42 Pac. 135; 23 Am. & Eng. Enc. Law, p. 415; 28 Cyc. Law & Proc. p. 426; State ex rel. Stevenson v. Smith, 87 Mo. 158; Savings Bank v. Hunt, 72 Mo. 597, 37 Am. Rep. 449; Long v. Seay, 72 Mo. 648; State ex rel. Bueneman v. Kurtzeborn, 78 Mo. 99; State ex rel. Loring v. Benedict, 15 Minn. 198, Gil. 153.

A vacancy does not occur at the expiration of the technical term nor until a successor is elected or appointed and qualified.

Treadwell v. Yolo County, 62 Cal. 563; State ex rel. Carson v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; People ex rel. Melony v. Whitman, 10 Cal. 38; Kimberlin v. State, 130 Ind. 120, 14 L.R.A. 858, 30 Am. St. Rep. 208, 29 N. E. 773; State v. Howe, 25 Ohio St. 588, 18 Am. Rep. 321; Grand Haven v. United States Fidelity & G. Co. 128 Mich. 106, 92 Am. St. Rep. 446, 87 N. W. 104; Throop, Pub. Off. § 213; State ex rel. Atty. Gen. v. Ranson, 73 Mo. 94; Mechem, Pub. Off. §§ 377, 396.

If appellant does not hold by virtue of his election under the old law, then he has no right to the office and no standing in this court.

Mechem, Pub. Off. § 396; 28 Am. & Eng. Enc. Law, p. 427; Long v. New York, 81 N. Y. 425; De Lacey v. Brooklyn, 36 N. Y. S. R. 95, 12 N. Y. Supp. 540; Black, Constr. & Interpretation of Laws, 35; Sturges v. Crowninshield, 4 Wheat, 122, 4 L. ed. 529.

McCarty, J., delivered the opinion of the court:

Respondent contends, first, that the period of time elapsing from January 3, 1910, the date upon which the officers of Logan City elected in 1909 were installed in office, until March 1, 1910, was a part and a continuation of the term of office to which appellant was elected in November, 1907, and that the tenure of his office and the emoluments thereof were as fixed by law at the time he qualified and entered upon the duties of the office, January 6, 1908; and, second, "that so much of the ordinance passed October 1, 1909 (mentioned in the foregoing statement of the case), as purported to in- 32 L.R.A.(N.S.)

crease the salary of said marshal to take effect January 3, 1910, is void as to appellant, for the reason that it would increase the salary of said marshal 'to take effect during the time for which such officer was elected' and would be in conflict with § 225 of the Compiled Laws of the state of Utah, 1907."

The authorities seem to hold that when a person is elected or appointed to an office, and he qualifies and enters upon the duties thereof, under a statute which provides that the person so elected or appointed shall hold the office for a definite period of time and until his successor is elected and qualified, and such person holds over and continues to discharge the duties of the office after the expiration of his regular term, because of the failure to elect or appoint a successor, the holdover period is a part of the time for which such officer was elected or appointed. In this case, however, the law under which appellant was elected, and under which he held the office from January 6, 1908, until the first Monday in January, 1910, was, in the year 1909, amended and the office changed from an elective to an appointive office. The amendment, so far as it affects the officer in question, went into effect immediately on the expiration of the term (two years) for which appellant was elected. Utah, Sess. Laws 1909, chap. 107, p. 230. As appellant was not appointed to the office after his term expired, and the law under which he had been elected having been, in effect, repealed, it follows that during the month of February, 1910, he was not a *de jure* officer, and was in no sense a holdover, as the term "holdover" is understood when applied to a person holding a public office. State ex rel. Everding v. Simon, 20 Or. 365, 26 Pac. 170. It does appear, however, that he was a *de facto* officer, and as such discharged all the duties of the office during the month of February, 1910. The important question therefore is, Can an actual incumbent of a public office, who is only an officer *de facto* and in no sense a *de jure* officer, maintain an action for the salary, fees, or other compensation attached to the office, there being no adverse contestant or *de jure* officer?

There are many American decisions in which the view derived from England is still adhered to, namely, that the right to the emoluments of a public office is an incident to and rests upon the title to the office; and hence under no circumstances a *de facto* officer legally entitled to the emoluments of the office although he may have performed all the services and discharged all the duties of the office. Upon the other hand, there

are courts of high standing which hold that in this country a public office is in no sense property, and that public officers have no proprietary interest in their offices. Pursuant to these latter views, such courts have deduced the doctrine that the right to the emoluments of an office arises out of the actual rendition of the services required to be performed by the officer; that is, the emoluments are designed to be merely compensatory. *Stuhr v. Curran*, 44 N. J. L. 184, 43 Am. Rep. 353; *Erwin v. Jersey City*, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732. In view of the foregoing, some of the courts have adopted and followed the intermediate course, namely, that as between an officer *de facto* and a *de jure* officer the latter is entitled to whatever salary and other compensation may be attached to the office, even though the *de facto* officer may have performed all the duties of the office. This doctrine is based upon the theory that unless the *de jure* officer is protected, dishonest intruders will lay claim to the office, and, obtaining possession thereof, will claim the emoluments to the detriment of the public and the injury of the *de jure* officer. In cases, however, where there is no *de jure* officer, the line of decisions last mentioned hold that a *de facto* officer who, in good faith, has had possession of the office and has discharged the duties pertaining thereto, is legally entitled to the emoluments of the office, and may, in an appropriate action, recover the salary, fees, and other compensation attached to the office. This doctrine is discussed and illustrated in the following cases: *Erwin v. Jersey City*, supra; *Dickerson v. Butler*, 27 Mo. App. 9; *Behan v. Davis*, 3 Ariz. 399, 31 Pac. 521; *Adams v. Insane Asylum*, 4 Ariz. 327, 40 Pac. 185.

Constantineau, in his treatise on the De Facto Doctrine, § 238, says: "Certain courts, while denying to the *de facto* officer the right to recover salary when there is a *de jure* officer entitled to the office, have thought that the rule should be different when there is no such officer in existence. This doctrine may undoubtedly be supported on equitable grounds, since it seems unjust that the public should benefit by the services of an officer *de facto*, and then be freed from all liability to pay anyone for such services." The author cites with approval the Arizona cases above mentioned.

We think the rule as declared by these authorities is more in consonance with the principles of equity than the opposite rule, which holds that an officer *de facto* cannot, under any circumstances, maintain an action for the salary, fees, or other compensation attached to the office which he holds.

The judgment is reversed, with directions 32 L.R.A. (N.S.)

to the trial court to issue a writ of mandate as prayed for in appellant's complaint. Appellant to recover costs.

Straup, Ch. J., and Frick, J., concur.

SOUTH DAKOTA SUPREME COURT.

JAMES ARTHUR PUGH, Appt.,

v.

MARY MANTON PUGH, Respnt.

(— S. D. —, 124 N. W. 959.)

State — power to require residence of suitors.

1. A state is not prevented by the Federal Constitution from fixing the time of residence of one coming into it before he can commence an action for divorce in its courts.

Statute — constitutionality — right to question.

2. A nonresident coming into a state cannot attack the constitutionality, under provisions of either the state or Federal Constitution against the granting of special privileges or immunities, of a statute which requires him to be a resident for a certain time before he can commence an action for divorce in the state courts, because it contains exceptions permitting persons who were married and continued thereafter to reside in the state to bring the action immediately after the cause arose, since the unconstitutionality, if any, being in the exception, he, not being affected by it, cannot question its validity.

Same — elimination of unconstitutional provision.

3. A statute requiring a residence of a certain time within the state before one can begin a proceeding for divorce in the state courts will be upheld against a nonresident coming into the state, although it contains unconstitutional provisions permitting residents to maintain such suits immediately after the cause arises, since the latter provisions may be eliminated without affecting the other provisions of the statute.

(February 9, 1910.)

Note. — Who may raise objection that a statute contains an unconstitutional discrimination.

This note does not deal with the general question, who may raise the objection that a statute is unconstitutional, but it deals only with the question, who may raise the objection when the unconstitutionality is alleged to be due to an unlawful discrimination.

The objection that a statute is unconstitutional because discriminatory can only be taken by the person discriminated

A PPEAL by plaintiff from a judgment of the Circuit Court for Lincoln County in defendant's favor in an action for divorce. Affirmed.

The facts are stated in the opinion.

Mr. Joseph M. Donovan, for appellant:

The act is unconstitutional and void, as denying equal protection of the laws, and in direct opposition to the mandates of the Constitution of the United States and all of the states of the Federal Union.

Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; 8 Cyc. Law & Proc. pp. 877, 878, 1036, 1059, 1137; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; 6 Am. & Eng. Enc. Law, 2d ed. pp. 77, 958; State

v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; Winnett v. Adams, 71 Neb. 817, 99 N. W. 681; Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 388, 1 Woods, 21, Fed. Cas. No. 8,408; Cogger v. Northwestern Union Packet Co. 37 Iowa, 145; Re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; White v. Holman, 44 Or. 180, 74 Pac. 933, 1 A. & E. Ann. Cas. 843; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 121 Am. St. Rep. 313, 83 N. E. 215; Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep.

against, or adversely affected. Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; Cronin v. Adams, 192 U. S. 108, 28 L. ed. 365, 24 Sup. Ct. Rep. 219; Brown v. Ohio Valley R. Co. 79 Fed. 176; Fidelity & C. Co. v. Freeman, 54 L.R.A. 680, 48 C. C. A. 692, 109 Fed. 847; Moredock v. Kirby, 118 Fed. 180; Engel v. O'Malley, 182 Fed. 365, affirmed in 219 U. S. 128, 55 L. ed. —, 31 Sup. Ct. Rep. 190; Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; Re Damon, 10 Cal. App. 542, 102 Pac. 684; Ritz v. Lightston, 10 Cal. App. 685, 103 Pac. 363; Thomas v. Joplin, — Cal. App. —, 112 Pac. 729; Montgomery v. State, 55 Fla. 97, 45 So. 879; Reid v. Eaton, 80 Ga. 755, 6 S. E. 602; Wagner v. Garrett, 118 Ind. 114, 20 N. E. 706; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Gallup v. Schmidt, — Ind. —, 54 N. E. 384, modified in 154 Ind. 196, 56 N. E. 443, affirmed in 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162; Schmidt v. Indianapolis, 168 Ind. 631, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385, 80 N. E. 632; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 A. & E. Ann. Cas. 1146; Kansas City v. Union P. R. Co. (Kansas City v. Clark), 59 Kan. 427, 52 L.R.A. 321, 53 Pac. 468; Marshall v. Donovan, 10 Bush. 681; Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203; Norman v. Boaz, 85 Ky. 557, 4 S. W. 316; Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 14 L.R.A. 579, 17 S. W. 567; Eakins v. Eakins, 14 Ky. L. Rep. 562, 20 S. W. 285; Com. v. Porter, 113 Ky. 575, 68 S. W. 621; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710; State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State ex rel. Crandall v. McIntosh, 205 Mo. 589, 103 S. W. 1078; McCully v. Chicago, B. & Q. R. Co. 212 Mo. 1, 53, 110 S. W. 711; Or-32 L.R.A.(N.S.)

delheide v. Modern Brotherhood, 226 Mo. 203, post, 965, 125 S. W. 1105; Spratt v. Helena Power Transmission Co. 37 Mont. 60, 94 Pac. 631; State v. Rose, 40 Mont. 66, 105 Pac. 82; Re Keeney, 194 N. Y. 281, 87 N. E. 428; People ex rel. Kenny v. Folks, 89 App. Div. 171, 85 N. Y. Supp. 1100 (concurring opinion of Woodward, J.); Patti v. United Surety Co. 61 Misc. 445, 115 N. Y. Supp. 844; Sweeny v. Webb, 33 Tex. Civ. App. 324, 76 S. W. 766, writ of error denied in 97 Tex. 250, 77 S. W. 1135; McLaury v. Watelsky, 39 Tex. Civ. App. 394, 87 S. W. 1045; State v. Barr, 78 Vt. 97, 62 Atl. 43; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; McKinney v. State, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293.

Specific applications of this doctrine will be found in the subsequent subdivisions of the note. From the decision in *PUGH v. PUGH* it would seem that even a member of the class discriminated against may not raise the objection where, if the objection were to be sustained, the result would be not to strike down the entire statute, but merely to eliminate therefrom the provisions in favor of the other class, which constituted the discrimination, and leave the statute to operate on all classes alike. It will be seen that *PUGH v. PUGH* differs from nearly all the cases cited in this note in that case, the alleged unconstitutional discrimination occurs in two exceptions to the general rule. The general rule, requiring a year's residence as a prerequisite to a plaintiff instituting a divorce action, was constitutional, and would be constitutional and stand even though the two exceptions allowing a shorter residence than a year in certain cases should be declared unconstitutional. The only effect, therefore, of declaring the exceptions unconstitutional, would be to blot them out and bring everyone desiring a divorce under the general rule requiring a year's residence. There would be no object, therefore, for a plaintiff in a divorce action, who did not belong to either of the exceptions, to question their constitutionality, because, even if his point were sustained, he would still have

431; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1004; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *State v. Shedroff*, 75 Vt. 277, 63 L.R.A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, 15 Am. Crim. Rep. 129; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Greene v. State*, 83 Neb. 84, 131 Am. St. Rep. 626, 119 N. Y. 6; *Courts for Trial of Infants*, 14 Pa. Co. Ct. 254; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Ashurst v. Phillips*, 43 Ala.

158; *McFarland v. Butler*, 8 Minn. 116, Gil. 91; *Coffman v. Bank of Kentucky*, 40 Miss. 29, 90 Am. Dec. 311; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929; *Re Townsend*, 39 N. Y. 171; *Holman v. Manning*, 65 N. H. 228, 19 Atl. 1002; *Beyman v. Black*, 47 Tex. 558; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 505; *Davis v. State*, 3 Lea, 379; *Brown v. Levee Comrs.* 50 Miss. 468; *Den ex dem. Murray v. Hoboken*, 18 How. 272, 15 L. ed. 372; *Allyn's Appeal*, 81 Conn. 534, 23 L.R.A. (N.S.) 630, 129 Am. St. Rep. 225, 71 Atl. 794.

A law or municipal regulation must equally apply and be equally enforced against all persons within a municipality or state.

Jew Ho v. Williamson, 103 Fed. 10; *Of-*

to wait a year before bringing his action. The question, therefore, as to him, would be a purely academic one. The question could be raised, however, by a defendant in an action brought by a plaintiff who came within one of the exceptions, since such a defendant would be discriminated against in that he could be sued in less than a year, while other defendants could not be sued for a year, and since the result of declaring the exceptions unconstitutional would be the dismissal of the suit against him.

Although the point does not seem to have been made in any of the cases, the question arises whether the doctrine that one in the favored class may not object to a statute as discriminatory ought not to be confined to cases where no duty or obligation whatever is imposed on the favored class, or where, if it does impose some obligation on such class, though less onerous than that imposed on others, the constitutional objection, if sustained, would merely strike down the discrimination in favor of such class, and not vitiate the whole statute. The reason given by the courts for the rule that no one not discriminated against can question the constitutionality of a statute on the ground that it is discriminatory is that he cannot be hurt or injured by its enforcement. While this is usually true, it is not universally true. It is not true when some duty is imposed on a member of a favored class, though a less onerous one than is imposed on a member of a less favored class, since the enforcement of the statute would subject him to a burden which he would escape altogether if allowed to question its validity, and which members of the less favored class can escape wholly by contesting its validity. For example, in *Re Keeney*, 194 N. Y. 281, 87 N. E. 428, cited below, under the heading "Taxation," it was held that the objection that a transfer tax law was unconstitutional because certain classes of grantees were subject to a higher tax than others could not be taken by one belonging to the favored class. The result would be an adjudication that such a per- 32 L.R.A. (N.S.)

son must pay the tax. Assuming, for the purpose of argument, that the objection to the law was a valid one, and sufficient to overturn the entire statute, and not merely the provisions in relation to the favored class, it could be raised thereafter by one belonging to a class subject to the higher tax, and the law declared unconstitutional and void, so that he would escape liability altogether. But meanwhile the one subject to the lower tax has been compelled to pay it, and cannot recover it, as the matter has become *res judicata* as to him. So the practical result would be that the one whom the legislature intended to favor would be compelled to pay a tax, while those whom the legislature intended to tax at a higher rate would escape taxation altogether. Similar results might follow in some of the other cases cited above. Of course, if the discrimination resides in some exception or proviso which alone would be wiped out should the objection to the constitutionality of the statute be sustained, without vitiating the whole statute, there would be no object in a member of a favored class questioning its constitutionality, as the result of his success would be not to allow him to escape altogether, but to impose upon him the heavier burdens imposed on others.

In any event there would necessarily come a time when it would be necessary to allow one who is not discriminated against by the terms of the statute, but on whom a duty is imposed, to raise the question of constitutionality; namely, after the courts have declared the law unconstitutional. For, if he could not raise it then, and it should still be sought to enforce it against him, he would never have means of protection against an unconstitutional law. And even prior to its being formally declared unconstitutional by the highest court having jurisdiction of the matter, several years might elapse before an appeal taken by one in terms discriminated against could be heard, and a final adjudication obtained, during which time the law might be continually enforced against the one in terms not discriminated against, without

ficer v. Young, 5 Yerg. 320, 26 Am. Dec. 268; Re Lowrie, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489; State v. Lewin, 53 Kan. 679, 37 Pac. 168; State v. Divine, 98 N. C. 778, 4 S. E. 477; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927; People v. Beattie, 96 App. Div. 383, 89 N. Y. Supp. 193; Re Watson, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321; 8 Cyc. Law & Proc. p. 1038, § C; 6 Am. & Eng. Enc. Law, 2d ed. pp. 78, 79; Ex parte Sohneke, 148 Cal. 262, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 A. & E. Ann. Cas. 475; Tibbs v. Zirkle, 55 W. Va. 49, 104 Am. St.

Rep. 977, 46 S. E. 701, 2 A. & E. Ann. Cas. 421; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 53 N. W. 226; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Re Appointments, 21 Colo. 14, 39 Pac. 329; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

A statute granting a special indulgence, to one or a class, is unconstitutional and void.

1 Bishop, Marr. Div. & Sep. p. 606, § 1462; Simonds v. Simonds, 103 Mass. 572, 4 Am. Rep. 570; Middleton v. Middleton, 54 N. J. Eq. 692, 36 L.R.A. 221, 55 Am. St. Rep. 602, 35 Atl. 1065, 37 Atl. 1106;

his being able to prevent it, while the one who is in terms discriminated against is able to save his rights pending the litigation.

Composition of juries.

A white person indicted by a grand jury cannot complain because by statute negroes are excluded from grand juries. Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203.

But the objection that a statute making none but white men eligible to serve on juries or grand juries is discriminatory may be raised by a negro defendant in a criminal case. Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; Montgomery v. State, 55 Fla. 97, 45 So. 879.

The exclusion of women from a jury on the trial of a man for crime, even if wrongful, does not deprive him of any rights or privileges under a constitutional provision giving women the right to vote and hold office, and declaring that both male and female citizens shall equally enjoy all civil, political, and religious rights and privileges. McKinney v. State, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293.

Taxation.

The objection that a statute regulating the distribution of money for school purposes discriminates against negroes cannot be raised by a white person. Reid v. Eatonton, 80 Ga. 755, 6 S. E. 602; Marshall v. Donovan, 10 Bush, 681; Norman v. Boaz, 85 Ky. 557, 4 S. W. 316; Eakins v. Eakins, 14 Ky. L. Rep. 562, 20 S. W. 285.

An inheritance tax law will not be declared unconstitutional on the theory that there is a discrimination between citizens of the state and those of other state, when it does not appear to which class the party raising the question belongs. Re Damon, 10 Cal. App. 542, 102 Pac. 684.

The constitutionality of a statute providing for the assessment and taxation of omitted property owned by nonresidents of the state, without affording such nonresident owners notice, or a day in court, while such right is accorded to resident owners, cannot be assailed by a resident owner, on the ground that it discriminates against nonresident owners. Gallup v. Schmidt, — Ind. —, 54 N. E. 384, modified in 154 Ind. 196, 56 N. E. 443, affirmed in 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 102.

ers, cannot be assailed by a resident owner, on the ground that it discriminates against nonresident owners. Gallup v. Schmidt, — Ind. —, 54 N. E. 384, modified in 154 Ind. 196, 56 N. E. 443, affirmed in 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 102.

A transfer-tax law will not be declared unconstitutional on the ground that it involves an arbitrary, discriminatory, and unequal tax upon the transfer of property, in that the rate of tax varies according to the relation which the grantee bears to the grantor, at the suit of one who, under the law, is subject to the lowest rate of taxation. Re Keeney, 194 N. Y. 281, 87 N. E. 428.

The objection that a statute taxing shares of national banks is unconstitutional, as discriminatory, because not allowing a deduction for the debts of the owner of the shares, while such deduction is allowed in the case of the taxation of other personal property, cannot be taken by a shareholder who owes no debts which he can deduct from the assessed value of his shares. Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044.

The objection that an inheritance tax statute subjecting residents of the state to a lower rate of taxation than nonresidents violates the constitutional provision that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" cannot be raised by an alien. Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424 (dictum).

Annexing land to cities.

An owner of nonagricultural land annexed to a city cannot question the constitutionality of the act permitting it, on the ground that the act discriminates between different classes of owners of agricultural land. Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; affirming, 59 Kan. 427, 52 L.R.A. 321, 53 Pac. 468.

Thus, the discrimination between individuals and corporations in respect to an-

Re Bank of Commerce, 153 Ind. 460, 47 L.R.A. 489, 53 N. E. 950, 55 N. E. 224; Mansfield's Case, 22 Pa. Super. Ct. 224; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 750; Phipps v. Wisconsin C. R. Co. 133 Wis. 153, 113 N. W. 456.

The legislature cannot, under the guise of police regulations, arbitrarily invade private property or personal rights, but the exercise of the powers must have relation to the public health or public welfare.

Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; 8 Cyc. Law & Proc. p. 864, § B; Gibbons v. Ogden, 9 Wheat. 210, 6 L. ed. 73; Missouri, K. & T. R. Co. v. Haber, 109 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488;

annexation to a city of lands held for agricultural purposes cannot be attacked as unconstitutional, to defeat the annexation of lands of a corporation which are not held for agricultural purposes. Clark v. Kansas City, *supra*.

Employers' liability laws.

The objection that an act making railroads and corporations other than municipal liable to employees for injuries caused by the negligence of fellow servants is unconstitutional, on the ground that there is no just reason for the classification in the case of certain other corporations, cannot be raised by a railroad corporation, with regard to which the classification is proper. Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582.

A railroad company cannot complain that a statute is unconstitutional in discriminating against its employees, and in favor of third persons, by giving a right of action against it for negligence causing the death of any person not in its employ. Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 14 L.R.A. 579, 17 S. W. 567.

But the constitutionality of an employers' liability law claimed to be discriminatory because applying only to corporations, and not to individuals and partnerships in the same line of business, may be raised by a corporation as well as by employees of individuals and partnerships who are denied the benefits of the law, since the law imposes a burden on corporations not imposed on individuals and partnerships. Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529.

Anti-trust laws.

The objection that a statute permitting "persons to combine or pool their crops of wheat, tobacco, or other product, and sell the same as a whole," is unconstitutional because it discriminates in favor of certain 32 L.R.A.(N.S.)

Jewett Bros. & Jewett v. Smail, 20 S. D. 232, 105 N. W. 738, 22 Am. & Eng. Enc. Law, 2d ed. p. 939; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 297; Ex parte Hawley, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93.

The legislature has no power to impose burdens upon citizens from other states, in favor of natural-born citizens.

Rash v. Halloway, 6 Ky. L. Rep. 291.

In all cases where an attempt has been made by any state to assume jurisdiction on any basis other than domicile of one of the parties, or because the offense was com-

mitted in another state, cannot be raised by a member of a favored class. Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710.

The constitutionality of an anti-trust act prohibiting combinations to prevent dealers and manufacturers from selling supplies to any dealer, mechanic, or artisan, cannot be objected to, on the ground that it is limited to dealers, mechanics, and artisans, and because the equal protection of the laws is denied to consumers and the public generally, by a dealer or manufacturer who is a member of such combination, as he is not a member of the class discriminated against. Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823.

Discriminations based on citizenship or residence.

The objection that a municipal ordinance requiring contractors for public work to hire only residents of the city as laborers on the work is unconstitutional, because discriminating against other citizens of the state, cannot be taken by a resident citizen of the municipality, as he belongs to the favored class. Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

The objection that a statute giving to resident creditors of a state a prior claim on the assets of railroad companies thereafter organized is unconstitutional, as discriminatory against citizens of other states, cannot be raised by a receiver of a railroad company. Brown v. Ohio Valley R. Co. 79 Fed. 176.

The objection that a statute regulating private banking is unconstitutional, as it allows only those residing in the United States for five years to be licensed, cannot be raised by one who has resided in the country for that period. Engel v. O'Malley, 182 Fed. 365, affirmed in 219 U. S. 128, 55 L. ed. —, 31 Sup. Ct. Rep. 190.

The objection that a statute allowing suit to restrain the illegal application of public funds to be brought only by citizen residents is unconstitutional, because depriving nonresident citizens of the right to

mitted within the state of suit, or because the parties were married within the state. universal condemnation and rebuke have been the only legal result.

Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108; *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145; *State v. Westmoreland*, 76 S. C. 145, 8 L.R.A.(N.S.) 842, 56 S. E. 673; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189; *Wilson v. Wilson*, 95 Minn. 464, 104 N. W. 300; 19 Am. & Eng. Enc. Law, pp. 1218, 1219.

protect their property rights, cannot be raised by a resident. *Thomas v. Joplin*, — Cal. App. —, 112 Pac. 729.

One not shown to be a nonresident cannot raise the question whether or not a municipal ordinance discriminates against citizens of other states. *Schmidt v. Indianapolis*, 168 Ind. 631, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385, 80 N. E. 632.

The objection that a statute extending the right of eminent domain to certain classes of foreign corporations, which was withheld from other foreign corporations, is unconstitutional, as denying to the latter the equal protection of the laws, cannot be raised by one whose property a foreign corporation seeks to condemn, since he does not belong to the class discriminated against. *Spratt v. Helena Power Transmission Co.* 37 Mont. 60, 94 Pac. 631.

A domestic corporation which has filed its articles of incorporation both in the office of the secretary of state and of the county clerk, as required by statute, cannot object to the constitutionality of the statute, on the ground that foreign corporations must file their articles only in the office of the secretary of state, although the Constitution provides that foreign corporations shall not be allowed greater rights and privileges than domestic corporations. *Uihlain v. Caplice Commercial Co.* 39 Mont. 327, 102 Pac. 564.

In *Greene v. State*, 83 Neb. 84, 131 Am. St. Rep. 626, 119 N. W. 6, a statute prohibiting blackmailing "any citizen or resident of the state" was held unconstitutional on objection raised by a convicted defendant, on the ground that it was special legislation, and as such prohibited by the state Constitution, and on the ground that it denied to persons within the state, who were neither citizens nor residents of the state, the equal protection of the laws, contrary to the 14th Amendment of the United States Constitution. The court said: "We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest 32 L.R.A.(N.S.)

Mr. Herbert Abbott, for respondent:

The question as to the constitutionality of an act can never be raised by a person or persons not affected by the act.

Coffin v. Portland, 27 Fed. 412; *Craig v. First Presby. Church*, 88 Pa. 42, 32 Am. Rep. 417; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; *Tomlinson v. Bainaka*, 163 Ind. 112, 70 N. E. 155; *State v. Smiley*, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; *Kansas City v. Union P. R. Co.* (*Kansas City v. Clark*) 59 Kan. 427, 52 L.R.A. 321, 53 Pac. 468, 22 Am. & Eng.

in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without any just reason for such discrimination, it is safe to leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such case there is no way by which any person within the jurisdiction of the state, denied the protection of its criminal law, could bring the question before a court for its determination. If the legislature should enact a law amending our Criminal Code so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void, but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection of its invalidity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against, or not, it should be declared void."

A dentist residing in a state cannot object to the constitutionality of a statute of the state regulating dentists, on the grounds that certain classes of nonresidents cannot take advantage of its terms. *State ex rel. Crandall v. McIntosh*, 205 Mo. 589, 103 S. W. 1078.

Since a citizen or resident of one state has a constitutional right to engage in business in another state, he does not, by thus engaging in business in such foreign state, waive the right to object that a statute of such foreign state, subjecting him to a personal liability without personal service, is unconstitutional, because

Enc. Law, 2d ed. p. 915, § 11; Chicago, B. & Q. R. Co. v. People, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

Equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. St. Rep. 192; State v. Schlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357.

Corson, J., delivered the opinion of the court:

This case comes before us on an appeal by the plaintiff from an order of the circuit court sustaining the defendant's demurrer to the complaint of the plaintiff, and from the final judgment entered by the court on said order, dismissing the complaint.

The action was commenced on January 2,

depriving him of the right to do business on an equality with citizens of such foreign state. Moredock v. Kirby, 118 Fed. 180.

The objection that the provision in a liquor dealers' act, exempting from its provisions wines from grapes grown in the state, while in the hands of the producers or manufacturers, is unconstitutional, because discriminatory, is not one which can be taken by a retail liquor dealer; since the discrimination, if any, is not against the retail liquor dealer, but against the venders of liquor other than wines produced from grapes grown in the state. McLaury v. Watelsky, 39 Tex. Civ. App. 394, 87 S. W. 1045.

As coming under this heading, see also Re Damon, 10 Cal. App. 542, 102 Pac. 684; Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; Gallup v. Schmidt, — Ind. —, 54 N. E. 384, modified in 154 Ind. 196, 56 N. E. 443, affirmed in 186 U. S. 300, 48 L. ed. 207, 22 Sup. Ct. Rep. 162, under title, "Taxation," supra.

Discriminations based on sex.

A male person accused of selling liquor without a license cannot question the validity of the ordinance under which he was convicted, on the ground that it discriminated against women, in that no one but a male person could receive a license. Wagner v. Garrett, 118 Ind. 114, 20 N. E. 706.

A saloon keeper cannot challenge the constitutionality of an ordinance excluding females from saloons. Cronin v. Adams, 192 U. S. 108, 23 L. ed. 365, 24 Sup. Ct. Rep. 219. In the above case the court said: "What cause of action, then, has plaintiff in error? He is not a female, nor delegated to champion any grievance females 32 L.R.A.(N.S.)

1909, and the complaint to which the demurrer was interposed and sustained is as follows:

"First. That the plaintiff now is, and for a period of more than six months next and immediately preceding the commencement of this action has been, an actual and bona fide resident in good faith of the state of South Dakota, having at all times since the 15th day of June, 1908, maintained his sole domicile within the state of South Dakota, with the intention of making the said state of South Dakota his sole residence and domicile indefinitely. That the plaintiff is a citizen of the United States, over the age of twenty-one years, and now, and at all times since the 15th day of December, 1908 (at which last-named date he had been a bona fide resident of the state of South Dakota for six months), has been a bona fide citizen and qualified elector of the state of South Dakota, and at the time of the commencement of this action is such bona fide citizen and qualified elector of this

may have under the ordinance, if they have any."

See also McKinney v. State, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293, under title, "Composition of juries," supra.

Discriminations based on race.

See Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; Montgomery v. State, 55 Fla. 97, 45 So. 879, under the title, "Composition of juries," and also several cases under title, "Taxation," supra.

Miscellaneous.

The objection that a statute places burdens on one kind of insurance company from which other kinds of insurance companies are exempt can only be taken by a company discriminated against. Fidelity & C. Co. v. Freeman, 54 L.R.A. 680, 48 C. C. A. 692, 109 Fed. 847.

An insurance company not organized in accordance with the law authorizing its creation has no standing as a corporation to attack the statute on the ground of unconstitutional discriminations in favor of other classes of insurance companies. State ex rel. People's F. Ins. Co. v. Michel, 125 La. 55, 51 So. 66.

The validity of a statute applicable only to libel actions, requiring the plaintiff to file a bond to secure costs, and allowing a counsel fee to the defendant in the event that the plaintiff fails to sustain his action, cannot be raised on appeal by the unsuccessful plaintiff in a libel action, where it does not appear that any bond was given or attorney fee allowed. Skrocki v. Stahl, — Cal. App.—, 110 Pac. 957 (semble).

state, and as such is entitled to the privileges of all of its law equally with every other citizen and elector, as provided by § 18 of article 6 of the Constitution of the state of South Dakota, which is in words and figures as follows: 'No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.'

"Second. Plaintiff further alleges and shows to the court that the plaintiff and the defendant herein legally intermarried, the one with the other, in the state of Pennsylvania, on or about the 28th day of April, 1889, and have since remained and now are husband and wife, and that no children were born as issue of this marriage.

"Third. And for a cause of action herein the plaintiff further alleges that on or about the 22d day of July, 1906, at Baltimore, in the state of Maryland, the defendant herein, without any sufficient cause or reason

on the part of the plaintiff, did wilfully, voluntarily, and unlawfully desert and abandon this plaintiff, and at all times since has continued, and still so continues, to wilfully, voluntarily, and unlawfully desert and abandon this plaintiff, and to live separate and apart from him, without sufficient cause, or any reason, and against his will and without his consent.

"Fourth. And for a cause of action herein the plaintiff further alleges and reiterates all of the foregoing paragraphs of this complaint, the same as if they, the first, second, and third paragraphs of this complaint, were set out in full in this paragraph, and further alleges: That under the law or statute of the state of South Dakota, known as senate bill 95, passed by the legislature of the state of South Dakota of 1907, duly referended as provided by the Constitution of the state of South Dakota, favorably voted upon, and now at any times since about the 5th day of December, 1908, in force and effect within this

Where a statute punishes embezzlement by officers of a bank, whether incorporated or not, and by officers of other corporations, an officer of a bank cannot raise the objection that the statute is discriminatory because it is not applicable to embezzlement by servants of individuals not engaged in banking, but transacting the same character of business as nonbanking corporations, since there is no discrimination between officers of banking corporations and servants of individuals engaged in the banking business. *Com. v. Porter*, 113 Ky. 575, 68 S. W. 621.

The objection that a statute requiring railroads to carry shippers of live stock free, but making no such requirement in the case of other shippers, is unconstitutional as discriminatory, cannot be raised by a railroad company, since the discrimination, if any, is between shipper and shipper, and not between railroad company and railroad company. *McCully v. Chicago, B. & Q. R. Co.* 212 Mo. 1, 110 S. W. 711.

Where a statute prohibits, with certain exceptions, betting on horse racing, whether such racing occurs within or without the state, one convicted of betting on a race which took place outside of the state cannot raise the objection that the statute is unconstitutional because that portion of the statute relating only to racing occurring within the state denies the equal protection of the laws. *State v. Rose*, 40 Mont. 66, 105 Pac. 82.

The objection that a statute requiring notice, a hearing, etc., before a veteran volunteer fireman can be removed from office, but making no such requirement in the case of others holding such office, is unconstitutional, as denying the equal protection of the laws, cannot be raised by a superior officer of such official, having power

of removal in a proper case. *People ex rel. Kenny v. Kolks*, 89 App. Div. 171, 85 N. Y. Supp. 1100 (concurring opinion of Woodward, J.).

One not a physician cannot question the constitutionality of a local-option act on the ground that it denies the equal protection of the law, because one section forbids the prescribing of intoxicating liquors by anyone who does not follow the practice of medicine as his principal and usual occupation, since there is no discrimination except as between physicians who practice medicine occasionally and physicians who make it their principal calling. *Sweeney v. Webb*, 33 Tex. Civ. App. 324, 78 S. W. 766, writ of error dismissed in 97 Tex. 250, 77 S. W. 1135.

An applicant for a license to practise medicine, who has all the qualifications to admit him to the examination required by statute, cannot assail the validity of the statutory requirements for admission, on the ground that a class of applicants may be admitted to examination with less qualification than he has, or that, with equal learning, applicants cannot be admitted to examination without possessing a diploma. *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561.

One convicted of selling intoxicating liquor without a license, but who was not convicted of selling either wine or cider, cannot raise the constitutionality of the statute under which he was convicted because of a discrimination affecting only wine and cider. *State v. Barr*, 78 Vt. 97, 62 Atl. 43.

A city ordinance forbidding barbers to work on Sunday, and applicable to all barbers, will not be declared unconstitutional, on the objection of one following that occupation, on the ground that it is class legislation, when, by violating its provi-

state as a statute or law of this state, being chapter 132 of the Session Laws South Dakota 1907, a true and certified copy of which law or statute of this state is hereto attached, marked 'Exhibit A' for identification, and made a part of this complaint, is unconstitutional and void under § 1 of the 14th Amendment to the Constitution of the United States, which is in words and figures as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' And that said law or statute is void and unconstitutional under § 18 of article 6 of the Constitution of the state of South Dakota, which is in words and figures as follows: 'No law shall be passed granting to any citizen, class of citizens, or corporation, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.' That said statute or law hereto attached, marked 'Exhibit A,' and made a part of this complaint, is unconstitutional and void as discriminatory or class legislation, in that it allows or permits one class of citizens or persons within the borders of this state to maintain an action for divorce without any stated term of residence or domicile within the state, viz., those persons who were married within this state, and allows another class of citizens or persons within the borders of this state, to maintain an action for divorce on a residence or domicile of six months, viz., those persons whose cause of action arose in this state, while the class of citizens or persons within the borders of this state to which your complainant belongs are compelled by said law or statute to reside and have their domicile within this state for one year be-

fore having the privilege or right to maintain an action for divorce. That said law or statute, hereto attached, marked for identification as 'Exhibit A,' and made a part of this complaint, is unconstitutional and void under the Constitution of the state of South Dakota, conferring upon all male persons over the age of twenty-one years, and who are citizens of the United States, full citizenship and the benefit of all of its laws equally with every other citizen, class of citizens, or corporations. And that said law or statute hereto attached, marked 'Exhibit A,' for identification, and made a part hereof, is unconstitutional and void under the Constitution of the United States and the Amendments thereto and under the Constitution of the state of South Dakota and the amendments thereto.

"Wherefore, the plaintiff demands judgment herein, and prays: That the bonds of matrimony heretofore and until now existing between this plaintiff and this defendant be, by judgment and decree of this court absolutely dissolved, and that the parties plaintiff and defendant be absolutely released from said marriage, and restored to the status of single persons."

To the complaint was annexed a copy of "An Act Relating to Action for Divorce, and the Proceedings Therein. Approved March 8, 1907, and constituting chapter 132, Sess. Laws 1907, which reads as follows:

"Section 1. The plaintiff in an action for divorce must have been an actual resident, in good faith, of this state for one year, and of the county wherein such action is commenced for three months next preceding the commencement of said action, except as herein otherwise provided.

"Sec. 2. If the parties were married in this state, and the plaintiff shall have resided therein from the time of marriage until the commencement of the action, said action may be commenced at any time after the cause of action has arisen.

"Sec. 3. All hearings and trials upon the merits in actions for divorce, except

sions, he also violates the general state law. *McClelland v. Denver*, 36 Colo. 486, 86 Pac. 126, 10 A. & E. Ann. Cas. 1014.

Every voter of a state has such a direct interest in a constitutional apportionment of senators and representatives throughout the state as to enable him to test the validity of an apportionment act by the legislature. *Brooks v. State*, 162 Ind. 568, 70 N. E. 980. In the above case the court said: "It is not requisite to his right to sue that the wrong complained of should exist in his own senatorial or representative district. Overrepresentation in other districts, or the denial of fair representation, is just as injurious to the political 32 L.R.A. (N.S.)

rights of any portion of the male inhabitants over twenty-one years of age, aggrieved thereby, as if these inequalities were found in their own district."

Where an ordinance forbidding saloons except in certain defined limits of the city, contained the proviso that existing hotels outside of such limits might conduct bars, one living outside of such limits, who had not hotel at all, erected either before or after the passage of such ordinance, could not object that the ordinance was void because it unreasonably discriminated between existing hotels and those thereafter built. *Ritz v. Lightston*, 10 Cal. App. 685, 103 Pac. 363.

R. A. E.

default cases and except such hearings as relate to alimony during the pendency of the action, or the granting of an interlocutory order or decree, shall be had at a regular term of court.

"Sec. 4. If the cause of action arose in this state, then said action may be commenced at any time after the plaintiff shall have resided in the state for a period of six months.

"Sec. 5. All acts and parts of acts in conflict herewith are hereby repealed."

The demurrer interposed was upon the following grounds: (1) That the court has no jurisdiction of the person of the defendant or the subject of the action. (2) That the complaint does not state facts sufficient to constitute a cause of action.

It is contended by the appellant: (1) That chapter 132 of the Session Laws of 1907 is unconstitutional and void, being in direct conflict with and prohibited by the 14th Amendment of the Constitution of the United States, and § 18 of article 6 of the Constitution of the state of South Dakota. (2) That said statute or act is unconstitutional and void under all of the provisions of the Constitution of the United States and of the state of South Dakota respecting the right of all citizens of the United States and of the state wherein they reside being qualified equally with all others of the same class to the equal benefits and protection of the laws, courts, and procedure, without hindrance or delay. (3) That said act or statute is unconstitutional and void as being discriminatory and class legislation even under the police powers of the state. (4) That said act or statute is unconstitutional and void as a violation of interstate comity, in that it assumes to give the courts of this state jurisdiction to determine the status of parties who may both be citizens of another state or country, and neither of whom are required to become qualified citizens of this state before maintaining such action. (5) That said act or statute is void as a whole. (6) That said statute or act is void under the fundamental principles of law.

It is contended by the respondent that among the powers retained by the state upon the adoption of the Constitution of the United States was the right to regulate and control the domestic relations, marriage and divorce; that the right retained by the states may be exercised for the purpose of protecting the public health, morals, and general welfare of the state, and may be exercised at will, so long as the same is not used to oppress or discriminate unjustly against certain members of a class similarly circumstanced and in like condition; that the state may regulate and con-

trol, through its three departments of government, its citizens, and may enact laws for their benefit and protection so long as such laws are not expressly or impliedly prohibited by the state or Federal Constitution; that the state may make such classification as it sees fit, so long as the classification affects all those persons within the class or those who may come within alike, and does not discriminate against any similarly situated and circumstanced; that the 14th Amendment was enacted for the protection of the African race, and to declare who are citizens of the United States, and that the said state has the power to enact and say what shall be due process of law in each instance within that state.

It is further contended by the respondent that the appellant is not affected by the law; therefore, he is not entitled to the privilege of raising the question with regard to its constitutionality, the appellant not being within the class or classes entitled to institute an action for a divorce in the excepted cases. It will be observed that it is alleged in the complaint that the plaintiff and defendant were married in the state of Pennsylvania, and that the cause of action arose in the city of Baltimore, in the state of Maryland, and that the plaintiff had only resided in this state for a period of a little over six months when his action for divorce was commenced. Therefore, under the terms of the law, he was only authorized to commence the action after he had been a bona fide resident of this state for a period of one year. The allegations of the complaint affirmatively show that the plaintiff does not come within either of the exceptions, and that, therefore, he belongs to the class of persons who are only entitled to bring the action after a residence of one year in the state and three months in the county next preceding the commencement of the action. There is therefore much force in the contention of the defendant that the plaintiff is not affected by the exceptions contained in the act, and consequently it is immaterial to him whether the exceptions contained in §§ 2 and 4 are or are not constitutional. *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *Shehane v. Bailey*, 110 Ala. 308, 20 So. 359; *Kansas City v. Union P. R. Co.* (Kansas City v. Clark) 59 Kan. 427, 52 L.R.A. 321, 53 Pac. 468; *State ex rel. Morris v. Wrightson*, 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56.

In the case of *State v. Becker*, 3 S. D. 29, 51 N. W. 1018, this court held: "It is a well-established and wholesome rule of law that no one can take advantage of the unconstitutionality of an independent provision of a law who has no interest in,

and is not affected by, such provision." In *Shehane v. Bailey*, 110 Ala. 308, 20 So. 359, the learned supreme court of Alabama held as appears from the headnote: "A statute will not be declared unconstitutional on the application of a person whose rights it does not specially affect; and where the question of unconstitutionality is not one of public interest, this court will not decide the question of the constitutionality of the provision of the statute, which does not, in any way, affect the rights of the party urging the objection." The 1st section of the act fixing the time within which actions may be commenced for a divorce is clearly within the powers reserved to the state, and is not in conflict with any constitutional provision of this state or the United States, and is therefore clearly constitutional. The right of the state to thus limit the time for the commencement of an action for divorce cannot be questioned; and assuming, for the purposes of this decision only, that the exceptions provided in §§ 2 and 4 are unconstitutional, as before stated, the rights of the plaintiff are in no manner affected by these exceptions. It is quite clear, therefore, that the plaintiff is not in a position to raise the question as to the constitutionality of these exceptions, and the circuit court was clearly right in sustaining the demurrer.

In the view we take of the case, therefore, we do not deem it necessary to enter upon a discussion of the question as to the constitutionality of these exceptions on this appeal.

Sections 1 and 3 of the act are clearly within the powers reserved to the state, and are therefore constitutional. Cooley in his work on Constitutional Limitations, 7th ed. p. 578, in discussing this subject, says: "We conceive the true rule to be that the actual, bona fide residence of either husband or wife within a state will give to that state authority to determine the status of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offense; and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law." The act of 1907 with §§ 2 and 4 eliminated constitutes a perfect act of itself. Where a part of a law is unconstitutional, when it can be properly separated from the constitutional portion, and which contains valid provisions that may be enforced, such parts of the law will be held constitutional, and the unconstitutional portion eliminated from the act. *State v. Beck*-32 L.R.A. (N.S.)

er, supra; Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121; *Shehane v. Bailey, supra*. In *State v. Becker, supra*, this court, in discussing this question, says: "It is possible, and perhaps probable, that some of the minor and subsidiary measures of this law could not be sustained, but they are, all of them, we think, independent and severable, so that they might be stricken out in accordance with the suggestions already made, without fatal consequences to the law; and, even if it were now certain that in a case presenting such question this court would hold certain of these provisions unconstitutional, defendant in error is not in position to take advantage of such fact, for the reason, in connection with those already stated, that the charge against him is not predicted upon either of the challenged provisions. He is charged with the offense of keeping and maintaining a common nuisance. As affecting this prosecution, he is interested in no other provision of the law, unless such provision is so inextricably intermingled in substance with the balance of the law that it cannot be withdrawn without defeating the law itself, and this, we think, is not the case with any provision to which our attention has been called. It is a well-established and wholesome rule of law that no one can take advantage of the unconstitutionality of any provision who has no interest in and is not affected by it. *State ex rel. Potter v. Snow*, 3 R. I. 64; *Stickrod v. Com.* 86 Ky. 285, 5 S. W. 580; *Sinclair v. Jackson*, 8 Cow. 543."

In the recent case decided by this court of *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, this court held: "That a part of a statute is unconstitutional does not authorize the court to adjudge the remainder void, unless the provisions are so interdependent that one cannot operate without the other, or so related as to preclude the supposition that the legislature would have passed one without the other; and where the remainder is complete in itself, capable of execution in accordance with the apparent legislative intent, the remainder will be sustained." In the case of *Shehane v. Bailey*, the supreme court of Alabama, in discussing this question, says: "Several sections of the act are referred to as being unconstitutional. Without undertaking to discuss the validity of these several sections, it is sufficient to declare that §§ 1, 3, and 6 afford a complete remedy to the person whose crop has been injured by the trespass of stock of another uncontrolled, as provided for in the statute. These sections could stand as an entire law, even though all others were stricken out. We must not be understood as passing upon the validity of the other sections of the statute. It will

be time enough when a case arises which requires an adjudication of those questions."

In the view we take of the case, therefore, we do not deem it necessary to consider, discuss, or decide as to the constitutionality or unconstitutionality of the provisions contained in §§ 2 and 4 of the act, as it clearly appears from the complaint that the plaintiff's marriage was solemnized without the state, and his cause of action accrued without the state; hence, as before stated, these sections in no manner affect the rights of the plaintiff.

The order sustaining the demurrer and the judgment entered in the action are affirmed.

MISSOURI SUPREME COURT.
(Division No. 1.)

F. A. ORDELHEIDE, Admr., etc., of Walter L. Leek, Deceased, Respt.,
v.

MODERN BROTHERHOOD OF AMERICA,
Appt.

(226 Mo. 203, 125 S. W. 1105.)

Constitutional law — right to invoke aid — jurisdiction of court.

An insurance company has no right to raise, so as to invoke the aid of a court whose jurisdiction depends upon the presence of a constitutional question in the case, the question of the constitutionality of a provision in a statute depriving it of the defense of suicide in an action on the policy, in favor of a citizen of the state, on the theory that an unconstitutional discrimination is thereby made against persons not citizens.

(March 1, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Warren County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Appeal transferred.

The facts are stated in the opinion.

Messrs. Ball & Sparrow, for appellant:

Defendant is entitled to raise the constitutionality of the act.

State ex rel. Anheuser-Busch Brewing Assn. v. Eby, 170 Mo. 497, 71 S. W. 52; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Brannon, 14th Amend. 320.

Mr. Emil Roehrig, for respondent:

Section 7896 of article 2, of chapter 119, Revised Statutes of Missouri, 1899, is not

violative of any provision of the Constitution of the state of Missouri, nor of the Constitution of the United States.

Schuermann v. Union Cent. L. Ins. Co. 165 Mo. 641, 65 S. W. 723.

The denial of equal rights and privileges by discriminating legislation can be pleaded only by those who can show that they belong to the class discriminated against.

Brown v. Ohio Valley R. Co. 79 Fed. 176; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Carlisle v. Saginaw, 84 Mich. 134, 47 N. W. 444; 8 Cyc. Law & Proc. 791.

Lamm, P. J., delivered the opinion of the court:

Walter L. Leek died by his own hand, unmarried and intestate, on June 14, 1905; then (and always since his birth) a citizen of Warren county Missouri. Ordelleide was appointed administrator of his estate, qualified and took upon himself the burden of administration. The defendant is a corporation domiciled in Iowa, and for ten or twelve years last past did a life insurance business in Missouri under a license from the insurance department, permitting it to insure its members as a fraternal beneficiary association; it having a lodge system, ritual, and the other prerequisites of that form of insurance. In 1903 Leek made written application for membership and a benefit certificate in defendant, in which application he agreed that, in the event of his death by suicide, whether sane or insane, any benefit certificate issued by said fraternity should be void. Presently his application was accepted, and he became a member of the local lodge, and defendant issued to him a beneficiary certificate for \$1,000. He remained a member in good standing to the day of his death. The policy, *inter alia*, contained this provision: "If the holder of this certificate shall be expelled or suspended by the lodge . . . or shall die in consequence of a duel, or by his own hand, whether sane or insane, . . . then this certificate shall be null and void," etc. The provision designating the beneficiary in case of death is in part as follows: "The Modern Brotherhood of America issues to Walter L. Leek, of Warrentown, county of Warren, state of Missouri this membership certificate, which entitles him to membership in said fraternity, and in case of the death of said member while in good standing, permits his beneficiary to participate in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity, not to exceed \$1,000, which shall be paid to legal representatives related to

the member as—within ninety days after said satisfactory proofs of such member's death shall have been furnished by the beneficiary to the board of directors at Mason City, Iowa." Due death proofs were made, defendant refused to pay, and Ordelheide, as administrator, sued on the policy in the Warren circuit court. Judgment going for \$1,076.25, defendant appeals here.

The question of jurisdiction confronts us *in limine*, and therefore bespeaks preliminary disposition. Attending to that question, we observe: The theory of the petition is that defendant is an all-line life insurance company. It is contended in plaintiff's brief that by the omission to name a beneficiary in the policy of the class of blood kin or relationship by marriage, etc., as provided in §§ 1408, 1410, Rev. Stat. 1899 (Anno. Stat. 1906, pp. 1111, 1112), and by the use of the term "legal representatives" in the policy, defendant thereby is put outside of the pale of fraternal beneficiary associations, although it complies in other respects with the statutory designation of such associations. *Contra*, defendant, by answer, defends on the theory it is a fraternal benefit association, that by virtue of such fact it may contract against liability in cases of *felo de se*, and therefore is not amenable to the statutory limitations on the powers of old-line companies to contract against self-destruction,—that statute reading (§ 7896, Rev. Stat. [Anno. Stat. 1906, p. 37501]: "In all suits upon policies of insurance on life, hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy; and any stipulation in the policy to the contrary shall be void.")

However, there is another defense interposed by way of casting an anchor to the windward; *viz.*, the unconstitutionality of § 7896. The cause was tried without a jury or instructions. By briefs the constitutional point is developed as follows: Assuming (for argument's sake) that defendant is not a fraternal beneficiary association, but is an old-line life insurance company, yet, as the policy contains a provision making the insurance void in case of suicide, such policy provision should be enforced in spite of the statute, because that statute is void, in that it discriminates in favor of policy holders and beneficiaries who are citizens of this state, and against those who are not citizens (although within the jurisdiction of the state), thereby violating named provisions of the state and Federal Constitu-

tions. On this contention hinges our jurisdiction, and we think we have none. This because: A grave provision of the Constitution may not be invoked by every litigant at every turn to cause an act of the legislature to perish by judicial construction, or to take away or confer jurisdiction. Not only may the right to raise a constitutional point be waived, but such point may be injected untimely, and (what is more to the point) it may be raised by a litigant not entitled to raise it at all or invoke a given constitutional safeguard on the record presented to the court. Said Owen Glendower (sweepingly):

"I can call spirits from the vasty deep."

Retorted young Henry Percy, surnamed Hotspur (full of critical doubt):

"Why, so can I, and so can any man; But will they come when you do call for them?"

Somewhat as it was of old in the days of Henry IV., Falstaff, Mortimer, Glendower, Poins, Bardolph, and Hotspur *et al.*, with spirits, so is it now with constitutional points. A litigant may call on the Constitution, but will it come? Whether it will or no depends not a little on whether the litigant has the right to make the call. In deciding that delicate and turning question, stress must be laid on the comity that should exist between the judicial and the legislative departments. Says Cooley (Cooley, Const. Lim. 7th ed. p. 228): "The task" (*i. e.*, the task of declaring a statute unconstitutional) "is therefore a delicate one, and only to be entered upon with reluctance and hesitation. It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold." "Neither will a court," continues that author (page 231), "as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause." Adopting the language of Stuart, J., in *Hoover v. Wood*, 9 Ind., loc. cit. 287, our author goes on to say: "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional ques-

tions only when that is the very *lis mota*. . . . [Page 232.] Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. And a party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property. The statute is assumed to be valid until someone complains whose rights it invades."

In *Brown v. Ohio Valley R. Co.* (C. C.) 79 Fed. 176, a statute of Indiana relating to railway corporations, providing that a citizen of the state "shall have a lien upon all the personal property of said corporations, to the amount of \$100, for all debts originally contracted within this state; which, after said lien of the state, shall take precedence of all other debts, demands, judgments, or decrees, liens or mortgages against such corporations." [2 Burns's Anno. Stat. 1894, §5179], was under exposition. Under that statute certain citizens of the state of Indiana filed an intervening petition claiming \$100 for services rendered the railway company prior to the appointment of the receiver. The receiver of the railway company, holding appointment in the principal case, defended on the ground that the statute was unconstitutional, in that it discriminated against citizens of other states. In deciding the point, Baker, J., said: "The precise constitutional objection is not, and cannot be, that the legislature is not possessed of the power to provide for the payment of all small debts of the corporation by giving them a preference and priority over liens and mortgages subsequently originating, for such power is undoubted. The objection must be that the statute in question is unconstitutional because it limits the right to citizens of this state, and to debts originally contracted therein, and thus discriminates injuriously against the citizens of other states. If it should be granted that nonresidents of this state have equal constitutional rights in respect to enforcing the collection of small debts with the citizens of this state, it might follow that, as to those who were injuriously affected, or as to those against whom the statute discriminates, it would be invalid, while as to those to whom it assumes to grant a 32 L.R.A. (N.S.)

special privilege, it would be valid. When a nonresident of the state assails the constitutionality of the statute on the ground that it injuriously affects him, or on the ground that it denies him a privilege granted to the citizens of this state, it will be time to consider the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law. . . . The only ground of complaint open to them is that the statute limits their liability within too narrow bounds. If it granted the right to sue for debts amounting to \$100 to everyone, it would confessedly be a valid enactment. Can the receiver object that the statute is unconstitutional because it is less burdensome to railway corporations than it might and ought to have been? [Here certain cases are cited.] . . . These cases are agreeable to the principle that only those who are injuriously affected by an unconstitutional act will be heard to complain of it [citing other cases]. The receiver, having admitted the rights of the complainants unless the statute in question should be held unconstitutional, is in no situation to object to the allowance of the demand of the intervening petitioners as a preferential claim." In *Re Wellington*, 16 Pick. 96, 26 Am. Dec. 631, it was said in substance by no less an oracle of the law than Chief Justice Shaw that it was quite clear that when an act of the legislature was alleged to be void on the ground that it exceeded the limits of legislative power, and thus injuriously affected the rights of others, such act was to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected; and that it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. In *State v. Seebold*, 192 Mo., loc. cit. 730, 91 S. W. 491, the propositions announced by Judge Shaw, *supra*, are indorsed by this court. *Jones v. Black*, 48 Ala. 540, also is in point. It was there held in substance that an act of the legislature will be assumed to be valid until someone whose rights are injuriously affected and specially invaded complains. To the same effect are *Shehane v. Bailey*, 110 Ala. 308, 20 So. 359; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; *State v. Barr*, 78 Vt. 97, 62 Atl. 43; *Re O'Brien*, 29 Mont. 530, 75 Pac. 196; 1 A. & E. Ann. Cas. 373; *Davidson v. Von Detten*, 139 Cal. 467, 73 Pac. 189. In *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044, the question came before the

Supreme Court of the United States in the form of a charge of an unconstitutional discrimination in the method of assessing shares of stock in banks for taxation purposes. The complaining shareholder in that case did not belong to the class affected by the law. In speaking to the point, Mr. Justice Miller delivered the opinion of the court, and said (page 311 of 105 U. S.): "What is there to render it void as to a shareholder in a national bank who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?" The question was also up and ruled in *State ex rel. Crandall v. McIntosh*, 205 Mo. loc. cit. 601-605, 103 S. W. 1078, 1082. In that case it is said: "The sum of the matter is not that his neighbor is hurt, but that a litigant himself must be hurt by the unconstitutional exercise of power before he may vex the judicial ear with complaints. No one may demand judicial consideration of a question not singular to his individual rights of person or property, as contradistinguished from his neighbor's. 'We cannot,' said the supreme court of Wisconsin (*State ex rel. Kellogg v. Currens*, 111 Wis. loc. cit. 442, 56 L.R.A. 252, 87 N. W. 561), 'set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others.'"

As defendant is in no way prejudiced by the statute in question, it cannot complain of it as unconstitutional, because it discriminates against certain policy holders. It will be time enough for us to consider and determine its constitutionality or unconstitutionality when a citizen of another state, who claims to be discriminated against, calls in the aid of the judicial powers in this state to pronounce it void as to him, his property, or his rights. The defendant does not claim that the legislature had no power to put limitations on insurance contracts in this state. That power is unquestioned. The defendant claims that the citizens of other states are discriminated against by the statute. In doing so, it does not speak for itself, but 32 L.R.A. (N.S.)

speaks for policy holders it claims are injuriously affected. It has no right to speak for them in the way of raising the constitutionality of the law. As put by Baker, J., in the *Brown Case*, supra: Could defendant object that the statute is unconstitutional because it is less burdensome to insurance companies than it might and ought to have been?

As defendant cannot raise the question, it is the same as if not raised at all. Since without it we have no jurisdiction, the case does not belong here. Let it be transferred to the St. Louis Court of Appeals. It is so ordered.

All concur.

WASHINGTON SUPREME COURT.

CECIL THORNTON, by Guardian *ad Litem*,
Respt.,

v.

MATTHEW DOW et al., Appts.

(— Wash. —, 111 Pac. 899.)

Appeal — refusal to follow instructions — effect.

1. A judgment will not be reversed because the jury did not follow instructions which were so erroneous that doing so would have required reversal.

Negligence — unsafe building — liability of contractor.

2. That a railing protecting the gallery of an armory is so insufficient to withstand the pressure of the crowd that may be in the gallery and lean over it to see transactions on the floor below that it may constitute a nuisance does not render the contractor who erects the building liable for an injury due to its giving way, if, without negligence on his part, he follows the plans given him, and turns the building over to, and it is accepted by, the proper authorities.

Same — defects in acceptance — effect.

3. Technical omissions in the manner of the acceptance of a public building by state officers will not continue the liability of the contractor for defects in the plan which injure strangers, if, at the time of the injury, the state is in fact in possession and control of the building, and the injured persons are upon the premises by invitation of the state alone.

(November 26, 1910.)

Note. — Liability of contractor to third persons for defects in his work after its completion and acceptance.

The earlier cases on this subject are included in the note to *First Presby. Congregation v. Smith*, 26 L.R.A. 504; and the present note covers only the subsequent cases.

A question quite similar to the one dis-

APPEAL by defendants from a judgment of the Superior Court for King County granting a new trial after verdict in their favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Shank & Smith, for appellant: This was not a case of nuisance.

21 Am. & Eng. Enc. Law, 2d ed. p. 701; Wendell v. Baxter, 12 Gray, 494.

No structure which is erected by the state, when erected in the manner and according to the plans and specifications of the state, can be a nuisance.

2 Cooley, Torts, new ed. §§ 732, 1293; Payne v. Kansas City, St. J. & C. B. R. Co.

cussed in this note is that of the liability of the manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in articles sold. The authorities upon this question are collected in the note to Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923. For cases where the owner is held liable for injuries notwithstanding the contractor may have accepted the work and proceeded to use it, see note to Bright v. Barnett & R. Co. 26 L.R.A. 524.

Reference is also here made to the note to Miner v. McNamara, 21 L.R.A.(N.S.) 477, on the liability of contractor to tenant for injury caused by defects in building; to the note to Galbraith v. Illinois Steel Co. 2 L.R.A.(N.S.) 799, on the liability of a subcontractor to the owner for an injury to property, resulting from defective performance of work; to the note to Schneider v. Cahill, 27 L.R.A.(N.S.) 1009, on the liability of highway contractor for dangerous conditions where municipality, county, or town is not liable.

General rule.

The general rule is that, after the contractor has turned the work over, and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work, but the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the proprietor. Memphis Asphalt & Paving Co. v. Fleming, — Ark. —, 132 S. W. 222; Richards v. O'Brien Bros. 1 Ga. App. 107, 57 S. E. 907; Young v. Smith & K. Co. 124 Ga. 475, 110 Am. St. Rep. 186, 52 S. E. 765, 4 A. & E. Ann. Cas. 226; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457 (set out sufficiently in THORNTON v. Dow); Casey v. Wrought Iron Bridge Co. 114 Mo. App. 47, 89 S. W. 330; McCrorey v. Thomas, 109 Va. 373, 63 S. E. 1011, 17 A. & E. Ann. Cas. 373 (strong dicta in support of general rule).

And there is a statement in Church of the Holy Communion v. Paterson Extension 32 L.R.A.(N.S.)

112 Mo. 6, 17 L.R.A. 628, 20 S. W. 322; Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

A contractor is liable only for his own negligence or improper construction prior to completion and acceptance.

16 Am. & Eng. Enc. Law, 2d. ed. p. 209; 6 Cyc. Law & Proc. pp. 60-62; Pearson v. Zable, 78 Ky. 170; Lawrence v. Shipman, 39 Conn. 586; Church of the Holy Communion v. Paterson Extension R. Co. 68 N. J. L. 399, 53 Atl. 440, 1079; Cooley, Torts, 1st ed. 548; Cloud County v. Vickers, 62 Kan. 25, 61 Pac. 391; Pye v. Faxon, 156 Mass. 471, 31 N. E. 640; Laycock v. Parker,

R. Co. 68 N. J. L. 399, 53 Atl. 440, 1079, which apparently supports this rule.

So, the general rule is recognized in Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710, on a second appeal in 57 Atl. 448; but the case is valuable only for its holding that where a contract is made by a public corporation for the construction of a public bridge, and incidentally contains stipulations for the safety of the public, an individual who sustains personal injuries by reason of the nonperformance of such stipulations does not bear such a relation to the contractor as will support an action of tort against the latter, based upon the mere violation of the contractual duty; and that the injured party is remitted to his action for breach of such duty, if any, as may be imposed upon the defendant, aside from the contract.

One of the reasons supporting the rule as laid down is stated by Alderson, B., in the leading case of Winterbottom v. Wright, 10 Mees. & W. 115, cited in the note to which this is supplemental (26 L.R.A. 504), as follows: "If we were to hold that the plaintiff could sue in such a case, there is no point at which actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty."

"But the better reason," said Mr. Justice Johnson, in Casey v. Wrought Iron Bridge Co. 114 Mo. App. 47, 89 S. W. 330, "is that ordinarily in such cases there is found a break in the causal connection between the contractor's negligence and the injury. [Wharton, Neg. 368.] It is the intervening negligence of the proprietor that is the proximate cause, and not the original negligence of the contractor. By occupying and resuming possession of the work, the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof and to know of its defects; and if he takes it in the defective condition, he accepts the defects and the

103 Wis. 161, 79 N. W. 327; *Boswell v. Laird*, 8 Cal. 469; *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490; *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; *Louisville v. Shanahan*, 22 Ky. L. Rep. 163, 56 S. W. 808; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174; *Morgan v. Bowman*, 22 Mo. 538; *Horner v. Nicholson*, 56 Mo. 220.

Where a contractor has completed his contract, and the owner has accepted possession of the building, the owner thereby assumes to the public and to third parties

negligence that caused them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury. His liability may be incurred either from his substitution for the contractor, or from his neglect to repair."

But before this responsibility is shifted from the contractor to the proprietor or owner, it must be shown that the work was fully completed by the contractor, fully accepted by the owner or proprietor, and the contractor fully discharged of the contract. *Richards v. O'Brien Bros.* 1 Ga. App. 107, 57 S. E. 907.

An independent contractor who has constructed a roadbed and track through the field of a landowner for a railroad company, in accordance with the plans and specifications furnished to it by the company's engineer, is not liable to the landowner for permanent damages to his land and crops, arising through the putting in of an insufficient drainage pipe, owing to error of the engineer, and the damages do not accrue until the work has been completed and turned over to the railroad company. *Willis v. White*, 150 N. C. 190, 134 Am. St. Rep. 906, 63 S. E. 942.

Nor is a railroad company liable for the death of one, alleged to have been due to its negligent construction of a bridge over its tracks, under an agreement with a borough council by which the latter, in consideration of the railroad company constructing and maintaining the bridge, agreed to vacate portions of certain streets which crossed the tracks of the railroad company at grade, and the accident did not occur until after the bridge had been completed and accepted by the borough council. *Smith v. Pennsylvania R. Co.* 201 Pa. 131, 50 Atl. 829.

One who decorates the front of a building with flags and bunting, in fulfillment of a contract, and departs from the premises, 32 L.R.A. (N.S.)

the responsibility for any injuries which result from the use or occupancy of the building or structure.

16 Am. Enq. Enc. Law, 2d ed. p. 209; 6 Cyc. Law & Proc. pp. 60-62; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Albany v. Cunliff*, 2 N. Y. 165; *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; *Galbraith v. Illinois Steel Co.* 2 L.R.A. (N.S.) 799, 66 C. C. A. 359, 133 Fed. 485; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651; *Fanjoy v. Seales*, 29 Cal. 244; *Wharton Neg. art.*

is not liable for injuries sustained by a passer-by three days afterwards, by the falling of a piece of terra cotta ornamentation from the front of the building, owing, perhaps, to certain of the decorations "flopping all over the building" in the wind. *Cross v. Koster*, 17 App. Div. 402, 45 N. Y. Supp. 215.

And one who has constructed a bridge under contract for another is not liable for injuries to adjoining land because of the deflection of currents, due to the work, where the injury does not occur until after the bridge has been surrendered to, and accepted by, the owner. *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 469, 122 Fed. 381, writ of certiorari denied in 191 U. S. 569, 48 L. ed. 306, 24 Sup. Ct. Rep. 841.

So, one who has contracted with a county to keep its bridges in repair is not liable for injuries sustained by a third person while crossing a bridge alleged to have been out of repair. *Williams v. Stillwell*, 88 Ala. 333, 6 So. 914.

An asphalt company that has constructed a concrete sidewalk over a stream in a city, in accordance with the contract, plans, and specifications, is not liable for injury to one who steps or falls off the sidewalk in the nighttime because of the absence of any guard rail or lights on the sidewalk, where the injury does not occur until three days after the work has been accepted by the proper authority. *Memphis Asphalt & Paving Co. v. Fleming*, — Ark. —, 132 S. W. 222.

Where contractors grade a street in all respects as required by an ordinance and contract, they are not responsible for injury resulting to a property owner in consequence of the failure to provide an outlet for the water accumulating in the street. *Pearson v. Zable*, 78 Ky. 170, wherein it was said: "It was not their duty, but the duty of the city, to provide plans for the work, and to guard against unnecessary injury to property."

An elevator company that has constructed an elevator in a store is not liable to a

439; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. C38.

Messrs. Reynolds, Ballinger, & Hutson, for respondent:

All or any persons who have to do with the creation of a nuisance are liable for any injury which is the proximate result thereof.

2 Wood, Nuisances, 3d ed. p. 906, § 703; *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; *Barron v. Baltimore*, 2 Am. Journal, 103.

The King himself cannot give license to anyone to commit a nuisance.

Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Niblett v. Nash-*

ville, 12 Heisk. 684, 27 Am. Rep. 755; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Dorman v. Ames*, 12 Minn. 451; *Gil. 347*; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

If the result of appellant's work was the unnecessary creation of a nuisance, the following of the plans and specifications would be no defense.

2 Wood, Nuisances, p. 1047; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 650; *Timlin v. Standard Oil Co.* 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786.

The creator of a nuisance is liable for any injury which is the proximate result of such nuisance.

customer of the store for injuries sustained through the negligent construction of the elevator. *Field v. French*, 80 Ill. App. 78.

In *Lechman v. Hooper*, 52 N. J. L. 253, 19 Atl. 215, certain contractors, who had obligated themselves to put up an engine house, engaged another to supply and erect the lintels of the door; they also sublet the contract to build the walls. While the plaintiff, a servant of the subcontractor, was doing the work on the door, the wall, which had been negligently and defectively constructed, fell and injured the plaintiff. Here, although there was no contractual relation whatever between the plaintiff and the builder of the wall, it was held that the former could recover.

One who had contracted to keep in repair a number of vans owned by a firm was held not liable for an injury to the plaintiff, a driver in the employment of the firm, which was caused by a wheel coming off the van he was driving. *Earl v. Lubbock* [1905] 1 K. B. 253. The van had been in the hands of the defendant's workmen shortly before and on the day of the accident, and the cause of action was based upon the negligence of the workmen in failing properly to inspect and repair the defective state of the van, and the negligent manner in which the repairs were done. *Mathew, L. J.*, said: "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their employment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade."

In *Davies v. Pelham Hod Elevating Co.* 65 Hun, 573, 20 N. Y. Supp. 523, a recovery was not permitted by the administratrix of a third person, who was killed by

the breaking of a manila rope in a derrick which was supplied under contract, and properly equipped with wire rope, the manila rope having been substituted at the request of the third person, after the wire rope had proven safe.

In *St. Louis Expanded Metal Fireproofing Co. v. Dawson*, — Tex. Civ. App. —, 59 S. W. 847, it was held that a subcontractor for the construction of concrete floors in panels between iron joists in a building to be erected by the original contractor was not liable to an employee of the latter who was injured by falling through one of the panels the day after it was put in, and before it had had time to harden. The court, after citing certain decisions to show that the subcontractor would not be liable to third persons for injuries which might occur after its completion, said: "All the panel which broke through under the weight of defendant in error [servant of contractor] and his fellow servant lacked of being completed was time to undergo the natural process of hardening. Nothing more to complete it had to be done by the plaintiff in error [subcontractor]; and it was entitled to have the panel left alone and left unmolested by Shields [original contractor] and his servants until sufficient time had elapsed for it to undergo this process. Until then the plaintiff in error must be regarded to have and exercise the same right and control over it as if it were the owner; and not having authorized the defendant in error to go upon it, he took all the risks upon himself for the use he was making of it, and he has no right to complain of the defect which caused his injury; it being shown by the evidence that plaintiff in error could not have reasonably anticipated that the panel would be used by defendant in error or some other of Shields' servants at the time and the manner it was before it had become sufficiently hardened to sustain their weight."

In *Cochran v. Sess*, 168 N. Y. 372, 61 N. E. 639, reversing 49 App. Div. 223, 62 N. Y. Supp. 1088, the defendants contracted to build a stone wall for the erec

Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 296.

Dunbar, J., delivered the opinion of the court:

This is an action for personal injuries sustained by the plaintiff, against the defendants as contractors, who built the present state armory building for the state of Washington, in the city of Seattle. The plaintiff alleged negligence in the construction of a balcony railing, constructed in such a way as to render the same dangerous, that it was dangerous, and that by reason of its frailty the plaintiff and others, while witnessing an athletic meet, were precipitated over the balcony railing and were injured. The defense was that the building was constructed in accordance with

the plans and specifications; that prior to the date of the accident, which was May 6, 1909, the building had been turned over to the state through its agents; that the state had taken absolute possession of the building; and that the defendants had nothing whatever to do with giving or permitting the athletic entertainment at which the accident occurred. These were, in substance, the issues presented. The case was tried by a jury, who returned a verdict in favor of defendants. A motion for a new trial was interposed, and was granted, because, in the opinion of the court, the jury had disobeyed the instructions of the court in this: The court defined a nuisance to the jury, and instructed the jury that, if they found that this structure was a nuisance from the beginning, the question

tion of a building. The owner furnished the foundation. A brick wall was erected upon the stone wall by other contractors. The stone wall collapsed, owing to the insecurity of the foundation, and injured an employee of another contractor. It was held that the defendants were not liable "unless it was shown that, notwithstanding the assurances of the building department, there was such an apparent defect as to render it obvious to the contractors that they were about to erect a building upon a dangerous and insecure foundation. Ordinarily they would be justified in relying upon the assurances of the building department, the architect, and the owner himself, that the bottom furnished for the stone wall was safe and suitable for the purpose. But it may be that, notwithstanding assurances of this kind, from so many responsible sources, yet, if it was obvious to a reasonably prudent man that a building of the character contemplated could not be erected upon such a foundation with safety to human life, the defendants might be held responsible. It would undoubtedly require very strong proof of knowledge or negligence on the part of the contractors to subject them to liability under such circumstances."

Exceptions.

But there are well-defined exceptions to the rule discharging the contractor from liability where the work has been completed and accepted. It will be seen that in none of the cases cited under the general rule was it shown that the defendant furnished an instrumentality, or did work, which was, or should have been, known to be imminently dangerous to life or limb of persons who were to make use of it; and in none of them was there a concealment of a dangerous condition. When such circumstances appear, the contractor is liable for injuries to third persons resulting from his work, notwithstanding it may have been accepted by the owner.
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This is the doctrine that was applied in *O'Brien v. American Bridge Co.* post, 980.

And the same doctrine was applied in *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* 175 Fed. 176, which involved damage to a third person consequent upon disintegrated piers of a bridge.

So, a very similar case is *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 47, 89 S. W. 330, wherein Mr. Justice Johnson said: "Applying the principles upon which these exceptions are based that bear upon the case in hand, we are of the opinion that the defendant should not be excused from liability to the plaintiff, even under the supposition that the bridge was accepted by the commissioners. The facts, which the evidence tends to establish, that the structure was so defective as to be essentially and imminently dangerous to the safety of others; that the defects were so hidden or concealed that a reasonably careful inspection would not have disclosed them, and the danger resulting from them; and that these things were known to the defendant, but not to the commissioners, left the liability of the defendant where it would have been had there been no acceptance. The flagrant character of the negligence and its potentiality, coupled with its concealment, amounted to a deception practised upon the commissioners. There is no righteous principle upon which the obligation imposed by duty upon the contractor may be cast off under circumstances such as these."

Within the principle of these exceptions, *Murray v. Arthur*, 98 Ill. App. 331, seems to come. Here there was evidence to show that the carrying up of a party wall and the building of a chimney were done according to the plans and specifications furnished, and that, in the course of the work by the defendants, a tar and paper roof on an adjoining building was torn up and rolled back, and left in such condition as to permit a heavy rain to come down and injure the goods of the plaintiff, who was a tenant in the adjoining building. The court

of occupancy cut no figure in the case, and that the defendants would be liable as the creators of such nuisance; and in order to make this effective, the following question was propounded to the jury for answer: "At the time of the occurrence of the accident in question in this case, was the railing around the balcony in the drill hall of the armory, and particularly was that part of the railing on the east side of the drill hall, a nuisance, within the definition of a nuisance as contained in the instruction of the court?" The jury answered this question in the affirmative, but also found for the defendants. Deeming this a refusal on the part of the jury to follow the instructions of the court, the motion for a new trial was sustained; and from the granting of such motion this appeal is taken.

instructed the jury to find all of the defendants—the owner of the building, the contractor, and subcontractor—not guilty. What the appellate court said in this case is pertinent: "The court erred in taking the case from the jury. The proofs demonstrated that some or all of the defendants are responsible for the injury. No one pretends that the plaintiff is not entitled to recover, but each defendant sought to show that the cause of action was one for which some other defendant was responsible. . . . The owner has no right to contract for the doing of that which will necessarily create injury to another, and the contract is no justification to the contractor in a suit by an injured party who has sustained damages in consequence of the performance of the contract. It was as much his duty to refrain from executing it to the injury of a third party as it was the duty of the owner to have refrained from making it. Under such circumstances, both parties to the contract could be held liable to the party damaged. . . . Which were liable, or whether all were liable, was a question for the jury, under proper instructions."

And in *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* supra, Ray, District Judge, said: "In my judgment it is immaterial that the dangerous thing made and turned over for use by others, known to the maker, is a structure, such as piers for a bridge, instead of some article of commerce, such as naphtha, or a drug, or a chemical compound."

So, where an elevator company, employed to repair and place an elevator in first-class condition, negligently cracked one of the brake wheels, and left the work in such condition as to render it unsafe and imminently dangerous to human life, it was held that it was liable to a third person for an injury caused by the falling of the brake wheel. *Kahner v. Otis Elevator Co.* 96 App. Div. 169, 89 N. Y. Supp. 185, affirmed in 183 N. Y. 512, 76 N. E. 1097.

But the doctrine of these exceptional cases, said Mr. Chief Justice Hobson, in 32 L.R.A. (N.S.)

It is the contention of the respondent that, inasmuch as the special verdict should control the general finding, and the general finding is inconsistent with the special verdict, the general finding was properly set aside, and that it is not within the province of this court to enter into an investigation of the correctness or incorrectness of the instructions given by the court to the jury, for the reason that the instructions, whether right or wrong, were the law of the case. Counsel for respondent rely upon the case of *Pepperall v. City Park Transit Co.* 15 Wash. 176, 45 Pac. 743, 46 Pac. 407, where, it must be confessed, this question was decided by this court in favor of such contention, and the doctrine announced that, although an instruction to the jury may have been wrongfully given, it was

Simons v. Gregory, 120 Ky. 116, 85 S. W. 751, is not to be applied to the fall of an elevator, which is charged to be due concurrently to its defectiveness, the unskillfulness of the operator, and his gross neglect in using it; for an elevator which, after being run for months, breaks down by reason of its being operated by an inexperienced and unfit person, and by reason of his gross negligence, cannot be said to be imminently dangerous to human life. Such an elevator cannot be distinguished from a defective steam boiler, a defective coach for the carriage of passengers, a defective wall, defective shelving in a store room, or a defective chandelier in a hotel, or the other things for which the maker has been held not to be responsible to third persons injured thereby. To the same effect, see *Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A. (N.S.) 1103, 92 S. W. 608.

In *Blendingan v. Souders*, 2 Monaghan (Pa.) 48, the building which the contractors were erecting according to the plans and specifications of an architect was not complete, but the wall which fell and caused the death complained of had been finished, and the court said: "We are not disposed to adopt the doctrine that a contractor may build a defective and dangerous wall, which, by its fall, kills someone, and escape the consequences of his own act by interposing the orders of an architect."

And for another case pertinent to this subdivision of the note, see *Cochran v. Sess*, supra.

The exception to the general rule, of course, embraces cases where the contractor's work was so imminently dangerous as to constitute a nuisance.

Thus, in *Young v. Smith & K. Co.* 124 Ga. 475, 110 Am. St. Rep. 186, 52 S. E. 765, 4 A. & E. Ann. Cas. 226, the court said: "There are some modifications of this rule [general rule, as stated, supra]. Among them are cases where the work is a nuisance *per se*, or where it is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons." E. M. S.

binding and conclusive upon the jury. This case was decided by a divided court, three judges concurring and two dissenting, and the case has been indorsed in a measure two or three times since. But it may not be amiss to say that it has been followed with some reluctance, and that this court as since constituted has not been satisfied with the rule there announced in its fullest application. In that opinion several cases were discussed by the court which undoubtedly sustain the conclusion reached, but there are other cases which hold to the contrary view; and it must conclusively appear that such a doctrine as this is opposed to the well-established rule, announced by this and other courts, that when it affirmatively appears that an error is not prejudicial, and could not have affected the result which was reached, and which ought to have been reached, the commission of such an error would not warrant a reversal of the judgment. In this case, if this judgment should be reversed because the jury did not follow the erroneous instruction on the part of the court, and the case should be sent back for a retrial for that reason, the court being instructed to remedy the error by giving a proper instruction, and the case should be tried again, and the same verdict rendered under such proper instruction, what benefit would accrue to either of the parties litigant? It is true that it is the duty of the judge under the provisions of the Constitution and statutes to declare the law; but this is on the theory and on the supposition that the law will be declared correctly. While inconveniences may arise by reason of the failure of the jury to implicitly follow the instructions as given by the court, if it can be clearly seen that such instructions were wrong, and that a case would have to be reversed by this court if the jury had obeyed such instructions, thereby depriving the litigant of a legal right, it would seem idle to put him to the expense of another trial to obtain a right which he had lost without any fault of his own.

In *Thornburgh v. Mastin*, 93 N. C. 259, it was held that, when a jury correctly decides a question of law, incorrectly left to them by the court, the verdict cures the error. That is exactly the proposition here. If the jury had followed the erroneous instruction of the court, on appeal this court would have cured the error by a reversal of the judgment. But it would have necessitated a circuitry of action and additional expenses; and if we find in the investigation of the case here that the instruction was erroneous, but that it was not prejudicial, because the jury cured it, it seems to us that this is the short and sensible way out of the

difficulty, and is in accordance with the trend of modern authority generally, to the effect that a judgment will not be reversed if it conclusively appears that it was not prejudicial in its results. In *Thompson on Trials*, § 1020, it is said: "If the judge submits a question of law to the jury, and they decide it rightly, there is no ground of exception, since it would be absurd to reverse a judgment in order that the judge might decide what the jury rightly decided." It is manifest that it would be just as absurd to reverse a judgment, in order that the jury might bring in the same verdict under a different instruction. This is attaching more importance to the machinery of the law than to the law itself, and imposing unnecessary costs and delays upon litigants who are confessedly entitled to the judgments which are rendered. A judgment will not be reversed for intermediate errors, when the record upon the whole case shows it to be right on its merits. *Whitworth v. Ballard*, 56 Ind. 279.

It has been the uniform holding of this court that, where the whole record shows that no other judgment than the one that was rendered could properly be rendered, errors occurring during the trial become immaterial. A common instance is where a court renders a decision on some particular ground which is not tenable. In such case it has always been determined by this court that, if the judgment could be maintained on any ground, the reason assigned for the judgment or ruling would be immaterial. As was said in the case of *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837: "The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered,"—the object of courts, and especially of appellate courts, being to see that the litigants have obtained their legal rights; which in a broad sense means not a right to every intermediate order or ruling which may occur in the trial of the cause, but an ultimate right to which they are entitled under the facts and the actual law in the case. In consideration of these views, we are constrained to overrule the case of *Pepperall v. City Park Transit Co.* supra, and to hold, in conformity with the general principles announced by this court,—that where we find that the verdict of the jury is sustained by the law, the verdict cures the erroneous instruction, and the judgment will not be reversed.

This conclusion renders it necessary, then, to enter into a determination of the question whether the instructions of the court were right; and in order to do this, we must consider the nature of the structure, and the

nature of the employment of the appellants. Sess. Laws, Wash. 1907, chap. 55, make an appropriation and provide for the erection of a state armory building, for the use of the national guard in the city of Seattle; provide for a commission, of which the adjutant general and others shall be members; that the commission shall choose a suitable site for the armory building, shall obtain proper architectural design and plans, and specifications and details in conformity with such plan and design, and secure the erection and completion of such armory building, conforming faithfully to such plan and design. The contract for this building was let to the appellants. A meeting was held on the 16th of April, 1909, and an inspection of the building was made, after which, on motion, the armory building was accepted by the state, and final payment allowed. Some minor corrections were suggested, and were made before the casualty which was the cause of this accident. The final certificate of the architect was issued, and entire and complete possession was taken by the state on April 16th, and it has since kept exclusive and absolute control. Gen. Lamping, as adjutant general, after taking possession of the building, and before the falling of the railing, let independent contracts for lockers and for other minor particulars which were not included in the contract. He thereafter rented the armory building on one occasion to the May Festival for a public entertainment, receiving substantial payment therefor; to wit, \$400. He rented the armory building to the Seattle Athletic Association for the athletic entertainment which was the occasion of the accident, receiving \$200 therefor. He has continued to rent the armory building, receiving, all told, the sum of \$2,800 therefor, which money has gone into the treasury of the state. The drill hall in which the entertainment was held is 200 feet long by 100 feet wide, and the railing goes around the entire balcony, which is 10 or 12 feet high; the balcony containing three rows of seats around its entire length.

As bearing upon the question of whether this construction was a nuisance *per se*, or such a nuisance as might be said to be dangerous within itself, and which would reasonably be brought to the knowledge of the contractor as a nuisance *per se*, it becomes necessary to notice somewhat the manner in which this accident occurred. On the evening on which this athletic association held its entertainment, there were different classes of entertainment, but the culminating feature was a 10-mile Marathon race. In this race four or five laps were run in the armory building, and then the course went

into the open air around Lake Union, and back into the armory building for the closing laps. The contestants, coming back earlier than was expected, collided with a relay race which was in progress, and the leaders fell in a heap, which incident was somewhat exciting to the crowd. One of the leaders was a Seattle boy, and the other was a Portland boy. The race was very close, and was run in what might be, in race-horse parlance, called "neck and neck;" the Seattle boy being put forward by the Seattle club, and the Portland boy being backed by the Portland club. According to the testimony, there was intense rivalry between the two clubs. The testimony shows that the wildest excitement prevailed at the finish of this contest, bringing vividly to mind the celebrated contest between Messala, the Roman, and Ben Hur, the Jew, so graphically described by Gen. Lew Wallace.

According to the testimony, after the men had left the armory and were completing their course, at various points word would be sent to the audience concerning their respective positions, and, when the men finally on their return entered neck and neck, the excitement was at fever heat; the witness stating that it was the most exciting contest he had ever witnessed, and that he had witnessed a great many. His language is as follows: "These men circled the hall five times, running neck and neck all the time, and the crowd was getting wilder naturally, with enthusiasm, at each circle of the hall; so at the very final—at the final dash, about 50 yards I should judge, straight away to the finish—these two men, just inches apart, the enthusiasm of the crowd, broke over all bounds, and they not only came down from,—some of them came down from where they had been standing, back under the balcony, and they rushed clear across from the other side of the hall, and even people who were on the opposite side upon the balcony rushed—came downstairs all at once—to see the finish of this very exciting race, so that they came rushing in from both sides of this narrow lane where the runners were to finish, and they rushing in from behind; that is, from the outside, on the floor, not under the balcony. The judges were stationed—one judge on the inside of the track, that is, under the balcony, and two of us on the other side, and several timers and a number of officials were there. And they rushed in and pressed this finish line back under the balcony; that is to say, in the finish the runners had to run closer under the balcony than they would on the lines originally laid out by the men who laid off the track, and it was necessary for several of us—we tried to hold the crowd back by forming a line with our hands, several gentlemen on

this side of me and several on that side of me, we tried to hold them back, but it was impossible. They broke right through our arms, our locked hands, and swept over the floor. At the finish of the race—it was just about 5 or 6 yards from the finish, the men were—when this accident occurred, they were within 5 or 6 yards of the finish, and the forcing of this finish line under the balcony upset all the plans to have the finish out in full sight, so that the people upstairs in the back rows of the balcony were unable to see the finish and rushed down to get to the front of the balcony, and I first noticed it on the last lap, as the men were coming around the last turn, when I saw the people in the front row of the balcony beginning to lean over the railing, and a great many of them with their hats in their hands—I mean, particularly, leaning over there and shouting to the runners, waving their hats and yelling, so that many of them were bent very far over the balcony, with the railing above across the middle of their bodies, and most of their weight on the outside, and people behind them were rushing down, jumping over the seats and everything else, to get a view of these runners, who were right down below them, and the next thing I saw was the—mentioned to several people that the crowd was the wildest I had ever seen in an event of that kind—and the next thing I noticed was this wave of people just falling over the edge of the balcony.”

There was some testimony tending to show that the railing would not resist very much of a strain; but the jury had this question before them, and evidently concluded that the strain was very great and unprecedented, and that the contractors were not responsible for this extraordinary strain. The answer of the jury to the special interrogatory was to the effect that, at the time of the occurrence of the accident in question, the railing around the balcony constituted a nuisance. It is the contention of the appellants that this is not a finding that the railing around the balcony was a nuisance at the time the building was completed and turned over to the state. But we think this would be too narrow a construction to place upon this finding, as there is nothing in the testimony to show that the railing was in any different condition at the time of the accident than it was at the time it was completed. In fact, it appears pretty conclusively from the testimony that it was in the same condition. So that it becomes necessary to determine whether the instruction given by the court, to the effect that if the jury found that the railing was a nuisance, the defendants would be responsible, was erroneous.

We think, under the great weight of authority, that it was. The word “nuisance” 32 L.R.A. (N.S.)

is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen, either in person, property, the enjoyment of his property, or his comfort, and is defined as “anything that worketh hurt, inconvenience, or damage.” *Veazie v. Dwinel*, 50 Me. 479, citing 3 Bl. Com. 116. It is also defined as “anything that unlawfully worketh hurt, inconvenience, or damage.” *People v. Metropolitan Teleph. & Teleg. Co.* 11 Abb. N. C. 304, Russell, in his treatise on Crimes, said: “‘Nuisance’ signifieth anything that worketh inconvenience.” “Whatever unlawfully annoys or does damage to another is a nuisance.” *United States v. Douglas-Willan-Sartoris Co.* 3 Wyo. 287, 22 Pac. 92. “A ‘nuisance,’ as ordinarily understood, is that which is offensive and annoys and disturbs.” *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246. “A ‘nuisance’ is that which disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable.” *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. “The term ‘nuisance,’ derived from the French word ‘nuire,’ to do hurt or annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights.” Addison, Torts, 155. There are very many other definitions of the word or term “nuisance,” which, in effect, spread it over almost every injury that is done by one person to another; but we have cited enough to show the general idea of the term “nuisance.” Now, it is earnestly contended by the respondent that the general rule is that all parties to a nuisance—he who creates it and he who maintains it—are responsible for its effect, without limitation of condition or of time; and this is undoubtedly true as to a certain class of nuisances,—what are termed “nuisances *per se*.” But, in order to intelligently consider these general announcements in regard to the responsibility of parties to a nuisance, whether of owners, or builders, or lessors, or lessees, or contractors, the term and the responsibility must be classified, or an investigation, however extensive it may be, results only in confusion.

This classification is intelligently set forth in *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651, where it was held that the manufacturer of a drop press was not liable to a purchaser’s employee for injuries caused by the breaking of a defective hook holding a heavy weight; the cause of the injury not being in its nature imminently dangerous, and there being no fraud or concealment or implied invitation

to the employee to use the machine. The court in that case said: "Cases which involve the liability of a defendant to those with whom he does not stand in privity of contract may be grouped into three classes: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the thing; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous. The principle that governs the first class of cases is that one who deals with an imminently dangerous article owes a public duty, to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved."

This principle has been applied in many cases to the sale of poisonous drugs under a false label, where dangerous naphtha was sold, where laudanum was sold for rhubarb, and, in general, where the action was in relation to the things that were inherently dangerous; as where the air which people breathe is poisoned or polluted with noxious vapors, where vicious animals are allowed to run at large, and where deadly missiles are thrown into a gathering or crowd of people. Said the court in that case: "A similar principle governs the second class of cases, in which the degree of danger in the thing itself may be less, but where the seller actually knows of the danger in the article, and puts it forth by some fraud or deceit. In such cases the breach of duty grows out of the fraud or deceit in the sale, and it extends to persons injured thereby, who may reasonably be deemed to be within the contemplation of the parties to the transaction." And instances are given by the court of this character of nuisances. It will be seen that this case does not fall within either of these classes. The thing built or constructed here—the armory—of course, was not of a noxious or dangerous kind, and nothing noxious emanated from it; and within itself it could not be said to be dangerous. The danger would depend entirely upon the use to which it was put.

The third class of cases, said the court in the case we have just been reviewing, relating to the sale of a thing not in its nature dangerous, rests upon the principle that in such thing there is no general or public duty, but only a duty which arises from contract, out of which no duty arises to strangers to the contract. It will be seen in this case that there was a contractual relation between the builders, the owners of the armory, and the contractors, which ended with those two parties. The

principle governing this sort of a transaction is treated of by Cooley on Torts, 2d ed. 672, where the author appropriately remarks: "An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing." It is also treated of by Wharton in his Law of Negligence, 2d ed. §§ 438 et seq., and he bases the liability on the law of contract, and of what he terms "causal connection," as will be seen from the following excerpt: "Thus, a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection [as we have seen] between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city, that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city,—an independent responsible agent,—breaking the causal connection." Many cases are cited which seem to be squarely in point, sustaining the text. It will be seen, however, that this is a stronger case against the respondent's contention than the case at bar, because in the instance given by the learned author the accident was caused by the contractor's negligence, while in the case at bar, if the contractors are to be held liable under the testimony, they are liable because they carried into effect the plans and specifications which were furnished them by the owner.

There is an attempt by the respondent to establish the fact that there was no specification as to the manner in which the railing should be attached, and that inasmuch as there was a provision in the contract for an application to the architect to furnish specifications when any were omitted, and as no written application had been applied for, the contractors

themselves became responsible for the manner in which the railing was fastened to the building. But the overwhelming and undisputed testimony is that, while no written application was made to the architect, he was there, looking over the work, and seeing how the work in every particular was done; and it must be reasonably concluded that this part of the work, as well as all the rest, was done by consultation with, or by at least the consent and direction of, the architect. The testimony of the architect, as to the building being completed in every respect according to the specifications, is so direct and positive that there can be no question raised about it. It would be a hard and impracticable rule to announce that a man who had performed his duty under the contract should be held responsible for the sufficiency and correctness, not of the work which he performed, but of the plans which are furnished him to be carried into execution. It may readily be conceived that a carpenter or builder may have the mechanical knowledge and skill to erect a building or structure of any kind, when he would in no way be competent to determine its safety, or whether it would meet the requirements of its construction. Frequently such questions would have to be determined by skilful and learned engineers. In the case of building bridges, the resisting or sustaining power of material would have to be scientifically determined; and it would be a strange law indeed that, under such circumstances, the mechanic would be held responsible for a mistake in a calculation of this kind. The result would be, either that contractors would refuse to erect structures, or that, in order to make themselves safe, they would charge such prices as would be prohibitive.

In reviewing the many cases that have been cited to us, and which we have been able to find through our own research, there has entered into nearly all of them, where the contractor has been held liable, the element of negligence or of violation of contract. The respondent cites the following from *Wood on Nuisances*, vol. 2, 3d ed. § 703, under the heading, "Personal Injury Always Actionable When Person Injured Is Free from Fault:" "It should perhaps be stated that for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted; and no degree of care on the part of the person erecting or main-

taining the nuisance will exempt him from liability. The act is a wrongful one, and he is answerable for all the consequences that flow therefrom, to a person who is not chargeable with negligence by reason of which the injury is inflicted,"—citing, to sustain the text, *Jones v. Chantry*, 4 *Thomp. & C.* 63, and *Chicago v. Robbins*, 2 *Black*, 418, 17 *L. ed.* 298. In *Jones v. Chantry*, the defendant placed wagons in a highway, and the plaintiff, in turning to avoid collision with the wagons, ran upon a heap of sand which had been hauled there by the defendant, and was thrown out of his wagon and injured. It was held that the defendant, having directed where the sand should be deposited, was not exempted from liability for the injury caused by it because the person who placed it there was a contractor for the erection of the building in which it was to be used. It will be seen that this was the ordinary case of damages for obstruction in the street, which was directed to be placed there by the defendant in the case, and in no way bears upon the text announced by the author above quoted. In *Chicago v. Robbins*, so far as the question under discussion by the learned author was concerned, it was simply held that, if a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable; but, if it happens by the negligence of the contractor or his servants, the contractor alone is liable. That, too, is the universal doctrine in relation to the liability of independent contractors, and in no way bears upon the subject under discussion, where, as we have seen, this case must be dealt with on the theory that there was no independent negligence on the part of the contractors.

In *Galbraith v. Illinois Steel Co.* 2 *L.R.A. (N.S.)* 799, 66 *C. C. A.* 359, 133 *Fed.* 485, it was held, where the owner of a building contracted with the company to install a sprinkler system according to plans and specifications, and the company contracted with the defendant for the construction of the support, but, in the actual construction, a tie member specified in the plans was omitted by the defendant, and by reason of such omission the support afterwards collapsed and damaged the plaintiff, the plaintiff could not maintain an action in tort to recover such loss from defendant, whose duty was measured by the requirements of the contract, and was enforceable only by the other party to the contract; the court basing its opinion on the doctrine, announced above by Wharton, that there was no contractual connection between the defendant and the plaintiff. Judge Grosscup dissented in that case, not

upon the theory contended for by the appellants in this case, but upon the theory of contractual responsibility. "The modern structure," said the judge, "is the work of many trades. To safely erect such structure, plans and specifications covering the whole, by competent architects, are not simply a convenience—they are a necessity. Through such plans and specifications alone can the work of the many trades be co-ordinated. Through them alone, in the midst of diversity, can the owner build to a given end. Plans and specifications, therefore, are essentially the law of the building. They are in practical effect the owner's direction to the contractors,—not simply to the immediate contractor, but to all who take contracts subservient thereto,—a direction that each contractor, by taking his contract, in reality accepts; and safety and good faith demand not simply that contractors should perform their contracts with each other, but that each contractor, by living up to the law of the building, should obey the direction thus given and accepted, and thus perform his duty to the owner,—indeed, to all who may, in person or property, be directly affected by the building's being erected in accordance with the plans and specifications." The term "law of the building" is a happy and forceful expression, and is particularly pertinent to the facts of this case. No higher duty, it seems to us, can be demanded of the ordinary contractor, in building structures of this kind, than to live up to the law of the contract, or the law of the building.

In *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279, it was held, not only that a contractor was not liable, but that the negligence of a contractor in building a sewer for a city would not render him liable to the owner of private property which was injured by the breaking of the sewer, after the completion of the work and its acceptance and use by the city. This case goes beyond the defense in relation to following the specifications, but also reaches the other defense, that the property had been turned over to the owner, and that the contractor was no longer responsible for it. In this case the class of cases which may be termed nuisances *per se* were noticed and distinguished from the case under consideration. It announces its allegiance to the rule of causal connection put forth by Mr. Wharton, as above cited, and reaffirmed the doctrine of *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244, which is severely criticized by learned counsel in this case.

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In *Curtin v. Somerset* it was held that, in order that a person who had been injured by an accident may hold another liable therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt; and that such causal connection must be uninterrupted by interposition between the negligence and the hurt of any independent human agency. It was there held that a contractor for the erection of a hotel building, who used improper material in its construction, and in other respects departed from the specifications embodied in his contract, so that the building, when completed, was structurally weak and unsafe, would not be liable to a guest of the hotel for an injury caused to him by such defective construction, occurring after the owner had taken possession. That case was distinguished from *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, where the court held a dealer in drugs and medicines, who carelessly labeled a deadly poison as a harmless medicine, and sent it so labeled into market, was liable to anyone who was injured without any fault on his part; holding that there was no analogy between that class of cases and the one under consideration. It is intimated by learned counsel for respondent that this case stands alone, and ought to receive the condemnation of other courts; but from our investigation it seems to us that it is well sustained by authority, and, omitting that portion of the case which bears upon the liability of a negligent contractor, meets with our indorsement.

In *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23, the distinction was made between a case where the negligence which produced the injury was in the workmanship or materials to be furnished by the contracts, and one where the negligence was in the plans and specifications; and held that in the latter case the defendant would be relieved from liability. This case, we think, is in harmony with the great weight of authority and with right reasoning.

In *Albany v. Cunliff*, 2 N. Y. 165, it was held that the mere architect or builder of a public work was answerable only to his employers for any want of care and skill in the execution thereof, and that he was not liable to third persons for accidents or injuries which might occur after the completion of such work—a much stronger case than the one under consideration. The court, in the course of its remarks in that case, said: "But the bridge was completed, and had been in the charge of pier owners, more than three years before it fell and injured the plaintiff. In such

a case, there is neither precedent nor principle for allowing a third person to turn from those who are bound to maintain the bridge, and bring an action against the architect or builder. He is only answerable to those for whom he builds." The court added: "He is not answerable to them, if he builds according to his contract or duty, however frail the structure may be. But the owner, on whom the duty of maintaining rests, is answerable to third persons for the sufficiency of the work, whether he has been injured by the builder or not." The court then proceeds to the statement that a party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land; but that it is only where he continued to derive a benefit from the nuisance; citing different cases to that effect. But even in those cases it was an erection of a nuisance by the owner or director that was spoken of.

In *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457, it was held that the negligence of a contractor in reconstructing a building would not render him liable to a third person, who was injured in consequence thereof, after the work had been completed and accepted by the owner of the building; indorsing the rule of causal connection before referred to, and citing many cases to sustain the doctrine. Without further discussion, the same doctrine is announced in *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; *Church of the Holy Communion v. Paterson Extension R. Co.* 68 N. J. L. 399, 53 Atl. 449, 1079; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; and a wilderness of other cases bearing directly or indirectly upon this proposition.

The respondent attempts to show that many of the cases which we have reviewed did not sustain the doctrine of nonliability on the part of the contractor; but we think that they unquestionably do, and that the attempt has not been successful. Few of the cases relied upon by the respondent really sustain his view. From a thorough investigation of this question (for it has been an interesting one, and the court is indebted to counsel on both sides for great research and industry in presenting it in a masterly way), we are compelled to hold that, especially in the absence of negligence on the part of an independent contractor,—a question which, under the testimony in this case, we think is not pertinent,—and especially where the structure has been taken over by the owner and accepted as completed under the plans and specifications, such contractor is not responsible to third

parties for injuries sustained by any defects in such structure.

There was some question raised by the respondent in relation to the illegality of the manner of acceptance; but the whole testimony is conclusive that, while there might have been some technical omissions, as a matter of fact the state did have control of the armory, that the officer appointed by the state to receive it had passed upon and received it, that it was in the possession of the state at the time of the accident, and that the parties who were injured were there by invitation of the state alone. Under such circumstances the judgment of the court will be reversed.

While the court undoubtedly, and so candidly stated, granted the motion for a rehearing alone on the alleged misconduct of the jury, there were some other questions raised on the motion, and the court, in response to the request of counsel for the respondent, made the order general; so that the cause will be remanded, with instructions to pass upon questions raised upon the motion for a new trial, other than the ones discussed in this opinion, and, if not sustained upon such other grounds, the court will enter judgment upon the verdict of the jury.

Rudkin, Ch. J., and Morris, Crow, and Chadwick, JJ., concur.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

PATRICK H. O'BRIEN, Resp't.,
v.

AMERICAN BRIDGE COMPANY OF
NEW JERSEY, Appt.

(110 Minn. 364, 125 N. W. 1012.)

Negligence — breach of contract — injury to stranger — liability of contractor.

1. The mere fact that the party sought to be charged has broken his contract with the other party thereto is not of itself sufficient to render him liable for consequential damages to a stranger to that contract.

Same — duty to use ordinary care.

2. As a general, not as a universal, rule, "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense

Headnotes by Jaggard, J.

Note. — As to liability of contractor to third persons for defects in his work after its completion and acceptance, see *Thornton v. Dow*, and note, ante, 968.

who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid the danger."

Same — breach of contract — injury to stranger — dangerous agency.

3. When the breach of a contract has resulted in proximate and substantial damages to a stranger thereto, because of the negligence of one party to that agreement, such damages are recoverable, if the agency causing the harm complained of be of a noxious or dangerous kind, and the party sought to be charged as a manufacturer or contractor had knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care.

Same — potentially dangerous agency.

4. It is sufficient if the agency be "potentially dangerous." Its noxious or dangerous character refers not so much to its intrinsic quality as to the extremity and imminence of the peril which its ordinary use with ordinary care involves.

Same — intermediate agents — effect on liability.

5. The effect of the original wrongful act may be traced in accordance with general principles of causation, through the unconscious intermediate agents who may be parties to the contract.

Same — defective bridge — injury to traveler — liability of builder.

6. Defendant was responsible for the erection of a bridge under contract. Five or six weeks after its acceptance it collapsed, while plaintiff and others were passing over it. Plaintiff was seriously injured. It is held that under pleadings, proof, and charge of the trial court, plaintiff is entitled to recover.

Action — injury to traveler — defective bridge — nature.

7. While the action of deceit rests upon fraudulent, and not merely upon negligent, misrepresentations, the present action lay upon allegations of negligence, although actionable fraud was not shown.

(April 8, 1910.)

APPEAL by defendant from an order of the District Court for Ramsey County denying a new trial after verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Haff & Michaels and Davis, Kellogg, & Severance, for appellant:

A contractor is not liable to third persons after his work has been accepted and passed from his control, for injuries resulting by reason of negligent construction. 32 L.R.A. (N.S.)

National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Albany v. Cunliff, 2 N. Y. 165; 2 Wharton, Neg. 2d ed. chap. 1, pp. 364-370; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; Williams v. Stillwell, 88 Ala. 333, 6 So. 914; Lee County v. Yarbrough, 85 Ala. 590, 5 So. 341; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Mann v. Chicago, R. I. & P. R. Co. 86 Mo. 347; Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; Smith v. Pennsylvania R. Co. 201 Pa. 131, 50 Atl. 829; O'Loughlin v. Jefferson County, 56 Pa. 62 (bridge case); Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 867; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Sawyer v. Minneapolis & St. L. R. Co. 38 Minn. 103, 8 Am. St. Rep. 648, 35 N. W. 671; Glynn v. Central R. Co. 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698; Moon v. Northern P. R. Co. 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; Winterbottom v. Wright, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415; Longmeid v. Holliday, 6 Exch. 761, 20 L. J. Exch. N. S. 430; Collis v. Selden, L. R. 3 C. P. 495, 37 L. J. C. P. N. S. 233, 16 Week. Rep. 1170; Caledonian R. Co. v. Mulholland [1898] A. C. 216, 67 L. J. P. C. N. S. 1, 77 L. T. N. S. 570, 14 Times L. R. 41, 46 Week. Rep. 237; Necker v. Harvey, 49 Mich. 517, 14 N. W. 503; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Cross v. Koster, 17 App. Div. 402, 45 N. Y. Supp. 215; First Presby. Congregation v. Smith, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; Hasbrouck v. Armour & Co. 139 Wis. 357, 23 L.R.A. (N.S.) 876, 121 N. W. 157.

A bridge is not an imminently dangerous instrumentality.

Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710, s. c. 70 N. J. L. 301, 57 Atl. 448; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; Marvin Safe Co. v. Ward, 46 N. J. L. 19; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Smith v. Pennsylvania R. Co. 201 Pa. 131, 50 Atl. 829; Vosburgh v. Lake Shore & M. S. R. Co. 94 N. Y. 374, 46 Am. Rep. 148; Mann v. Chicago, R. I. & P. R. Co. 86 Mo. 347; Albany v. Cunliff, 2 N. Y. 165; Williams v. Stillwell, 88 Ala. 333, 6 So. 914.

Messrs. E. H. McVey and Thomas P. McNamara for respondent.

Jaggard, J., delivered the opinion of the court:

Defendant was responsible for the erection of a bridge under contract. The county itself constructed the approaches and connected them with the bridge. Five or six weeks after the acceptance of the bridge it collapsed, while plaintiff and others were crossing over it. One person was killed, and others, including plaintiff, were injured. In this, an action to recover therefor, the jury awarded plaintiff \$11,000. From an order denying defendant's motion for a new trial, this appeal was taken. The law applicable to such a state of facts is familiar, and in its general outlines well settled.

1. In the English law, there are at least four distinct and different principles applicable to related states of fact which are established by as many separate lines of decisions, namely: (1) The principle established by the cases of which *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415, may be taken as an example; (2) the principle of *Nelson v. Liverpool Brewery Co.* (1877) L. R. 2 C. P. Div. 311, 46 L. J. C. P. N. S. 675, 25 Week. Rep. 877; (3) the principle of *Indermaur v. Dames* (1866) L. R. 1 C. P. 274 (1867) L. R. 2 C. P. 311, 36 L. J. C. P. N. S. 181, 16 L. T. N. S. 293, 15 Week. Rep. 434, 19 Eng. Rul. Cas. 64; (4) the principle of *Langridge v. Levy* (1837) 2 Mees. & W. 519, 6 L. J. Exch. N. S. 137, and of *George v. Skivington* (1869) L. R. 5 Exch. 1, 39 L. J. Exch. N. S. 8, 21 L. T. N. S. 495, 18 Week. Rep. 118. See Lord Atkinson in *Cavalier v. Pope*, H. L. (E.) [1906] A. C. 428, at 432, 433, 75 L. J. K. B. N. S. 609, 95 L. T. N. S. 65, 22 Times L. R. 648.

It is convenient and sufficient for present purposes, although it may not be strictly necessary, to regard the case at bar as involving the rules laid down in the first and fourth classes of cases. The principle of *Winterbottom v. Wright* has been frequently misconstrued, misstated, and misapplied. There the declaration demurred to set forth that the dangerous condition of the coach which was supplied by defendant to plaintiff's master, and by which plaintiff was hurt, was due to "certain latent defects." In consequence, that "declaration was nothing more than an attempt to sue on that contract by a person who was a total stranger to it." Clerk & L. Torts, Can. ed. 478. The facts of *Longmeid v. Holliday*, 6 Exch. 761, 20 L. J. Exch. N. S. 430, have been still more grossly distorted. In that case "the jury found bona fides, and no negligence on the part of the vendor." Kelly, C. B., in *George v. Skivington* (1869) L. R. 5 Exch. 1. "The decision itself cannot 32 L.R.A. (N.S.)

be regarded as any authority for the proposition stated in the headnote." Clerk & L. Torts, Can. ed. 478. Mr. Pollock has pointed out that what *Winterbottom v. Wright* and *Longmeid v. Holliday* decided was, not that "facts which constitute a contract cannot have any other legal effect, . . . [but] something different and much more rational, namely, that if A breaks his contract with B, . . . that is not of itself sufficient to make A liable to C, a stranger to the contract, for consequential damages." Pollock, Torts, 8th ed. 546. And see *Baumwoll Manufactur von Carl Scheibler v. Furness* [1893] A. C. 16, 62 L. J. Q. B. N. S. 201, 68 L. T. N. S. 1, 1 Reports, 59, 7 Asp. Mar. L. Cas. 263.

In the fourth class of cases, the underlying principle, of general, though not of universal, application upon which the liability in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, has been enforced, was thus formulated by Brett, M. R.: "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The authorities are regarded by Clerk & Lindsell (whose discussion is most thoughtful and exhaustive) as establishing these propositions, namely: A duty with respect to instrumentalities delivered under contract may exist towards others than the contracting parties. That duty extends to all persons likely to be injured by defendant's want of care, providing it is reasonable for such person to rely on care having been taken. To entitle the injured party to complain, he must have used the dangerous thing in the manner intended, and he must be one of the class of persons by whom the defendant contemplated the thing being used. Clerk & L. Torts, Can. ed. 470. And see general classification of cases on page 468.

Mr. Pollock's view of the English cases is more consistent with an accepted American theory (which suffices to determine this controversy) namely: Two features are conspicuously necessary to the creation of this duty to strangers to a contract: (1) That the thing be of a noxious or dangerous kind; (2) that the builder, manufacturer, or contractor had actual knowledge of its being in such a state of danger as would amount to concealed danger to persons using it in ordinary manner and with ordinary care. Pollock, Torts, 8th ed. 515. It is convenient to later consider the

element of danger. Knowledge of imperfect condition is essential. In *Earl v. Lubbock*, [1905] 1 K. B. 253-258, 74 L. J. K. B. N. S. 121, 53 Week. Rep. 145, 91 L. T. N. S. 830, 21 Times L. R. 71, plaintiff, a driver in the employment of a firm for whom defendant had agreed to keep in repair a number of vans, was unable to recover damages based on the negligence of the workmen in failing to properly inspect and repair a defective van, because he failed to "adduce [and use] evidence to show that to the knowledge of the defendant the van was in such a condition as to cause danger not necessarily incident to its use." And see note to 1 A. & E. Ann. Cas. 755. It would serve no useful purpose to detail or discuss the familiar cases on the subject.

Lord Atkinson, in *Cavalier v. Pope*, *supra*, at page 443, regards the group here under consideration as including cases of fraud, misrepresentation, warranty, the handing over of a thing known to be dangerous without warning. Some English authorities recognize a very wide liability. For example, in *Parry v. Smith* (1879) L. R. 4 C. P. Div. 327, 48 L. J. C. P. N. S. 731, 41 L. T. N. S. 93, 27 Week. Rep. 801, defendant, employed by plaintiff's master to repair a gas meter upon his premises, was held responsible to plaintiff in damages consequent upon an explosion of gas which had escaped by reason of defendant's negligence, when plaintiff, in the performance of his ordinary duty, went near with a light. *Lopes, J.*, said at page 327: "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract." And see *Elliott v. Hall* (1885) L. R. 15 Q. B. Div. 315, 54 L. J. Q. B. N. S. 518, 34 Week. Rep. 16.

This is not equivalent to requiring that the agency must be "noxious or dangerous in itself" (see *e. g.*, *Caledonian R. Co. v. Mulholland*, H. L. [Sc.] [1898] A. C. 216, 67 L. J. P. C. N. S. 1, 77 L. T. N. S. 570, 14 Times L. R. 41, 46 Week. Rep. 237), or *per se* lethal. In *Heaven v. Pender*, L. R. 11 Q. B. Div. 503-517, Bowen, Ch. J., said: "Anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument

or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." In *Clark v. Army & Navy Co-operative Soc.* [1903] 1 K. B. 155, 72 L. J. K. B. N. S. 153, 88 L. T. N. S. 1, 19 Times, L. R. 80, a vendor of tins of chlorinated lime knew it was likely to cause damage to a person opening them, unless special care was taken. The danger was not such as presumptively would have been known to or appreciable by a purchaser unless warned of it. It was held that, independent of any warranty, there was cast upon the vendor the duty to warn the purchaser of the danger. It is sufficient, it was there said, to create the duty that the article be "potentially dangerous." Few things, like substances capable of spontaneous explosion or combustion, as wet hay, nitroglycerin, and flour dust, are intrinsically dangerous. Most perils arise from instrumentalities innocent in themselves, but capable of doing harm on being used in an ordinary and natural manner, as even poisons and most explosives. The initial wrong of exposing innocent persons to the probability of harm from either kind of instrumentality is the same in kind, and may or may not be the same in degree. The expressions "dangerous in itself," "intrinsically dangerous," are not generally used to accurately state a merely metaphysical distinction, of little or no practical value, but are used as synonyms for the "case of a trap . . . or an invitation to use a trap, or a case of a noxious instrument" (*Caledonian R. Co. v. Mulholland*, *supra*), or a case of "something noxious or dangerous . . . which amounts to a public nuisance" (*Malone v. Laskey* [1907] 2 K. B. 141-156, 76 L. J. K. B. N. S. 1134, 97 L. T. N. S. 324, 23 Times L. R. 399). The English cases generally have placed emphasis, not on whether the instrumentality is dangerous *per se*, but whether or not it is imminently or extremely perilous. Cf. *O'Neill v. James*, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177, with *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956, as to explosion of bottles.

The significance of the English decisions is the greater because of the general tendency of the English courts to limit much more strictly than do the American courts the cases in which a person not a party to a contract may recover under a state of facts of which that contract is a necessary part. 1 Beven, Neg. (3d ed.) viii.

So far as the doctrine of cause is concerned, no difficulty is experienced in appropriate cases in the transmission of effect of the original wrongful act through intermediate unconscious agents, who are parties to the contract. See *Beven*, Neg. 50, 51. In a very late case, *Hartley v. Rochdale* [1908] 2 K. B. 594, 77 L. J. K. B. N. S. 884, 72 J. P. 343, 99 L. T. N. S. 275, 24 Times L. R. 625, 6 Local G. R. 858, it was held that "the mere passive omission by a road authority to rectify a subsidence in a road in their area, which has been originally occasioned by the neglect of a water company to make good the road after having broken it up for the purposes of their undertaking, does not exonerate the water company from liability for an injury caused to a person using the road, by reason of the subsidence." The decision proceeded upon the doctrine in *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, *Smith*, Lead. Cas. 494; not upon the doctrine of *Heaven v. Pender*, supra: "It must be borne in mind that, though there may intervene various stages in the development of the mischief, yet if none of these is due to a conscious volition, the last conscious agent continues to be liable." [1 *Beven*, Neg. 3d ed. p. 53.] Cf. *Corby v. Hill*, 4 C. B. N. S. 550, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575. It would appear quite certain that under this decision defendants were liable. And see *Trail v. Actieselskabet Dabbeattie*, 6 Court Sessions, 5th series, 798.

2. The law in this country is in accord. It was pointed out in *Moon v. Northern P. R. Co.* 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, that "one may owe two distinct duties in respect to the same thing,—one of a special character to one person, growing out of special relations to him; and another, of a general character, to those who could necessarily be exposed to risk and danger from the negligent discharge of such duty." It was therefore held that a person injured in the use of an unsafe car could recover from a railroad company which was not his master, because of the violation of the duty last named.

The leading case on the subject in this state is *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 61 N. W. 1103. It was there held that "if one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and for ultimate use, so negligently constructs an article that, by reason of such negligence, it will obviously endanger the life or limb of anyone who may use it, and if the manufacturer, knowing such defects and knowing that the same are so con-

cealed that they are not likely to be discovered, puts the article in his stock of goods for sale, he is liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer." The instrumentality there involved was a 10-foot ladder "made of poor, crossgrained and decayed lumber and 'was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same.'" The ladder was "so oiled, painted, and varnished that a person could not discover that it was made of defective material." This is the well-settled law in this state. See *Holmvik v. Parsons Band Cutter & Self-Feeder Co.* 98 Minn. 424, 108 N. W. 810; *Wolden v. Deering*, 105 Minn. 259, 117 N. W. 493; *Teal v. American Min. Co.* 84 Minn. 320, 87 N. W. 837. The *Schubert Case* has been repeatedly followed and applied by the courts of many jurisdictions. See *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398 (folding bed); *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847 (buggy); *O'Neill v. James*, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177 (champagne cider bottle); *Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A. (N.S.) 1103, 92 S. W. 608 (elevator); *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A. (N.S.) 923, 70 Atl. 314 (poisoned meat); *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A. (N.S.) 588, 111 N. W. 746, 12 A. & E. Ann. Cas. 265 (stove polish); *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 323, 116 N. W. 1106 (threshing machine); *Peters v. Johnson* (*Peters v. Jackson*) 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 915, 41 S. E. 190 (drugs); *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 935, 73 Pac. 797 (champagne cider); *Keep v. National Tube Co.* (C. C.) 154 Fed. 130. Cf. and see note to *Kuelling v. Roderick Lean Mfg. Co.* 5 A. & E. Ann. Cas. 128, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691; *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A. (N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; *Crandall v. Boutell*, 95 Minn. 114, 103 N. W. 890, 5 A. & E. Ann. Cas. 122; *Evans v. Chicago & N. W. R. Co.* 109 Minn. 64, 26 L.R.A. (N.S.) 278, 122 N. W. 879.

The effect of the Federal decisions is substantially the same. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159-179, 53 L. ed. 453-463, 29 Sup. Ct. Rep. 270. Cf. *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621. *Huset v. J. I. Case Threshing*

Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, 870, 871, in practical effect, followed and applied the rule in the Schubert Case, which it purports to regard as unique, that the vendor or manufacturer who, without giving notice of its character or quality, supplies or delivers to another a machine or article (in this case a threshing machine with a defective cylinder deck,—cf. *Holmvik v. Parsons Band Cutter & Self-Feeder Co.* 98 Minn. 424, 108 N. W. 810; *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 323, 116 N. W. 1104) which, at the time of the delivery, he knows to be imminently dangerous to the life or limb of anyone who may use it for the purpose for which it is intended, is liable to anyone who sustains injury from its dangerous condition, whether he has any contractual relations with him or not. Except in so far as it follows the Schubert Case, the doctrine as formulated by the court, however, is as peculiar to itself as it is unwarranted by the authorities it cites, and opposed to the universally recognized rule. It regards *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415, as announcing: "The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him, for negligence in the construction, manufacture, or sale of the articles he handles," and the other cases in which liability may extend to strangers to the contract as constituting three classes of exceptions to the general rule. At the outstart, the court fell into the same inaccuracy of conception and error of statement which occurs in many ill-considered cases, of attributing to *Winterbottom v. Wright* and allied cases a force and effect which, although sometimes set forth in their syllabi, are unjustified by the facts in issue, and are disapproved by the English jurists themselves. This has previously appeared. The fact of the reiteration of the misconception does not serve to convert what is not true into truth, but serves rather to illustrate the persistence of error. The classification of the so-called exceptions fails, because the enumerated classes are neither exhaustive nor mutually exclusive. But the fallacy in the reasoning of the court lies deeper. The truth is that one principle of law applies to cases in which the facts show that the duty is confined to parties to a contract, and that another principle of law applies to those cases in which additional facts appear which are in law sufficient to create a duty to third persons who are strangers to the contract, and to show damage as a proximate consequence of the violation of that duty. Different 32 L.R.A. (N.S.)

rules are invoked, because different cases involve different facts. Either principle of law may be the rule; neither is the exception.

It would be a work of supererogation to discuss the authorities, English or American, generally, on this subject. They are familiar, and will be found collated and stated with sufficient definiteness in almost every standard work of reference.

3. This case is specifically ruled for the plaintiff by *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* (C. C.) 175 Fed. 176, which involves damage to a third person consequent upon disintegrated piers of a bridge. The same accident was involved in *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. at page 47, 89 S. W. 330. Mr. Justice Johnson said: "The facts which the evidence tends to establish, that the structure was so defective as to be essentially and imminently dangerous to the safety of others, that the defects were so hidden or concealed that a reasonably careful inspection would not have disclosed them and the danger resulting from them, and that these things were known to the defendant, but not to the commissioners, left the liability of the defendant where it would have been had there been no acceptance. The flagrant character of the negligence and its potentiality, coupled with its concealment, amounted to a deception practised upon the commissioners. There is no righteous principle upon which the obligation imposed by duty upon the contractor may be cast off under circumstances such as these." The cases in defendant's brief in which a third person not a party to a contract has been unable to recover from the builder of a bridge, damages consequent upon negligent or defective construction, are not significant, namely: *Albany v. Cunliff*, 2 N. Y. 165; *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; *Williams v. Stillwell*, 88 Ala. 333, 6 So. 914; *Lee County v. Yarbrough*, 85 Ala. 590, 5 So. 341; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Mann v. Chicago, R. I. & P. R. Co.* 86 Mo. 347; *Styles v. F. R. Long Co.* 67 N. J. L. 413, 51 Atl. 710; *Id.* 70 N. J. L. 301, at page 303, 57 Atl. 448; *Smith v. Pennsylvania R. Co.* 201 Pa. 131, 50 Atl. 820; *O'Loughlin v. Jefferson County*, 56 Pa. 62. These cases involved a state of facts to which the rule supposed to have been announced by *Winterbottom v. Wright*, applies. In none of them was there shown that defendant furnished an instrumentality which was, and was known to be, imminently dangerous to the life or limb of persons who were invited to use them, and a concealment of this dangerous condition. They are, therefore, not in point. Defend-

ant has also laid great stress on *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112, and *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630. It will appear from the most casual inspection that these cases do not rule the present controversy for defendant. *I Beven, Neg.* 56; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, 870, 871. On the contrary, plaintiff's contention is in a large measure sustained by *Young v. Waters-Pierce Oil Co.* 185 Mo. 634, 84 S. W. 929, in which defendant was held liable to a stranger to the contract for damages consequent upon its negligence in running a pipe from its tank on the right of way of a railroad.

4. The facts bring the case at bar within the rule of liability. The record contains abundant and convincing evidence that the bridge was so negligently constructed that it was practically certain to collapse soon after its use by the public. There was abundant testimony tending to show the soil on which the piers of the bridge rested was a black, soft earth, a tough, sticky substance, not very hard, easily penetrated with a shovel. The materials of which the cement used in the foundation for the piers and in the piers was made were improper. The rock was soft, and did not stand exposure when lying in the sand. The sand was "kind of dust and small shale rock, quicksand mixed with silt and mud." It was not screened. The silt which was mixed with it was so fine that, when wet, it was practically a liquid in itself. The effect of its presence was to prevent proper bond. A witness testified: "The southeast pier was filled with sand, twigs, and leaves, with a slush of cement thrown on top. The contents were perfectly loose, and ran out where the tube was broken. There was concrete between the layers. I dug with my hands for a foot through sand and dirt." Another witness testified: "I probed down into the foundation of the southwest pier on the south side of the creek, with an iron rod, and ran it right down through the foundation something like 8 or 10 feet. . . ." It was not material that the county surveyor had told the contractor where to find the rock and sand. This was not logically more significant than if he had referred the contractor to a dealer in supplies. It did not exonerate, or tend to exonerate, defendant's agent in choosing and using improper materials. There was, moreover, an abundance of testimony that the methods of working, for example, the grouting method, under water, tended to make it impossible to construct a firm and

reliable foundation. Taken as a whole, both the materials and the methods of use tended to "invite disaster." An examination of the foundation showed that the result of the use of the materials used by the methods employed, was obviously and certainly dangerous. There was much evidence of this tenor, and to the effect that the fall of the bridge was caused by the observed settlement of the foundation.

There is some doubt whether the charge of the court limited the question of defendant's negligence to the foundation of the bridge alone, or permitted inquiry as to negligence concerning such foundation and the piers also. The evidence entitled plaintiff to have the jury consider the charge of negligence as to both the piers and the foundation touching the earth. But if the charge be regarded as limiting defendant's negligence to the southeast foundation, supporting the southeast double pier, the record clearly justified the verdict of the jury on defendant's negligence.

Defendant's knowledge of the danger created by its negligence in the construction of the foundation is clear. It selected and combined the materials. How it could have avoided knowing the character of the underlying soil, and of the imperfect materials used, and the improper methods employed in the construction of the foundation, or the foundation and the piers, does not appear. Defendant denies its negligence; but we are bound by the verdict of the jury. Defendant "ought to have known" of the danger it thereby created, in the sense that a man of ordinary prudence "must have known" of it. The danger was obvious, and certainly followed defendant's own choice and use of materials. Cf. *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 323, 116 N. W. 1104, at 1106. Defendant "presumably knew." *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 179, 53 L. ed. 453, 463, 29 Sup. Ct. Rep. 270. And see *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A.(N.S.) 238, 103 S. W. 245. The jury was justified in imputing actual knowledge to the defendant. Nor did that knowledge rest upon defendant's mere failure to exercise reasonable care in ascertaining the dangerous condition. Cf. *Lebourdais v. Vitriified Wheel Co.* 194 Mass. 341, 80 N. E. 482. The charge of the trial court as to defendant's knowledge was, we have concluded, without reversible error upon its construction as a whole.

That dangerous condition was concealed, so far as the foundation was concerned, by the waters above it; so far as the "rotteness of the cement in the piers," by the iron castings, if the piers be regarded as involved.

The resulting instrumentality was not only extremely and imminently baneful, but it was almost inevitable lethal. If the bridge should fall while or because it was being used, death would be probable, and damage certain. If it should fall of its own weight during the night, it would operate as a most dangerous trap. This case comes within the rule of liability, restricted however much that rule may be by the demands of expediency or of principle. The jury was justified in finding that within a short time after use the bridge must fall, that the use of the bridge meant destruction and probably death, that plaintiff was one of the class of persons by whom it was contemplated that the bridge would be used, and that he used the bridge in the manner intended and with ordinary care.

Defendant has laid great stress on that alleged fact that this suit was for "ordinary" or "plain" negligence, and for nothing more. "The case was not tried upon the theory of deceit, nor was the jury charged upon that theory, nor was there the slightest proof of fraud, falsehood, deceit, or knowledge." There is no merit in the contention. Plaintiff sued in negligence. His complaint was, we think, sufficient as against objection made after verdict. That, in addition to showing its initial negligence, plaintiff adduced proof of facts sufficient to impose upon defendant a duty to take care, for the violation of which plaintiff was entitled to recover consequent damages, in no wise tended to change the nature of his cause of action. In the absence of such proof, he could not have recovered. The trial court charged correctly on this view of the facts proved. It is not significant nor inconsistent that in some authorities the facts justified the submission of a given case essentially upon the doctrine of deceit. It does not at all follow that there might not be a recovery for negligence in the absence of fraud. At the one extreme negligence and fraud bear no resemblance. They approach each other, however, until, at the other extreme, there is substantial identity. The action of deceit must, however, be based upon fraud, and not on merely negligent misrepresentation. *Derry v. Peck*, L. R. 14 App. Cas. 337, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 38 Week. Rep. 33, 1 Megone, 292, 54 J. P. 148, 12 Eng. Rul. Cas. 250. The distinction between fraud and negligence so far as the liability to third persons not parties to the agreement, will be found clearly stated in *Le Lievre v. Gould* [1893] 1 Q. B. 491, 62 L. J. Q. B. N. S. 353, 4 Reports, 274, 68 L. T. N. S. 628, 41 Week. Rep. 468, 57 J. P. 484, overruling *Cann v. Wilson*, L. R. 39 Ch. Div. 39, 57 L. J. 32 L.R.A. (N.S.)

Ch. N. S. 1034, 59 L. T. N. S. 723, 37 Week. Rep. 23. That, in this class of cases, negligence may be actionable, although fraud is not shown, has previously appeared. Defendant has, however, especially urged upon our attentions *Collis v. Selden* (1868) L. R. 3 C. P. 495, 37 L. J. C. P. N. S. 233, 16 Week. Rep. 1170. Properly interpreted, that case is not inconsistent with the view here expressed. *Grove, J.*, in *Elliott v. Hall* (1885) L. R. 15 Q. B. Div. 320, 54 L. J. Q. B. N. S. 518, 34 Week. Rep. 16; Clerk & L. Torts, Can. ed. 474.

The cause of the catastrophe was for the jury. Defendant urges: The conceded physical facts show that the bridge did not collapse as plaintiff claims, but was caused to buckle by an end pressure from a land connection made by the county with the bridge; for this pressure, the bridge builder was not in any event responsible; it must necessarily have come from the unskilful and unscientific manner in which heavy dirt fills were placed against the bridge structure, not by defendant, but by the county. It would serve no useful purpose to discuss the conflicting evidence on this point. The question of cause in such a case is naturally one of fact. In this case there was abundant evidence to justify the instructions by the trial court on this point. We must affirm its rulings.

Defendant has not objected to the amount of the verdict, but has urged other assignments of error, including some rulings on evidence. We have examined them all, and have concluded that none of them justify reversal, or more than this reference.

Affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

EDWARD PINKNEY, Plff. in Err.,

v.

KANAWHA VALLEY BANK.

(— W. Va. —, 69 S. E. 1012.)

Check — indorsement for collection — right to charge back.

1. If the holder of a check indorses it,

Headnotes by MILLER, J.

Note. — The effect of sending a check directly to the drawee bank for payment is covered in the note to *Anderson v. Rodgers*, 27 L.R.A. 248, and the supplemental note thereto accompanying the case of *Winchester Mill. Co. v. Bank of Manchester*, 18 L.R.A. (N.S.) 441. A search has disclosed no decisions passing on the point since the writing of the last note.

and deposits it for credit and collection in another bank, the collecting bank, if the check is not paid, and it is without fault in forwarding it for payment, has the right, on its return, to charge it back to its customer, or recover the amount if he has in the meantime withdrawn the money.

Same — forwarding to drawee — credit — payment.

2. The general rule is that if a collecting bank forwards a check directly to the drawee bank, and by custom or agreement it is authorized to credit the collecting bank and remit, or settle at stated periods, its receipt of the check, debiting it to the drawer and crediting it to the collecting bank, constitutes payment, and renders the forwarding bank liable to its principal for the amount thereof.

Same — overdraft — insolvency.

3. This would be the effect of the transaction whether there was sufficient cash in the bank at the moment to pay the check, or it be afterwards discovered that the check was an overdraft, and the drawee insolvent.

Same — time for forwarding — choice of mails.

4. The qualification of the general two-day rule, allowed for forwarding paper for presentment, is that if there would be more than one mail on the second day it need not go by the first, but, if there be but one, it must go by it, unless it leave or close at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business.

Same — depressed financial condition of maker — duty to inform.

5. A collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customer of such vital condition, and fails to take vigorous measures under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care, and diligence which the nature of its undertaking calls for, with reference to the time, place, and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained.

Same — forwarding to drawee — negligence.

6. The general rule to which there are few, if any, exceptions, is that it is negligence for a collecting bank to send checks direct to a drawee bank. The drawee bank, who is to pay the check, is not a suitable agent for its collection.

Same — only bank in town — effect.

7. And the fact that the drawee bank is the only bank at the place where it is located constitutes no exception to the general rule.

Same — effect of custom.

8. The custom of the banks at the place where the collecting bank is located, of sending checks to a drawee bank, will not

justify the sending of a check directly to a drawee. Custom cannot justify negligence.

Same — liability of collecting bank.

9. Where a collecting bank is negligent in transmitting a check for collection, and in forwarding it to the drawee bank, whereby such drawee, though in disregard of a special agreement, is enabled to debit the drawer of the check and credit the collecting bank, and control of the check is lost by the collecting bank, and it is never returned to the customer, the latter may in an action of assumpsit, upon the common counts as for money had and received, recover the full amount of the check.

(November 29, 1910.)

ERROR to the Circuit Court for Kanawha County to review a judgment in defendant's favor in an action brought to recover a balance alleged to be due plaintiff from the defendant bank. *Reversed.*

The facts are stated in the opinion.

Messrs. B. W. Moore, S. S. Green, and Littlepage, Cato, & Bledsoe, for plaintiff in error:

The holder of a check must present the same in a reasonable time, and the holder of a check on a bank in another town shall forward the same not later than the mail of the succeeding day, unless that day should be Sunday, when Monday will do.

Minneapolis Sash & Door Co. v. Metropolitan Bank, 77 Am. St. Rep. 618, note; Morse, Banks & Bkg. 4th ed. § 421; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687.

It was negligence in the defendant bank to send the check directly by mail to the drawee bank on which it was drawn, for payment. It must employ a suitable agent.

Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 44 L.R.A. 504, 77 Am. St. Rep. 609, 78 N. W. 980; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; Anderson v. Rodgers, 27 L.R.A. 248, and note, 53 Kan. 542, 36 Pac. 1067; 1 Dan. Neg. Inst. § 328a; Sterling Organ Co. v. House, 25 W. Va. 64; Winchester Mill Co. v. Bank of Winchester, 120 Tenn. 225, 18 L.R.A. (N.S.) 441, 111 S. W. 248; Briggs v. Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285.

If a collecting bank forwards a check directly to the drawee bank, and by custom or agreement it is authorized to credit the collecting bank and remit or settle at stated periods, its receipt of the check, debiting it to drawer and crediting it to the collecting bank, constitutes payment, and renders the forwarding bank liable to its principal for the amount thereof.

Briggs v. Central Nat. Bank, 80 N. Y. 182, 42 Am. Rep. 285; Smith Roofing &

Contracting Co. v. Mitchell, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47; Montgomery County v. Cochran, 62 C. C. A. 70, 126 Fed. 456; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; 2 Morse, Banks & Bkg. 4th ed. § 451, p. 781.

Messrs. Brown, Jackson, and Knight, for defendant in error:

If the defendant bank had selected an outside agent at Montgomery to present the check, it would not have been required to forward the check to such agent before the 26th, and such agent would have been under no legal obligation to present the check before the 27th.

1 Morse, Banks & Bkg. 4th ed. §§ 240, 241.

Courts have upheld the custom of the banks in using the mails for the presentation of checks.

Heywood v. Pickering, L. R. 9 Q. B. 432, 43 L. J. Q. B. N. S. 145; Prideaux v. Criddle, 10 Best & S. 524, 38 L. J. Q. B. N. S. 232, L. R. 4 Q. B. 455, 20 L. T. N. S. 695; Indig v. National City Bank, 80 N. Y. 100; Briggs v. Central Nat. Bank, 80 N. Y. 194, 42 Am. Rep. 285; McIntosh v. Tyler, 47 Hun, 99; Kershaw v. Ladd, 34 Or. 375, 44 L.R.A. 236, 56 Pac. 402; Wilson v. Carlinville Nat. Bank, 187 Ill. 222, 52 L.R.A. 632, 58 N. E. 250.

Miller, J., delivered the opinion of the court:

In an action in assumpsit, upon the common counts, and bill of particulars filed, plaintiff seeks recovery of a balance alleged to be due from defendant. The bill of particulars consists of deposits debited and credits for checks paid, beginning February 5, 1900, with balance \$1,797.17, and covering other deposits ranging from \$33.33 to \$204.38, and concluding September 25, 1900, with a debit of \$2,500. On the other side the account is credited September 25, "By check to Dent Bros. of this date, \$2,500." The balance, \$2,130.34, is the amount sued for.

The defense was nonassumpsit, and sets-off with specifications of sets-off filed, as follows: "September 25, 1900. To check of this date given by Dent Brothers to Edward Pinkney for the amount of \$2,500, on the Montgomery Banking & Trust Company, indorsed by Edward Pinkney, and delivered by him to Kanawha Valley Bank for collection, and credited, and by said Kanawha Valley Bank credited to said Pinkney, conditioned on the same being paid, but which Montgomery Banking & Trust Company failed and refused to pay. \$2,500."

On the trial, on the issues joined on these 32 L.R.A. (N.S.)

pleas, and after the evidence on both sides had been introduced and the parties had rested, the jury, as instructed by the court on motion of the defendant, found the following verdict: "We, the jury, upon the issues joined find for the defendant, and that the true state of indebtedness between the parties shows that the plaintiff is indebted to the defendant in the sum of \$369.66. We therefore find for the defendant in the sum of three hundred and sixty-nine dollars and sixty-six cents." On this verdict, the court below, overruling plaintiff's motion to set the verdict aside as contrary to the law and the evidence, and grant him a new trial, pronounced the judgment complained of, that the defendant recover of the plaintiff the said sum of \$369.66, interest and costs.

The facts out of which this controversy arose are as follows: Dent Brothers and Pinkney, residing at Montgomery, where the drawee bank was located, by arrangements made September 24, exchanged checks September 25. The same day Dent Brothers sent Pinkney's check to a Charleston bank for credit to them, and Pinkney sent their check, the one involved here, to the defendant for credit to his account. The Montgomery Banking & Trust Company, drawee of the Dent Brothers check, was the only banking institution at that point. Prior to that time the defendant had had a special arrangement with the Montgomery bank for making collections, requiring remittances every Saturday, but this arrangement, as Dickinson swears, had been changed some three weeks before the transaction in question, the new agreement requiring the bank to remit whenever collections aggregated \$500.

The defendant received from Pinkney the Dent Brothers' check, indorsed by him, September 25, about two o'clock P. M., and the letter inclosing it requested that it be placed to his credit. After being opened, the letter and check, along with other items, were laid aside by Dickinson for attention the following day. The next day, Dickinson, before forwarding the check for collection, phoned to Champe, the president, at Montgomery, to come to Charleston for consultation. Champe arrived about noon, saw Dickinson, who explained to him that his bank had this check of Dent Brothers for collection, and credit to Pinkney, but that he was unwilling to forward it to the Montgomery bank, unless assured that that bank was in a condition to send currency in payment. Champe professing to be ignorant about the actual condition of his bank, but expressing the opinion that it was all right and that the check would be paid, agreed to return to Montgomery.

make an investigation, and telephone Dickinson. About 9 o'clock that evening, he did telephone Dickinson the message "O. K.," meaning, as arranged, that he had found his bank could and would send the money for the check. Dickinson, having held the check all that day, on receipt of this message, at once inclosed it and a letter of advice, printed form, in an envelope addressed to the drawee bank at Montgomery, and shortly afterwards deposited it in the postoffice at Charleston. The printed form of this letter said: "We inclose for credit," but plainly written below, the letter said: "Kindly ship us currency for above on No. 3," meaning No. 3, C. & O. train arriving at Charleston about noon. At the same time Dickinson wrote Pinkney on a printed form, advising him of the receipt of the check and saying: "Your favor of the 25th inst. with stated inclosure received. We credit your account, \$2,500. Thank you. X Foreign items credited subject to payment." The letter to the bank reached Montgomery by the mail leaving Charleston about 3 A. M. of the morning of September 27, and was actually delivered to the bank at the opening of the bank that morning. The check was not otherwise presented for payment to the bank that day. The money was not sent as requested by defendant's letter of advice, but instead was some time that day debited to Dent Brothers and credited to the Kanawha Valley Bank. Champe was at the bank that morning when the bank opened, saw the check, was there several times afterwards during the day to see if a deposit which Sims, a director, had gone after, and out of which it was intended to pay this Dent Brothers' check, had arrived, the last time about 12 o'clock M., and the deposit not arriving, he returned to Charleston, reaching there about 2 o'clock P. M., explained to Dickinson the condition of the bank, and why the money had not been sent, consulted counsel, and as a result, on application, a receiver of the bank was appointed, and the bank closed. The defendant bank that evening sent an attorney to Montgomery to try and get the Dent Brothers' check. On arriving he went to the bank, made demand for the check, with a view to making demand for payment, and if not paid to have it protested. But Coleman, in charge of the bank, refused his demand, giving some reason, probably that it had passed through the books, or had been charged to Dent Brothers and credited to the defendant. At all events the check was not recovered, protested, or returned to Pinkney, but after the receiver was appointed was returned to Dent Brothers, as a paid and canceled check. The next day, the 28th, Dickinson

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wrote Pinkney, also Dent Brothers, at Montgomery, advising them that the check had been duly presented, payment demanded and refused, of which he had been advised that morning, and to do what they might think necessary to protect their interests. These are substantially all the material facts on which the rights of the parties depend.

It is not and cannot be successfully controverted that if the holder of a check indorses and deposits it for credit and collection in another bank, the collecting bank, if the check is not paid, and it is without fault in forwarding and presenting it for payment, has the right on its return to charge it back to its customer, or recover the amount of it, if he has in the meantime withdrawn the money. 1 Bolles, Modern Law of Bkg. 210. It is not pretended that defendant ever actually got the money on the Dent Brothers' check, except by way of credit by the drawee bank.

Plaintiff's claim of right to credit for the check is based on several grounds or theories: First, it is said that because of the alleged agency of the Montgomery bank, its act in debiting Dent Brothers and crediting the Kanawha Valley Bank, amounted in law to payment of the check, binding the latter to account to Pinkney, its customer; second, and whether the first proposition be correct or not, that owing to the condition of the drawee bank, known to defendant and disclosed by the record, greater diligence was required of it in the collection of the check, than is ordinarily required, and that its act in holding the check all of the afternoon of September 25, and all of the following day, and until after all the mails for Montgomery had departed, without notice to or the knowledge of Pinkney, or Dent Brothers, made it guilty of gross negligence, rendering it liable to account to plaintiff, and precluding it from charging back the check, even if it had not parted with the check, but had presented it for payment, and protested it for non-payment; third, that by forwarding the check directly to the drawee bank, especially under the circumstances disclosed, and suffering and enabling that bank to dispose of the check as was done, defendant was guilty of such negligence also as will preclude it from charging back the check, or recovering any part of it from Pinkney.

Is plaintiff's first proposition correct? The authorities cited by plaintiff's counsel do hold, as a general rule, that if a collecting bank forwards a check directly to the drawee bank, and by custom or agreement it is authorized to credit the collecting bank and remit, or settle at stated periods, its

receipt of the check, debiting it to drawer and crediting it to the collecting bank, constitutes payment, and renders the forwarding bank liable to its principal for the amount thereof. *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285; *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47; citing 2 *Morse, Banks & Bkg.* § 451; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; *Montgomery County v. Cochran*, 62 C. C. A. 70, 126 Fed. 456. "This effect," says the court in the latter case, "cannot, we think, depend on there being cash enough in the bank at the moment the check is presented to pay it." And, says the court again, "can the effect of the deposit of the check be limited by the financial condition of the bank on the settlement of all of its business transactions? It cannot, we think, for obvious reasons." "The effect would be the same," says the supreme court of Alabama, "though it be afterwards discovered that the check was an overdraft and the drawee insolvent." *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138. Is this general rule applicable here? While there is proof of prior arrangement between the Montgomery bank and defendant, the transaction here was the subject of special agreement, and taken entirely out of that agreement. Defendant would not and did not agree to send the check here involved to the Montgomery bank for payment and credit to its account. The forwarding of the check by mail for presentment and payment was the subject of special agreement, and as between the parties to that agreement the Montgomery bank had no right to debit Dent Brothers and credit the defendant bank. Did its act in doing so, its breach of that contract, amount to payment of the check, binding the defendant, and rendering it liable to account for the amount as if in fact collected? The answer to this question, we think, depends on the disposition to be made of plaintiff's other propositions in which it is involved.

Now as to plaintiff's second proposition: In *Lewis, H. & Co. v. Montgomery Supply Co.* 59 W. Va. 75, 4 L.R.A. (N.S.) 132, 52 S. E. 1017, a case between the drawer and payee of a check of the same date, drawn on this same Montgomery bank, and sought to be collected in the same way, this court has held, in accordance with the general doctrine obtaining in this country, that "a person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency

of the drawee;" that, "if the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof;" that, "if the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail or other similar means of conveyance leaving after said date;" that "neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it;" that "the parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment;" that, "in such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner." Other rules more or less applicable to the present case are also promulgated in the cases as cited. On the trial, and as pertinent to the proposition under consideration, it was stipulated by counsel, that mails left Charleston for Montgomery each day about 3:00 A. M., 9:30 A. M., and 6:26 P. M., due to arrive at Montgomery about three quarters of an hour later; and that mails left Montgomery for Charleston about 2:00 A. M., 11:30 A. M. and 4:30 P. M., and requiring about the same time to reach Charleston; that mails leaving Charleston were closed about thirty minutes before the time of departure.

The question is then presented, Was defendant negligent either in not forwarding the check immediately on its receipt on September 25, or by either of the mails going to Montgomery on September 26, or in not sending a special messenger to Montgomery with the check, or declining to accept it for credit and collection, and returning it to Pinkney? In the *Lewis, Hubbard & Co. Case*, as appears from the opin-

ion at pages 78, 79, of 59 W. Va., the proof was that two daily mails left Charleston for Montgomery, one reaching Montgomery about six A. M., the other between ten and eleven A. M. Accordingly it was said in that case, after reviewing the authorities, pages 81, 82, of 59 W. Va.: "The way to a conclusion would seem to be perfectly clear but for the circumstance of there being no mail from Charleston to Montgomery on the afternoon of . . . the last day allowed by the rule for forwarding the check to Montgomery. Did this circumstance make it necessary to forward the check in the mail leaving Charleston at about 9 or 10 o'clock A. M.: If not, and it was allowable to deposit it in the postoffice within business hours on Wednesday, it could not have reached Montgomery until Thursday." After some general observations applicable here, the opinion then says: "Hence, the two-day rule, allowed for forwarding notices or paper for presentment, is subject to this qualification, namely, that it must be sent by the mail of the second day. If there be more than one mail on that day, it need not go by the first; but, if there be but one, it must go by it, unless it leave or closes at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business. To this point, the American authorities seem to be unanimous." In this case it was stipulated that there was an afternoon mail leaving Charleston for Montgomery about 6:26 P. M., and it is conceded that the check involved here was not forwarded by that mail. So that, by these rules, defendant was certainly negligent in not forwarding the check by the last mail of that day. The answer it makes to this proposition is that matter sent by that mail would reach Montgomery too late for delivery that day, and that matter deposited in the postoffice in time for the 3:00 A. M. mail the next morning would reach Montgomery before business hours of that day, and would be delivered with matter sent on the last mail of the preceding day. Is this a sufficient answer to the charge of negligence in not complying with a positive rule of commercial law, violated by it? We think not. Was defendant otherwise negligent as suggested in the question? That Dickinson, the cashier, knew the Montgomery bank was in bad condition is evidenced by the new agreement made with it a short time before; and that he was unwilling that this check should go forward subject to that agreement, although, the check being over \$500, immediate remittance would have been required; and by the fact that he sent for

Champe, the president, and made a special agreement about this check. Dickinson thinks he tried to communicate with Pinkney. He is not sure, and his testimony leaves it in doubt whether this was on the twenty-sixth or twenty-seventh of September. First he says twenty-sixth, but immediately afterwards he says twenty-seventh. He does say he learned that Pinkney was not at Montgomery. He admits Pinkney knew nothing as to what was going on between him and Champe. It is suggested in argument that Pinkney and Dent Brothers had conspired to saddle a loss on defendant by exchanging checks and absenting themselves, but the evidence gives little force in the suggestion. The check of Pinkney to Dent Brothers which was mailed to Charleston by the same mail was promptly paid by defendant, and it was apparent, if Dickinson's attention was called to both items, that there had been a swapping of checks. Dent explains that this arrangement was for the purpose of transferring so much of his funds to another bank in Charleston for a business reason, which he explains. It is not shown that either Pinkney or Dent Brothers had any knowledge of the bank's condition. After paying this check given Pinkney, Dent Brothers still had left to their credit over \$900. What do the law books say on this subject? Quoting from *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, Clark & Skyles on the Law of Agency, § 402, at page 902, say: "Suppose an agent receives for collection from the payee a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand, and notice on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this, and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented

until the next day." This modification of the general rule requiring only reasonable diligence and care where the collecting bank knows of the depressed financial condition of the drawee or debtor is recognized and enforced in *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 389, 391, 79 N. W. 859. That court holds, a collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customers of such vital condition and fails to take vigorous measures, under the circumstances, to secure payment. An agent is bound to exercise that degree of skill, care, and diligence which the nature of his undertaking calls for with reference to the time, place, and circumstances surrounding the undertaking. See note to *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 77 Am. St. Rep. 613, 616. The same rule laid down by Clark and Skyles is, upon the same authority, affirmed in 1 *Morse on Banks & Banking*, § 219. Indeed this we perceive to be but the general law of agency. Under the circumstances of this case we think defendant was guilty of negligence in not either declining the agency to collect altogether, or taking such vigorous measures as the facts demanded for the protection of its customers.

Now as to plaintiff's third proposition, that the defendant was guilty of negligence in forwarding the check directly to the drawee bank. It is practically conceded by counsel for defendant that the rule in this country, outside of New York, is that it is negligence for a collecting bank to send checks direct to the drawee bank. The cases so holding are the following: "*Lowenstein v. Bresler* (1895) 109 Ala. 326, 19 So. 860; *Farley Nat. Bank v. Pollock & Bernheimer* (1905) 145 Ala. 321, 2 L.R.A. (N.S.) 194, 117 Am. St. Rep. 44, 39 So. 612, 8 A. & E. Ann. Cas. 370; *O'Leary Bros. v. Abeles* (1900) 68 Ark. 259, 82 Am. St. Rep. 291, 57 S. W. 791; *German Nat. Bank v. Burns* (1889) 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.* (1886) 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *First Nat. Bank v. Bank of Whittier* (1906) 221 Ill. 319, 77 N. E. 563, 5 A. & E. Ann. Cas. 653; *Anderson v. Rodgers* (1894) 53 Kan. 542, 27 L.R.A. 248, 36 Pac. 1067; *First Nat. Bank v. Citizens' Sav. Bank* (1900) 123 Mich. 336, 48 L.R.A. 583, 82 N. W. 66; *Carson, P. S. & Co. v. Fincher* (1902) 129 Mich. 687, 95 Am. St. Rep. 449, 89 N. W. 570; *Minneapolis Sash & Door Co. v. Metropolitan Bank* (1899) 76 Minn. 136, 44 L.R.A. 504, 77 Am. St. Rep. 609, 78 N. W. 980; *American Exch. Nat. Bank v. Metropolitan Nat. Bank* (1897) 71 Mo. 32 L.R.A. (N.S.)

App. 451; *Western Wheeled Scraper Co. v. Sadilek* (1897) 50 Neb. 105, 61 Am. St. Rep. 550, 69 N. W. 705; *Bank of Rocky Mt. v. Floyd* (1906) 142 N. C. 187, 55 S. E. 95; *National Bank v. Johnson* (1896) 6 N. D. 180, 69 N. W. 49; *Commercial Bank v. Red River Valley Nat. Bank* (1899) 8 N. D. 382, 79 N. W. 859; *Merchants' Nat. Bank v. Goodman* (1885) 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; *Harvey v. Girard Nat. Bank* (1888) 110 Pa. 212, 13 Atl. 202; *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55; *Wagner v. Crook* (1895) 167 Pa. 259, 40 Am. St. Rep. 672, 31 Atl. 576; *Givan v. Bank of Alexandria* (1898) — Tenn. —, 47 L.R.A. 270, 52 S. W. 923; *Winchester Mill Co. v. Bank of Winchester* (1908) 120 Tenn. 225, 18 L.R.A. (N.S.) 441, 111 S. W. 248; *First Nat. Bank v. City Nat. Bank* (1896) 12 Tex. Civ. App. 318, 34 S. W. 458; *First Nat. Bank v. Fourth Nat. Bank* (1893) 6 C. C. A. 183, 16 U. S. App. 1, 56 Fed. 967; *Farwell v. Curtis* (1876) 7 Biss. 160, Fed. Cas. No. 4,690." The general rule deducible from these cases and as stated in 1 *Morse on Banks & Banking*, § 236, page 467, is that, "in this country the party who is to pay a check is not a suitable agent for its collection." Counsel for defendant criticize the cases cited, and endeavor to show how they differ from the case we have in hand, and how, as they view them, they are inapplicable. Of course they do differ in their facts and circumstances, but taken together they do no more than state a general law of duty and obligation upon the part of a collecting agent to select suitable subagents in the execution of a contract of agency, and they unite in holding that, as a general rule, a drawee bank is not a suitable agent for the collection of checks drawn on it. Two points of distinction attempted to be drawn by counsel, between the cases cited and this case, is this, that it does not appear in most of those cases that the drawee bank was the only bank located in the place of the drawee, and that there was no evidence of a custom existing in the locality of the collecting banks of sending such collections direct to the drawee. Evidence was admitted in this case of such custom among the banks of Charleston, which was objected to, but admitted over the objection. It is argued that as the plaintiff had been a customer of the defendant bank for years and accustomed to do business in Charleston, and, as he lived at Montgomery, where the drawee bank was located, and had knowledge of the fact that the drawee was the only bank located there, he is chargeable with notice of that custom, and that when he sent the check in question to

the defendant for collection, he must be deemed to have contracted with reference to that custom, and the usual method observed in making such collections, and bound thereby. This argument is not without force. But aside from it we are appealed to by counsel to disregard the general rule prevailing in this country, and to adopt what they regard as the better and more sensible one prevailing in England and New York, and, as it is claimed, enunciated in *Heywood v. Pickering*, L. R. 9 Q. B. 432, 43 L. J. Q. B. N. S. 145; *Prideaux v. Criddle*, 10 Best & S. 524, 38 L. J. Q. B. N. S. 232, L. R. 4 Q. B. 455, 20 L. T. N. S. 695; *Indig v. National City Bank*, 80 N. Y. 100; *Briggs v. Central Nat. Bank*, 89 N. Y. 184, 42 Am. Rep. 285; *McIntosh v. Tyler*, 47 Hun, 99. *Aprpos* to this argument we refer to the editorial note to *Anderson v. Rodgers*, supra, 27 L.R.A. 248. The New York and English cases cited and relied upon by defendant's counsel are there considered and criticized. The editor, referring to *Merchants' Nat. Bank v. Goodman*, and *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.* as supporting the proposition that a collecting bank which sends a check directly to the drawee by mail is liable in case the draft which was received in return proves uncollectible when the check would have been paid if duly sent for presentment at the counter, further observes, "Both of these cases also decided that a custom cannot be successfully set up as a justification for sending a check directly to the drawee bank by mail." He refers also to *Harvey v. Girard Nat. Bank* (1888) 119 Pa. 212, 13 Atl. 202, and *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55, for the same proposition. In criticism of *McIntosh v. Tyler*, 47 Hun, 99, relied on by defendant's counsel, this annotator says: "This is a decision of the general term of the supreme court relying on *Indig v. National City Bank* (1880) 80 N. Y. 100, and *Briggs v. Central Nat. Bank* (1882) 89 N. Y. 182, 42 Am. Rep. 285, and refusing to follow the decisions of other states on the question." "But," says he, "the court of appeals in neither of the cases thus relied upon as authority really decided that exact question." He then enters upon a more minute consideration of these two cases, and concludes that "the decision of the general term . . . in reliance on the authority of these two cases is in itself the only direct authority in New York state to that effect. This decision itself is weakened by the fact that it is based on cases which do not exactly support it." Of the English decisions this editor says: "In England the cases have 32 L.R.A. (N.S.)

not much discussed the question, but in several the practice of sending checks by mail to the drawee bank through the country clearing house has been recognized, but the real question in controversy in nearly all of these cases has been the question of time of presentment." He further observes that the English cases stand on somewhat different footing from the American cases by reason of the recognized custom in respect to the country clearing house in which the country banks are represented by London correspondents, and in conclusion he makes the following observations: "The result of the American decisions is entire unanimity in holding that it is not proper to send a check by mail directly to the drawee for payment, except in New York state, where, as shown above, the decision to the contrary cites as authority two other cases which do not exactly decide the question. Considering the great importance of New York decisions on commercial questions, it is unfortunate for the clearness of the law on this question that the New York cases are in any degree at variance with other American cases." Bolles says on this subject (2 Bolles on Banking, p. 548): "Once it was the universal custom to send checks and other instruments directly by mail to the drawee bank for payment; and this practice still prevails in some states. On the other hand, it has been condemned by many of them, unless there is no other bank in the place; or instructions or other circumstances attending the deposit justified the bank in sending to the drawee for payment. Wherever the more general rule prevails, and is violated, and the drawee bank fails having in its possession a sufficient fund belonging to the drawer to pay the check, he is discharged." The authorities cited by this writer for the "once universal custom" are mainly those relied upon by defendant's counsel. A few other New York and other cases are also cited in the note. The cases in which the rule "has been condemned," are those relied upon by the plaintiff in error and criticized by defendant's counsel. Our examination of the cases referred to satisfies us that Mr. Bolles is in error in saying that once the custom referred to was "the universal custom." The fact is otherwise, we think, for the cases condemning the custom cover the same period as the cases cited by him for the proposition, and it is certain, we think, that a custom thus condemned by so many judicial decisions could never have become universal. In examining the cases cited by Mr. Bolles, showing this "universal custom," we are impressed with the decision in *National Revere Bank v. National Bank*,

172 N. Y. 102, 64 N. E. 799. The particular point there decided, and affecting this case, is point six of the syllabus, namely, that "a bank which is the collecting agent of another does not cease to be such because it is the drawee upon which the drafts forwarded to it for collection are drawn." This is in accord with the general rule contended for by the plaintiff here, and the court says, to the discredit of *Briggs v. Central Nat. Bank*, and *Indig v. National City Bank*, and other New York cases relied upon by the defendant, that "in this state a bank receiving commercial paper for collection is, in the absence of some special agreement, liable for a loss occasioned by a default of its correspondents or other agents selected by it to make the collection. Where a subagent collects, but fails to pay over and becomes insolvent, such insolvency will not shield the collecting agent from liability for the loss." And at page 108 of 172 N. Y., replying to the contention of counsel for the defendant, that as a matter of law the act of the defendant in sending the drafts to the bank where they were payable, and upon which they were drawn, the drawee did not become the agent of the defendant, and referring to the case of *Indig v. National City Bank*, in support of the proposition, the court replied: "With respect to that case generally it may be said, as it has been said before by this court in the *St. Nicholas Bank Case*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849, that it was a border case, the doctrine of which was not to be extended, and, indeed, it has been already explained and limited in *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285. But no one will claim that it is not competent for the collecting bank to make the drawee bank in such a case its agent in the same way as if the paper was payable at some other place. If it had been shown in that case, as it was in this, that for several years before the transaction the drawee bank had been the collecting agent of the bank transmitting the paper, doubtless it would have been held that the relation of agency existed between the two banks. The court was careful in that case to emphasize the fact that there was no indorser on the paper, and that all that was to be done was to demand payment. In the case at bar there was an indorser who has been discharged, and the consequence is that prima facie the plaintiff has been damaged in a sum equal to the face of the paper (*Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273), so that the distinction between that case and this is to be found in the wide difference in the facts. Moreover, the *Indig Case* does not really decide 32 L.R.A.(N.S.)

any such proposition as is claimed. It will be seen from the report that three members of the court concurred in the proposition now asserted. Three other members dissented entirely, and the chief Judge concurred with the three first mentioned on the question of damages, and this resulted in the reversal of the judgment below. Hence it is very obvious that the only question decided in that case was the point presented in the opinion relating to the question of damages." Here we have the highest court of New York, in a late case, decided in 1902, limiting and explaining, if not practically overruling, the other New York cases relied upon by defendant's counsel.

But is there an exception to the general rule, where there is no other bank in the place? Bolles notes an exception in the section quoted from, predicating it upon *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 52 L.R.A. 632, 58 N. E. 250, and *First Nat. Bank v. Citizens' Sav. Bank*, 123 Mich. 336, 48 L.R.A. 583, 82 N. W. 66. The cases cited are relied upon by defendant's counsel. It is also noted in 5 Cyc. Law & Proc. p. 506, as based on the same decisions. But we think such an exception opposed to the weight of authority, and to reason. These and other decisions are reviewed and criticized in the well-considered case of *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. E. 248, denying the exception, which, in an opinion already too long, we are disposed to adopt as expressive of our own views on the subject. The cases on which Cyc. Law & Proc. bases the statement found at page 506, namely, that "some states which deny the legality of the rule permit the paper to be sent to the drawee when there is no other bank in the place known by the owner, and collection by a different method would be costly and inconvenient," are also reviewed; and that court says: "We do not think the text of Cyc. Law & Proc. supra is sustained by the authorities cited." We are of the same opinion.

These authorities, we think, require an affirmation of plaintiff's third proposition; for in the face of all the information Dickinson had about the condition of the drawee bank he took the risk of trusting Champe and his bank, to carry out their special agreement; sent the check directly to the drawee; gave no information to either Pinkney or Dent Brothers, the makers of the check; and only sent a special messenger to Montgomery to recover the check, make demand of payment and protest, after the check had passed beyond his control, and after hearing from Champe in the after-

noon, that the bank could not, or would not send the currency. The messenger failed in his mission, the check was never recovered, or returned to Pinkney, but was charged to Dent Brothers, and the bank credited therewith in settlement with them by the special receiver after its failure. In other words the check was paid as between the drawee and Dent Brothers. Must it not in law be treated as paid also, as between defendant and Pinkney? Has Pinkney any right of action against Dent Brothers? He lost that right when, by the negligence of defendant, the check was surrendered to the drawee, and charged to the makers.

The question remains, Can recovery be had on the common counts in assumpsit as for money had and received? Defendant's counsel say no. The defendant credited Pinkney and so advised him, but, as it is claimed, subject to payment. If on presentation of the check in due course, payment had been refused by the drawee, and the check had been retained and returned to Pinkney, the defendant would, as a general rule, have been entitled to charge it back to Pinkney. But by employing an improper agent it lost the possession of the check and put it in the power of that agent to collect the money, and, as between it and the defendant, make a wrongful disposition of it. What right of action then has Pinkney? He has not the check with which to go back on Dent Brothers. As to them the check is paid. Defendant was credited with the proceeds, and had the right to participate in the distribution of the assets of the defunct bank. Defendant took the check in the place of money, gave plaintiff credit, and until it returns the thing it got unimpaired, with all rights against all parties preserved, is it not chargeable with that check as a deposit in settlement with Pinkney, its customer? Its agent got that thing, disposed of it, credited it with the proceeds, and charged Dent Brothers.

We are of opinion that upon the case as made plaintiff may recover on the common counts, for money had and received. High authority says, it is only necessary to show that defendant has obtained possession of money or received something as money, which *ex æquo et bono*, he ought to refund. 2 Enc. Pl. & Pr. p. 1016. We have examined the cases cited for the proposition in a note, and we think they support the text and our conclusion in this case. In *Lary v. Hart*, 12 Ga. 423, a note was intrusted to an agent, and he intrusted it

to another to return it to the owner, who instead settled with the maker. In an action by the owner against his agent as for money had and received, recovery was denied, the court, however, observing, that "had he shown that Conner acted as the agent of Hart, in settling this note, the verdict might have been supported." In *Seavey v. Dana*, 61 N. H. 339, the court says: "The action for money had and received can be maintained against the defendant; if he received the note as money or its equivalent, or if he received the proceeds of the note, . . . the plaintiff could waive the tort, and maintain assumpsit for money had and received." 2 Greenleaf on Evidence, § 118, says: "What is money had and received? In regard to things treated as money, it has been held that this count may be supported by evidence of the defendant's receipt of bank notes; or promissory notes; or credit in account, in the books of a third person; or a mortgage, assigned to the defendant as collateral security, and afterwards foreclosed and brought in by him; or a note payable in specific articles; or any chattel." *Mathewson v. Eureka Powder Works*, 44 N. H. 289, 291, a leading and well-considered case, and other cases cited, support the text of Greenleaf. This case also says: "The rule that the action for money had and received lies only where one party has received, and has in his hands money which he has no right to retain, has been long since relaxed; and it is sufficient, to sustain the action, that something has been received by the defendant, which, under the circumstances of the case, ought, as between the parties, to be regarded as money." A check was held to be money, being treated as such, in *Spratt v. Hobhouse*, 4 Bing. 179, 12 J. B. Moore, 395, 5 L. J. C. P. 147, cited and quoted in the last New Hampshire case cited, at page 292. This action lies by a customer against a banker for a balance on settlement, or on proof that a certain sum has been received in so many different payments, and that a certain other sum has been paid out in so many payments. 3 Rob. New Pr. 391. We think it unnecessary to dwell further on this point.

Our conclusion is that the court below erred, and that its judgment should be reversed, the verdict set aside, and a new trial awarded, and we will so order.

Petition for rehearing denied January 12, 1911.

MASSACHUSETTS SUPREME JUDICIAL COURT.

**POSTAL TELEGRAPH-CABLE COMPANY
OF MASSACHUSETTS**

v.

CITY OF CHICOPEE.

(207 Mass. 341, 93 N. E. 927.)

Municipal corporation — license to telephone company — condition — use of poles.

1. Requiring a telephone company, as a condition to receiving a license to place poles on a city street, to permit the municipality to use them to carry its fire alarm and electric light wires without compensation, is not unreasonable, where the benefit to the municipality does not exceed the cost of inspecting the poles to keep them safe from travelers, and the risk it runs of being held liable to them for injuries because of the presence of the poles in the street; and it is immaterial that the high current of the light wires renders greater care necessary on the part of employees at work upon the poles, and makes possible inductive disturbance on the telephone line, which may require its owner to maintain a higher voltage than it otherwise would.

Interstate commerce — burden on telegraph company — validity.

2. There is no unconstitutional interference with interstate commerce by requir-

Note.—Power to require public service corporation to carry municipal wires on its poles.

While few cases involving this precise point have been found, the decision in *POSTAL TELEGRAPH-CABLE CO. v. CHICOPEE* seems to be in accord with the general rule that a municipality, on granting a privilege to use a street, has the power, in its legislative discretion, to impose reasonable conditions (28 Cyc. Law & Proc. p. 876). and with the cases holding that a municipality has a right to charge a public service corporation for the use of its streets and public places for poles erected therein (*St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, petition for rehearing denied, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990).

In *Western U. Teleg. Co. v. Richmond*, 178 Fed. 310, holding that a city ordinance concerning wires, poles, and conduits in, over and under the city streets, was legal and valid, and did not deprive the telegraph company of any of its rights under the laws and Constitution of the United States, and did not provide any unreasonable rules and regulations for the conduct of its business, the court said of a section of the ordinance providing that the city should have the right to run all wires needed for its fire alarm and police departments on the company's poles in its streets, that it was a wise provision, bene-

ing an interstate telegraph company, as a condition to receiving a license to place poles to carry its wires in the city streets, to permit the city to place on the poles, without compensation, wires necessary for its fire alarm and electric lighting systems, where the detriment to the telegraph company is no greater than the reasonable cost of inspecting the poles necessary to keep the streets safe for travelers.

Injunction — discretion — inconvenience.

3. A telegraph company which has permitted wires belonging to a municipal corporation to remain for ten years on its poles, as required as a condition to its receiving a franchise to place the poles in the streets, may, although the corporation exceeded its authority in making the requirement, be denied an injunction to compel their removal, where that would cause expense and public inconvenience, and compensation in damages may be made.

(January 4, 1911.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the consideration of the full bench of a bill to enjoin the defendant city from using complainant's telegraph poles for the maintenance of its electric light and fire alarm wires, and to compel their removal. Bill dismissed.

The facts are stated in the opinion.

ficial to the public, and not burdensome to the company, and made unnecessary the erection of additional poles on crowded streets for those purposes.

In *Hudson & M. Teleph. & Teleg. Co. v. Linden Twp.* — N. J. L. —, 76 Atl. 444, it was held, however, that under a state statute providing that municipal authorities shall designate by resolution the streets in which the poles of a telephone and telegraph company desiring to operate a through line shall be placed, "subject to such police and other proper regulations and restrictions as may be deemed for the best interests of the municipality," township authorities cannot by ordinance reserve the right to the township of placing and maintaining fire or police wires on the poles,—no such burden being authorized by the statute,—as the reservation of an easement is neither a "regulation" nor a "restriction."

In some cases involving ordinances whereby municipalities have required public service corporations to carry municipal wires on their poles, the corporations seem to have accepted the condition without question, and the power of the municipalities to impose the condition seems to be assumed. Thus, in *St. Louis v. Western U. Teleg. Co.* supra, after judgment was reversed and the case was remanded by the United States Supreme Court, it was held, on a second trial (63 Fed. 68, affirmed in 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct.

Messrs. Carver, Wardner, & Goodwin, G. Phillip Wardner, and Clifford H. Walker, for complainant:

The complainant has a clear legal right to maintain and operate its telegraph line in the streets in the city of Chicopee, where it is now located.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Postal & Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Southern Bell Teleph. & Teleg. Co. v. Richmond, 78 Fed. 858; Richmond v. Southern Bell Teleph. & Teleg. Co. 28 C. C. A. 659, 42 U. S. App. 686, 85 Fed. 19, 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Old Colony Trust Co. v. Wichita, 123 Fed. 762, 66 C. C. A. 19, 132 Fed. 641; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, s. c. on rehearing, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; St. Louis v. Western U. Teleg. Co. 63 Fed. 68.

The city's use of the complainant's poles is illegal, as a direct interference with interstate commerce.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com.

Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The power to establish reasonable regulations for the erection and maintenance of lines does not authorize cities and towns in this commonwealth to charge a rental for the use of their streets by telegraph companies which occupy the streets under the paramount authority of the acts of Congress.

Wright v. Glen Teleph. Co. 112 App. Div. 745, 99 N. Y. Supp. 85; Wichita v. Old Colony Trust Co. 66 C. C. A. 19, 132 Fed. 641.

The attachment of the city's wires to complainant's poles without its consent and without any compensation is a taking of property without compensation.

McGehee, Due Process of Law, p. 205; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Turner v. Nye, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Miller v. Horton, 152 Mass. 544, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Bent v. Emery, 173 Mass. 495, 53 N. E. 910.

The presence of the city's wires on the complainant's poles constitutes a continu-

Rep. 608), that a city ordinance requiring, in consideration of a grant to a telegraph company of occupancy of the city streets, that the company, before obtaining a permit therefor from the board of public improvements, should file an agreement with the city permitting the city to occupy and use the top cross-arm of any pole for the use of the city for telegraph purposes, free of charge, became, after the company had filed its agreement in accordance therewith, a binding contract; and after the city had taken the benefit thereof by using the poles, an executed contract, in violation of which the city could not thereafter, by ordinance, subject the company to the additional burden of a cash payment per pole for the privilege of using the streets.

Similarly, in New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533, it was held that where a city has by ordinance authorized a telephone and telegraph company to construct and maintain its lines through the city streets, provided it connect its

wires with certain public offices, and place and keep telephones therein free of charge to the city, so that such telephones may be used in connection with all wires under the control of the company, and the company has constructed its lines and complied with all the conditions imposed, the city cannot exact a further consideration for the privilege in the form of an annual payment per pole aside from all regular taxes.

And where a municipal corporation has granted to an electric company the right to place and set its poles on the streets of the city, requiring only that the company furnish free of charge electric lights for use in certain public buildings and electric street lights at certain places, and the company has complied with all the terms and conditions of the grant, the city has no authority subsequently to levy and collect a license fee of 50 cents per pole. Texarkana Gas & Electric Co. v. Texarkana, — Tex. Civ. App. —, 123 S. W. 213.

A. C. W.

ing interference with complainant's property which equity should enjoin on the principle of continuing trespass.

Providence, F. River & N. S. B. Co. v. Fall River, 183 Mass. 535, 67 N. E. 647; 28 Am. & Eng. Enc. Law, p. 595.

Mr. Luther White, for defendant:

The petitioner not only failed to use due diligence in asserting its alleged rights, but was guilty of gross laches.

Tash v. Adams, 10 Cush. 252; Fuller v. Melrose, 1 Allen, 166.

The complainant company took the property subject to the conditions under which the line was constructed.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Com. v. New Bedford Bridge, 2 Gray, 348; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Worcester v. Worcester Consol. Street R. Co. 192 Mass. 106, 78 N. E. 222; St. Louis v. Western U. Teleg. Co. 63 Fed. 70; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 103, 37 L. ed. 380, 385, 13 Sup. Ct. Rep. 485; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 83, 52 L. ed. 114, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990.

If the city has not a contractual right to use the poles for its electric wires, it has, nevertheless, the right by virtue of its ordinances on the subject.

St. Louis v. Western U. Teleg. Co. 148 U. S. 385, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204.

There is no evidence that the complainant has expended any money by reason of the use of its poles by the respondent, either for the purpose of strengthening the poles and lines, or of protecting its business against alleged inductive disturbances, or guarding its employees from injury.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Southern R. Co. v. King, 217 U. S. 529, 54 L. ed. 868, 30 Sup. Ct. Rep. 594.

Knowlton, Ch. J., delivered the opinion of the court:

This is a bill in equity to enjoin the defendant from maintaining certain electric wires upon the plaintiff's telegraph poles. In 1891 the Postal Telegraph Cable Company of New York erected a telegraph line in the city of Chicopee from the line of the city of Springfield on the south, by a somewhat circuitous route, through Chicopee Center to Chicopee Falls, and thence 32 L.R.A. (N.S.)

northwesterly to the line of the city of Holyoke, this being a part of a telegraphic system extending into and through other states, which was used in part in interstate commerce. By a series of conveyances through different corporations this line has passed into the ownership of the plaintiff, which holds it, with all the rights, and subject to all the liabilities, of the original owner. It runs through public highways which are post roads. The plaintiff's predecessor in title had a right to construct and maintain such a line, and the plaintiff has a right to maintain it, along public highways, under U. S. Rev. Stat. § 5263, U. S. Comp. Stat. 1901, p. 3579. This right also is reaffirmed and extended to other classes of corporations by Rev. Laws, chap. 122, § 1. But it is subject to the right of cities and towns, by ordinance or by-law, to make any reasonable local regulations in regard to the exercise of it. Rev. Laws, chap. 25, § 54; Id. chap. 26, § 6. These regulations, under the Constitution of the United States, must be such as do not interfere with or regulate directly interstate commerce. These propositions are all well established by decisions of the Supreme Court of the United States.

On June 15, 1891, the plaintiff's predecessor in title, acting in accordance with Rev. Laws, chap. 122, §§ 1, 2, applied to the mayor and aldermen for authority in writing, fixing the location of its line and establishing its rights. In July, 1891, the city of Chicopee passed an ordinance, which is chapter 17 of the ordinances of that year, and which provided that the mayor and aldermen should have the exclusive power to license the erection and maintenance of telegraph and telephone and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm telegraph or other electric wires upon the poles or through the conduit so licensed to be maintained, and to the right of the city to license the location of lines by any other person or corporation upon said poles and through said conduit, upon payment being made of a reasonable compensation, to be determined by the parties, or, if they fail to agree, to be determined by the mayor. There was also a requirement that all parties licensed to erect poles and fixtures and to maintain electric wires should give to the city an agreement in writing to save it harmless from all claims for damages, costs, expenses, charges, or compensation, for or on account of the erection, maintenance, or use of such poles, fixtures, or wires. It also provided for the appointment and term of office of an inspector of wires, and

for many other things, with a view to the proper regulation of the business of maintaining and using electric wires within the city.

The committee on highways, to whom was referred the application of the Postal Telegraph Cable Company for a permit, reported on July 6, 1891, recommending the granting of the petition with certain modifications, and that the company must agree to comply with the city ordinance entitled "Electric Wires." The ordinance was ordained at or about the same time. On the day when the report was filed it was accepted, and the clerk was instructed to notify the petitioner that the petition would be granted upon compliance with the restrictions and agreements therein enumerated. On September 7th, two months later, an order was passed by the mayor and aldermen that permission be given the petitioner to erect its lines in the specified streets, "upon the following express conditions, a violation of any of which shall, at the election of the board of aldermen, operate as a forfeiture of the permission and rights herein granted, to wit:

"First, that said company shall agree to comply with the requirements of chapter 22 of the Revised Ordinances of the city of Chicopee.

"Second, that said company shall use the poles now erected in said city on Broadway, from the house of Charles T. Hendrick to the Overman Wheel Company's factories.

"Fourth, that the officers and members of the fire department may, in the event of a fire, and whenever in connection therewith they deem it proper, cut the wires of said company, and that, if so cut, they shall be repaired at the expense of said company.

"Fifth, that said company shall, before any work or construction in said streets or highways is done, execute, under seal, a contract in the words following, all blanks being properly filled, and deliver the same to the city."

Then followed an agreement to indemnify the city from loss, cost, or damage suffered by reason of the erection or maintenance of the poles or wires. This contract was signed by one of the officers of the company, but was never returned to the defendant. By a clerical error the chapter of the ordinance was referred to in this order as 22, instead of 17, the number intended. Chapter 22 is an ordinance relative to public parks, and it makes no reference to locations, poles, or wires. Nearly all of the line was built shortly after this location was granted, although about

half a mile of it was constructed before the license was granted.

This was the first location granted in the city of Chicopee for the erection and maintenance of electric wires. Since then the city has granted four locations to the Holyoke Street Railway Company, one location to the United Electric Light Company of Springfield, two locations to the J. Stevens Arm & Tool Company, thirty-one locations to the New England Telephone & Telegraph Company, and one location to the Postal Telegraph Cable Company of New York. There are now 10 miles of trolley lines in Chicopee, not including span wires and feed wires, about 6 miles of municipal fire alarm lines averaging 2 wires, and about 30 miles of poles of the New England Telephone & Telegraph Company, carrying on the average, a large number of wires.

Beginning more than ten years ago and ending before April, 1908, the city put municipal electric light wires upon 87 of the plaintiff's poles, making 223 hitches in all, and put 80 hitches in all of municipal fire alarm wires on the poles of the plaintiff. Up to the end of that time, all this was done without objection of the plaintiff or its predecessors in title, and without any requirement or tender of payment for the benefit. During this time the general officers of the plaintiff and its predecessors had no knowledge of this use of the poles, although the company's district foreman, whose duty it was to report anything going on along the lines of interest to the company, knew it and reported it to the circuit manager at Boston. The master's report gives us the ordinance in full, together with an elaborate statement of conditions as to different lines of wires in different places, and other important facts, much in detail.

It is obvious that in framing the ordinance the city council attempted to make careful provision for the protection of the public, in view of the probability of a great increase in the number of applications for authority to transmit electricity for various purposes through the streets. It is certain that careful regulation of the erection and maintenance of poles and wires in the streets of a city is necessary, in the public interest. As cities grow compact, and the need of using many wires for the transmission of electricity for many different purposes, on closely built streets, becomes more urgent, relief from inconvenience and danger can only be had by the removal of overhead wires from the streets and by placing them in conduits underground. Legislation for this purpose, applicable especially to great cities, has become common in different parts of the country. By the running of lines of wire upon different sets of

poles in a crowded city, the difficulty of extinguishing fire and preventing a conflagration is often greatly increased, as well as the danger and inconvenience in using the streets in the ordinary way, and the unsightliness of numerous poles and wires. It was therefore reasonable and proper that the ordinance should forbid the unnecessary duplication of lines and of poles in public places. This was done in the requirement that licenses might be granted by the mayor and aldermen to other companies to use the same poles by making reasonable compensation therefor. This was nothing more than a regulation that, if two or more companies desired to run two lines of wires through a street, they might be required, if it could be done reasonably, to put them on the same line of poles, the two companies sharing the expense equitably. This was entirely reasonable. To the same effect and for the same purpose was the provision in the order granting the permit to the plaintiff's predecessor, that the company should "use the poles now erected in said city on Broadway, from the house of Charles T. Hendrick to the Overman Wheel Company's factories." The plaintiff has made no objection to these regulations. The city's wires for a fire alarm telegraph and those for the municipal lighting, which was undertaken several years later, were also to be provided for, and if there had been a provision for pecuniary compensation by the city for the benefit that it might derive in this way, the reasons already referred to plainly would have been an ample justification for the requirement that the plaintiff's predecessor should allow the wires to be put upon its poles. The reason for this regulation in the ordinance plainly was to protect the interest of the public. That the plaintiff would be subjected to some slight burden and increased expense in the construction of its line, for the protection and convenience of the public in the use of the streets and in the preservation of their property, surely did not deprive the mayor and aldermen of the right to impose the requirement upon it as a regulation. The very idea of regulation involves, not only possible restriction in the exercise of rights and the use of property, but also possible expenditure in the public interest, to make one's property available or one's rights enjoyable in the best way. The rights and interests of the public and the individual must be considered alike, in making police regulations for the common good. Unless this burden is excessive, and plainly unreasonable in reference to the benefits to be derived from the imposition of it, the ordinance is not invalid by reason of the re-

quirement that it makes of the plaintiff.

Does the fact that the city derives a benefit from it, for which it makes no direct payment, change the character of the provision? In framing the ordinance the city might well take into account the probable expense to be incurred for the inspection of the lines from time to time to diminish the risk of accident, and the liability of the city for injuries suffered by travelers from an unsafe condition of the poles or wires. The mayor and aldermen properly could require a pecuniary payment by the telegraph company to meet this cost of inspection, and this risk of loss, to which the city would be subjected. This has been directly decided, even when the payment required was in the form of a tax, if the amount was such that it did not appear to be a tax for revenue, but merely a compensation for the reasonably anticipated cost of protecting the public. *Western U. Tele. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *St. Louis v. Western U. Tele. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Atlantic & P. Tele. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Postal Tele. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208.

The burden of expense put upon the plaintiff and its predecessors is very small. The first company was obliged, for its own purposes, to erect poles for its wires. The plaintiff's line in the city of Chicopee consists of about 250 poles, and five wires upon one six-pin cross-arm, attached to the top gain of each of these poles. The poles, as they are described by the master, would readily carry many more wires besides those belonging to the city,—probably many more than the plaintiff will ever have occasion to put upon them. The attachment of the city's wires has increased the expense to the plaintiff in only a trifling sum. Indeed, it is found that this increased expense did not attract the attention of the general officers of the company until more than ten years after a considerable part of it had been incurred, and then only when a letter had been written by the defendant's inspector of wires, demanding that a cross-arm on some of the poles be lowered one gain, to make a place for the city's wires. The master has found that the cost to the city of the inspection of the plaintiff's poles and wires is small. Probably it is smaller than was expected when the ordinance was adopted; but it is a real and constant expense every year. Very likely, in a series of years covering the life of a line of poles, this expense would be much more than the additional cost to the plaintiff of a bar on the poles for such wires as

the city would want to put there. We are of opinion that the ordinance, in the parts in question, was reasonable and proper, and so within the authority conferred by Rev. Laws, chap. 25, § 54, and chap. 26, § 6.

The plaintiff complains that, while a part of the defendant's electric lighting is done by the direct system, carrying a very light current of electricity, another part of it is done with an alternating current of high tension, and that the proximity of wires carrying such a current increases the danger to persons making repairs upon its line, and is objectionable by reason of the effect of induction. The master has found that there is more danger and that more care is required in making repairs where wires of high tension are in close proximity than where there are none; but he also found that there had been no injury to the plaintiff's servants or to its property from this cause. It is obvious that this is a matter simply calling for proper care on the part of those who are engaged in the work, and that the care must be adapted to circumstances of greater danger. As bearing upon the questions involved, this does not seem to us a matter of much importance. It relates simply to the method of doing work which is done in every city and large town, and in which there is no inherent difficulty if proper precautions are taken.

The master considered the subject of induction, and has found, in substance, that the inductive effect of near-by high-tension wires interferes with the efficient operation of a telegraph system, but that the defendant's wires have had no appreciable effect upon the plaintiff's business in this particular. In the first place, for the most part, these wires are not charged with electricity in the daytime. In the next place, to produce any serious interference with the plaintiff's business would require a longer line of parallel high-tension wires than exists in that city. It was not shown that there had been any specific instances of trouble on the plaintiff's line in Chicopee, caused by the proximity of high-tension wires, or that the increase of voltage on its system was due in any degree to inductive difficulties caused by the proximity of the defendant's wires. He did find, however, that, by reason of inductive disturbances over its entire system, the plaintiff had been compelled to increase its voltage on its system over that which was formerly sufficient for the operation of its lines. Of course, he found that inductive disturbance from other lines did not depend at all upon the wires being upon the same poles, except so far as they might be in closer proximity than if attached to an independent line of poles. The possibility of detriment to the 32 L.R.A. (N.S.)

plaintiff from induction, by reason of having these wires on its poles instead of upon independent poles, seems to be of little consequence, as against the importance of keeping the obstructions in the streets of the city as few as possible.

If these requirements of the ordinance were not unreasonable or invalid under the statutes of this commonwealth, it follows almost necessarily that they were not an interference with interstate commerce. They were adopted in the exercise of the police power, in reference to a local matter of public importance, about which Congress had taken no action. In *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347-359, 30 L. ed. 1187-1189, 1 *Inters. Com. Rep.* 306, 7 *Sup. Ct. Rep.* 1126, 1129, it was said that, within the limitation that it does not encroach upon the free exercise of the powers vested in Congress by the Constitution, a state "may undoubtedly make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require." A provision almost identical with that in the present case was upheld in *St. Louis v. Western U. Tele. Co.* 148 U. S. 92, 37 L. ed. 380, 13 *Sup. Ct. Rep.* 485, and was assumed to be reasonable on the rehearing of the case, in 149 U. S. 465, 37 L. ed. 810, 13 *Sup. Ct. Rep.* 990, and in the opinion in *Western U. Tele. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 *Sup. Ct. Rep.* 204. In the first of these cases an additional requirement of a money payment by the telegraph company to the city was upheld, on the ground that it was to be treated as rent for the "absolute, permanent, and exclusive appropriation" of space in the streets. Assuming that the statutes of this commonwealth do not authorize a city to claim rent of a telegraph company for the use of the streets as property, the principles involved in other branches of this decision and in other decisions of the same court seem to cover the present case. It is well established that a police regulation of a state, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 346, 51 L. ed. 209, 215, 27 *Sup. Ct. Rep.* 90; *Lake Shore & M. S. R. Co. v. Ohio* 173 U. S. 285-298, 43 L. ed. 702-707, 19 *Sup. Ct. Rep.* 465. All that has been done by the defendant under this ordinance seems to have but a slight and incidental effect upon interstate commerce, through the imposition of a local

regulation of the use of the streets, for the purpose, primarily and principally, of preventing the erection of unnecessary and objectionable poles to the obstruction of travel; and, secondarily, to provide compensation for the expense to the city of inspecting the line of telegraph for the protection of the public.

If it were held that the ordinance goes too far in requiring the plaintiff to permit other companies, if licensed by the city, to use its poles upon making compensation, and the city to use them for public purposes without compensation, it does not follow that the plaintiff should have an injunction. The vote of the city upon the report of the committee, which was communicated to the plaintiff's representatives, referred to the ordinance as entitled "Electric Wires." Then the formal order, which referred to the ordinance by a wrong number, put the plaintiff on inquiry as to the contents of the ordinance. It is hardly possible that the plaintiff's representatives did not understand, in general, the conditions under which they were permitted to erect their poles. The use of these poles by the city under these circumstances for more than ten years without objection or claim of compensation, will hardly permit the enforcement of the plaintiff's alleged equitable right against the defendant. There is much in the case to support the defendant's argument that there has been laches. If the highest officers of the company were ignorant of the facts, its agents who were in charge of business of this kind knew all about them.

If the existence of the defendant's wires upon the plaintiff's poles were a technical invasion of the plaintiff's right, we are of opinion, upon the facts of this case, that the relief granted should not be an injunction against the continuance of the wires upon the poles, thus compelling the erection of new poles and the attachment of the wires to them. The master has found that this change could not be made without a large expenditure of money. Moreover, it would involve a crowding of the streets with poles, which the mayor and alderman have rightly been attempting to prevent. It appears that, at present, in one or two places, there are four or five poles in front of one house. The master finds that, if the change were made as the plaintiff desires, there would be at least two places where there would be four or five poles within a distance of 75 feet. It would be more equitable, if the plaintiff's right were established, that its relief should be by compensation in damages.

But for reasons already stated, the entry will be:

Bill dismissed.
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MAINE SUPREME JUDICIAL COURT.

AMERICAN ICE COMPANY

v. SOUTH GARDINER LUMBER COMPANY.

(— Me. —, 79 Atl. 6.)

Fire — sparks from stack — liability.

1. The owner of a smokestack is not liable for fire set by a spark from it unless he is shown to have failed to exercise ordinary care in the construction, maintenance, or operation of the plant, in view of the conditions of the surrounding property.

Same — approved plan — long use.

2. The owner of a lumber yard cannot be held negligent in the construction of a smokestack of a certain height without a spark arrester, so as to be liable for fire set by a spark from it, where the stack and furnace were constructed on approved plans, and, for a period of seventeen years, no live spark was known to have come from, or fire to have been set by, it, although it was surrounded by a large amount of highly inflammable material, and in the opinion of an expert, it should have been higher and had a spark arrester.

Evidence — admission of negligence — contradictory facts.

3. The opinion of the owner of a mill that there was danger of fire being set by the smokestack, expressed in a letter urging the owner of neighboring property to protect his roofs, is not of much probative weight upon the question of his negligence in maintaining the stack, as against the fact that the plant was constructed on approved plans, and, for a period of seventeen years, no live spark had been known to escape from the chimney nor any fire to be set by it.

(February, 1911.)

Note. — Liability for fire set by sparks from chimney.

This note does not include fires set by railroad locomotives.

As to negligence with respect to spark arresters on threshing machine and similar engines, see note to *Martin v. McCrary*, 1 L.R.A. (N.S.) 630.

The liability for fire set by sparks from a chimney is not absolute, but is founded upon negligence, and it seems to be the general rule that the owner of a chimney is not liable for a fire set by sparks from it, unless he is shown to have failed to exercise such ordinary care and caution as an ordinarily prudent man, with knowledge of the business and existing conditions, would have used under similar circumstances. *Planters' Warehouse & Compress Co. v. Taylor*, 64 Ark. 307, 42 S. W. 279; *Pueblo Light, Heat & P. Co. v. McGinley*, 5 Colo. App. 238, 38 Pac. 425 (*obiter*); *York v. Cleaves*, 97 Me. 413, 54 Atl. 915; *Hoyt v. Jeffers*, 30 Mich. 181; *Collins v. George*, 102 Va. 509, 40 S. E. 684.

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Kennebec County made during the trial of an action brought to recover damages for the destruction of property by fire alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff: Sustained.

The facts are stated in the opinion.

Messrs. Heath & Andrews and George W. Heselton, for defendant:

The defendants are not liable if they have exercised the care that a man of ordinary prudence would exercise under all the circumstances, if all the property to be affected was his own.

Houston & G. N. R. Co. v. Parker, 50 Tex. 330; Dallas Rapid Transit R. Co. v. Dunlap, 7 Tex. Civ. App. 471, 26 S. W. 877; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; Duthie v. Washburn, 87 Wis. 231, 58 N. W. 380; Madden v. Port Royal & W. C. R. Co. 41 S. C. 440, 19 S. E. 951; Briggs v. Taylor, 28 Vt. 180; Sullivan v. Scripture, 3 Allen, 564; Cooper v. Lee, 1 Tex. Civ. App. 9, 21 S. W. 998; Osborn v. Woodford Bros. 31 Kan. 290, 1 Pac. 548; Mason v. St. Louis Union Stock Yards Co. 60 Mo. App. 93; Howard County v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Chicago & A. R. Co. v. Scott, 42 Ill. 132; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Mechanics' Bank v. Merchants' Bank, 6 Met. 13; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Ennis v. Eden Mills Paper Co. 65 N. J. L. 577, 48 Atl. 610.

Messrs. Charles F. Johnson and W. C. Atkins for plaintiff.

Kling, J., delivered the opinion of the court:

Action on the case to recover damages for the destruction of property by fire al-

leged to have been caused by the defendant's negligence. Verdict for \$7,000. The case is before this court on motion and exceptions by defendant.

Motion. The plaintiff was the owner of an ice plant situated at South Gardiner, Maine, on the west side of the Kennebec river. The defendant owned a lumber mill and plant immediately adjoining the plaintiff's plant on the south, and in the operation of its mill maintained and used steam boilers and a smokestack for the escape of smoke and cinders from the fires under the boilers. It also maintained and operated a large "burner" for burning waste material. On the 22d of June, 1907, certain large ice houses and other property of the plaintiff's plant were destroyed by fire.

The plaintiff alleged in its declaration "that said burners and stacks were so negligently located, constructed, maintained, used, and guarded on said 22d of June last, and long prior thereto, that on said day hot cinders, sparks, and flame, negligently permitted by said defendant to escape therefrom, set fire to the shipping runs and houses of the plaintiff, and caused a total destruction thereof," etc.

It is apparent that the plaintiff at the trial practically abandoned its claim that the fire was caused by sparks from the "burner," presumably because of its location and the evidence as to the direction of the wind at the time of the fire. The jury found specially, in answer to questions submitted to them by the presiding justice, that the fire was caused by sparks or cinders from the defendant's smokestack, and that the defendant was negligent in the construction, maintenance, or operation of the stack connected with its boilers.

The fire started in or upon the "shipping run," so called. This was a long narrow, low structure with shingled gable roof, lap-boarded sides, and extended from the

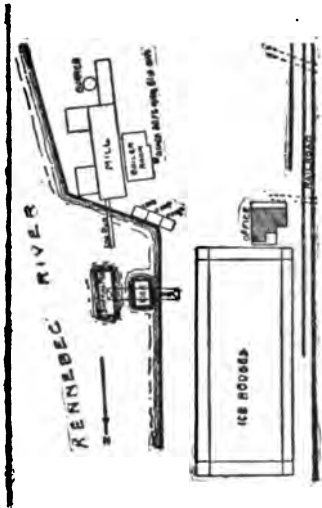
In Lawton v. Giles, 90 N. C. 374, however, applying the same rule as in cases of fires set by sparks from railroad locomotives, it was held that when a fire has been set by sparks from the smokestack of a mill, the burden of proving the use of proper care and diligence in exoneration devolves upon the owner or operator of the mill.

The question of negligence is ordinarily one for the jury, and when negligence is sufficiently shown, liability follows. Thus, in Carpenter v. Laswell, 23 Ky. L. Rep. 686, 63 S. W. 609, where there was evidence that plaintiff's house was burned on a dry day when the wind was blowing from defendant's smokestack directly over plaintiff's house, that defendant's spark arrester was not closed down over the top of the smokestack, that he was burning highly in-

flammable wood in his furnace, and that sparks and cinders habitually escaped from the smokestack when the spark arrester was not in place, the court said, in affirming a judgment for the plaintiff: "There is no doubt about the liability of a person for the consequence of a fire negligently started or controlled, and the question of negligence in this case is properly submitted to the jury."

And one guilty of actual negligence in using a steam dredge near buildings, whereby a fire is set by sparks from the smokestack thereof, is liable for such fire, although the dredge is constructed in the form generally adopted, is used for the purposes to which such dredges are generally applied, and is used and applied in the ordinary manner and with the usual guards and precautions adopted by persons using them. Hinds v. Barton, 25 N. Y. 544.

outer shipping pier nearly to the ice houses, and through which the ice passed from the houses to the vessels. The run was open at each end, and people were accustomed to pass and repass through it, going to and fro from the river to the town way and to the little railway waiting room situated not far distant from the southwest corner of the ice houses. It is 215 feet from the base of the stack to the point in or upon the run where the fire started. The stack is 80 feet high. The following sketch shows the relative situations of the plants and the location of the defendant's smokestack in relation to the shipping run and the other property of defendant:



Whether the fire started inside or outside of the run was an issue sharply contested at the trial. No one saw sparks in the air or upon the roof. The testimony of the witnesses, on the one side and the other, who were early at the fire, was con-

flicting upon this issue. If the fire started inside of the run, then manifestly no sparks or cinders from the smoke stack caused it; on the other hand, if the fire started on the roof of the run, the jury might properly have found that it was caused by sparks or cinders from the stack. The special finding of the jury shows that such was their conclusion.

In the brief of the learned counsel for the defendant it is said: "The defendant will not contend in this court that the finding that the fire was caused by sparks from the stack was so clearly and manifestly wrong as to authorize the law court to set it aside. . . . It rests so largely upon questions of credibility that, for the purposes of this hearing, it must be allowed to stand." But it is confidently contended on behalf of the defendant that the finding of the jury that it was negligent in the construction, maintenance, or operation of its smokestack connected with its boilers is so manifestly against the weight of the evidence as to require this court to order a new trial.

The principles of law applicable to the question of the defendant's negligence are not in controversy. They are too well settled to require the citation of authorities. The mere fact that the fire was caused by a spark or cinder from the defendant's stack is not alone sufficient to establish its liability. The defendant was not as insurer of the plaintiff's property. Its duty was to exercise ordinary care in the construction, maintenance, and operation of its plant to prevent injury to the plaintiff's property. And the question now presented is whether the evidence justifies the finding that it did not exercise ordinary care in the construction, maintenance, and operation of its smokestack. Ordinary care has been so frequently, recently, and explicitly defined by this court that no mis-

The owner of a sawmill may be found guilty of negligence rendering him liable for a fire set by sparks from the smokestack of the mill, where the smokestack was constantly emitting sparks, both before and after putting on a spark arrester which did not fit and was insufficient and did not answer the purposes for which it was intended, although there is testimony that it was a good one and one of the best that were made. *John Mouat Lumber Co. v. Wilmore*, 15 Colo. 136, 25 Pac. 556.

And the owner of a stationary sawmill located near wooden structures liable to take fire from sparks emitted from his smokestack may be found guilty of negligence rendering him liable for a fire set by sparks so emitted, if, knowing that sparks are often emitted, he fails to use a spark arrester to lessen the chances of fire, although 32 L.R.A. (N.S.)

spark arresters are not generally used or required on mills similarly constructed and using no artificial draft. *Webster v. Symes*, 109 Mich. 1, 66 N. W. 580.

But in *Collins v. George*, 102 Va. 509, 46 S. E. 684, it was held that the mere fact that the owner of a stationary steam sawmill in the country has not used a spark arrester on the smokestack of the engine thereof, to prevent it from emitting sparks, does not render him liable for a fire set by sparks therefrom, where he has used due care in other respects, and the use of spark arresters on sawmill engines is not customary in the locality and impedes the powers of engines, and no up-to-date, and what is considered properly equipped, sawmill engine is sold there with a spark arrester.

And the mere want of a spark arrester on

apprehension can exist as to its meaning. It is "such care as reasonable and prudent men use under like circumstances." *Caven v. Bodwell Granite Co.* 99 Me. 278, 59 Atl. 285. "Such care as persons of ordinary prudence would have exercised under like circumstances." *Sawyer v. J. M. Arnold Shoe Co.* 90 Me. 369, 38 Atl. 333. "Such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances." *Raymond v. Portland R. Co.* 100 Me. 529, 3 L.R.A.(N.S.) 94, 62 Atl. 602. In the case at bar ordinary care was defined to the jury as "such care as the ordinarily prudent man, mindful of himself and of the rights of others, would have exercised under the same conditions and circumstances,"—a definition fully in accord with the decisions of this court.

The plaintiff contended at the trial, and still contends, that the defendant failed to exercise ordinary care in respect to its smokestack in two particulars: First, that the stack was not high enough; and, sec-

ond, that it was not provided with a spark arrester on its top.

Fundamental to both of these propositions set up by the plaintiff is the inquiry as to the kind and character of the system used of which the smokestack was a part. That system and its working was thus described by Mr. A. R. Artz, an insurance inspector of nineteen years' experience in examining and inspecting steam lumber mills for insurance companies and rating the risks: "The front of the boiler has what is called a 'Dutch over;' that is really an extension of the grates of the boiler so as to give a larger burning space. Onto this the sawdust drops through holes in the top. Slabs are put in the doors in front. Here the refuse is burned. Back of this, under the boiler proper, is what is called a combustion chamber. Here the gases which are roasted out of the fuel are burned. About a third back from the front they have an arch across, which is an obstruction to this. The object of that is to confine the flames and heat underneath the box, so it don't escape too rapidly. This

a steam engine used in pressing hay is not, in point of law, such negligence as to render the owner thereof liable for a fire set by sparks therefrom. *Peers v. Elliott*, 21 Can. S. C. 19.

A railroad company may be found guilty of negligence rendering it liable for the destruction of an ice house alongside its tracks by fire set by sparks from a stove pipe in a switch house on the opposite side of the track, where such pipe was erected about opposite the center of the ice house, a long wooden building, and not more than 15 feet from it, and was not more than 8 feet long and ascended perpendicularly, without crook or elbow, from the top of a wood stove, and was not provided with any spark arrester. *Briggs v. New York C. & H. R. R. Co.* 72 N. Y. 26.

And the owner of a stationary sawmill of which the operation during a violent wind endangers wooden structures near which it is located, by emitting sparks from its smokestack, may be found guilty of negligence rendering him liable for a fire set by sparks so emitted, if he fails to shut down his mill until the violence of the wind has abated. *Webster v. Symes*, *supra*.

So, an owner of a sawmill is guilty of negligence rendering him liable for a fire set by sparks from his smokestack, during a high wind, if his furnace, flues, and smokestack are so constructed that they are liable in a strong wind to carry sparks and cinders for a considerable distance through the air. *York v. Cleaves*, 97 Me. 413, 54 Atl. 915.

And the owner of a traction engine is guilty of negligence rendering him liable for a fire set by the sparks from it, if he runs it along a highway past certain buildings, and stops it within about 20 feet of

them while taking water, without a hood or spark arrester on the smokestack. *McFarland v. Sayen*, 156 Mich. 426, 120 N. W. 794.

The owners of a brewery built in the populous part of a large and growing city are liable for a fire set by sparks from a chimney of the brewery, if they have failed to use ordinary care and diligence in the construction of their chimney, furnaces, and flues, or have been guilty of negligence in the management thereof with reference to the safety of adjoining premises and all other surrounding circumstances. *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322.

And in *Hoyt v. Jeffers*, 30 Mich. 181, it was held that the owner of a mill situated in the midst of a city with numerous wooden buildings in close proximity, who knows that his mill chimney frequently throws out sparks and burning material, and has sometimes set fire to surrounding property, is liable for a fire set by sparks from such chimney, if he fails to adopt the means shown by experience, in the progress of science and improvement, to be reasonably adequate, if not the most effectual, to avert danger, although such means may not have been previously used upon that particular kind of chimney.

In *Lawton v. Giles*, 90 N. C. 374, it was held that if a sawmill situated in the heart of a city frequently emits through its smokestack live sparks which, blown by the wind, fall on neighboring property in a condition likely to ignite, it is negligence to operate the mill without curing the defect which allows them to escape; and if the defect is irremediable, the mill should not be run at all, or, if run, the owners are responsible for consequences when a fire occurs as a result.

A. C. W.

also acts to make the fuel burn more completely. After it passes this arch, it goes under the rest of the boiler, then up somewhere about 4 feet, and then it passes back through the tubes of the boiler, around which is the water of the boiler to make the steam. Coming to the front of the boiler, it goes up the uptake into the smoke flue or breech. Now, this uptake is about 787 square inches, cross section, but the flue is 2,200 in size, cross section. The result is that when the smoke enters that large chamber, the velocity is checked just like steam out in the open air. It is checked and slows down, and that produces an eddy in the stream of smoke, which has a tendency to make the sparks settle and burn. Here it is somewhat different from the flues in the boiler. The stack, instead of going up directly in front of the boiler, is placed on a base outside, so the horizontal flue goes into that base and then up the stack, but this base is hollow, and a cross section is almost twice as large as the flue which enters into it. To be exact, it is practically three quarters in excess. When the smoke enters this chamber, the chamber being larger, the velocity is checked, and it slows down sparks or anything burning that goes in there. The velocity being checked, they slow down, and, being heavier than the air or smoke, they drop a little, and the result is that they get out of the direct current of the smoke and drop to the bottom of this chamber and burn up, and don't go up the stack at all."

It was not contended that the boilers and smokestack were not of an approved and standard pattern. They were installed in 1890 by the Bradstreet Lumber Company, of which company the defendant bought the property in 1895, and accordingly had been in use for seventeen years.

The burden was on the plaintiff to establish by a fair preponderance of the evidence that the defendant, in maintaining and using that smokestack at its height of 80 feet and without a spark arrester, was negligent; in other words, that an ordinarily prudent man under the same circumstances and conditions would not have so maintained and used it. We cannot here analyze in detail all the evidence which the plaintiff claims tends to sustain that burden, but it may be thus grouped and summarized: The information which the jury acquired from a view of the premises as they were at the time of the trial; the fact that the fire was caused by a spark from the stack, as found by the jury; the opinion of Mr. Toppan, called by the plaintiff as an expert; the falling of cinders and burned-out sparks all about the property, which came from the stack; and certain

acts and conduct of the defendant, and other facts and circumstances, tending to show its knowledge and appreciation of a danger that sparks from its stack might cause fire to plaintiff's property.

Information as to the relative situations of the properties, and of the size, height, and location of the stack, may have been quickly and readily acquired by the jury from a view of the premises, but we do not think the information so acquired can be more accurate and trustworthy than that relating to the same facts which can be acquired from the plans and surveys and the testimony in explanation thereof as disclosed in the record. There is no dispute as to the relative situations of the properties, or as to any of the measurements and distances disclosed in the record.

The fact that the fire was caused by a spark from the stack is a circumstance to be considered on the question of the defendant's negligence; but it really has but little probative force on that issue, which should be determined, and can only be rightly determined, with reference to the danger that was actually created by the operation of the stack prior to the fire, and the knowledge which the defendant had, or by the exercise of reasonable care would have had, of that danger.

Mr. Toppan, whose business is steam engineering, and who had examined the defendant's plant the day before he testified, gave his opinion that the stack was not high enough, and that it should have been provided with a spark arrester. He did not support his opinion by any comparison of the height of this stack with those used commonly at similar mills with like surroundings; nor did he state that spark arresters are commonly and usually used on smokestacks at steam mills similarly situated. He admitted that this stack more than satisfies the scientific rule by which the size or area of the stack is determined with relation to the area of all the boiler tubes and flues; but he claimed that the rule was not applicable to the question whether a smokestack is so constructed that it will not emit live sparks. In this particular he differs materially from Mr. Artz, the insurance inspector, called by the defendant as an expert. The latter claims that the rule which is well recognized among boiler makers, commissioners of boilers, and insurance men, is the test by which it can be determined if a smokestack will "spark;" that experience has shown that the modern steam plant, constructed according to the well-recognized rule as to the size and area of the stack compared with the areas of all the other

tubes and flues, does not emit live or burning sparks from its smokestack.

Mr. Artz testified that he had inspected the defendant's plant since 1896, "not a year and a half apart at any time," and that the construction of the plant was in accordance with, and well within, the recognized rule for the construction of such steam plants.

His opinion as to the sufficiency of the height of the stack, and the need of a spark arrester, is shown by the following excerpt from his testimony:

Q. From what you have observed and studied, would you expect that live sparks would be emitted from the top of that stack?

A. Not at all.

Q. Your duty in inspecting this plant from time to time from 1896 down was to recommend and require such construction there as would reduce the dangers of fire, was it not?

A. Yes, sir.

Q. Whether in your judgment as an insurance proposition there, and applying my question wholly to the property of the South Gardiner Lumber Company, any spark arrester was needed?

A. Not at all.

He also testified that the want of a spark arrester was never included as an element of risk in fixing the insurance rate, and that "we have never charged them 1 cent for danger from sparks." The fact that this witness had special experience in inspecting steam mills with reference to the danger and risk from fire, and had for so many years prior to this fire inspected and observed the defendant's plant, and his detailed explanation of its construction and operation, adds force and weight we think to his opinion.

But of more importance we think than all else, as bearing on the issue whether this defendant was negligent in using that smokestack, is the history of the use of it for seventeen years, and the knowledge the defendant had, or ought to have had, of its capacity in operation to emit sparks capable of setting fire or otherwise.

From a careful and painstaking examination of the evidence contained in the voluminous record in this case, we are unable to find any proof that during the seventeen years this stack was used prior to the fire involved in this case, a fire, large or small, was set from a spark or cinder that came from this stack. This is not a mere absence of evidence as to that point. The witnesses were inquired of in reference to it, and no witness testified that he ever saw or knew of a fire that was set from a spark or cinder that came from this stack.

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Charles W. Coss, called by the plaintiff, testified that he was superintendent of the ice plant from 1894 to 1897, and that while he was there a fire caught on the roof of the ice house and was put out. He was unable to state on what part of the roof the fire caught, or when it was, or even that the mill was in operation at the time. That testimony certainly does not show that a spark from this stack caused that fire. To appreciate fully the weight that should be given to this fact, that during the constant use of this stack through all of that period no fire is known to have been communicated by a spark from it, it must be borne in mind that all about the stack and in the mill yard there was material of a highly inflammable character, —chips, sawdust, shavings, and lumber dried and drying. It is also abundantly proved that during all this time cinders, charred sawdust, and shavings fell all over the property upon the chips, the shavings, the lumber, the roofs of the buildings, and upon the canvas and rigging of the vessels at the piers, and yet no fire had been known to start from a spark that came from the stack.

James W. Parker, the largest stockholder and president of the defendant company, testified that he had been connected with the company since May 1, 1896, and that during the first four or five years he spent the greater part of his time at the mill when it was running, and since then, and until the last season, he had visited the mill as often as once a week; that he knew of the inspections of the plant made by Mr. Artz, and that the property was also inspected for other insurance companies; that he had made a personal study of the property with reference to the risks of fires, and had observed the smokestack when the mill was operating, both by day and by night, and that he never saw a live spark come from the top of the stack, and never knew or heard of a fire being started by a spark from the stack. Mr. Longfellow, treasurer of defendant company, who had been connected with the plant since 1877, testified that he never had any knowledge, either from personal observation or from reports made to him, that a fire had ever started from a spark from the stack.

What more could a man have to justify him in believing that this smokestack was suitable and safe to use, so far as any risk that sparks would come from it and cause fires to adjoining property is concerned, than the fact that it had been in constant use for seventeen years and no fire had ever started from it? Would an ordinarily prudent man require any other test of its safety? In *Laffin v. Buffalo & S. W. R.*

Co. 106 N. Y. 141, 60 Am. Rep. 433, 12 N. E. 601, it is well said: "No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

To hold that the defendant in the use of its smokestack, with knowledge that for seventeen years it had been in constant use and no fire had been known to originate from sparks coming from it, was negligent,—did what the ordinarily prudent person under the same circumstances would not have done,—requires stronger evidence, we think, than the opinion of an expert that the stack should have been higher and had a spark arrester on its top.

But the plaintiff claims that there is evidence in the case which shows that the defendant knew and appreciated that there was a danger of fire from the stack, notwithstanding the history of its use with immunity from fire.

Mr. Ballard, general manager of the plaintiff company, testified that in 1894 he had a conversation with Mr. Parker, the defendant's president, in which he told Mr. Parker that he had great fears that his company would burn the ice houses down, and that "I wished that he would put a spark arrester on the smokestack." With reference to whether Mr. Parker made any reply to that, he said: "Not any. He talked about renting the property, the shore." Mr. Parker denies that anything was said in the conversation as to a spark arrester on the stack.

May 22, 1905, Mr. Longfellow wrote Mr. Ballard as follows:

Dear Sir:—

We very kindly call your attention to the Great Falls property here at South Gardiner, joining our lot. You are aware that we are running our refuse burner, consequently there is great danger from the sparks coming from it catching on the roofs. We have had our mill roof afire two or three times, and the small rigging shed on our premises caught twice in one day, the shingles being old and dry. Now is not there the same danger with the roof of the ice building? We are covering all of our roofs with rubberoid at quite an expense. We would suggest that you look into the matter in the very near future, and ascertain if anything can be done to make the danger less.

To this letter Mr. Ballard replied, declining to act according to the suggestion, and 32 L.R.A. (N.S.)

stating, in substance, that the defendant was required to so use its property as not to endanger the plaintiff's from fire, and that the plaintiff would hold the defendant responsible for any damage that might occur from such cause. To this Mr. Longfellow replied: "We were a little surprised at your reply to our letter relative to fire risk at the mill. We thought you understood the conditions, or we should have been more explicit. There is no more danger of fire being set by our burner than by our smokestack, or by the chimney of the pulp mill. It is all with the covering of the surrounding buildings. Our mill buildings have cedar shingles, and have not been reshingled for some time. The shingles are curled, and become somewhat decayed, which creates the risk. We have been removing them, placing on iron on the main mill and rubberoid on the other buildings. We very kindly called your attention to this, thinking it possible that you would want to look after the shingles on the roof of the ice buildings. We were hardly prepared for such a letter. It is certainly a poor return for a neighborly kindness. We have a great deal more property here than the American Ice Company, and are making every effort to protect it, and in protecting it, we have been to considerable expense in furnishing hose, very much more than would be required if it was not for your ice building. . . . We would be very much pleased if you would come here and look the situation over. We think you would be convinced that we were not maintaining a fire trap at the expense of our neighbors. Our refuse burner has been in use for twenty-five years, is now in as good condition as when first built, and there is no more danger of fire from it."

The plaintiff argues that these letters written by Mr. Longfellow in 1905 show that he at that time was of opinion that there was danger of fire from the smokestack. We do not understand what the writer of the letter meant by the words used: "There is no more danger of fire being set by our burner than by our smokestack, or by the chimney of the pulp mill." It is not the statement, of a truth, for there is no controversy but that the burner did emit sparks that caused fires about it, and upon the roofs of the mill and buildings; and it appears from the evidence, as we have noted above, that no one had ever known of a fire being set from a spark from the smokestack. The pulp mill was situated further south on the river. If it was the opinion of Mr. Longfellow when he wrote that letter that there was as much danger of fire from the smokestack as from the burner, that opinion could not

have been founded in fact, for it is plainly contrary to the fact; and we do not think the expression of such an opinion, if it can be so considered, in the letter, should have much probative weight upon the question of whether it was negligence for the defendant to use the smokestack which seventeen years of use had shown to be safe and suitable, and from which during all that use no spark had been emitted that caused a fire, so far as was known.

After a painstaking consideration of all the evidence in this case, the court is constrained to hold that the finding of the jury that the defendant was not in the exercise of ordinary care in the maintenance and use of its smokestack is so manifestly contrary to the weight of the evidence that a new trial must be granted.

Motion sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY MILTON

v.

LUTHER W. PUFFER et al., Admr., etc.
of Aivin D. Puffer, Deceased.

(207 Mass. 416, 93 N. E. 634.)

Trespass — continuance — successor in title — right of action.

1. The maintenance of the portion of the foundation wall of the building, which had without right been projected over the bound-

Note. — Projection of building or other structure over the boundary as a continuing trespass or nuisance.

As to whether an adjudication respecting the abatement of a nuisance bars an action for damages therefor, see note to *Gilbert v. Boak Fish Co.* 58 L.R.A. 735.

The words "continuous nuisance" or "trespass" are not always used in the same sense. In *Augusta v. Lombard*, 101 Ga. 724, 28 S. E. 994, and other cases, they are spoken of as if synonymous with permanent nuisance or trespass. But for the purpose of this note they will be treated as synonymous with successive nuisance or trespass, as was done in *MILTON v. PUFFER*. Adopting such definition, it may be said that, by the weight of authority, the projection of a building or other structure over the land of another is a continuous nuisance or trespass. Being a continuous trespass or nuisance, it follows, *inter alia*, that successive actions at law can be brought to recover damages, and that the recovery of damages in one action is not a bar to a later action to recover subsequently accruing damages, and that equity, in a proper case, will lend its aid in order to avoid a multiplicity of suits.

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ary line into the soil of the adjoining owner, is a continuing trespass or nuisance and for the injury inflicted by it upon him, one succeeding to the title of the adjoining property may maintain an action against the wrongdoer.

Evidence — burden of proof — defense — license.

2. The burden of showing a license from a former owner is upon one sued for maintaining a portion of the foundation wall of his building, which was projected into the soil of the adjoining property owner, to enable him to avoid liability for the continuing trespass upon that ground.

(January 5, 1911.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for the alleged maintenance of a nuisance by defendants' intestate upon plaintiff's land, which resulted in a verdict for defendants. Sustained.

The facts are stated in the opinion.

Mr. Charles F. Smith, for plaintiff:

The same rule of law applies to projections into another's land below the surface as to those above.

Codman v. Evans, 5 Allen, 308, 81 Am. Dec. 748; *Miles v. Worcester*, 154 Mass. 511, 13 L.R.A. 841, 26 Am. St. Rep. 264, 28 N. E. 676; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623.

The continuance of a nuisance is a new nuisance, entitling successive owners of the

Thus, in *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 448, 133 Am. St. Rep. 307, 89 N. E. 534, the court issued a mandatory injunction to compel a landowner to remove a foundation of a building which he had wilfully and knowingly extended over onto the land of an adjacent owner, although the superstructure was wholly on his own land, saying: "This building, as it stands, is a continuing trespass, and successive actions at law can be brought."

In *Crocker v. Manhattan L. Ins. Co.* 61 App. Div. 226, 70 N. Y. Supp. 492, the lower part of the walls of a building was wholly on its owner's land, but the upper part overhung the land of another. In an equitable action by the latter to have the projecting portion removed, the court, after stating that ejectment would not lie, since no judgment could put plaintiff in possession of his property above the surface of the ground, said: "It seems to be conceded, however, and such is the law, that he might maintain an action at law to recover damage for the trespass, and would have a continuing right to maintain such action so long as the trespass continued."

In *Cumberland Teleph. & Teleg. Co. v. Barnes*, 30 Ky. L. Rep. 1290, 101 S. W. 301, where a telephone company so erected a

estate who suffer from the continuance to maintain an action therefor.

Westbourne v. Mordant, Cro. Eliz. pt. 1, p. 191; *Beswick v. Cunden*, Cro. Eliz. pt. 1, p. 402; *Staple v. Spring*, 10 Mass. 72; *Sherman v. Fall River Iron Works Co.* 2 Allen, 524, 79 Am. Dec. 799; *Prentiss v. Wood*, 132 Mass. 486; *New Salem v. Eagle Mill Co.* 138 Mass. 8; *Wells v. New Haven & N. Co.* 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724.

The defendants' intestate, having erected the nuisance in the case at bar, was liable to the plaintiff for its continuance after plaintiff acquired her title, even if plaintiff had not notified him to remove the nuisance.

Leahan v. Cochran, 178 Mass. 586, 53 L.R.A. 891, 86 Am. St. Rep. 506, 60 N. E.

telephone pole that its cross-arms and wires projected over the land of another, and its guy wires stretched across a corner of his land, it was held that a mandatory injunction would issue to compel their removal. The court said: "It was intended to be a continuous trespass upon his premises, and was that character of wrong for which adequate recompense might not be obtained in an action for damages."

Where a house is so built that its walls and eaves are on the land of another, equity will enjoin its continuance, since redress at law would require a multiplicity of suits. *Hahl v. Sugo*, 46 App. Div. 632, 61 N. Y. Supp. 770, reversed on point of practice in 169 N. Y. 109, 61 L.R.A. 226, 88 Am. St. Rep. 539, 62 N. E. 135.

In *Hahl v. Sugo*, 46 App. Div. 632, 61 N. Y. Supp. 770, the court said: "The defendant, by the erection of a house with its wall on the land of the plaintiffs, and by maintaining the eaves of her house over and upon the land of the plaintiffs, is continuing to perpetuate a wrong to the plaintiffs. To redress that wrong would require a multiplicity of actions. To avoid a multiplicity of actions, equity takes jurisdiction. If an action of trespass was brought, the plaintiff could only maintain damages for injuries sustained up to the time of the bringing of that action."

It was held in *Bischof v. Merchants' Nat. Bank*, 75 Neb. 838, 5 L.R.A. (N.S.) 486, 106 N. W. 996, that two ornamental pillars in front of the door of a bank building, extending into the street nearly 3 feet, in violation of positive law, but which could be removed without material injury to the building, did not constitute a permanent nuisance; and hence, as an adjoining property owner whose building was rendered less conspicuous and valuable could not recover all the damages in one action at law, and successive actions would be necessary, equity will order the nuisance to be abated.

In *Holmes v. Wilson*, 10 Ad. & El. 503, it was held that trespass is the proper remedy for wrongfully continuing a building on plaintiff's land, for the erection of which

382; *Eastman v. Amosreag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201.

Messrs. I. R. Clark and G. F. Ordway, for defendants:

The projection may have been placed in position by an independent contractor who erected the building in question, in which case defendant was not liable.

Pye v. Faxon, 156 Mass. 471, 31 N. E. 640.

Morton, J., delivered the opinion of the court:

The plaintiff and the defendants' intestate, whom we shall speak of as the defendant, owned adjoining estates on Irving street, in Boston. On the premises of the defendant was a brick building which he had erected after he acquired title in 1896,

plaintiff has already recovered compensation; and that a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection; and therefore, where the trustees of a turnpike road which ran along the top of an embankment, and was supported by a wall, built buttresses further to support it, which extended onto the land of another, who sued the trustees and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held that, after notice to defendants to remove the buttresses, and a refusal to do so, the owner of the land encroached upon might bring another action of trespass against the trustees for keeping and continuing the buttresses on the land, to which the former recovery was no bar.

The mere continuance of a wall wrongfully erected on another's land constitutes a trespass for which an action lies, even after a former judgment in damages for erecting and maintaining such wall up to the time of the former suit. *Russell v. Brown*, 63 Me. 203.

In *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748, where the owner of land had, in a former action, recovered damages against an adjoining landowner for erecting a bay window so as to project over his land, he was allowed to recover, in a subsequent action, damages for a continuance of the same injury. The question, however, whether the former recovery would not include future as well as past injuries was not raised nor discussed.

In *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475, the court held that the owner of land overhung by the eaves of a building belonging to an adjacent landowner had a remedy in equity to have the nuisance abated, saying: "The continued invasion of complainant's rights of property by the maintenance of the projection of the cornice over her north line, constituting a permanent injury to and depreciation of her property, addresses itself to and calls in exercise the equitable jurisdiction of the court."

the face of the southerly wall of which coincided with the dividing line between the two estates. The plaintiff acquired title in 1905, and immediately began the erection of a brick building according to plans which contemplated that the northerly foundation and wall should be up to and flush with the northerly line of her land and the dividing line between the two estates. In excavating for the foundations, the plaintiff found that all along the divid-

ing line the foundation stones of the defendant's building projected irregularly into her land from 10 to 12 inches, and interfered materially with the construction of her building. Thereupon she complained to the defendant, and after a delay which inflicted upon her, as the plaintiff contended, a substantial loss, the defendant caused the stones to be cut off up to the dividing line, except for a distance of 12 or 14 feet near the front of the two estates, where the

In *McGann v. Hamilton*, 53 Conn. 69, 19 Atl. 376, which was an action for damages for the encroachment of a wall on the land of the plaintiff, the court held the following instruction to be erroneous: "Whenever by one act a permanent injury is done to the property of another, the damages should be assessed once for all, and any depreciation in the value of the property on account of such trespass is an element of damages." The court said: "The rule here given is applicable to a case where the damage consists in an injury to the property itself whereby its value is lessened; but it is hardly applicable to a case where the damage consists solely in depriving the owner of the use of it for the time being. If it is, then the legal effect of it is this,—that when one erects a building or other permanent structure upon the land of another, and the owner sues and recovers damages, the result is that the title to the land thus taken vests in the wrongdoer. The true rule we understand to be, that where real estate is encroached upon, as is claimed in this case, the plaintiff will recover not the full value of the land, but the damages he sustains in being deprived of its use; and such damage will be limited to past time."

In *Goldschmid v. New York*, 14 App. Div. 136, 43 N. Y. Supp. 447, it was held that where a city, in building an approach to a bridge, had encroached upon a neighboring lot with its retaining wall, the rule of damages is the difference between the value of the property before the trespass was committed and afterwards, since the encroachment was practically a permanent one. This case would necessarily imply that the trespass was permanent, and would have to be compensated in one suit, and that repeated suits could not be brought, since the measure of damages was held to be the difference between the value of the property before and after the trespass was committed. It should be noted, however, that a public work was involved, and not a mere trespass by an individual, and that the city would have had a right to condemn the land by eminent domain proceedings. The rule here followed would be proper in the case of railroads and other public service corporations who encroach on the land of others. Compare in this connection *Atchison, T. & S. F. R. Co. v. Jones*, 110 Ill. App. 626, in which it was held that although a railroad, its works, and improvements, built according to the methods of good railroad construction, cannot be treated as a continu-

ing nuisance for which successive recoveries may be had, yet the doctrine as to entirety of recovery in one action, where the cause of injury is a permanent kind, is limited to the case of a railroad built under authority of law and in a reasonable, proper, and skilful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road, and does not apply where the injury is caused by negligent construction which can be remedied.

In *Langfeldt v. McGrath*, 33 Ill. App. 158, the owner of land brought an action on the case against an adjoining owner whose wall overhung plaintiff's land. The defense was that the injury was permanent and that the action was barred by the five-year statute of limitation. It was held that the action was maintainable, but that there could be no recovery for permanent injury, and that damages must be limited to the value at the time of commencing suit. The court said: "There appears to be a distinction between injuries permanent in their nature, which are authorized by law, and those which are wrongful and without legal sanction. The doctrine of entirety of recovery in one action for injuries of a permanent kind is limited to cases where the damage is caused by public improvements under authority of law, the construction thereof being done in a reasonably proper and skilful manner, so as to avoid all unnecessary loss and injury. *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279. But when the improvement, such as a bridge, has been imperfectly built, and there has been negligence in the mode of its construction, the party whose property is damaged is not bound to assume that the structure will be a permanent one. To indulge in such assumption would be to take it for granted that the party building, having done a wrong, intended to continue in such wrongdoing. *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239. An act which the law allows, if done in a proper manner, cannot be considered a nuisance (*Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460), although damages may be recovered therefor, as in the common case of permanent injury by the operation of railroads, to premises adjoining their right of way; but an act committed in defiance of law, which naturally and necessarily injures the property of another, as in the case at bar, is a nuisance." R. A. E.

building inspector of the city of Boston refused to allow it to be done, on the ground that, owing to the peculiar nature of the foundation of the defendant's building at that point, it would tend, if done, to weaken the wall of the defendant's building. In consequence thereof the plaintiff was subjected, as she alleges, to additional expense in the erection of her building, which she seeks to recover in this action, with other expenses and damages alleged to have been caused by the projection of the stones into her land and the maintenance of them there. At the conclusion of the plaintiff's evidence, the presiding judge ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant. The case is here upon exceptions by the plaintiff to this ruling and direction. We think that the ruling and direction were wrong.

Projecting the stones into the adjoining land without a right or license from the owner to do so was a wrongful act on the part of the defendant, and the maintenance of them in the position in which they were so placed constituted a continuing trespass or nuisance. *Smith v. Smith*, 110 Mass. 302, 304.

The plaintiff cannot maintain an action against the defendant for the original trespass, since she was not in possession at the time that it was committed. The plaintiff, however, does not seek to recover for that. But the maintenance of the stones in the places where they were originally put constituted successive or continuing trespasses or nuisances, and anyone injured thereby could maintain an action therefor. *Pren-tiss v. Wood*, 132 Mass. 486, 488; *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 448, 452, 133 Am. St. Rep. 307, 89 N. E. 534. That is the cause of the action set out in the declaration. If the defendant relied on a right or license obtained from the former owner of the premises belonging to the plaintiff, the burden was on him to show that he had such right or license. *McLeod v. Jones*, 105 Mass. 403, 407, 7 Am. Rep. 539; *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998.

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

M. STEINERT & SONS COMPANY

v.

GEORGE F. TAGEN et al.

(207 Mass. 394, 93 N. E. 584.)

Injunction — strike — bearing placards.
Injunction will lie against the bearing of 32 L.R.A. (N.S.)

a placard through the streets announcing the pendency of a strike against a business man long after the strike has ended by the installation of a new set of employees and the old ones finding other employment, since the only object of it must be to injure the one against whom the strike was declared.

(January 4, 1911.)

Note. — Injunction against publishing or circulating statements relative to industrial disputes by labor union.

The constitutional right of an individual freely to express his sentiments upon any subject is as much entitled to the protection of the court as any other constitutional right. And courts cannot lawfully place restrictions thereon by injunctive process, since the abuse of the right can be redressed only in civil or criminal prosecutions for libel and slander. By the weight of authority, however, courts are not impairing or infringing this right of free speech by enjoining publications which are incidental to or in aid of an unlawful conspiracy to injure the business of another.

Thus, if a libelous publication is in pursuance of a conspiracy to destroy or injure the business of another, and there is no adequate remedy at law for such injury, and irreparable damage is being inflicted, the fact that the publication is libelous is but an incident. The jurisdiction of equity to give relief rests upon the clear right to equitable interposition to restrain the conspiracy to do irreparable injury to the business of another. *National L. Ins. Co. v. Myers*, 140 Ill. App. 392.

A publication by a labor union of statements libelous to the business of a third person with whom it is engaged in an industrial war, if made for the malicious purpose of injuring the business of such person, or as an incident of or aid in an unlawful strike or boycott, by the weight of authority, may be restrained by a court of equity, where no adequate remedy at law exists for the injury occasioned, and irreparable damage is being caused thereby. *Gompers v. Buck's Stove & Range Co.* 221 U. S. —, 55 L. ed. —, 31 Sup. Ct. Rep. 492; *Casey v. Cincinnati Typographical Union No. 3*, 12 L.R.A. 193, 45 Fed. 135; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Loewe v. California State Federation*, 139 Fed. 71; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor*, 158 Fed. 809; *Brown v. Jacobs' Pharmacy*, 115 Ga. 431, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 424, 14 L.R.A. (N.S.) 1018, 83 N. E. 940, 13 A. & E. Ann. Cas. 54; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 527, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13;

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of a suit to restrain certain acts of defendants which were alleged to unlawfully interfere with plaintiff's business. Decree for plaintiff.

Plaintiff is a corporation engaged in dealing in and moving pianos, with places of business in Boston and other cities. Defendants are members of a local labor union of piano movers, connected with a larger body called the International Brotherhood of Teamsters. On May 2, 1910, in accordance with a vote of the union a number of teamsters employed by plaintiff struck for higher wages and shorter hours, but the strike was not successful. Nearly five months after the termination of the strike,

defendants caused a wagon to be driven through the streets bearing the inscription:

"The union teamsters are on strike for hours and wages at the following places:

"Hunter & Ross, Haymarket place.

"M. Steinert & Sons Company, 162 Boylston St."

On the rear of the wagon was the following inscription:

"I. B. of T.

A. F. of L."

This wagon was driven past the plaintiff's place of business once every day, and down the side street in the rear in sight of the place where plaintiff's new employees congregated while awaiting orders. It also went generally throughout the city.

Further facts appear in the opinion.

George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 72 N. J. Eq. 653, 66 Atl. 953, affirmed in — N. J. —, 79 Atl. 262. Brace Bros. v. Evans, 5 Pa. Co. Ct. 163. But see Marx & H. Jeans Clothing Co. v. Watson and Richter Bros. v. Journeymen Tailors' Union, *infra*.

In *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803, in considering the question whether the right of free speech was infringed by enjoining the exercise thereof for the purpose of aiding and carrying out an illegal conspiracy to boycott railroads by refusing to handle pullman cars, Judge Taft said: "It would be strange indeed if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand."

The question squarely arose in *Gompers v. Buck's Stove & Range Co.* 33 App. D. C. 516, in a proceeding against certain members of the American Federation of Labor, for the publication of the name of a person against whom or with whom the Federation of Labor was engaged in an industrial strike, as unfair to union labor. On the theory that such a publication was in aid of an unlawful boycott and for the purpose of furthering the same, the power of the court to issue the injunction to restrain the publication was sustained.

And see also *American Federation of Labor v. Buck's Stove & Range Co.* ante, 748, wherein the defendants in the preceding case were held guilty of contempt, on the theory that an agreement between the members of the association itself not to patronize one with whom the association was engaged in an industrial strike amounted to an unlawful boycott, and hence any pub-

lication of the name of such person as being unfair to labor, for the purpose of inducing the members not to patronize him, was unlawful and in violation of the injunction issued, and hence amounted to criminal contempt. The soundness of the doctrine of the court that an agreement among the members of the association not to patronize an employer of labor with whom the association is involved in an industrial strike is an unlawful conspiracy may be doubted. That question, however, is not under discussion here. See note to foregoing case; also note to *Hey v. Wilson*, 16 L.R.A.(N.S.) 85; and note to *Lindsay & Co. v. Montana Federation of Labor*, 18 L.R.A.(N.S.) 707; also note to *Purvis v. Local No. 500, U. B. C. & J.* 12 L.R.A.(N.S.) 643, for a discussion of the question of when, if at all, a boycott is lawful. And compare with *Casey v. Cincinnati Typographical Union*; *Wilson v. Hey*; *Gray v. Building & Trade's Council*; and *New York cases*,—*infra*.

This contempt case was reversed on appeal to the United States Supreme Court, on the ground that the contempt proceedings were in character civil, and hence it was error to treat them as criminal in rendering judgment. *Gompers v. Buck's Stove & Range Co.* 221 U. S. —, 55 L. ed. —, 31 Sup. Ct. Rep. 492. In this case it is asserted that where a publication and use of letters, circulars, and printed matter constitute a means whereby a boycott is unlawfully continued, such use may be enjoined, and by so doing the constitutional right of free speech is not abridged.

Although the point was not considered in *Casey v. Cincinnati Typographical Union* No. 3, 12 L.R.A. 193, 45 Fed. 135, the court, nevertheless, enjoined a boycott enforced by means of circulars threatening loss of patronage to any who should patronize a newspaper then engaged in an industrial dispute with a labor organization, the injunction being granted upon the theory that the facts complained of amounted to a technical boycott. The court, however, conceded that the newspaper company having declared they would not employ any member of a labor

Messrs. Hudson & Nichols, for plaintiff:

One who intentionally and without justifiable cause issues false statements not necessarily defamatory, but calculated to injure another in his business, is liable in an action of tort, if the injury actually occurs.

Keeble v. Hickeringill, 11 East, 574, note, 11 Revised Rep. 273, note; **Tarleton v. M'Gawley, Peake**, N. P. Cas. 205, 3 Revised Rep. 689; **Carew v. Rutherford**, 106 Mass. 1, 8 Am. Rep. 287; **Skinner v. Shew** [1893] 1 Ch. 413; **Mogul S. S. Co. v. McGregor**, L. R. 23 Q. B. Div. 598; **Kelly v. Partington**, 5 Barn. & Ad. 645; **Morasse v. Brochu**, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74; **Walker v. Cronin**, 107 Mass. 555; **Tasker v. Stanley**,

153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417, **Hartnett v. Plumbers' Supply Asso.** 100 Mass. 229, 38 L.R.A. 194, 47 N. E. 1002; **May v. Wood**, 172 Mass. 11, 51 N. E. 191; **Plant v. Woods**, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; **Moran v. Dunphy**, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; **Martell v. White**, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; **Berry v. Donovan**, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738; **Nolin v. Pearson**, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658; **Multer v. Knibbs**, 193 Mass. 556, 9 L.R.A. (N.S.) 322, 79 N. E. 762, 9 A. & E. Ann. Cas. 958; **Davis v. New Eng-**

union, the union had the right to say that its members would not patronize the newspaper company.

In **Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor**, 156 Fed. 809, the court, in restraining what was held to be an illegal boycott, also restrained the use of circulars and notices to aid therein, on the ground that it amounted to unlawful coercion to address circulars and notices to the public not to patronize the employer with whom the labor union was having a dispute, and to laborers not to disgrace their sex by accepting employment with such employer, who was characterized a legalized highwayman, although but one of the circulars contained an express threat, which was a notice that such business man as might patronize the employer in question would thereby forfeit the right to the patronage of members of the labor union. The court said that while the right of free speech and to print and publish what one pleases is guaranteed by the Constitution, yet there is also a guaranty of the right of an individual to carry on a lawful business in a lawful way, and every constitutional guaranty is subject to the limitation that a man pursuing a business or enjoying his rights shall always be bound by the restraints of law.

In **Brown v. Jacobs' Pharmacy Co.** 115 Ga. 431, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553, members of a retail druggist association found guilty of a conspiracy to boycott another dealer were restrained from sending or delivering, in aid of such boycott, letters to wholesale druggists and proprietors of patent medicines, thereby seeking to induce such parties to sign an agreement not to sell goods to such retail druggist, who was not a member of their association.

It is not lawful for strikers, former employees of a retail merchant, to station pickets in front of his place of business, carrying placards or banners bearing the false statement: "Unfair firm; reduced wages 50 c. per day. Please don't patronize;" and such conduct will be enjoined. But an injunction goes too far which prevents 32 L.R.A. (N.S.)

such employees or strikers from at any time or place expressing an opinion of the plaintiff or his business, which, at the most, would be only a slander. **Goldberg, B. & Co. v. Stablemen's Union Local No. 8760**, 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 A. & E. Ann. Cas. 1219.

A constitutional provision of California which guarantees every person the right freely to speak, write, and publish his sentiments on all subjects, etc., does not authorize striking employees of a restaurant and their friends to congregate in front of the restaurant, carrying banners and placards, and interfering with the business of the restaurant by intimidating, insulting, or threatening, the patrons. **Jordahl v. Hayda**, 1 Cal. App. 696, 82 Pac. 1079. On the question under consideration, the court said: "While the right of free speech is guaranteed to all citizens by the Constitution, there is also guaranteed to them by the same Constitution the right of 'acquiring, possessing, and protecting property, and possessing and obtaining safety and happiness,' . . . and it is a maxim of jurisprudence prescribed by the statute law of this state, that 'one must so use his rights as not to infringe upon the rights of another.' . . . These guaranties are equally important to and equally necessary for the protection of all classes of citizens."

The right of free speech is not unlawfully restricted by enjoining a labor union from publishing circulars and placards containing the false statement that a strike is now on at the plaintiff's works against cheap labor and the sweating system, such publication being injurious to the business of the plaintiff. **Collard v. Marshall** [1892] 1 Ch. 571, 61 L. J. Ch. N. S. 268, 66 L. T. N. S. 248, 40 Week. Rep. 473.

Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307, holds that the act of displaying banners and devices as a means of intimidation, to prevent persons from entering into or continuing in the employment of another, is injurious to the latter, illegal at common law and by stat-

land R. Pub. Co. 203 Mass. 470, 25 L.R.A. (N. S.) 1024, 133 Am. St. Rep. 318, 89 N. E. 565.

In an action on the case for malicious interference with business by acts not in themselves wrongful, by malice is meant an intention to do an act to the detriment of another, without just cause or excuse.

Skinner v. Shew [1893] 1 Ch. 413; *Aikens v. Wisconsin*, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; *McGurk v. Cronenwett*, 199 Mass. 457, 19 L.R.A. (N.S.) 561, 85 N. E. 576.

When an injury to business of the kind in question is a continuing and in a sense irreparable one, a case for equitable relief is presented.

Sherry v. Perkins, 147 Mass. 212, 9 Am.

ute, and will be restrained. The court said: "The wrong is not, as argued by defendant's counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against."

In *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 14 L.R.A. (N.S.) 1013, 83 N. E. 940, 13 A. & E. Ann. Cas. 54, while the specific question here under consideration was not discussed by the court, a labor organization was restrained from sending any circulars or other communication to customers or other persons for the purpose of dissuading such persons from having business dealings with an employer engaged in an industrial dispute with his former employees, who were members of such labor union.

The publication or circulation of notices, in substance, that certain beer was unfair, and an appeal to organized labor and its friends not to drink scab beer, was held to be coercive, and hence unlawful, in *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011. These notices were held unlawful coercion although they contained no threat of any kind. The court, while conceding that there was not anything apparently coercive at first sight in these notices, reasoned "it is simply calling attention to the fact that these parties are using this beer; but what is the design of it, and what is the result of it? Why, it is to intimidate these people, or prevent them from dealing in complainant's beer. That far it is op-

St. Rep. 689, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; *Davis v. New England R. Pub. Co.* 203 Mass. 470, 25 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 318, 89 N. E. 565; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A. (N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 A. & E. Ann. Cas. 332; *Slater v. Gunn*, 170 Mass. 509, 41 L.R.A. 268, 49 N. E. 1017; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275,

pressive of the business of complainant, and tends to destroy its business. There is no question about that in so far as it would intimidate these people. It must be remembered that there are many timid people in this world, who would be much influenced by danger of even small losses. I have no doubt that many of these men who have this notice would fear that by continuing to engage in the selling of the beer, there would be some loss to them, and that far it would hurt their business. Here is another one: 'Organized Labor and Friends: Don't drink scab beer!' Then it names certain different kinds of beer and says they are 'unfair.' The mere use of the word 'unfair' has a very distinct meaning in these days; and when a notice like this is put out, it is almost in the nature of a command. Of course, it does not say to the laboring people, 'You shall not drink' such beer; but it says: 'To Organized Labor and Friends: Don't use this beer!' These organizations, in the way they are trained, for they are as well trained as any military force, understand these rules and know what they mean. The very use of that term 'unfair' has a distinct meaning to them, and it is in the nature of a direction to the members of these organizations not to use that beer, and it is also an intimidation to those who are dealing in it. It gives them to understand that that beer will be boycotted; that it is unfair, and will be boycotted. That would deter parties from using it or dealing in it. There are a number of that kind. Here is another one: 'Guard Your Health by Refusing to Drink Unfair Beer!' Then it proceeds to name the beer that is unfair, and it includes among others the beer of the complainant. All those things are what would be termed now under the law 'a boycott.' I need not go into the definition of that. We generally understand what it means. But those things tend to unfairly obstruct the business of the complainant, and in that far these defendants are wrong, and it is the duty of the court to restrain them from doing anything that will interfere with the complainant's business."

58 N. E. 689; O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700; Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co. 13 Blatchf. 375, Fed. Cas. No. 2,543; Emack v. Kane, 34 Fed. 46; Lewin v. Welsbach Light Co. 81 Fed. 904; A. B. Farquhar Co. v. National Harrow Co. 49 L.R.A. 755, 42 C. C. A. 600, 102 Fed. 714; Adriance, P. & Co. v. National Harrow Co. 58 C. C. A. 163, 121 Fed. 827; Dittgen v. Racine Paper Goods Co. 164 Fed. 85; Monson v. Tussaude [1894] 1 Q. B. 671, 63 L. J. Q. B. N. S. 454, 9 Reports, 177, 70 L. T. N. S. 335, 58 J. P. 524; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 37 L. J. Ch. N. S. 889, 19 L. T. N. S. 64, 16 Week. Rep. 1138; National L. Ins. Co. v. Myers, 140 Ill. App. 392; Brace Bros. v. Evans, 35

Pittsb. L. J. 399; Murdock v. Walker, 152 Pa. 595, 34 Am. St. Rep. 678, 25 Atl. 492; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Gilbert v. Mickle, 4 Sandf. Ch. 357.

Mr. Frederick W. Mansfield, for defendants:

There must be irreparable injury, present or threatened, to justify the granting of equitable relief.

Downing v. Elliott, 182 Mass. 28, 64 N. E. 201; Wing v. Fairhaven, 8 Cush. 304; Kenney v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 138; 2 High, Inj. 4th ed. § 1415 F; Vegelah v. Guntner, 167 Mass. 99, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E.

By the weight of authority, upon the lawfulness of the strike or boycott intended to be aided by the publications complained of, depends the ultimate right to enjoin the publication. It is axiomatic that if members of a labor union have the right to strike, they have the right, either by speech or writing, to give notice of their intentions so to do, and, having lawfully gone upon a strike, they have the right to give notice of the strike as a matter of news, or to anyone interested therein, or for the purpose of aiding in bringing the strike to a successful conclusion, providing the notice or publication does not threaten injury or loss to third persons, to force them against their will to do or refrain from doing anything which would injure the person against whom the strike is aimed.

Members of a labor union may lawfully agree not to purchase the goods produced by an employer with whom the union is engaged in industrial war. Having the right thus to refrain from purchasing such product, the labor organization has the right to publish, from time to time, notice of its intention in this regard, providing such notice contains nothing intimidating or coercive by threatening injury to third persons, except such as may naturally result to them from the lawful agreement of the members of the union to abstain from purchasing the products in question. Mere fear by third persons of loss to them from the natural result of this action of labor organizations is not unlawful coercion, and the fact that it may induce them to refrain from purchasing the product of the manufacturer or producer against whom the strike or boycott is aimed does not render such action unlawful or the publication unlawful.

In New York, the rule is asserted that a labor union is within the legal rights in publishing circulars setting forth the circumstances of the strike, and requesting their friends to withhold from the employer against whom the strike is directed their support. Butterick Pub. Co. v. Typographical Union No. 6, 50 Misc. 1, 100 N. Y. Supp. 292; Sinsheimer v. United Garment 32 L.R.A. (N.S.)

Workers, 77 Hun, 215, 23 N. Y. Supp. 321; Cohen v. United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341; Foster v. Retail Clerks' International Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860.

The doctrine is also asserted in National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, that an individual or combination of individuals have the absolute right to threaten to do that which they have the right to do, and that a labor union having the right to insist that plaintiff's men be discharged, and members of the union put in their place, and the services of the other members of the organization be retained, they also have the right to threaten that none of their men will stay unless their members can have all the work there is to do.

The rule was thus stated in Wilson v. Hey, 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 A. & E. Ann. Cas. 82: "It is not wrong for members of a union to cease patronizing anyone when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means with the motive of injuring such person. Such means as giving notices which excite the fear or reasonable apprehension of other persons, that their business will be injured unless they do break off such relations or cease patronizing another, are wrong and unlawful. If the notices given or things done have the natural effect of exciting such reasonable fear and apprehension, and accomplish the result intended, it is immaterial that they are not accompanied by direct threats." As to the right of a labor union to put an employer of labor upon an unfair list, the court said: "If the only purpose of putting one on the 'unfair list,' and the only effect, were to notify members of the union of the fact, so that they might withdraw their patronage, the injunction would be too broad; but the evidence in the record is that the purpose of that list is not so limited, and

1077; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011.

If it should be found that the strike was over, the most that can be said is that the inscription, in so far as it affected the plaintiff, was not true. But the inscription could not be enjoined merely for that reason or merely because it was a libel.

Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 19 Am. Rep. 310; *Whitehead v. Kitson*, 119 Mass. 484; *Raymond v. Russell*, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142, 44 L. J. Ch. N. S. 192, 31 L. T. N. S. 866, 23 Week. Rep. 249.

Sheldon, J., delivered the opinion of the court:

The strike of the plaintiff's employees in May was for the purpose of obtaining higher wages and shorter periods of labor. It was a justifiable strike. *L. D. Willcutt & Sons*

Co. v. Driscoll, 200 Mass. 110, 113, 114, 130, 23 L.R.A. (N.S.) 1236, 85 N. E. 897. It does not appear to have been carried on in any respect in an unlawful manner or by the use of any unfair coercion or wrongful means. Nor could we say that the particular act charged in the bill to have been done by the defendants would be in itself an unlawful means of publishing the fact that a strike was going on. There was no picketing, no blocking of the streets, no actual interference with the plaintiff or with the men whom it employed in place of the strikers. We see nothing more than an attempt to inform the public, including probable applicants for work with the plaintiff, of the fact of the pending strike. Even if this were before doubtful, we could not now condemn it, in view of the provisions of Stat. 1910, chap. 445, which imposed upon the plaintiff, while the strike lasted, the duty to give this information to any persons whom it solicited to take the place of the strikers. Of course, what we have said

that its purpose and effect is to establish a boycott, and in that view, it is not too broad."

Gray v. Building Trades Council, 91 Minn. 183, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172, holds that, in the absence of evidence that the term "unfair" as applied to an employer of labor amounted to an unlawful boycott, injunction should not be granted restraining a labor organization or its members from notifying employer's customers or prospective customers that he was unfair.

In *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Assn.* 150 Fed. 413, the court said that, inasmuch as retail hardware dealers have a lawful right to agree among themselves that they will not purchase merchandise from wholesalers and jobbers who sell to catalogue or mail-order houses, it necessarily follows that they have the right to inform each other as to what wholesalers and jobbers do sell to catalogue and mail-order houses. And it is also held that it would be a violation of the constitutional guaranty against free speech, etc., to enjoin the editor of the official organ of this association from publishing in his paper articles in aid of this combination, and for the purpose of inducing wholesalers and jobbing houses not to sell to such catalogue houses. It is, however, held that the editor of this paper is not a member of the combination.

In *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119, on the theory that it was lawful for an association of retail lumber dealers to agree among themselves that they would not deal with any wholesale dealer or manufacturer who sold directly to consumers not dealers at a point where

a member of the association is doing business, the court, at the instance of a wholesale dealer in lumber who had violated this rule, refused to enjoin a member of such association from giving notice to other member of the association of such violation, although the wholesale dealer or complainant claimed that the result of such notice would mean that the other retail dealers who were members of such association would refuse thereafter to patronize him.

A valuable case on this point is *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 516, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, which clearly distinguishes between the lawful and unlawful use of circulars by a labor organization. On this point it is said: "Laborers have the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars in a peaceable way and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case: the right of the laborer to sell his labor when, to whom, and for what price he chooses, is involved." As to the unlawful use of the circular, the court said: "The circular was false in stating that complainants had violated their agreement or had discharged their union men. They had

would not be applicable to a case presenting different circumstances from those which existed here, such as appeared, for example, in *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307, and similar cases.

But in the case at bar the strike was over. Although this fact was not expressly found in the superior court, in our opinion it is necessarily to be inferred from the facts which are found, and must be taken to be a fact. *Knowles v. Knowles*, 205 Mass. 291, 294, 91 N. E. 213. The strike was declared May 2, 1910. The plaintiff within a few days secured men to take the places of the strikers, has had ever since an adequate force, and is not seeking any new men. Of the eleven men who left the plaintiff's employ, eight soon secured and still have new employment in the same kind of

work as before, and three have left this commonwealth. Moreover, a short time after the strike began, the International Brotherhood of Teamsters, the organization with which the defendants' labor union was affiliated, ceased to aid the strikers any further. It is difficult to imagine a case, short of a formal agreement of both parties, in which it could be more manifest that a strike had come to an end.

The defendants' act in driving the wagon through the streets with the placards complained of began on October 14, 1910, long after the end of the strike, and has since been continued. We can see no justification of it. It is a false announcement, not adapted in any way to benefit the defendants or their union, but likely to embarrass the plaintiff whenever it may need to employ additional men. It manifestly was intended merely to injure the plaintiff. This shows that it was done maliciously, within the legal meaning of that word. *McGurk v. Cronenwett*, 199 Mass. 457, 461, 462, 19

done neither. It was also false in conveying the impression that complainants were not paying living wages or giving their employees fair treatment. The use of this false circular was one of the potent means to carry out the conspiracy. The defendants, by their conduct, gave every laborer and customer of complainants their definition of what they understood the term 'boycott' to mean. It would be idle to argue that these circulars were not intended as a menace, intimidation, and coercion. They were so used, and were 'a standing menace' to everyone who wished to work for or trade with complainants. They constituted a part of the unlawful scheme, and their circulation should have been enjoined."

In *Richter Bros. v. Journeymen Tailors' Union*, 24 Ohio L. J. 189, the court refused to restrain the posting and circulating of notices to the effect that the plaintiff's tailoring establishment was a scab shop and should be shunned by all fair-minded citizens; that their present employees are incompetent botches and professional tramps and ex-convicts. While conceding that this circular was a libel on the business of the plaintiff, the court held that under the constitutional guaranty of freedom of speech, a conspiracy to libel a business man could not be enjoined by a court of equity, but the remedy was in an action at law.

An important case denying the right of equity to interfere with the publication by a labor union of its grievance against an employer, together with an appeal to its membership and the public not to patronize the product of such employer, on the ground that to restrain such publication would be violating the constitutional right of free speech, is *Marx & H. Jeans Clothing Co. v. Watson*, 168 Mo. 144, 56 L.R.A. 851, 90 Am. St. Rep. 440, 67 S. W. 391. The doctrine is here asserted that the two ideas—the one

of absolute freedom "to say, write, or publish whatever he will on any subject," coupled with responsibility therefor, and the other idea of preventing any such free speech, free writing, or free publication—cannot coexist. The court said: "Language could not be broader, nor prohibition nor protection more amply comprehensive. Wherever, within our borders, speech is uttered, writing done, or publication made, there stands the constitutional guaranty giving staunch assurance that each and every one of them shall be free. The legislature cannot pass a law which even impairs the freedom of speech." The conclusion is reached that the purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. On this point the court said: "The authority to enjoin finds no better harbor in the empty pocket of the poor man than in the full pocket of the rich man. And such authority to enjoin can have no existence in circumstances such as the present case presents, if the Constitution is to be obeyed. If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth or with pen or print, and to endeavor to persuade others to aid them by all peaceable means in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that, in exercising that freedom, they thereby do plaintiff an actionable injury, such fact does not go a hair towards a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the Constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring."

A. G. S.

L.R.A. (N.S.) 561, 85 N. E. 576. The law will give a remedy for such an act. *Martell v. White*, 185 Mass. 255, 257, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; *Hartnett v. Plumbers' Supply Assn.* 169 Mass. 229, 38 L.R.A. 194, 47 N. E. 1002.

The case does not come within the doctrine that equity will not enjoin the publication of a libel. There is here a wrongful act maliciously done, continuing and repeated day by day, which, although it is not shown to have caused as yet any damage to the plaintiff, is manifestly intended to produce that result, is liable at any time in the future to do so, and may cause real and substantial damage of which it would be certainly difficult and might be impossible to prove either the existence or the quantum of loss. It is like a boycott declared and maintained without cause. In such a case equity will give relief. This is the real doctrine of many of our own decisions. *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A. (N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 A. & E. Ann. Cas. 332; *L. D. Wilcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; *Davis v. New England R. Pub. Co.* 203 Mass. 470, 25 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 318, 89 N. E. 565. The same principle has been maintained in other courts. *Emack v. Kane* (C. C.) 34 Fed. 46; *Lewin v. Welsbach Light Co.* (C. C.) 81 Fed. 904; *A. B. Farquhar Co. v. National Harrow Co.* 49 L.R.A. 755, 42 C. C. A. 600, 102 Fed. 714; *Dittgen v. Racine Paper Goods Co.* (C. C.) 164 Fed. 85; *National L. Ins. Co. v. Myers*, 140 Ill. App. 392; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Brace Bros. v. Evans*, 35 Pittsb. L. J. 399; *Murdock v. Walker*, 152 Pa. 595, 34 Am. St. Rep. 678, 25 Atl. 492; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13.

A decree must be entered giving to the plaintiff the relief prayed for.

So ordered.

32 L.R.A. (N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

A. J. PRESTON, Appt.,
v.

STURGIS MILLING COMPANY.

(— C. C. A. —, 183 Fed. 1.)

Tax — enforcement of lien by equity.

1. A court of equity will not enforce payment of a tax duly levied on real estate in favor of a judgment creditor of the taxing district, in the absence of statutory authority, where the statute makes provision for the collection of the tax by certain designated officers, although it makes the tax a lien on the property, and the officers designated by the statute to make the collection have refused or been unable, by reason of the opposition of the taxpayers, to do so.

Same — enforcement — manner.

2. The collection of a tax can be effected only in the manner prescribed by the legislature.

Same — enforcement in equity — statutory authority.

3. A provision in a statute authorizing the issuance of bonds in aid of railroad construction, that taxes levied under the act shall be a lien on the real estate of the person taxed, does not indicate an intention that the lien shall be enforced by a court of equity at the suit of a bondholder who has recovered judgment against the taxing district, and been unable to collect it, where the statute provides for the collection of the tax through certain designated officers.

(December 1, 1910.)

Note. — Right of creditor of taxing district to invoke aid of court to obtain satisfaction of debt, where ordinary remedies not available.

The note is confined strictly to cases in which, for one reason or another, the ordinary modes of procedure, judgment, and mandamus have failed to afford the desired result, and an attempt has been made to have the courts afford a remedy. Cases construing statutes which expressly give the courts power to levy or collect and pay over taxes are not included, as in such case the statute itself answers the question under discussion.

This limitation as to scope excludes not only cases in which it was sought to mandamus the taxing officials to compel them to perform the ministerial duty of levying or collecting and paying over taxes, but also cases in which it was sought, either at law or in equity, otherwise to compel a levy and collection, or mere collection, and

A PPEAL by complainant from a decree of the Circuit Court of the United States for the Western District of Kentucky dismissing his bill filed to enforce a tax lien on real estate owned by defendant, in satisfaction of a claim against the taxing district. Affirmed.

The facts are stated in the opinion.

Argued before Severens and Warrington, Circuit Judges, and Cochran, District Judge.

Messrs. Helm & Helm, with Mr. Helm Bruce, for appellant.

Messrs. H. X. Morton and James F. Fairleigh, for appellee:

The court has no authority to seize the property of citizens for the debt of the corporation.

Barkley v. Levee Comrs. 93 U. S. 265,

payment over. The latter class being limited, of course, to those cases in which an action at law, other than a mandamus proceeding or an equitable action, was resorted to without having first exhausted any possible relief by mandamus. As illustrative of this class of cases, which generally proceed upon the ground that the complainant has mistaken the appropriate remedy, and that mandamus is the only remedy, see *Walkley v. Muscatine*, 6 Wall. 483, 18 L. ed. 930 (bill in equity); *Marra v. San Jacinto & P. Valley Irrig. Dist.* 131 Fed. 780 (bill in equity); *Safe Deposit & T. Co. v. Anniston*, 96 Fed. 663 (bill in equity); *Maenhaut v. New Orleans*, 3 Woods, 1, Fed. Cas. No. 8,940 (bill in equity); *Crow v. Dallas County*, 13 Ark. 625 (bill in equity); *Cedar Rapids & M. R. Co. v. Carroll County*, 41 Iowa, 153 (bill in equity); *Boyce v. Cayuga County*, 20 Barb. 294 (action at law).

The principle that taxation is solely within the control of the legislative branch of government, and that the aid of the courts cannot be invoked either to levy or to collect and pay over taxes, except where express authority so to levy or collect and pay over has been conferred upon them by the legislature, which is emphasized in, and forms the basis of, the decision in *PRESTON v. STURGIS MILL Co.*, is undoubtedly not only correctly announced, but correctly applied; and although one or two Federal cases are unquestionably in irreconcilable conflict therewith, they do not undermine the logic upon which the *PRESTON CASE* is based, and in at least one instance the Supreme Court of the United States has expressed its disapproval of such adverse decisions.

Likewise, the holding of the *PRESTON CASE*, that "the scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the legislature prescribe," seems to be correctly deduced from the authorities, and hence the inclusion in this note, along with cases in which the aid of the court to collect and pay over taxes to the complaining

23 L. ed. 896; *Lexington v. Wilson*, 118 Ky. 221, 80 S. W. 811; *Turpin v. Lemon*, 187 U. S. 57, 47 L. ed. 73, 23 Sup. Ct. Rep. 20; *Windsor v. McVeigh*, 93 U. S. 277, 23 L. ed. 915; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72.

The lien provided by the statute is in favor of the government, to which no one can be subrogated.

Jones v. Gibson, 82 Ky. 561; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; 1 Cooley, Tax. 3d ed. p. 17; *Louisville Trust Co. v. Muhlenberg County*, 15 Ky. L. Rep. 397, 23 S. W. 674.

These liens cannot be enforced in courts of equity; courts cannot be transformed into tax collectors.

Johnston v. Louisville, 11 Bush, 527;

creditor was invoked, of cases in which the court was asked to levy a tax.

Application of the principles above set out results in the conclusion that, in the absence of statutory authority, neither the law nor the equity courts will either levy a tax on real estate or enforce payment of such a tax duly levied in favor of a judgment creditor of a taxing district, even though mandamus has failed to afford relief; or, in other words, that, in the absence of express authority, the remedy, if any, is by appeal to the legislature, and not to the courts. These principles and conclusions find ample support in the following cases, which are set out and analyzed at length in *PRESTON v. STURGIS MILL Co.*: *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Heine v. Levee Comrs.* 19 Wall. 655, 22 L. ed. 223, affirming 1 Woods, 246, Fed. Cas. No. 6,325; *Barkley v. Levee Comrs.* 93 U. S. 265, 23 L. ed. 896; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *Grand Rapids School Furniture Co. v. School Dist. No. 29*, 102 Ky. 556, 44 S. W. 98; *Louisville Trust Co. v. Muhlenberg County*, 15 Ky. L. Rep. 397, 23 S. W. 674.

And in *Preston v. Chicago, St. L. & N. O. R. Co.* 175 Fed. 487, affirmed in 183 Fed. 20, where the remedies provided by statute had proved utterly ineffectual, it was held that a holder of public bonds could not maintain an equitable action against an individual taxpayer for the amount which had been levied against his property, the court, on the authority of the *Rees*, *Heine*, and *Grand Rapids School Furniture Co.* Cases, supra, saying that, in the absence of statutory authority therefor, a suit in equity cannot be maintained for the collection of taxes assessed upon property.

So, in *Louisville Trust Co. v. Muhlenberg County*, 15 Ky. L. Rep. 397, 23 S. W. 674, the court, relying upon *McLean County Precinct v. Deposit Bank*, 81 Ky. 254, in holding that a court of equity has no

McLean County Precinct v. Deposit Bank, 81 Ky. 254; Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Barkley v. Levee Comrs. 93 U. S. 258, 23 L. ed. 893; Meriwether v. Garrett, 102 U. S. 515, 26 L. ed. 205; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; Grand Rapids School Furniture Co. v. School Dist. No. 29, 102 Ky. 556, 44 S. W. 98; Campbellsville Lumber Co. v. Hubbert, 80 C. C. A. 435, 112 Fed. 724.

Cochran, District Judge, delivered the opinion of the court:

The appellant, Preston, was complainant in the court below, and he appeals from a decree dismissing his bill on demurrer. The relief which he sought was the subjection of certain specifically described real estate owned by the defendant, Sturgis Milling Company, appellee here, located in the town of Sturgis, within the Caseyville district of Union county, Kentucky, to the payment to him of the sum of \$7,155.74 and costs. He claimed that there was lien on the real estate for that amount and that he was entitled to enforce it. The way in which he claimed that this lien had arisen, and that

he had become entitled to enforce it, was this:

Therefore he and his wife, who had since died, had obtained several judgments in the lower court on its law side against the Caseyville district for the principal and interest of certain bonds duly issued on its behalf, under an act of the legislature of Kentucky entitled "An Act to Incorporate the Madisonville & Shawneetown Straight Line Railroad Company," approved February 18, 1870 (Sess. Acts 1869-70, vol. 1, chap. 366, p. 342), in aid of the construction of the railroad, which, if built, was to run through the district upon which judgments executions had issued and been returned unsatisfied; and pursuant to the provisions of the act, a tax sufficient to pay the judgments had been duly levied, and the property subject thereto had been duly assessed. The appellee owned taxable property within the district of which that sought to be sold was part, and \$7,155.74 was the amount of the tax due from it according to the levy and assessment. The act provided that the tax authorized by it should be collected by the sheriff of the county upon his giving bond therefor, and that, upon his failure for thirty days after its levy to do so, he should

jurisdiction at the suit of the holder of county bonds to enforce tax liens on real property, even though the machinery provided by statute for the collection of such taxes had failed to make the collection, said that such an attempt on the part of the judiciary would be an invasion of the powers which belong exclusively to the legislative department of the government.

And in *O'Brien v. Wheelock*, 78 Fed. 673, where the machinery provided by the state of Illinois for the collection of certain taxes had failed, and the jurisdiction of a Federal court of equity was invoked, the court, in answer to the question, "If the law failed as to any of its provisions for the assessment or collection of taxes, then will equity for that reason take jurisdiction? In a word, will the absence of any and all other effective remedies render it incumbent on the court to act, or invest it with power so to do?" said: "It seems to be substantially settled that when the machinery for the collection of taxes is in existence under state authority, the Federal courts will, in a limited class of instances, compel the agents of the state to set the machinery in motion; but those courts will neither themselves create the machinery, nor invest any person with official power to use the same."

And in *Farmers' Nat. Bank v. Mt. Sterling*, 9 Ky. L. Rep. 104, it was held that a judgment against a municipal corporation cannot be enforced by process of garnishment against the taxpayer, on the ground that courts have no power to levy or collect taxes.

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But in *Post v. Taylor County*, 2 Flipp. 513, Fed. Cas. No. 11,302, it was held that in case taxes could not be collected because no one could be found who was willing and able to make the collection, equity will entertain jurisdiction and direct the payment of assessed taxes, to be applied in favor of complaining creditors of the taxing district. The court said: "The case made brings it within well-established equity jurisdiction. Equity regards the substance of things, and eschews the technicalities of the common law. There is no such privy between complainants and the defendant tax debtors as would authorize a suit at law. No such privy is necessary to the maintenance of this suit. Under the law it is the legal duty of the county court to assess the taxes, and apply the same in payment of the interest as it accrued on the county bonds. This legal duty imposed on that tribunal a trust for the benefit of the county creditors. But for the reasons stated it could not execute the trust. Upon this admitted state of the case, the complainants have a clear equity to come into this court and invoke its assistance to force the tax debtors to pay the county, to the end that the county may pay complainants. Such is the theory upon which complainants' equity rests, and which gives jurisdiction to this court. Having on this ground obtained jurisdiction, the court is bound to do full justice, and will, in the exercise of its judicial authority, direct the payment of the taxes so assessed into the registry of the court, to be applied in satisfaction of complainants' decrees."

forfeit his office, and the county court should appoint a collector who, upon giving bond, should collect the tax. By § 25 thereof it was provided as follows, to wit: "That sheriffs and other officers having in their hands for collection taxes levied under this act shall have all the powers of distraining and selling personal property which sheriffs have in the collection of the state revenue; and when such officer shall be unable to find personal property liable to sale for the unpaid tax of any individual, he may levy the same on any real estate of such person situated in the county, and shall sell the same under the regulations prescribed by law for the selling of real estate under execution; and all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied; but the owner of any real estate sold may redeem the same at any time within five (5) years after such sale, by paying the purchase money and ten (10) per cent per annum thereon, with all taxes of every description paid by the purchaser after his purchase, and ten (10) per cent per annum thereon."

The taxpayers of the district had repudiated its indebtedness incurred in aid of the construction of the railroad and deter-

mined to prevent its collection, and, if violence was necessary to this end, to resort to it. The sheriffs of the county from fear, or from sympathy with the position of the taxpayers, had repeatedly refused to give bond for the tax, or, after doing so, had resigned, so that, for much the greater portion of eighteen years previous to the bringing of this suit, the county had been without a sheriff. Collectors had from time to time been appointed, but with a single exception had refused to qualify or resigned after qualifying. In that instance the collector appointed had proceeded to the performance of his duty by distraining the personal property of one of the taxpayers, and advertising same for sale at the county seat, but on the day of sale a crowd of 600 or 800 armed men assembled there, and not only prevented the sale, but compelled the collector to flee the county for his life, to which he had never returned.

It was by virtue of the clause in § 25 of the act, in these words, to wit: "And all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied,"—that appellant claimed that there was a lien on appellee's real estate for that sum, and it was because of his in-

And in *Welch v. Sta. Genevieve*, 1 Dill. 130, Fed. Cas. No. 17,372, it was held that where there are no municipal officers to levy and collect taxes, the court will appoint a commissioner to do so. This decision, however, was expressly disapproved in *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72.

And in *Garrett v. Memphis*, 5 Fed. 870, the court, after stating that it must enforce the law as laid down by the United States Supreme Court, drew a distinction between the levying and the collection of a tax, saying: "I do not contend that a court of equity can itself levy a tax. I agree it cannot, and so this court has decided. *Rees v. Watertown*, supra. The argument which has been submitted to prove that the circuit court has no such power is quite unnecessary. It is inapplicable to the case we have in hand. The complainants' bill asked for no assessment or levy of a tax, and the circuit court decreed none. The levy of a tax is a very different thing from the collection of a tax already levied. The levy is generally a legislative or a quasi judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce. I have said, and I earnestly maintain, that the taxes which the city of Memphis had levied before the repeal of its charter, some of which were collected, but remained on deposit or undisposed of, and some of which are not collected, are assets of the corporation, which its creditors have an equitable right to have seized and appropriated to the payment of the corporate debts. By the 32 L.R.A. (N.S.)

lawful assessment and levy of a tax, the taxpayer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law; or, when it is a lien, by a bill in equity." However, as has been stated, it must be conceded that the better considered and controlling decisions have eliminated any fancied distinction between the levying and collecting of taxes.

As to equity affording a remedy where the machinery provided by statute has failed, and mandamus has proved ineffectual, it may be stated that the rule announced in *PRESTON v. STURGIS MILL. CO.* is correct upon theory and in law. For purposes of clarification, however, it may be best to restate the principle. In the first place, the law affords an adequate remedy, namely, judgment and mandamus. That is, a creditor of a taxing district may proceed to judgment, and by mandamus compel the taxing officers to levy and collect a tax sufficient to satisfy the judgment. This remedy, therefore, is adequate, at least in theory. In the second place, if the remedy at law is adequate, it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection because no one can be found who is willing and able to carry out the authorized methods of collection, or for other reasons. Thus, the conclusion that equity can give no relief where there is a remedy at law in theory, although the legal remedy is inadequate in practice.

G. J. C.

ability to collect it otherwise that he claimed that he was entitled to enforce this lien. The facts stated appeared from the allegations of the bill, which were admitted to be true for the sake of the demurrer.

The lower court denied appellant the relief he sought, on the ground that there was no legislation authorizing its granting. It has been earnestly and ably argued here that he is entitled to such relief; but, after carefully considering all that has been said, we are constrained to hold that the lower court's position was well taken, and that it was powerless to relieve the situation.

Before stating more in detail than above the grounds upon which it is claimed that appellant is entitled to the relief which he sought, we desire to make good the fundamental principle which underlies the lower court's decision, and to indicate its scope. That principle is that the power of taxation is legislative, and cannot be exercised otherwise than under legislative authority. It seems to us that if one will enter into the possession of this principle and comprehend its full scope, he will have no difficulty in reaching the conclusion that the decision was correct. The scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the legislature may prescribe. This is true of the levy of the tax, of the assessment of the property subject thereto, if it be an *ad valorem* tax, of the collection of the tax, and of its disbursement after it has been collected. Courts of law by the writ of *mandamus* have power to compel persons charged with the performance of these duties to perform them. But in exercising such jurisdiction they do not to any extent exercise the power of taxation. That power is exercised only in the taking of any of the steps in the process of raising and disbursing taxes. It is not, however, within the scope of this principle that the judiciary shall in no event exercise this power of taxation. Its scope is that it shall not exercise it unless the legislature shall so provide. If the legislature does so provide, it may exercise it to the extent provided.

That this is a fundamental principle of jurisprudence, and that such is its scope, has been settled beyond question by the Supreme Court of the United States in the following cases, to wit: *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Heine v. Levee Comrs.* 19 Wall. 655, 22 L. ed. 223; *Barkley v. Levee Comrs.* 93 U. S. 258, 23 L. ed. 893; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140.

Each one of these cases had to do with a tax duly authorized to be raised from the taxpayers within a certain political 32 L.R.A. (N.S.)

legal entity, to pay certain obligations incurred by it, and in each one the tax had not been paid, and a United States circuit court had been appealed to for its assistance in enabling the holder of such obligations to obtain the tax. In the first three cases the tax had never been levied, and the relief sought was its levy, collection, and payment to plaintiff. No relief was sought as to the assessment of the property subject to the tax unless that was included in its levy. Possibly the assessment of property for general purposes answered the purpose of an assessment as to the particular tax involved. In the last two cases the tax had been levied and property assessed, and the relief sought was the collection of the tax and its payment to plaintiff.

We will first dispose of the three cases in which no levy had been made. In the *Rees* and *Heine* Cases there was opposition to the payment of the tax, and its levy had been evaded by the officials whose duty it was to make it, or so many of them as not to leave a quorum, resigning; in the *Barkley* Case there had been no evasion. The trouble there was that the political legal entity had ceased to exist, and the officials whose duty it was to levy the tax had gone out of office with such cessation. In the *Rees* and *Barkley* Cases judgments had been obtained at law for the amount of the indebtedness, and executions returned thereon unsatisfied; in the *Heine* Case no such judgment had been obtained. The indebtedness there was simply due and unpaid. In the *Rees* and *Heine* Cases the relief was sought in equity; in the *Barkley* Case at law, by the writ of *mandamus*. In all three cases the way in which levy, collection, and payment of the tax was sought was by a direction to the United States marshal for the district to levy, collect, and pay. It is not so clear that this was so in the *Heine* Case. at least from Mr. Justice Miller's opinion therein. But it appears from the brief of counsel for the appellant as given in the *Lawyers' Co-operative Publishing Company's* edition of the Supreme Court reports that such was the case. The suit had been originally brought against the officials whose duty it was to make the levy. They set up that they had resigned, and disclaimed any interest in the matter. Thereupon an amended bill was filed against the defendants as representative taxpayers, seeking to have the United States marshal directed to levy, collect, and pay the tax. The breadth of the opinion of Mr. Justice Miller calls for this condition of things. Otherwise it would have been sufficient to have limited the opinion to the case as made by the original bill, and held that it was not maintainable be-

cause there was an adequate remedy at law, to wit, mandamus, of which the lower court had no original jurisdiction, but only as ancillary to a judgment for the amount of the indebtedness, which had not been obtained. He did not so limit the case, but considered it as if direction to the marshal to levy, collect, and pay had been sought, the right to which relief was not affected by the fact that no judgment had been obtained. In the Rees Case relief beyond a direction to the marshal to levy, collect, and pay was sought, in addition to such direction. It was sought also that the court itself apportion the indebtedness amongst the taxpayers and then direct the marshal to collect the apportioned amounts from each, or in default to sell his property, which Mr. Justice Hunt said would accomplish the same result as a direction to the marshal to levy, collect, and pay, but "under a different name."

The Supreme Court held in each one of these cases that the lower courts had properly denied the plaintiffs the relief sought; Justices Clifford and Swayne dissenting in the first two. And just here it is important to understand the reason why it so held, because appellant's counsel would deny these decisions any relevancy here because in those cases no levy had been made; whereas, here a levy and assessment had been made, and the exact amount of tax due from the appellee had been ascertained before suit was brought. It was not because the machinery of a court of equity or a court of law was not adequate to making or bringing about a levy and assessment which are but steps in an apportionment. The Supreme Court in the earlier case of *Lee County v. Rogers* (Lee County v. United States) 7 Wall. 176, 19 L. ed. 162, had affirmed the judgment of the United States circuit court for the district of Iowa in a case at law awarding a mandamus against the United States marshal for that district, commanding him to levy and collect and pay a tax. This it did because there was legislation in Iowa authorizing similar action by its courts. In the case of *Rees v. Watertown*, Mr. Justice Hunt had this to say as to the adequacy of the machinery of a court of equity in this particular, to wit: "The difficulty and the embarrassment arising from an apportionment or contribution amongst those bound to make the payment, we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and, if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity would make the apportionment more conveniently than could a court of law."

Mr. Justices Clifford and Swayne had no

idea that there was any such inadequacy. They thought that the plaintiffs in the Rees and Heine Cases were entitled to the relief which they sought, placing their position on the ground that the tax was a trust fund, and equity would never suffer a trust to be defeated by the refusal of the trustee to administer the fund. The real ground of the decision in each of these cases was the fundamental principle which we have put forward, to wit, that the power of taxation is legislative, and cannot be exercised otherwise than as the legislature provides. The lower courts had no power to direct a levy and assessment, or itself to make one, because to do so would be to exercise the power of taxation, and this power had not been conferred on the judiciary by the legislature. In the Rees Case Mr. Justice Hunt said: "This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of the legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important."

In the Heine Case Mr. Justice Miller said: "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

And in the *Barkley Case* Mr. Justice Bradley said: "The truth is that a party situated like the present petitioner is forced to rely on the public faith of the legislature to supply him a proper remedy. The ordinary means of legal redress have failed by

the lapse of time and the operation of unavoidable contingencies. It is to be presumed that the legislature will do what is equitable and just; and in this case legislative action seems to be absolutely requisite."

Such being the ground of decision in these cases they are direct authorities in support of the position that where a levy and assessment have been made, the judiciary have no power to collect and pay the tax whose amount has thus been exactly determined, since for it to exercise such power would be to exercise the power of taxation, which it cannot do in the absence of legislation. If it cannot levy, collect, and pay because to do so would be to exercise such power, it cannot for the same reason collect and pay. Hence those decisions are relevant here, notwithstanding there have been a levy and assessment.

This brings us to the other two cases which are more in point, because in each of them there had been a levy and assessment, and the amount of tax due from each taxpayer had been rendered exactly ascertainable, and the relief which was sought was limited to a collection of the tax and payment thereof to the plaintiff. In the Garrett Case there had been no evasion of the indebtedness. The political legal entity there concerned was the city of Memphis. By mismanagement its financial affairs had gotten in a bad shape and it had become insolvent. A large portion of taxes which had been levied for general purposes, and specifically to pay certain indebtedness, had been allowed to remain uncollected past the time they should have been collected, through carelessness and incompetency of the officials chargeable therewith. That suit was then brought in the lower court for the appointment of a receiver to, amongst other things, collect the unpaid taxes, and apply those which had been so specifically levied on the debts which they had been levied to pay. Within a very short time after the bringing of the suit, the legislature of Tennessee took a hand in the matter. It repealed the city's charter and provided for the government of its territory in another way, and for the appointment of a collector of the taxes which were unpaid, whose duty it was to collect them and apply them to the purposes for which they had been levied; and that position was thereafter filled. The lower court granted the relief sought, but on appeal the Supreme Court reversed the decree, and ordered the bill dismissed. This it did because the granting of the relief sought was an exercise of the power of taxation and that the lower court had no right to exercise in the absence of legislation. Mr. Chief Justice Waite announced the conclusions of the court in 32 L.R.A. (N.S.)

eight brief propositions. The third one is in these words: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature." It is here that we obtained the phraseology in which we have stated the fundamental principles in question.

In the fourth proposition, as to the taxes in question, he said that they could not "be collected through the instrumentality of a court of chancery at the instance of the creditors of the city." "Such taxes," he said, "can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief." Then, as if there could be some possible question as to the scope of said principle, he said: "Whether taxes levied in obedience to contract obligations or under judicial direction can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it."

Mr. Justice Field, on behalf of himself and Justices Miller and Bradley, delivered an opinion in which he set forth their reasons for concurring in those conclusions. In it he cited the Rees, Heine and Barkley Cases as controlling of the case there involved, notwithstanding the fact that there had been no levy in either one of them, and a levy had been made in the case in hand. And for the reasons heretofore given it must be held that they were controlling. In the course of the opinion he recurred again and again to a statement of the fundamental principle which we are emphasizing, as if he felt it important to drive it home. He said. "In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

He quoted these words from the opinion of Mr. Justice Bradley in the lower court in the Heine Case: "The judicial department has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the pre-

rogative writ of mandamus, compel them to perform acts which are ministerial as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers." Again he said: "These authorities—and many others to the same purport might be cited—are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it." And again he said: "No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors, and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the state, and wield it in their behalf."

Finally, concerning the power of the Federal judiciary, he said: "It cannot make laws when the state refuses to pass them. It is itself but the servant of the law. If the state will not levy a tax or provide for one, the Federal judiciary cannot assume the legislative power of the state; and proceed to levy the tax. If the state has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place. If the state appoints no officers of collection, the Federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of state legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the state."

Justices Strong, Swayne, and Harlan dissented. Justice Strong delivered a dissenting opinion. The ground upon which he based the position that the lower court had the right to appoint a receiver was the same as that upon which Justices Clifford and Swayne dissented in the Rees and Heine Cases. He contended that the decision in those and the Barkley Case was not controlling of the one in hand, on what we think we have shown to be the untenable ground that in neither one of those cases had there been a levy; whereas, in that one there had.

This brings us to the other one of the two cases, the last one cited. Its origin is to be found in the reservation made by Mr. Chief Justice Waite in his fourth proposition, which we have quoted. It came from

Kentucky. There a tax had been levied by the appropriate officials of Allen county to pay two judgments rendered against it by the United States circuit court for the district of Kentucky, for interest upon bonds issued by it in aid of a railroad; and the act under which the tax was levied provided for the appointment of a collector to collect the tax and pay it over in satisfaction of the judgment. By reason of the hostility of the citizens and taxpayers of the county, no one could be found who would accept the position of collector and perform the duties of the position. Thus was brought about the situation covered by that reservation. There was no public officer charged with authority from the legislature to perform the duty of collecting the tax. Thereupon a bill in equity was filed for the appointment of a receiver to collect the tax, and the question was presented whether in that contingency it was proper to grant the relief sought. The county and thirty of the principal taxpayers thereof were made defendants, and the value of the assessed property of each and the amount of tax due from him was set forth in the bill. It was held that the plaintiff was not entitled to the relief he sought. The decisions heretofore considered, both those where there had been no levy and the Garrett Case, where there had been one, were cited as controlling. In his opinion on behalf of the court, Mr. Justice Miller said but little as to the power of taxation being legislative, and not capable of being exercised otherwise than under legislative authority. He referred to it mainly in quotations made from the opinions in the previous cases. He gave the matter a somewhat different turn by emphasizing that what was asked was in effect the filling by the Federal court of the vacancy in the state office of tax collector, occasioned by the refusal of anyone to act, which it had less right to do than to fill a vacancy in the position of United States marshal.

It was this fundamental principle that the power of taxation is legislative, and cannot be exercised otherwise than under legislative authority, recognized and applied in these cases, then, which lay at the bottom of the lower court's decision. And if it was this principle, in connection with the position that § 25 of said act did not authorize the granting of judicial relief of the kind sought herein, that led the court to render the decree of dismissal. We will not now consider the question whether the act did contain such authority, but proceed to take up the grounds upon which it is urged that the lower court erred in so doing, which we are now in position to appreciate. In the course of the considera-

tion thereof that question will arise for determination.

We do not understand that the inadequacy of the summary mode of collection provided for by § 25, due to the hostility of the taxpayers and the inability to get anyone to act as collector, and the absence of any other relief at law, are relied on by themselves independently of any other consideration, as affording a right to the equitable relief sought. So far as they are relied on at all, it is as a buttress to or part of other grounds. They certainly cannot be relied on as a ground of right to such relief in and of themselves.

This matter was dealt with in the cases we have analyzed, mainly in the Rees and Thompson Cases, and it was held that there was nothing in the general principle of equity jurisprudence that, all legal remedies having failed, equity should give a remedy, to warrant a court of equity granting relief in cases like those involved there and here. The scope of that principle is that the legal remedy in its nature or character must be inadequate, which cannot be said of the summary remedy provided by § 25. It is not sufficient that it is inadequate because those charged with executing it will not do so from fear, or are prevented from so doing by hostility on the part of the taxpayers. In the Rees Case Mr. Justice Hunt said: "The remedy is in law and in theory adequate. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: The writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York confederations of settlers and tenants disguised as Indians and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power; the Court of Chancery gained none."

And in the Thompson Case Mr. Justice Miller said: "By inadequacy of the remedy at law is here meant, not that it fails to 32 L.R.A. (N.S.)

produce the money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view."

The statement of Mr. Justice Fuller in the case of *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594, that "the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances,"—and of Mr. Justice Blatchford in the case of *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340, that "Under § 723 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 583, the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity,"—which appellant's counsel have quoted, the italics being his, do not import any other doctrine. What is meant is that the remedy must be "as efficient," or "as practical and as efficient," in its nature and character.

Nor does the rule that equity has jurisdiction to subject property fraudulently conveyed by a debtor to the payment of his debts after judgment and return of an execution unsatisfied, to which reference is made, import otherwise. Such jurisdiction does not exist because otherwise the creditors cannot reach the property, but because the remedy which the law affords is so partial and insufficient in its nature and character that complete justice can only be done by means of the equity jurisdiction.

There is, then, nothing in this general principle of equity jurisprudence to help appellant, at least in and by itself. Indeed, the fundamental principle of jurisprudence that the power of taxation is legislative, and cannot be exercised otherwise than under legislative authority, negatives its application in such a case as we have here. That principle we understand to be one of universal application, admitting of no exception or qualification. The two principles in a case of this sort cannot, therefore, stand together. One or the other must give way.

The main ground relied on by appellant's counsel as entitling appellant to the relief sought—he states it as if it were the only ground—is that this is a case for the exercise by a court of equity of its jurisdiction to enforce liens. The exact amount due from the appellee has been ascertained, or rendered ascertainable by the levy and assessment which have been made, its obligation to pay this amount is fixed, a lien to secure its payment exists, by virtue of § 25 of the act, on appellee's real estate in

the county, the bill describes that real estate specifically, and seeks to have it subjected to the payment of the tax, as liens are enforced in equity, and the enforcement of liens is one of the heads of equity jurisdiction. In the exercise of such jurisdiction, therefore, it is argued, appellant should have been granted the relief sought. He thus states it; the italics being his: "The only question in the case is as to whether or not a court of equity has jurisdiction to enforce a lien upon property securing a fixed obligation to pay a fixed sum of money, by decreeing a sale of the property for that purpose. We cannot see any other question in the case, and we cannot see how any but an affirmative answer can be given to the question."

We do not understand that there is involved in this position any claim that the legislature intended by § 25 that the lien created by it should be enforced in this way. The position is that, irrespective of the question whether the legislature so intended, appellant was entitled to so enforce it. It has created a lien; it has done that at least; equity has jurisdiction to enforce liens; the amount of the lien has been fixed by the levy and assessment,—there is, therefore, no hindrance to equity exercising its jurisdiction in this particular, and it should exercise it and give the relief sought. Such we think is a fair statement of the position.

It is claimed that, in that this case presents this question, it differs from each one of the cases analyzed above, and is thereby taken from under them. It must be conceded that in this particular this case does differ from those cases. But in saying this we do not mean that in none of those cases was there a lien to secure the tax. This would not be true. For instance, in the Barkley Case Mr. Justice Bradley said: "Much reliance is placed by the counsel of the petitioner on the fact that the taxes directed to be imposed by the acts of 1858 and 1859 were made a first lien and privilege upon the property liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout the country; but it is never supposed that the public creditors to whom the money raised by tax is to be paid have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed."

And in the Thompson Case the act authorizing the tax sought to be collected—which was an act of the legislature of Kentucky—contained a provision like that which we have here, and counsel for the ap-

pellant, as appears from the synopsis of his brief in the Lawyer's Co-operative Publishing Company's edition of the Supreme Court reports, urged the existence of this lien on the Supreme Court as a reason why appellant should be adjudged entitled to the relief he sought. He said: "The taxes here levied are by law a lien on the property against which they are assessed. They are made so by express provision of statute. It is the peculiar province of a court of equity to enforce liens where no other mode of enforcing them exists. We do not claim that such a lien exists until the levy is made. This distinguishes this case from *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72, and *Heine v. Levee Comrs.* 19 Wall. 655, 22 L. ed. 223" [29 L. ed. 472].

The particular wherein this case differs from those in the matter of lien is that there the suit was not to enforce the lien,—in the *Barkley Case* it was for mandamus to the United States marshal directing him to levy and collect the tax from all the taxpayers, and in the *Thompson Case* it was for the appointment of a receiver to collect the tax from all the taxpayers,—whereas, the suit here is against a single taxpayer, the real estate subject to the lien is specifically described in the bill, and the lien is sought to be enforced.

The position here taken involves that if it had occurred to the counsel for the judgment creditor in the *Thompson Case* to sue each of the taxpayers separately, and to shape his bill as the one here has been shaped, which the facts warranted him in doing, the result in that case would have been different. He lost his case because he did not pursue the right course.

No authority exactly in point is relied on to uphold the position, but cases which are claimed to be analogous are cited to that effect. They are: *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936; *Albrecht v. C. C. Foster Lumber Co.* 126 Ind. 318, 26 N. E. 157; *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 493, 66 N. E. 395. Each of these cases involved a statutory lien; the first two a mechanics' lien, and the other a lawyers' lien. The statute in the first case provided for an action at law to enforce the lien, and the question was whether the Federal court, sitting in equity, had a right to enforce it notwithstanding the remedy at law. It was held that it had. In the second case the question was whether the defendant was entitled to a trial by jury, and it was held that he was not. And in the last case the statute provided a remedy for the enforcement of the lien, and the question was whether the lien was enforceable in equity. It was held that it was. The ground of de-

cision in all three of these cases was the same, to wit, that the enforcement of liens was an equitable proceeding. In the first case Mr. Justice Brewer said: "The foreclosure of a mechanics' lien is essentially an equitable proceeding." In the second case Judge Elliott said: "A court of equity has jurisdiction to foreclose liens by a decree of foreclosure. One of the maxims of equity jurisprudence is that 'equity acts specifically,' and, under this maxim, courts of chancery have assumed jurisdiction to foreclose liens upon real property." And in the last case the court said: "Actions to establish and enforce liens are among those most familiar to equity jurisprudence."

These cases, however, are not analogous to the one at hand. They did not have to reckon with the fundamental principle that the power of taxation is legislative, and cannot be exercised otherwise than under legislative authority; whereas, this case does have to reckon therewith. No tax was involved there; whereas, a tax is involved here. This consideration removes these cases from our pathway. What then is the effect of this difference between this case and those we have analyzed, as a matter of principle? Is it such as to take this case from under them? We think not. It is true that here the matter is presented in such a way that to grant the relief has less the appearance of in effect appointing a tax collector,—as it were, filling the vacancy in that office. But whether or not such is its effect in reality, to take jurisdiction of it is certainly to exercise the power of taxation. Whenever a court takes jurisdiction of a suit against an individual taxpayer for his tax, it exercises the power of taxation,—it in that way undertakes to collect the tax,—and it follows from our fundamental principle that it cannot rightly do so unless the legislature has authorized it. If the judgment creditor in the Thompson Case had been entitled to sue separately each one of the thirty taxpayers made defendants to his bill to enforce the lien on their real estate,—which he was entitled to do if appellant's contention here is sound,—it is strange that neither Mr. Justice Miller nor Mr. Justice Harlan in their opinions referred to the matter, and that it was not held that there was nothing fundamentally wrong in the judgment creditor's case, and that he had simply mistaken the course to be pursued to get his money. We fail to see anything in Mr. Justice Miller's statement in the course of his opinion, as to how a court of equity enforces its decrees as contrasted with the mode in which a court of law enforces its judgment quoted and emphasized by counsel, that indicates that he thought that the judgment creditor could

properly have taken the course pursued here.

Then, if there is any virtue in this position, it is immaterial that the tax was uncollectable otherwise than by a suit in equity. Had there been a collector duly appointed, willing to perform his duty, and no hostility on the part of the taxpayers to its collection, yet, if it was due and unpaid, appellant would have had the right to sue each taxpayer in equity for the amount of the tax, and subject his real estate to its payment. In the first of the three cases relied on as analogous to this case, it was held that the Federal court, sitting in equity, had jurisdiction to enforce the lien notwithstanding the fact that there was an adequate remedy at law. And in the last one it was held that a court of equity had jurisdiction to enforce the lien notwithstanding the statute provided another remedy which was available, but had not been pursued.

Appellant's counsel seems unwilling to go this length, for, though, in the quotation we have made from his brief, he makes no mention of the fact of the uncollectability of the tax otherwise than in equity as being essential to the validity of his position, in the course of his presentation thereof he lays stress thereon and seemingly thinks it is.

In considering this position we make no point of the fact that it is the judgment creditor of the Caseyville district, and not that district or its collecting officer, that is asserting the right to enforce the lien. That consideration will be alluded to in connection with the other ground upon which appellant's counsel maintains that appellant was entitled to the relief sought.

That ground is that legislative authority for the suit is to be found in § 25. In view of counsel's reference to the other grounds relied on, which we have just considered, as representing the sole question in the case, it is not entirely certain that he claims that legislative authority for the suit is to be found there. But in view of the extended consideration he has given to the question of the right to sue a taxpayer for his taxes, and the great reliance placed on the last one as having bearing on this case, we will take it for granted that it is so claimed. At any rate, the matter should be dealt with so as to cover the case completely.

The question then is whether the legislature by that section authorized a suit against the taxpayer for the collection of the tax, and that by a holder of the bonds authorized to be issued by the act either before or after a judgment had been obtained

for the amount thereof, and the return of an execution thereon unsatisfied. It is not sufficient that this section authorized a suit to be brought to collect the tax. It is essential that it be held also that it authorized a suit by such a holder as here. This is so because here again comes in our fundamental principle to regulate matters and say what can be done. If the power of taxation is legislative, then it can be exercised by the judiciary so far as and no farther than the legislature says. It is not for the judiciary to make up for any deficiency in the legislation; otherwise it cannot be said that the power of taxation is legislative. The cases in Kentucky dealing with the right to sue for taxes are quite numerous. They are as follows, to wit: Portland Dry Dock & Ins. Co. v. Portland, 12 B. Mon. 77; Johnston v. Louisville, 11 Bush, 527; McLean County Precinct v. Deposit Bank, 81 Ky. 254; Louisville Water Co. v. Hamilton, 81 Ky. 523; Greer v. Covington, 83 Ky. 410, 2 S. W. 323; Baldwin v. Hewitt, 88 Ky. 680, 11 S. W. 803; Louisville Water Co. v. Com. 89 Ky. 248, 6 L.R.A. 69, 12 S. W. 300; Clark v. Louisville Water Co. 90 Ky. 524, 14 S. W. 502; Louisville Trust Co. v. Muhlenberg County, 15 Ky. L. Rep. 397, 23 S. W. 674; Grand Rapids School Furniture Co. v. School Dist. No. 29, 102 Ky. 556, 44 S. W. 98; Covington v. District of Highlands, 113 Ky. 612, 68 S. W. 669; Lexington v. Wilson, 118 Ky. 221, 80 S. W. 811.

We will refer to these cases by the name of the plaintiff in the lower court, and we will omit all reference to the Louisville Trust Company Case until we have disposed of all the rest. It is the City of Lexington Case, the last of the series, upon which so much reliance is placed. The cases are not in entire harmony. But it was not until the District of Highlands Case, followed by the City of Lexington Case, that discord arose. The cases in which it was held that suit was maintainable are the following, to wit: Trustees of Portland, City of Covington, District of Highlands, and City of Lexington Cases,—four in all. They will be considered in detail later. The cases in which it was held that the suit was not maintainable were the City of Louisville, Deposit Bank, Hewitt Auditor, Commonwealth of Kentucky, the Grand Rapids School Furniture Company,—five in all. In none of these cases was there legislation authorizing the bringing of a suit for the tax involved. The City of Louisville, Hewitt, Auditor, and the Commonwealth of Kentucky Cases were each one a suit against an individual taxpayer to recover the amount of his tax. And it was a suit by or on behalf of the political legal entity to

whom the tax was due. The first two were at law, and a personal judgment was sought. The last one was in equity, and the relief sought was the appointment of a receiver to collect sufficient money to pay the tax from the resources of the defendant, and pay same to the plaintiff. The usual summary remedy for the collection of the tax existed in each case. In the City of Louisville Case there was no question as to its adequacy to yield the tax. The tax was otherwise collectable than by suit. In the other two cases the tax was not otherwise collectable. In the Hewitt Auditor Case this was so because it was a suit against a personal representative of a decedent who had disbursed the entire estate in his hands. In the Commonwealth of Kentucky Case this was so because the defendant was a public service corporation, to wit, a water company, and its assets were not subject to seizure and sale. The Deposit Bank and Grand Rapids School Furniture Company Cases were, neither one, a suit against an individual taxpayer. Each sought the collection of the tax from all the taxpayers, and it sought to collect them in equity through the appointment of a receiver. In neither one of them was the suit by or on behalf of the legal entity to whom the tax was due. In each case the tax had been duly levied, the same as here, and the suit was by the creditor of that entity for whose benefit it was levied, and who would be entitled to it when collected. In the Deposit Bank Case no judgment had been obtained for the debt; in the School Furniture Company Case one had been obtained. The tax was not otherwise collectable than by the suit brought to collect it. This was so in each instance, because no one would accept the appointment of tax collector, no doubt for the purpose of evading the payment of the tax. Each case was, therefore, substantially similar to the Supreme Court case of Thompson v. Allen County, above considered; the only difference being that in the Deposit Bank Case no judgment had been obtained for the debt. But this was not a material difference, and that case was cited by the Supreme Court in the Thompson Case as justifying its position.

In the Hamilton and Clark Cases the question was not really involved whether suit could be brought for the tax in question therein. Neither was a suit against a taxpayer. Each was a suit by a taxpayer against a representative of the political legal entity to whom the tax was due. The taxpayer was a public service corporation, to wit, the Louisville Water Company, defendant in the Commonwealth of Kentucky Case. Its assets were not subject to seizure and sale, and the suit was brought

to enjoin the personal representative from seizing and selling any of its assets to pay the tax. The validity of the tax was questioned. It was held that the plaintiff was entitled to the relief sought, but on condition that it first deposit the amount of the tax in court; if it did not do so, it would be left to its legal remedies. This was in accordance with the well-recognized principle of granting injunctive relief in such cases. *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; *People's Nat. Bank v. Marye*, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68.

The court perhaps went farther than it had a right to do, or there was any necessity of doing, in saying that if the tax was not so deposited, the chancellor should place the management of the corporation in the hands of a receiver to collect the tax. These cases are not an authority for the position that suit might have been brought on behalf of the political legal entity to whom the tax was due against the taxpayer for the collection of the tax, and there is not the slightest conflict between them and the *Commonwealth of Kentucky Case*, in which it was distinctly held that no such suit could be brought.

This takes us back to the four cases in which it was held that a suit was maintainable. Each was a suit against an individual taxpayer, and it was brought by the political legal entity to whom the same was due. In the *City of Covington Case* there was express legalization authorizing the bringing of the suit. In neither one of the other three was there any such legislation. In the *Trustees of Portland Case* the legislature had imposed a specific tax on an insurance company in favor of the trustees, and the suit was brought to recover the tax so imposed. Judge Marshall said: "It is objected that the action of debt cannot be maintained for the demand disclosed in the declaration, but that, if the plaintiffs are entitled to it at all, they should collect it as they do their ordinary taxes. But as the sum is certain and due by statute, and as debt is the ordinary remedy upon statutes, we do not perceive why, if the defendants are certainly bound to pay the tax to the plaintiffs, the action of debt may not be maintained, even if they might resort to a more summary mode of coercion. If a statute prohibit an injury under a certain penalty to be paid to the party injured he may sue for it in debt, though neither the right nor the form of action be expressly recognized in the statute. 1 Chitty, Pl. Much more, if the legislature may require payment of a certain sum by one person to

another, should the person entitled to it be allowed to maintain an action of debt against the party who, being bound to pay it, actually owes it. If the statute creating the liability had presented a different remedy, the case might be different. But the mere fact that the statute creating this liability calls it a tax does not in our opinion preclude the remedy by action."

It is plain from this that the statute imposing the tax prescribed no remedy for its collection, for he said that if it had done so, the "case might be different." He did say, however, in response to the suggestion that the tax should be collected as ordinary taxes were collected, that the action was maintainable notwithstanding that it might be so collected. The decision in this case is in no way in conflict with any of the cases in which it was afterward held that a suit was not maintainable. The *District of Highlands Case* was a suit against a public service corporation, to wit, the city of Covington, which owned and operated its own waterworks, to recover tax due from property owned by it in the district of Highlands, a political legal entity. It thus presented the identical question decided in the *Commonwealth of Kentucky Case*, and, had the decision in that case been followed, it should have been held that the suit was not maintainable. But upon the erroneous notion that the decisions in the *Hamilton* and *Clark Cases*, in holding that before an injunction would be granted at the instance of a public service corporation, restraining the seizure and sale of its assets to pay a tax which it claimed to be invalid, a deposit of the amount of the tax should first be made, were inconsistent with the decision in the *Commonwealth of Kentucky Case*, it was held that the suit was maintainable. Thus, for the first time discord arose.

The *City of Lexington Case* was a suit by that entity to recover an occupation tax imposed on a livery stable keeper by an ordinance thereof. No remedy was provided for its collection. The case was more like the *Trustees of Portland Case* than any of the previous ones that preceded it, and was perhaps governed by it. We see no reason to question its soundness. In the opinion therein practically all the previous cases were reviewed. The decisions in the *Hewitt Auditor* and *Commonwealth of Kentucky Cases* were disapproved, and that in the *District of Highlands Case* approved. No disapproval was expressed of the decision in the *City of Louisville* and *City of Covington Cases*. The decisions in the *Deposit Bank* and *Grand Rapids School Furniture Company Cases* were expressly approved; but their holding was placed on too narrow a ground, to wit, that what the court of

equity was asked to do in those cases was to fill the vacancy in the office of tax collector. It may be that that was in reality what was asked to be done. But the decisions should be placed on the broader ground—as they are placed by the opinions therein—that what was asked of the court of equity therein was the exercise of power of taxation, and there was no legislation authorizing it.

Now we fail to find anything in any of these four cases, in which it has been held that a suit was maintainable, upholding the suit herein. The City of Lexington Case, which is most relied on, certainly does not. The decision therein is simply that where a tax is imposed, and no remedy whatever is provided for its collection, it may be collected by suit, on the ground that the legislature must have intended that it should be collected in some way. It recognizes our fundamental principle, and upholds the suit because there is legislative action authorizing it. The opinion, however, goes farther than the point actually necessary for decision, and, in so doing, it finds support in the District of Highlands Case, that, though a remedy may be provided, yet, if, in its nature or character, the remedy provided is inadequate to the collection of the tax, there too, as well as where no remedy at all is provided, an intention on the part of the legislature that it may be collected by suit will be inferred, and a suit to collect it will be upheld because there is legislation authorizing it. But we do not think it is to be gathered from the point decided, or anything said in the opinion, that it will be inferred that the legislature intended that if the tax could not be collected by reason of the fact that no one can be found to act as tax collector, or if one can be found, the taxpayers will not let him collect it, it may be collected by suit. To the contrary of this, it seems to us, it is said in the opinion as follows: "The court also recognizes the rule of this court to be that when the legislature has prescribed a full and adequate remedy for the collection of taxes, the authority to resort to any other remedy for their collection is denied."

There is no room to claim that by "full and adequate remedy" was meant other than that the remedy should be full and adequate to meet the situation as it may exist, otherwise than where no one will act as tax collector, or the taxpayers will not allow him to collect the taxes. The legislature should not be held to have contemplated such a situation. It would certainly be farfetched to hold that it did so contemplate, and that at a time when almost everyone was in favor of railroads and will-

ing to go down in their own pockets to help build them.

But, however all this may be, there is not the slightest warrant in the Trustees of Portland, District of Highlands, and City of Lexington Cases, or either of them, for the bringing of a suit by the judgment creditor of the political legal entity in whose favor the tax may be imposed. They were all suits by the political legal entity itself, and it is somewhat significant that the only two cases considered above wherein the suit was brought by the creditor, and not by the political legal entity, and held not maintainable, were set aside to themselves and expressly approved in the City of Lexington Case.

This leaves for consideration the Louisville Trust Company Case, which we have left for consideration by itself. We have done this because it is so similar to the case in hand. In that case bonds had been issued in compromise of former bonds, and the suit was to collect the tax imposed for their payment. The act under which the original bonds were issued contained a provision exactly similar to the one in the act here. The act under which the compromise bonds were issued contained a provision as to lien also, in somewhat different phraseology. It provided that "said county shall have a lien," etc. The bonds do not seem to have been reduced to judgment. The tax was not otherwise collectable than by that suit, because no one would act as collector. The suit was by the holder of the bonds against the entity and a number of the property owners thereof, seeking to enforce the tax liens. The case differs from the case here, in that the provisions as to the lien in the act under which the compromise bonds were issued said that "said county shall have a lien;" whereas, the act here did not in so many words say who should have the lien. The suit there was against more than one taxpayer; whereas, here it was against a single taxpayer. And it does not appear that the property of the taxpayers sought to be sold was specifically described in the bill; whereas, here it is. We do not see sufficient in these differences to lead to a difference in decision. It was held that the suit was not maintainable. Judge Hazelrigg said, referring to the two lien provisions: "It will be observed that the language of these provisions is substantially the same as that employed in the General Statutes of the state . . . creating similar tax liens, so that there is no intention to give the county any other lien than that which existed prior to the passage of these acts [or to afford any additional or extraordinary remedy for the enforcement of such lien]. These liens cannot

be enforced in courts of equity; courts cannot be transformed into tax collectors.

We are unable, therefore, to find anything in the decisions of the court of appeals of Kentucky upholding the position that the legislature intended that the lien created by § 2t should be enforceable by suit, much less that it should be enforceable by the holder of the bonds authorized to be issued by the act. On the contrary, we think that those decisions are conclusively against this position.

Is it to be said, then, that we have a case here of a wrong without a remedy? No. It is not a case of a wrong without a remedy. It is a case of a wrong without a judicial remedy. It is a case of a wrong where there is a remedy, but that remedy is legislative, not judicial. It is important that the position should be maintained that every wrong should have a remedy, but it is equally important that it should be maintained that wrongs should be remedied in the right way, and not in a wrong way.

The decree of the lower court is affirmed.

Petition for writ of certiorari denied by United States Supreme Court, February 27, 1911, 220 U. S. 610, 55 L. ed. —, 31 Sup. Ct. Rep. 714.

NEBRASKA SUPREME COURT.

CHRISTOPHER TIERNAN

v.

CITY OF LINCOLN, Appt.,

and

THOMAS J. THORP.

(— Neb. —, 130 N. W. 280.)

Municipal corporation — permitting excavation under street.

1. Under the charter of the city of Lincoln, as contained in Comp. Stat. 1893, chap. 13a, the city council had power to grant the right to a lot owner to excavate a room under an alley adjacent to his lot, to be used as a boiler and coal room, under suitable regulations protecting the public in the free, safe, and unobstructed use of the alley.

Same — compliance with ordinance — presumption.

2. When the evidence shows that an ordinance was enacted in 1892, authorizing such excavation, and that the same was thereupon made by the lot owner, and a boiler installed therein, and that the excavation has been ever since that time used by the lot owner for such boiler room

for the heating of a large building on such lot, and that the same was safely and securely covered and maintained by the lot owner, it will be presumed, in the absence of proof as to the terms of the ordinance, that the ordinance was complied with in the construction of said excavation, and that the work was done with the approval of the city council.

Same — removal as nuisance.

3. After such excavation has been so maintained and used for more than fifteen years, the city authorities cannot summarily declare it a nuisance, and destroy or remove the same as such.

(February 28, 1911.)

Note. — Power of municipality to require removal of vaults in street.

Without reference to whether an adjoining owner owns to the center of the street, or whether the fee of the street is in the municipality, the rule is well settled that any rights in the street incident to the ownership of adjoining land are subject to the use of the street for public purposes; and any grant from a municipality to an abutting owner of the use of any portion of the street is subject to revocation at any time public necessities require; hence, a vault constructed under a street by an abutting owner may be appropriated by a municipality at any time public necessities require, although the vault was constructed with its consent. *United States v. Boston Elev. R. Co.* 176 Fed. 963; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 423, 105 N. Y. Supp. 1071, affirmed in 124 App. Div. 920, 108 N. Y. Supp. 1145; *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327; *Patten v. New York Elev. R. Co.* 3 Abb. N. C. 306; *Lincoln Safe Deposit Co. v. New York*, 96 App. Div. 624, 88 N. Y. Supp. 912.

An abutting owner's right to maintain, under a license from a city, a vault in the public street, does not constitute a property right attached to the fee, and a dominant easement under the surface of the street, but it amounts to no more than a revocable permit, or license revocable whenever the city or public uses require. *Potter v. Interborough Rapid Transit Co.* 54 Misc. 423, 105 N. Y. Supp. 1071, affirmed in 124 App. Div. 920, 108 N. Y. Supp. 1145.

Where the construction of a vault in the public street has been permitted by the municipality as a matter of indulgence when not otherwise interfering with the use of the street for public purposes, the right to grant the indulgence may be conceded; but it is clear that whenever such use constitutes interference with the public use of the street, it becomes a public nuisance, and no concession made by the corporation can be interposed as a defense against public necessity. *Patten v. New York Elev. R. Co.* 3 Abb. N. C. 306.

In *Sears v. Crocker*, 184 Mass. 586,

APPEAL by the defendant city from a judgment of the District Court for Lancaster County in plaintiff's favor, enjoining it from interfering with repairs made by the plaintiff in an alley adjoining his property. Affirmed.

The facts are stated in the opinion.

Messrs. John M. Stewart, T. F. A. Williams, C. C. Flansburg, and L. A. Flansburg for appellant.

Messrs. E. P. Holmes and G. L. DeLacy, for appellee:

Appellee has an easement in the alley to maintain his excavation and roof over it.

Agnew v. Pawnee City, 79 Neb. 603, 113 N. W. 236; Cook v. Chicago, B. & Q. R. Co. 40 Iowa, 451; 10 Am. & Eng. Enc. Law, p. 428.

100 Am. St. Rep. 577, 69 N. E. 327, the court remarked that the mere fact that a subway deprives abutters of the use of vaults or other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets, above or below the surface, whenever the public needs the occupied space for travel.

The legislature may authorize the construction of a subway for a street railway in the street, and if such construction interferes with a vault built by an adjoining owner, and extending into the street, the municipality may require the closing or abandoning of it. United States v. Boston Elev. R. Co. 176 Fed. 963.

The right of a municipality to revoke a license or permit to an abutting owner to maintain a vault under a public street, which does not interfere with public use, and is being maintained in such a way as not to render the street unsafe for public use, is not so clear. In some jurisdictions, and especially those in which the fee of the street is in the public, the right of an abutting owner to maintain a vault in the street depends upon municipal consent, express or implied, is temporary, and may be revoked at any time by the municipality.

Thus, in New York Steam Co. v. Foundation Co. 195 N. Y. 43, 21 L.R.A.(N.S.) 470, 87 N. E. 765, the court said that the abutting owner, under a license to that effect, has the lawful right to build a vault in a street under a sidewalk, and that it is a property right, although not indestructible as to the municipality.

The doctrine was thus asserted in Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373: "An adjoining owner cannot, under the plea of convenience or necessity, make an excavation in the street in front of his premises, or construct a cellarway extending into the sidewalk, except by permission of a competent authority. The authority to construct vaults under sidewalks, or to make openings therein for a cellarway, or to inclose an area within the line of a 32 L.R.A.(N.S.)

The city of Lincoln having granted the right to maintain the roof and excavation, and the grantees having acted upon said grant, and invested large sums of money under it, the city is now estopped from revoking said grant, and from denying the appellee the right to maintain this improvement.

Agnew v. Pawnee City, 79 Neb. 603, 113 N. W. 236; Tewksbury v. Lincoln, 84 Neb. 571, 23 L.R.A.(N.S.) 282, 121 N. W. 994; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Gregsten v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; Oliver v. Synhorst, 48 Or. 292, 7 L.R.A.(N.S.) 243, 86 Pac. 376; Joliet v. Werner, 166 Ill. 34, 46 N. E. 780; Jordan v. Chenoa, 166 Ill. 530, 47 N. E. 191; Crook-

street, is not an incident of ownership of the adjacent premises, or implied from such ownership, however convenient or even necessary the exercise of such an authority may be to their full enjoyment. The implication of such a right, as one annexed to the land, and arising out of ownership merely, would or might lead to embarrassing conflicts, and interfere with the control and regulation of the streets, which, in the interest of the public, is reposed in public authorities. But it is competent for the legislature to authorize a limited use of sidewalks in front of buildings in cities and villages for stoops or cellar openings, or underground vaults, for the more convenient and beneficial enjoyment of the adjacent premises. While such uses may restrict somewhat the free and unembarrassed use of the streets for pedestrians, the general interests are subserved by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvements, and adding to taxable values."

In March v. New York, 69 App. Div. 3, note, 74 N. Y. Supp. 1151, the court said no trespass is disclosed in the destruction, under municipal authority, of a vault maintained in the street by an adjoining owner, presumptively by authority of a license from the city, which owns the fee of the street; that, as a matter of law, the plaintiff had no right to the possession of this portion of the street, as against the city.

In the absence of some contract to that effect, there is no presumption that an abutting property owner who has maintained a vault in a street for some years acquires anything more than a mere license to maintain a vault, which was revokable by the public authorities. The public is not estopped from at any time resuming possession of the street, and compelling the owner to remove the vault. Deahong v. New York, 74 App. Div. 234, 77 N. Y. Supp. 563, affirmed in 176 N. Y. 475, 68 N. E. 880.

A vault in a public street, unlawfully erected and maintained by an adjoining owner, constitutes a nuisance, and in equi-

er v. Collins, 37 S. C. 327, 34 Am. St. Rep. 752, 15 S. E. 951; People ex rel. Beardsley v. Rock Island, 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437.

Mr. R. S. Mockett for appellee Thorp.

Sedgwick, J., delivered the opinion of the court:

The district court for Lancaster county enjoined the defendant the city of Lincoln from interfering with, removing, or destroying repairs made by the plaintiff in the alley at the rear of the property owned by the plaintiff, and the city has appealed.

The petition alleged that the defendant Thorp was interfering with this property and threatening to continue doing so. He answered, denying these allegations, and the court found in his favor. As the plaintiff has not appealed, the defendant Thorp is no longer interested in this litigation.

On November 29, 1892, the owner of this property applied to the city council for "permission to excavate in the alley of said building for the purpose of a storage for coal;" and the record of the proceedings of the city council, introduced in evidence, recites that "the ordinance to authorize the

owners . . . (of the real estate on which the building stands) to construct an areaway in the alley in said block to the full width of said alley, and to provide for arching the same, and keeping said alley in suitable condition for travel, . . . was put to passage, and the required pass on the vote, ayes: Chapman, Daily," etc., naming twelve councilmen, and reciting that two councilmen, naming them, were absent. These two entries appear to be all of the record in regard to the manner. Thereupon the owner of the property constructed a room under the alley about 90 feet in length and the full width of the alley, 16 feet, and about 9 feet in depth. In this room he installed a boiler for heating the building, which is a four-story building. The plaintiff and his grantors have used this room for a boiler room and for the storage of coal from that time continuously until the commencement of this action. The room is covered with an arch of brick and concrete, supported by iron I-beams, and is covered over with cement. It has been continuously used for travel, and there is no evidence that it was ever allowed to become unsafe, nor is there any

ty may be abated as such. New York v. DePeyster, 120 App. Div. 762, 105 N. Y. Supp. 612, affirmed in 190 N. Y. 547, 83 N. E. 1123.

A municipality may interfere with and prevent the construction of a vault under a sidewalk, where it is being constructed without lawful authority from the municipality. Davis v. Clinton, 50 Iowa, 585.

In Illinois the rule prevails that excavations under a street, where authorized by a municipality, if temporary and reasonably necessary, are not an illegal obstruction of the street. Gridley v. Bloomington, 68 Ill. 47; Smith v. McDowell, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141.

And a municipality may authorize an abutting owner to build and maintain a vault under a public street, providing he keep the same in suitable repair for public use, unless the public convenience or necessity require its removal; and the municipality may further require that such an abutting owner shall forever save and keep harmless the municipality from any damage by reason of the vault being at any time out of repair. Such a contract is not revocable by the city unless the public necessity or convenience demand it, or there is some other cause by which the contract, by its terms, may be revoked. Gregsten v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426.

It is well settled, at least, where the abutting owner owns to the center of the street, that a vault properly constructed by him in the street is not a nuisance *per se*, where the vault does not in any way interfere with the public use of the street. Dubuque v. Maloney, 9 Iowa, 450, 74 Am. 32 L.R.A. (N.S.)

Dec. 358; Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Gordon v. Peltzer, 56 Mo. App. 599; McCarthy v. Syracuse, 46 N. Y. 194; Adams v. Fletcher, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 898; Papworth v. Milwaukee, 64 Wis. 389, 25 N. W. 431.

It does not, however, follow that because an abutting property owner has the right to erect a vault in a public street if the use of the street by the public is not thereby rendered unsafe, that such right cannot be interfered with by the municipality, under the exercise of the police power or express or implied authority conferred upon it by the legislature. It is to be noted that none of the foregoing cases go to the extent of denying the right of a municipality to prohibit the construction or require the removal of a vault; they do, however recognize the right of a municipality reasonably to regulate the construction and maintenance of the same. Since a municipality is liable for injury arising from the unsafe condition of public streets and ways, where it is chargeable with notice thereof. The power to regulate and control the construction of vaults under a street would seem necessarily to follow, even to the extent of prohibiting the construction of vaults, or requiring their removal unless the municipality be indemnified against any loss or damage resulting from the owner permitting the vault to get in a condition unsafe for the public use of the street.

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serious complaint in that regard. The covering of this room is about 18 inches higher in the center than the level of the streets at either end of the alley, and slopes gradually toward the ends of the alley. It appears to have been constructed in accordance with the surface of the ground at that time. Just before the commencement of this action, in 1908, some of the employees of the city began breaking up the covering of this room, with the avowed intention and purpose to remove the covering, and fill up the excavation, and reduce the grade to conform with the level of the streets at the ends of the alley. It is claimed that the city council had ordered this to be done, and it is intimated that an ordinance has been passed for that purpose. There is no competent evidence in the record that this covering of the area was not in accordance with the original grade as established or adopted by the city, and the assistant city engineer testified that "in case the alley is about level, we sometimes put a hump in the center," meaning, as we understand it, that it is not unusual in such cases, in establishing the grade of the alley, to raise the center somewhat so as to facilitate drainage. The answer of the defendant alleges that "the excavation and the roof over same, maintained by plaintiff in the public alley of the city of Lincoln, is an unlawful obstruction therein and a nuisance; and it is made the duty of the defendant the city of Lincoln, by the statutes of Nebraska, through its proper officers to remove the same; that this defendant is about to proceed to grade and pave said alley, and the said excavation and roof over the same interferes with such improvements, and it is necessary that the same be removed, in order that such improvements be properly made and such alley be restored to a safe condition for the public use," with a general denial.

1. It is contended that the city council was without authority to authorize this construction in the alley, and that there is no evidence that the city ever did authorize any such construction as was in fact made. It appears, as already stated, that there was an ordinance passed, authorizing the then owner of the property, under whom the plaintiff now claims to "construct an araway in the alley . . . to the full width of said alley, and to provide for arching the same, and keeping said alley in suitable condition for travel." We are not informed as to the details and language of the ordinance. The work was one of public notoriety. The city authorities must have taken notice of the manner in which it was being done, and we have recently held that under such circumstances

it will be presumed that the work was done pursuant to the ordinance, and in compliance with its terms, and with the approval of the city authorities. *Omaha v. Philadelphia Mortg. & T. Co.* — Neb. —, 129 N. W. 996.

The authority of the city council to authorize such use of the streets and alleys is thoroughly discussed in the briefs and many authorities cited. It is, of course, conceded that the city council cannot deprive the public of the ordinary use of the streets and alleys of the city for travel and other necessary and usual public purposes. Any private use thereof which substantially interferes with such public use is unlawful; and it may be conceded that any attempt of the city authorities to authorize such use of the streets and alleys would be *ultra vires*. The care and control of the streets and alleys is confided to the city council. The council must determine, in the first instance, what is and what is not an improper interference with the public use of its streets and alleys. The council must be allowed some discretion in such matters, and its action will not be interfered with by the courts unless it clearly violates some public or private right.

The privilege of excavating under sidewalks and streets for coal rooms, vaults, and subways is of great value and convenience; and, if properly regulated and controlled by the authorities, may be used with little or no inconvenience to the public. Judge Dillon suggests that the right of the lot owner in this respect does not depend upon his ownership of the fee in the streets. 2 Dill. Mun. Corp. 4th ed. § 699. The same author quotes with approval, and as of general application, the following from the opinion of the supreme court of Illinois, in *Nelson v. Godfrey*, 12 Ill. 20: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it; but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be implied, in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. . . . Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it; and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."

It may be questionable whether the owner of the adjacent lot can claim this privilege as a right, in the absence of any statute governing the matter. Courts have differed in opinion upon this point. The charter of the city of Lincoln when this work was done provided that the city should have power by ordinance "to remove all obstructions from the sidewalks, curbstone, gutters, and cross walks at the expense of the owners or occupiers of the grounds fronting thereon, or at the expense of the person placing the same there, and to regulate the building of bulkheads, cellars, and basements, stairways, railways, windows, and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures projecting upon or over adjoining excavation through and under the sidewalks in said city." Comp. Stat. 1893, chap. 13a, art. 1, § 67, subd. 9. It is suggested that the last clause limits the entire section; but cellars, basements, and railways do not project over sidewalks, and the legislature must have intended this section to extend to streets and alleys. The power to regulate these things having been given by the legislature, it must have been intended that they should be allowed, under suitable circumstances and with proper regulations protecting the public in the free and unrestricted use of the streets and alleys. We conclude that the city council has power to authorize this use of the alley by ordinance, and did so authorize it in 1892.

2. It is contended that the city council, in the exercise of the police power and the general power given it by statute over its streets and alleys, may declare this "excavation and the roof over same . . . an unlawful obstruction and a nuisance," and that it is the duty of the city "to remove the same," and that the city may proceed to "grade and pave said alley," and "remove the excavation and roof over the same," for that purpose. It will be seen from the above quotation of the answer that this is the entire defense of the city. There is no allegation of any fact from which it can be seen that public travel or any other public use of the alley is in any way interfered with, nor that the plaintiff has in any way neglected his duty in regard thereto, nor that any ordinance has been enacted, fixing or changing the grade of the alley, nor that plaintiff has refused to lower this covering of the excavation, so as to admit of change of grade, nor that any proceedings have been taken looking to a condemnation of plaintiff's property for public use.

There is in evidence a resolution and ordinance, and proof of publication of the 32 L.R.A. (N.S.)

ordinance, making this alley a paving district, ordering it paved, and the cost thereof assessed against the property in the district. These were not within the issues tendered by the answer. It was in pursuance of this ordinance that the city proceeded to remove the excavation and roof as a public nuisance.

We have already seen that this excavation was not unlawful, and therefore, of course, not a nuisance at its inception. If it is such now, when did it become so? Could the city have declared it a nuisance immediately after authorizing it, and its construction at great expense, pursuant to that authority? If not, when did that right on the part of the city accrue? We think that the city having authorized the construction and maintenance of this excavation and covering, and the grantee of this right having acted upon it, and expended large sums of money in constructing this improvement, the city cannot now summarily destroy this property as a public nuisance. *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236; 2 Dill. Mun. Corp. 4th ed. § 675; *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752, 15 S. E. 951; *City R. Co. v. Citizens' R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. See also cases cited by Voorhees, J., in *Mill Creek Valley Street R. Co. v. Carthage*, 18 Ohio C. C. 216, 9 Ohio C. D. 833, affirmed in 62 Ohio St. 636, 58 N. E. 1102.

These are the only questions presented by the pleadings, and the judgment of the District Court therein is right and is affirmed.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

MARY A. HOGLE, Respt.,
v.

H. H. FRANKLIN MANUFACTURING
COMPANY, Appt.

(199 N. Y. 388, 92 N. E. 794.)

Negligence — article thrown from window — liability for injury.

1. A master may be guilty of negligence which will render him liable for injury to an occupant of adjoining property by a

Note. — Failure of master to prevent practice by employees not in performance of any duty owed to him as ground of liability.

Upon the theory of nuisance, *HOGLE v. H. H. FRANKLIN MFG. Co.* seems to be a

missile thrown from his factory windows by his employee, if, with knowledge of the habit of his employees to throw such missiles from the windows, he fails to exercise reasonable care to prevent the practice.

Nuisance — articles thrown from window — liability of property owner.

2. The owner of a factory is guilty of maintaining a nuisance which will render him liable for injuries thereby caused to an occupant of adjoining property, if, with knowledge of its existence, he fails to suppress a practice on the part of his employees of throwing missiles from the windows onto the adjoining property and at persons seen there.

(October 25, 1910.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Onondaga County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Vann, J.:

For several years prior to the 21st of August, 1906, the plaintiff resided with her husband in a house on West Marcellus street in the city of Syracuse; the lease from James Doheny, the owner, being in the husband's name as lessee. The lot upon which the house stands is 34 by 100 feet,

case of first impression as to the liability of a master for knowingly permitting a dangerous practice by his employees, not in the performance of any duty owed to him, which ultimately results in a direct and substantial injury. On this theory, however, its holding seems to be in accord with the general rules as to liability for maintaining a nuisance.

Upon the theory of negligence, the principal case is supported by some authority. Thus, in *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35, quite fully set out in the opinion to *HOGLE v. H. H. FRANKLIN Mfg. Co.*, it was held that a railroad company may be found guilty of negligence which will render it liable for an injury to a person on a public highway near its tracks, by a stick of firewood thrown from a passing repair train by an employee returning home from work thereon, if, with knowledge of a constant habit of such employees during several years, of throwing such pieces of firewood from such train while in motion, at points nearest their homes, from which injury to a person on a street might reasonably have been expected, it has failed to exercise reasonable care to prevent the practice. The ground upon which the company was held liable in this case appears more fully from the quotation therefrom 32 L.R.A. (N.S.)

and the rear thereof adjoins the land of the defendant, upon which there is a large building several hundred feet long, used for the manufacture of automobiles. Between the lot on which the defendant's factory stands and the lot occupied by the plaintiff and her husband, which for convenience will be called the "plaintiff's lot," there is a vacant space 10 feet wide, which is not used for storage or dumping purposes, or for any purpose except the admission of light and air. At the rear of plaintiff's lot is a tight board fence 6 feet high, and the space between the fence and her house, 20 by 34 feet, is used as a garden. Each floor of the factory has windows overlooking the plaintiff's premises, and on each of said floors are many mechanics and laborers in the employ of the defendant.

For eighteen months prior to the 21st of August, 1906, the employees of the defendant had habitually thrown small pieces of iron, such as nuts, the ends of bolts, and the like, from the upper windows of its factory upon the rear of the plaintiff's lot. Mr. Hogle, who was not at home much in the daytime, saw such objects thrown from the third story of the factory at least a dozen times, some of which struck his house and others fell in the yard at the rear. This was after 6 o'clock in the evening, but when the men were still at work in the factory. He took a handful of the nuts and bolts collected from the garden to Mr. Franklin, the president of

by the court in *HOGLE v. H. H. FRANKLIN Mfg. Co.*

Similarly, under the duty of a merchant to use reasonable care to keep his premises in a safe condition for customers who come there by his invitation, a merchant is guilty of actionable negligence rendering him liable for an injury to a customer in his store, free from contributory negligence, by a pin snapped by a cash boy, if he has taken no reasonably sufficient precaution to suppress a dangerous habit of the cash boys employed in his store of snapping pins at objects and persons, which habit is likely to inflict injury on his customers, and has existed for months, and is known or ought to have been known to the merchant. *Swinarton v. Le Boutillier*, 7 Misc. 639, 28 N. Y. Supp. 53, affirmed without opinion in 148 N. Y. 752, 43 N. E. 990.

But in *Medlin Milling Co. v. Boutwell*, — Tex. —, — L.R.A. (N.S.) —, 133 S. W. 1042, reversing — Tex. Civ. App. —, 122 S. W. 442, it was held that a milling company is not liable for an injury sustained by a new employee in the course of an "initiation" performed against his will by the old employees, although with the knowledge and acquiescence of the company's management, a custom of its old employees to "initiate" new employees by

the defendant, stated the facts to him, and said he wanted the practice stopped, for he was afraid someone would get hurt. Mr. Franklin replied that he was glad to learn what had happened and would see that it was stopped. Mr. Doheny, the lessor of the plaintiff, complained on several occasions to the assistant manager of the defendant, who said he would do all he could to stop the annoyance.

The practice, however, continued and increased, although Mr. Franklin and his foreman forbade it and threatened to discharge anyone who was seen to throw anything upon the plaintiff's lot. A little son of the plaintiff was hit by a nut when playing in the back yard. On another occasion a pail of dirty water was thrown upon him, and on still another tobacco spittle hit him on the head. Mrs. Hogle testified that she saw nuts, pieces of bolts, etc., thrown on her lot and at the children playing there on the average once a day from the spring of 1905 until in August, 1906. Once she saw a rat tail file thrown from the window on the third floor, and saw it pass over her little boy and strike the ground behind him. These objects, which for convenience counsel called "missiles," came from the windows of defendant's factory and mainly from those on the third floor. She saw many of them when they were thrown by defendant's workmen from the windows of its factory.

On the 21st of August, 1906, she went out into her garden and looking up saw men at work and heard them talking by the windows of the third floor, which were open. As she was kneeling on one knee about 10

feet from the rear of her lot, to pull some radishes, she caught a side glance of some object coming from the direction of the third floor, and at once was hit by a piece of iron upon her arm just below the shoulder. She produced the iron in court, and the injury inflicted thereby was somewhat severe.

Upon the first trial, when the complaint was based wholly on negligence, she had a verdict, which was set aside by the trial justice upon the ground that, as the acts of the defendant's workmen were not done within the scope of their employment, an action for negligence would not lie; but it was pointedly suggested in the opinion that an action for nuisance was the proper remedy. The complaint was thereupon so amended as to rest both on negligence and nuisance. Upon the second trial, also, the plaintiff had a verdict, and the judgment entered thereon was affirmed by the appellate division; one of the justices dissenting. The defendant now appeals to this court.

Messrs. White, Cheney, Shinaman, & O'Neill, for appellant:

The master cannot be held liable for the malicious acts of his servants, outside of the scope of the employment, and not in the furtherance of the master's business.

Froomkin v. Brooklyn Daily Eagle Co. 113 App. Div. 443, 99 N. Y. Supp. 300; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Meehan v. Morewood*, 52 Hun. 566, 5 N. Y. Supp. 710, affirmed in 126 N. Y. 667, 27 N. E. 854; *Smith v. New York C. & H. R. R. Co.* 78 Hun. 524, 29 N. Y.

laying them across a barrel and applying a paddle has so long continued as to become a rule of the establishment. In the lower courts, the company was held liable on the ground that it had authorized an assault on the new employee and the consequent injury, although greater than anticipated in undertaking the wrongful act; but the supreme court said: "Officers, as well as employees, were engaged in it as individuals, and not as representatives of the company. Their knowledge of and acquiescence in it was simply that of men concerning the conduct of persons pursuing exclusively their personal ends. About a matter of that kind they were wholly without authority to act for or bind their principal. . . . The assault, unless expressly authorized, must come within the scope of that which the servant is employed to do. Nor does it [the company] by the mere selection of officers empower them to make it responsible for their action or non-action in or about matters entirely outside the sphere of its business. In such affairs the officers and employees do not act or acquiesce as representatives, but as free agents, responsible for their own conduct." 32 L.R.A. (N.S.)

Where it is the custom for certain yard employees of a railroad company, including the general yard master, to use for a trip of about a mile and a half to their dinners each day, one of the company's engines furnished them for that purpose, such use of the engine is not a private purpose of the company's servants, in which it has no interest, and it is liable for an injury to a pedestrian in a public street occupied by the company's tracks, who, without contributory negligence, is struck by such engine while being so used. *East St. Louis Connecting R. Co. v. Reames*, 173 Ill. 582, 51 N. E. 68.

It will be observed that the question considered in this note differs from the question of the master's liability for malicious or mischievous acts of servants while engaged in performance of a duty owing to him. Numerous aspects of that subject are treated in notes indexed in the subdivisions of the topic "Master and Servant" that relate to the liability of the master to third persons.

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Supp. 540; *Collins v. Butler*, 179 N. Y. 156, 71 N. E. 746; *Girvin v. New York C. & H. R. R. Co.* 166 N. Y. 289, 59 N. E. 921; *Kennedy v. White*, 91 App. Div. 475, 86 N. Y. Supp. 852; *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474; *Wallace v. John A. Casey Co.* 132 App. Div. 35, 116 N. Y. Supp. 394; *Miller v. Wanamaker*, 111 N. Y. Supp. 786; *Walton v. New York Cent. Sleeping Car Co.* 139 Mass. 550, 2 N. E. 101; *Walker v. Hannibal & St. J. R. Co.* 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360; *St. Louis Southwestern R. Co. v. Bryant*, 81 Ark. 368, 99 S. W. 693; *Mace v. Ashland Coal & I. Co.* 118 Ky. 885, 82 S. W. 612; *Evers v. Krouse*, 70 N. J. L. 653, 66 L.R.A. 502, 58 Atl. 181; *Shay v. American Iron & Steel Co.* 218 Pa. 172, 67 Atl. 54.

Mr. Frank O. Sargent, for respondent:

The defendant was guilty of negligence which caused the injury sustained by the plaintiff.

Swinerton v. Le Boutillier, 7 Misc. 639, 28 N. Y. Supp. 53, affirmed in 148 N. Y. 752, 43 N. E. 990; *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35; *Dwyer v. Delaware & H. Canal Co.* 17 App. Div. 623, 47 N. Y. Supp. 1135; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 40 Am. Rep. 540.

Vann, J., delivered the opinion of the court:

The theory upon which the case was sent to the jury upon the second trial is shown by the following extracts from the charge of the trial justice: "I do not intend to talk to you about negligence, or about a nuisance, or about any other subject with a technical name. I want you to consider simply, in the light of common sense, what is due from one man to another, from one neighbor to another. . . . If my servant repeatedly, with my knowledge, even if he is not engaged in my business, throws stones at you and injures you, I should do what I reasonably can to prevent that act on his part. In the first place, the servant is subject to my control. In the second place, he is occupying my land, and from it he is committing a trespass upon yours; he is using my personal property to help along in that trespass, and he is where he is, and is able to commit that trespass, because of my act in putting him there and keeping him there. . . . If you find that the plaintiff was injured as she claims, and if you find that these trespasses were repeatedly and continuously committed by persons upon the defendant's property, the defendant concededly having notice that these trespasses were being committed, I say it is a question for you to determine 32 L.R.A.(N.S.)

whether or not the defendant used such reasonable efforts as it should have used to prevent their recurrence, and so is liable because their recurrence was not prevented, and because as a result the plaintiff received this injury of which she complains."

As the appellate division held, and as we think, the evidence warranted the jury in finding that the piece of iron which injured the plaintiff was maliciously thrown from a window of the defendant's factory by one of its workmen, and that for more than a year it had been the practice of its workmen maliciously, or in a spirit of mischief, to throw similar objects from the windows of its factory upon the premises adjoining, where plaintiff lived, with the knowledge of the defendant, but without its consent and in violation of its orders.

The defendant contends—and its motion for a nonsuit was based on the ground—"that there can be no recovery in this case unless the jury should find that this piece of iron was thrown upon plaintiff's premises as a necessary consequence of the work being carried on there, or as an incident to it." The refusal to so hold is the main assignment of error on this appeal.

While we all think that the recovery should be sustained, we differ somewhat as to the exact theory upon which it should be based. No request that the plaintiff should elect between the theory of nuisance and that of negligence was made at the trial, and the complaint was adapted to either. The trial judge did not name the action, but treated it as an action on the case. If the evidence established a cause of action for negligence in failing to take reasonable precautions to suppress the evil practice, such as closing the windows, or screening them with wire netting, or setting a watch upon the men, or some other of like character, the defendant cannot complain. Such negligence would rest, not on the throwing of the missiles, as they were not thrown in furtherance of the master's business, but on not using reasonable care to prevent them from being thrown. In other words, it would rest on a relative, and not on an absolute, duty. If, on the other hand, the evidence established an action for nuisance, the rulings of the court were more favorable to the defendant than it was entitled to, because the liability for injury from a nuisance is not relative, but absolute, and proof of negligence on the one hand and the absence thereof on the other is not required.

The line between protracted and habitual negligence and nuisance is not easily drawn, and facts may exist which call for damages on either theory, when the pleadings are appropriate, as in this case, to either

kind of relief. High authority is not wanting to sustain the judgment below on the ground of negligence pure and simple. Thus, in an important case, the plaintiff was a workman employed by the defendant railroad at its workshop in the city of Washington. When returning from his day's labor, he stopped at the intersection of two streets to enable a repair train to pass him. For a long time prior it had been the custom of the defendant to allow its workmen who went out on a repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing the sticks off the train while in motion at the points nearest their own homes; but they had been cautioned by the company not to injure anyone in doing so. As the defendant's train passed the plaintiff, such a piece of refuse wood was thrown from it by one of the men, and, striking the ground, rebounded, struck the plaintiff, and injured him seriously. Upon the trial of an action to recover damages, after proving these facts, the plaintiff rested, and defendant moved for a verdict in its favor, and the motion was granted. Upon appeal to the court of appeals of the District of Columbia the judgment was affirmed; but upon further appeal to the Supreme Court of the United States it was reversed, on the ground that the jury could have found the defendant guilty of negligence. *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35. Mr. Justice Peckham, writing for all the judges, said: "Negligence on the part of the company is the basis of its liability, and the mere failure to prevent a single and dangerous act, as above stated, would not prove its existence. . . . If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act, and liable for the injury resulting therefrom, notwithstanding the act was that of an employee and beyond the scope of his employment and totally disconnected therewith. . . . It is not a question of scope of employment, or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is: Does the company owe any duty whatever to the general

public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could, by the exercise of reasonable diligence on the part of the company, have been prevented? We think the company does owe such a duty, and if, through and in consequence of its neglect of that duty, an act is performed by a passenger or employee which is one of a series of the same kind of acts, and which the company had knowledge of and had acquiesced in, and if the act be in its nature a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable. Any other rule would in our opinion be most disastrous, and would be founded upon no sound principle." See also *Swinarton v. Le Boutillier*, 7 Misc. 639, 23 N. Y. Supp. 53, affirmed in 148 N. Y. 752, 43 N. E. 990; *Dwyer v. Delaware & H. Canal Co.* 17 App. Div. 623, 47 N. Y. Supp. 1135.

The defendant had reason to believe that missiles would be thrown from its premises upon those of the plaintiff in the future, as they had been continuously in the past, and that they might hurt someone. It took some precautions to prevent the evil; but they were not effective, and the defendant knew they were not. It could not remain quiet and let the practice go on. The jury could properly say that, in the exercise of reasonable care in the management of its own property, so as to prevent an injury reasonably to be expected to its neighbor's property and person, it should have taken further precautions, and that it was negligent in not having done so. This would lead to an affirmance on the ground of negligence, the real ground upon which the case was sent to the jury. I am personally of the opinion, however, that the practice complained of was a nuisance as matter of fact, if the jury so found. *Sic utere tuo ut alienum non laedas* is an old maxim of the law, which applies both to the use made and the use knowingly suffered to be made of one's own property while he is in full control thereof. It is a trespass for the owner of one lot to throw anything upon the adjoining lot of his neighbor. The defendant furnished the place from which and the means with which habitual trespasses, calculated to inflict personal injury, were committed on the adjoining premises of the plaintiff. The defendant knew of the practice and knew that it had existed a long time, and, while some efforts were

made to prevent it, the evil continued and even grew worse. An occasional trespass of this kind committed by the defendant's workmen would not warrant a jury in finding it guilty of suffering or maintaining a nuisance; but when the practice became habitual and the injury was direct, substantial, and well known, I think the duty of the defendant became absolute, and that it was guilty of suffering a nuisance to continue on its land if it did not prevent the evil.

In a recent case, without attempting a general definition of a nuisance, we said that "if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme, and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law." *Melker v. New York*, 190 N. Y. 481, 488, 16 L.R.A. (N.S.) 621, 83 N. E. 565, 567, 13 A. & E. Ann. Cas. 544. See also *Sullivan v. Dunham*, 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923; *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 40, 13 L.R.A. (N.S.) 465, 81 N. E. 549, 12 A. & E. Ann. Cas. 840. While that definition implies that the act is that of the defendant, I think the same rule should apply when a series of acts extending over many months is committed by men in the employment of the defendant, to its knowledge, with its personal property and while standing on its premises, even if the acts are without the line of its business. Although the defendant did not commit the injuries nor sanction them, it suffered them to continue for so long a period as to make them its own, or so at least the jury could find. It is a nuisance for one to permit a crowd to habitually gather on his land, and by boisterous singing, obscene language, and other disorderly conduct to seriously annoy his next-door neighbor. It is immaterial whether the acts are committed by his own workmen or by strangers, so long as they are committed on his land, constantly and with his knowledge. It is the duty of the owner of premises to prevent them from being made a constant source of injury to others, and it is upon this principle that suffering a foul water-closet to exist in a crowded neighborhood is held a nuisance. The decaying carcasses of animals, whether placed on his land by the owner or not, hogpens, cesspools, dangerous structures, explosives, and the like, while all are dependent on the surrounding circumstances and on the degree of danger or annoyance, may be found nuisances in fact. Although the 32 L.R.A. (N.S.)

mere ownership of land may impose no liability for a nuisance thereon or committed therefrom, still if the owner suffers his premises to become the standpoint for the habitual infliction of injuries upon his neighbor, and such injuries could not be inflicted without standing on such land, he may be held liable by the jury as a principal. He suffers the evil to exist on his land, if, while in the full possession and control thereof, he knows that it exists thereon, and he does not abate it within a reasonable time and under reasonable circumstances; both time and circumstances ordinarily being for the jury.

I think that upon the facts as they are presumed to have been found by the jury the defendant was guilty of suffering a nuisance to exist and continue on its premises, and that it is liable for the injury resulting therefrom to the plaintiff, without proof of negligence or its incidents.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Willard Bartlett, Hiscock, and Chase, JJ., concur. Werner, J., concurs on first ground stated in opinion.

PENNSYLVANIA SUPREME COURT.

J. J. LANNING and Wife

v.

PITTSBURG RAILWAYS COMPANY,
Appt.

(229 Pa. 575, 79 Atl. 136.)

Electricity — accident in highway —
res ipsa loquitur.

An electric railway company cannot be held liable for injury to a person on the street by the breaking of its trolley wire, on the ground that there is no other apparent cause for the break than the negligence of the company.

(January 3, 1911.)

Note. — Applicability of rule, res ipsa loquitur, to accidents on highway, due to disordered electrical appliances.

This note is supplemental to the note to *Walter v. Baltimore Electric Co.* 22 L.R.A. (N.S.) 1178, and is limited in the same way.

Few cases seem to have arisen since the time of the former note, involving the applicability of the rule, *res ipsa loquitur*, to accidents on highways, caused by the escape of electricity through disordered appliances. In *Booker v. Southwest Missouri R. Co.* 144 Mo. App. 273, 128 S. W. 1012, where the trolley pole on an approaching car jumped

APPREAL by defendant from a judgment of the Court of Common Pleas for Washington County in plaintiff's favor in an action brought to recover damages for injuries to the plaintiff wife, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. John H. Murdoch and Edgar B. Murdock, for appellant:

There was no circumstance shown in the case from which an inference of negligence could be fairly and reasonably drawn, and it was error for the court so to charge the jury.

Stearns v. Ontario Spinning Co. 184 Pa. 519, 39 L.R.A. 842, 63 Am. St. Rep. 807, 39 Atl. 292; *Kepner v. Harrisburg Traction Co.* 183 Pa. 24, 38 Atl. 416; *Patterson Coal & Supply Co. v. Pittsburg R. Co.* 37 Pa. Super. Ct. 212; *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 350, 42 Atl. 707; *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036; *Ford v. Anderson*, 139 Pa. 261, 21 Atl. 18; *McCoy v. Ohio Valley Gas Co.* 213 Pa. 367, 62 Atl. 858.

Messrs. Underwood & Meloy, for appellees:

Even the slightest bit of evidence which shows negligence, or from which negligence can be reasonably inferred, is sufficient to warrant the submission of the case to the jury.

Shafer v. Lacock, 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44; *McCoy v. Ohio Valley Gas Co.* 213 Pa. 367, 62 Atl. 858.

When the thing which caused the injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not

happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care.

Shafer v. Lacock, supra; *Geiser v. Pittsburg R. Co.* 223 Pa. 170, 72 Atl. 351; *Fitzgerald v. Edison Electric Illuminating Co.* 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

Brown, J., delivered the opinion of the court:

On the evening of July 31, 1909, a trolley wire of the defendant company parted at the corner of Pike and Main streets, in the borough of Houston, and Mary Martha Lanning, one of the plaintiffs, who was crossing from Pike over to Main street, was either knocked down by one end of the broken wire, or fell in an effort to avoid it. Her fall resulted in the injuries for which damages are claimed in this action, brought by her and her husband. The averment in their statement, charging the defendant with negligence, is that it did not have its trolley and guy wires properly adjusted and fastened, and said wires, on account of improper adjusting and negligent fastening, broke and fell to the ground. The case went to the jury on the question of the defendant's negligence, and the verdict was for the plaintiffs, upon which judgments were entered.

Whatever may be the rule in other jurisdictions as to the presumption of negligence whenever one traveling on the street of a municipality is injured by an appliance of a company using electricity upon or over the street, our cases recognize no

and slipped from the trolley wire, and caught a guy wire holding it, breaking both the guy wire and the trolley wire itself, and the system of suspended wires fell to the street, one of them striking and injuring a person waiting to take a car, the court said that where a live wire carrying a deadly current, used by a street railway company for commercial purposes, and put above the street for that purpose, under the control and the management of its servants, breaks and falls to the street, these circumstances may well be held to show a complete prima facie case of negligence, although, in this case, on the petition, the evidence, and the instructions, the doctrine of *res ipsa loquitur* was not involved.

In *Cavanaugh v. Allegheny County Light Co.* 226 Pa. 86, 75 Atl. 21, however, it was held that negligence on the part of an electric light company was not established by evidence that a boy was found lying on the sidewalk, badly burned, and dead, with his body in contact with a live wire belonging to the company, which had broken and fallen into the street, and that it had emitted

sparks for some time previous to its breaking, it not being shown that sparks were emitted at or near the point where it broke, and the cause of the break being entirely a matter of conjecture.

Negligence of a telephone company is not established by evidence that a span of horses being driven along a public street were killed as they stepped into a pool of water 5 or 6 feet from a point where a guy wire from a pole of the company entered the ground, by an electric current coming down the guy wire through another wire connected therewith, and strung in close proximity to an electric wire used and owned by others, and charged with a heavy and deadly current of electricity. *Anthony v. Cass County Home Teleph. Co.* — Mich., —, 130 N. W. 659.

As to applicability of doctrine to accident on private property, due to escape of electricity from disordered electrical appliances, see notes to *Western Coal & Min Co. v. Garner*, 22 L.R.A. (N.S.) 1183, and *Turner v. Southern Power Co.* ante, 848.

A. C. W.

such presumption. With us the rule *res ipsa loquitur* does not apply in such a case, and the burden was upon the appellees to show more than the mere breaking of the wire. *Kepner v. Harrisburg Traction Co.* 183 Pa. 24, 38 Atl. 416. The burden was upon them to show that the breaking was due to some negligence of the company; and having charged in their statement the specific negligence which resulted in the breaking, it was upon them to establish that negligence on the trial. Until street railway companies are made insurers of the safety of persons traveling over the streets and highways of the commonwealth against injury from any appliance used in their transportation systems, one injured as this plaintiff was must prove more than the mere fact of the breaking of the trolley wire. All this seems to be conceded by counsel for the appellees, and the learned trial judge so instructed the jury. The error complained of is that he permitted them to pass upon the question of the defendant's negligence without any evidence to support it. Whether there was any such evidence was a preliminary question for the court, whose duty it was to have withdrawn the case from the jury if there was no evidence that ought reasonably to have satisfied them of the negligence which the plaintiffs were called upon to prove. *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036.

There was no direct proof of any negligence that caused the wire to break, but the learned trial judge submitted the question of the defendant's liability to the jury, because, as he states in his opinion overruling the motion for a new trial, and refusing judgment for the defendant, he thought it could be fairly inferred from all the circumstances that the company had either negligently constructed its trolley wire, or had failed to keep it in proper repair at the point of the accident, and no other cause was apparent to which the falling of the line could be attributed. The question for the jury was not whether there was no other apparent cause than the defendant's negligence for the breaking of the wire. The question before them was, Did the negligence of the defendant company cause it to break? If this did not appear, there was no liability upon the defendant. If a jury in an action against a street railway company is to be permitted to find it guilty of negligence because there is no other apparent cause for the act complained of, it is quite safe to assume that in every case the verdict will be for the plaintiff. The appellees were not required to establish the negligence of the defendant by direct or positive proof. Like any other fact, negligence may be, and often

is, established by circumstantial evidence: but, when such proof is relied upon, it must fairly and reasonably lead to the conclusion that the specific act of negligence existed, as charged, and was the proximate cause of the injury sustained.

No witness called by the plaintiffs in chief testified that, at the time the wire broke, it had not been properly adjusted, fastened, and strung. One who saw it drop, when asked whether he knew what caused it to fall, replied that he did not; another, who saw the flash before it fell, made the same answer. And so the testimony of all the other witnesses called by the plaintiffs in chief may be examined in vain to find a word from any one of them which would justify a finding that the wire had fallen because it had been improperly and negligently fastened. The only expert called by them—S. M. Pollock—described the condition of the overhead wire at the point of the accident, and, in doing so, pointed to no defect in it which, in his opinion, could have caused, or did cause, it to break, and nothing in his testimony tended to show negligence of the defendant which resulted in the breaking. It was shown by some of the witnesses that at or near the point of the accident, and prior thereto, guy or span wires had fallen at times, but, if they did fall, it was not shown what had caused them to fall. Even if it had been shown that they had fallen because they had not been properly fastened, their falling had no connection with the fall of the trolley wire, and, as the court below correctly held, could not be considered as evidence of negligence by the company which caused that wire to fall. The plaintiffs were permitted to show the falling of these other wires simply as evidence of the fact that the defendant company had knowledge that the line at the corner where the trolley wire broke was liable to get out of order, and therefore needed special care and attention.

When the plaintiffs rested, there was nothing before the jury showing any negligence on the part of the defendant which caused the wire to break, and the company was not called upon to prove anything. It did, however, call witnesses, from whose uncontradicted testimony it appeared that the overhead construction at the corner where the wire broke was proper and the one in ordinary use, and that the line had been duly inspected and kept in repair. This having been the situation when the defendant rested, if the plaintiffs had offered nothing in rebuttal, binding instructions to the jury to find for the defendant, if asked for, could not have been withheld, unless the trial judge was to permit the

jury to guess that the company had been negligent. The plaintiffs were permitted in rebuttal to call an expert, whose testimony ought to have been offered in chief, but the trial judge, in his discretion, permitted him to be called out of order because he had not been in court when the case of plaintiffs was being presented. In the opinion sustaining the verdict, stress is laid upon his testimony as supporting the theory of the plaintiffs that one of the guy wires had become loose and fallen across the trolley wire, striking the rail below and establishing a short circuit, which either burned the trolley wire in two, causing it to drop, or weakened it in such a way by burning it that it separated and fell. In view of the admission of this witness and of the uncontradicted testimony in the case, his theory does not help the case of the plaintiffs. He admitted that, if the wire had been burned, the burn could have been distinguished by the eye from a break. There was no proof by the plaintiffs, nor offer to prove, that the wire had parted as the result of burning, while the uncontradicted testimony on the part of an expert witness, who had examined it immediately after it fell, was that it had not been burned, but had broken. The case of the plaintiffs was therefore no stronger after the testimony of their witness, called out of order, than it was when they first rested.

While the trial judge correctly instructed the jury that the burden of proof was upon the plaintiffs to show negligence, as the rule *res ipsa loquitur* did not apply, it is evident that he unconsciously recognized that rule, for he permitted the jury to guess that the fall of the wire was due to its having been improperly and negligently fastened by the defendant. This was not permitted in either *Shafer v. Lacock*, 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44, or *McCoy v. Ohio Valley Gas Co.* 213 Pa. 367, 62 Atl. 858,—the two cases relied upon as authorities for submitting the case to the jury. In the first, the fire which destroyed the house of the plaintiff was caused by a spark or sparks from a fire pot used by servants of the defendants in repairing the roof, who, while the fire was in progress, made declarations to the effect that it had been caused by their carelessness; in the second, gas was leaking from the pipe at the point where the explosion occurred, and the company did not check or moderate its flow, although this could have been done. There is no analogy between these cases and the one now before us. Whatever principle or rule may have been recognized in them applied to the facts as established. Here no facts were established which under any of our cases

would make the defendant liable. The judgments are therefore reversed, and judgment is now entered for the defendant.

LOUISIANA SUPREME COURT.

VICTORIN JOLIVETTE

v.

MRS. FRANCESCA CHAVIS et al.

(125 La. 923, 52 So. 99.)

Vendor and purchaser — title — deed as mortgage.

Where an authentic act purporting to be a "sale with right of redemption" is placed of record, and the delay for redemption has passed without there being any evidence of record showing that the right of redemption had been exercised within the delay fixed, a person who has bought the property from the apparent vendee on the faith of the record will be protected in his purchase from an attack on his title by the apparent vendor, on the ground that the act purporting to be "an act of sale with a right of redemption" was in reality only an act of mortgage, securing a specific debt to the apparent vendee.

(February 28, 1910.)

Headnote by NICHOLLS, J.

Note. — Protection of purchaser from apparent vendee under instrument apparently a conveyance, but intended as a mortgage.

Purchaser with knowledge or notice.

In the absence of a statutory provision to the contrary, a deed absolute on its face, but intended by the parties as a security for a debt, will be treated in equity as a mortgage as between the original parties and subsequent purchasers from the grantee without consideration, or with knowledge or notice of the true character of the deed, and the grantor will be allowed to redeem from either. *Kuhn v. Rumpp*, 40 Cal. 299; *Daniels v. Alvord*, 2 Root, 196; *Hayward v. Mayse*, 1 App. D. C. 133; *Brown v. Gaffney*, 28 Ill. 149; *Shaver v. Woodward*, 28 Ill. 277; *Bartling v. Brasuhn*, 102 Ill. 441; *Over v. Carolus*, 171 Ill. 552, 49 N. E. 514; *Howat v. Howat*, 101 Ill. App. 158; *Graham v. Graham*, 55 Ind. 23; *Beatty v. Brummett*, 94 Ind. 79; *Hayworth v. Worthington*, 5 Blackf. 361, 35 Am. Dec. 126; *Butcher v. Stultz*, 60 Ind. 170; *Smith v. Brand*, 64 Ind. 427; *Le Comte v. Pennock*, 61 Kan. 330, 59 Pac. 641; *Calderwood v. Calderwood*, 23 La. Ann. 658; *Fultz v. Peterson*, 78 Miss. 128, 28 So. 829; *Eiseman v. Gallagher*, 24 Neb. 79, 37 N. W. 941; *Kemp v. Small*, 32 Neb. 318, 49 N. W. 169; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *Wallace v. Smith*,

CERTIORARI to the Court of Appeal to review a judgment reversing a judgment of the Judicial District Court for the Parish of Lafayette in plaintiff's favor in an action brought to set aside an act of sale with right of redemption of certain real estate, and to recover damages for alleged slander of title. Affirmed.

The facts are stated in the opinion.

Mr. John L. Kennedy, for plaintiff:

The conveyance of property in the form of a redemption sale does not divest the ownership of the apparent vendor when the deed was really intended by both parties to be a mortgage or pledge.

Crozier v. Ragan, 38 La. Ann. 154; Howe v. Powell, 40 La. Ann. 307, 4 So. 450.

A redeemable sale of immovable property, unaccompanied by the actual delivery of the thing sold, is, as between the par-

ties, in the absence of evidence to the contrary, a mere contract of security; and either party to the contract is at liberty to maintain this position.

Marbury v. Colbert, 105 La. 467, 29 So. 871; Collins v. Pellerin, 5 La. Ann. 99; Leblanc v. Bouchereau, 16 La. Ann. 11; Ware v. Morris, 23 La. Ann. 665; Parmer v. Mangham, 31 La. Ann. 348; Crozier v. Ragan, 38 La. Ann. 154; Howe v. Powell, 40 La. Ann. 307, 4 So. 450; Baker v. Smith, 44 La. Ann. 925, 11 So. 585; Davis v. Kendall, 50 La. Ann. 1121, 24 So. 264; Rester v. Powell, 120 La. 406, 45 So. 372.

Parol proof is admissible to prove that a redeemable sale was really intended by the parties thereto as a mortgage.

Franklin v. Sewall, 110 La. 294, 34 So. 448.

The rule which excludes parol testimony

155 Pa. 78, 35 Am. St. Rep. 868, 25 Atl. 807; Guthrie v. Kahle, 46 Pa. 331; McClurkan v. Thompson, 69 Pa. 305; State v. Mellette, 16 S. D. 297, 92 N. W. 395; Lawrence v. Du Bois, 16 W. Va. 443; Zane v. Fink, 18 W. Va. 693; Rose v. Peterkin, 13 Can. S. C. 677; Clarke v. Little, 5 Grant, Ch. (U. C.) 363.

This doctrine was applied in *Erickson v. Hammond*, 135 Wis. 573, 16 N. W. 244, in favor of a mortgagee whose mortgagor had previously deeded the property by deed absolute on its face, but which was intended as a mortgage, and it was held that a subsequent purchaser from such grantee and also from the mortgagor, with knowledge of the fact, took subject to the subsequent mortgage.

In *De Leonis v. Hammel*, 1 Cal. App. 390, 82 Pac. 349, the doctrine is asserted that a deed absolute on its face, but in fact a mortgage, does not operate to pass the legal title to the grantee, and subsequent purchasers or encumbrancers with notice acquire no right as against the grantor. As to whether a deed absolute on its face, but intended as a mortgage, conveys the legal title, see note to *Flynn v. Holmes*, 11 L.R.A. (N.S.) 209.

A purchaser from a grantee in a deed absolute on its face, but in fact a mortgage, who has actual notice that the mortgagor is in possession of the property, takes subject to his right to redeem. *Grimstone v. Carter*, 3 Paige, 421, 24 Am. Dec. 230. It is not intended to discuss herein the question whether possession by the grantor is, of itself, sufficient to put a subsequent purchaser upon inquiry as to his interest in the premises. On the general subject of possession of land as notice of title, see note to *Niles v. Cooper*, 13 L.R.A. (N.S.) 49.

A quitclaim deed from the grantee in a deed absolute on its face, but intended as a mortgage, conveys no right as against the grantees of the original debtor, where the debt was discharged prior to the execution

of the quitclaim deed. *Jameson v. Emerson*, 82 Me. 359, 19 Atl. 831.

Such a purchaser, in order to maintain a defense of being a bona fide purchaser, without notice of the grantor's rights, must have paid all the purchase money; if not, in equity the purchase is not completed; but the purchaser is entitled to protection to the extent of the payments innocently made before notice of the true character of the deed. *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997.

Bona fide purchaser for value.

A good-faith purchaser for value, without notice, from the grantee in a deed absolute on its face, but intended as a mortgage, takes the property free of any equity in favor of the mortgagor to redeem. *Satterfield v. Malone*, 1 L.R.A. 35, 35 Fed. 445; *Turner v. Wilkinson*, 72 Ala. 361; *Pico v. Gallardo*, 52 Cal. 206; *Hayward v. Mayse*, 1 App. D. C. 133; *Cumming v. McDade*, 118 Ga. 612, 45 S. E. 479; *Maxfield v. Patchen*, 29 Ill. 39; *Jenkins v. Rosenberg*, 105 Ill. 167; *Crane v. Buchanan*, 29 Ind. 570; *Bean v. Venable*, 27 Ky. L. Rep. 927, 87 S. W. 262; *Frink v. Adams*, 36 N. J. Eq. 485, affirmed in 38 N. J. Eq. 287; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 163; *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793; *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240; *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 573; *Pancake v. Cauffman*, 114 Pa. 113, 7 Atl. 67; *Lynn v. Sims*, — Tex. Civ. App. —, 43 S. W. 554; *Long v. Fields*, 31 Tex. Civ. App. 241, 71 S. W. 774; *White v. McSorley*, 47 Wash. 18, 91 Pac. 243; *Cherry v. Morton*, 8 Grant, Ch. (U. C.) 402; *Robertson v. Scobie*, 10 Grant, Ch. (U. C.) 557.

The doctrine was thus stated in *Walton v. Cronly*, 14 Wend. 63: "Third persons who are strangers to the contract are not to be prejudiced by such parol defeasances. If they deal with the mortgagor as absolute

to contradict or vary a written instrument has reference to the language used by the parties; but does not forbid an injury in to the object of the parties in executing and receiving the instrument.

Brick v. Brick, 98 U. S. 514, 25 L. ed. 256; 27 Cyc. Law & Proc. pp. 1023, 1024; Franklin v. Sewall, 110 La. 294, 34 So. 448; 20 Am. & Eng. Enc. Law, 2d ed. p. 953; Shreve v. McGowin, 143 Ala. 665, 42 So. 94; 7 Current Law, p. 1830.

A purchaser of land which is in the open, notorious possession of another, holding adversely to his vendor, is charged with knowledge of that other's title, and of all the equities which the possessor could set up against his vendor.

1 Beach, Modern Law of Contr. § 354; 23 Am. & Eng. Enc. Law, 2d ed. p. 498; Gayoso v. Delaroderie, 9 La. Ann. 278; Calderwood v. Calderwood, 23 La. Ann. 662; Edwards v. Thompson, 71 N. C. 177.

owner upon the strength of his title, ignorant of the secret defeasance, it cannot be set up against them. But where no faith or confidence has been reposed upon the strength of the absolute deed, and third persons have not been misled by the form of the transaction, it is not perceived when its real character should not be permitted to be proved and have its full legal operation." This doctrine was applied to an assignment of a leasehold interest, absolute on its face, but intended as a security.

Where a conveyance intended as a security is absolute on its face, and the land thereby conveyed is subsequently sold and transferred by the grantee to a third person, who pays the purchase money without notice of the true character of the conveyance, his title to the premises cannot be disturbed by the mortgagor. Under such circumstances the remedy is against the grantee or mortgagee. Whittick v. Kane, 1 Paige, 202.

A purchaser for value without notice, from the grantee in a deed absolute on its face, but intended for a mortgage, cannot maintain an action for breach of covenant contained in the deed of conveyance, on the theory that, because of the character of the deed to his grantor, his title is defective. Wilson v. Parshall, 54 Hun, 637, 27 N. Y. S. R. 178; 7 N. Y. Supp. 479, affirmed in 129 N. Y. 223, 29 N. E. 297, on the ground that the evidence failed to show that the deed in question was intended as a mortgage.

Where a deed intended as a security is recorded, but a defeasance clause, executed contemporaneously therewith, is not recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the right of the mortgagor to redeem. And such a purchaser cannot thereafter himself assert that the deed is not an absolute one. Gruber v. Baker, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858. To the same effect is Brophy 32 L.R.A. (N.S.)

Messrs. Orther C. Mouton and Ralph W. Elliott, for defendants:

Parol evidence is not admissible against or beyond what is contained in the act, nor on what may have been said before, or at the time of making it, or since.

Mulhaupt v. Youree, 35 La. Ann. 1054; Re Hackett, 4 Rob. (La.) 290; Marbury v. Colbert, 105 La. 467, 29 So. 871; Leger v. Leger, 118 La. 322, 42 So. 951; Eames v. Woodson, 120 La. 1031, 46 So. 13; Franklin v. Sewall, 110 La. 292, 34 So. 448.

If the vendor fails to exercise the equity of redemption within the time stipulated, the price being adequate, the property delivered to the purchaser, or else that such explanation be forthcoming, when required, of the continued possession of the vendor, as excludes the idea of his still-existing ownership, the purchaser becomes the absolute owner of the property.

Jackson v. Lemle, 35 La. Ann. 855; Levy

Min. Co. v. Brophy & D. Gold & S. Min. Co. 15 Nev. 107, 10 Mor. Min. Rep. 601.

But if an innocent purchaser without notice, and for a valuable consideration from a grantee in a deed absolute on its face, but in fact a mortgage, can be protected upon an accounting in a court of equity, even as against him, the court will declare such deed to be a mortgage, and will permit redemption by the mortgagor, but upon terms which will secure the innocent purchaser compensation for money parted with and improvements made upon the land. Carveth v. Winegar, 133 Mich. 34, 94 N. W. 381.

And see Miller v. Thomas, 14 Ill. 428, wherein a grantor in a deed absolute on its face, containing a provision for a resale or a reconveyance, and which was construed to be a mortgage, was permitted to redeem from a bona fide purchaser for value, without notice, upon his paying to such purchaser the amount of repairs and improvements placed by him upon the property.

Although a purchaser from a grantee under a deed absolute on its face, but in fact a mortgage, is entitled to hold free from the right of the grantor to redeem, he is not limited to this relief, but he is also entitled to rescind his purchase, and may do so by making the grantor and the grantee in the deed in question parties to a proceeding to rescind, and in such proceeding the rights of all the parties may be settled. Breckenridge v. Auld, 1 Rob. (Va.) 148.

As between a subsequent purchaser from a grantee in a deed absolute in form, but in fact a mortgage, according to a separate contemporaneously executed defeasance, and a subsequent mortgagee of the grantor, the latter is entitled to priority, since he is not chargeable with notice of the deed, it being recorded as a deed when it should have been recorded as a mortgage, and the subsequent purchaser having notice of the true character of the deed by reason

v. Ward, 32 La. Ann. 784; Soulié v. Ranson, 29 La. Ann. 169; Bevens v. Weill, 30 La. Ann. 185; Henkel v. Mix, 38 La. Ann. 271; Lawler v. Cosgrove, 39 La. Ann. 488, 2 So. 34; Bagley v. Bourque, 107 La. Ann. 395, 31 So. 860.

The plaintiff is estopped to set up the intention of the parties to the original act.

Baker v. Smith, 44 La. Ann. 925, 11 So. 585; Levy v. Ward, 32 La. Ann. 790.

Nicholls, J., delivered the opinion of the court:

In his petition to the district court plaintiff averred: That he was the true and lawful owner of certain described property. That on the 17th day of February, 1886, he pledged said property to the commercial firm of Gerac Brothers, a copartnership composed of Jean Gerac and Pierre Gerac, to secure pre-existing indebtedness to said firm amounting to the sum of

of the recording of the mortgage, which was of record at the time of his purchase. Thompson v. Mack, Harr. Ch. (Mich.) 150.

Where defeasance recorded.

As to effect of failure to record defeasance as against creditors of grantee, see note to Valley v. First Nat. Bank, 5 L.R.A.(N.S.) 387.

A subsequent purchaser from a grantee in a deed absolute in form, but in fact a mortgage, because of a contemporaneously executed bond to reconvey, which was duly recorded, is merely an assignee of the grantee's interest in the premises, and takes subject to the mortgagor's right of redemption. Radford v. Folsom, 58 Iowa, 473, 12 N. W. 536.

In Minnesota, the question is governed by statute. The statute in that state provides that a defeasance must be recorded in order to defeat the claim of a bona fide purchaser for value from the grantee in a deed absolute on its face, but intended for a mortgage. Benton v. Nicoll, 24 Minn. 221; Cogan v. Cook, 22 Minn. 137.

A deed absolute on its face, but executed contemporaneously with the bond by the grantee therein, who agrees to reconvey upon performance of certain conditions by the grantor, is a mortgage; and it retains its character as to a subsequent purchaser with notice chargeable to him from recording the bond. Hill v. Edwards, 11 Minn. 22, Gil. 5.

To be effectual under the Minnesota statute, the defeasance must be executed at the time of the execution of the deed, and duly recorded; and a defeasance executed three days subsequently to the execution of the deed, which gave to the grantor therein power to secure a reconveyance by paying a certain amount, but which did not refer expressly to the previous deed, was held to give no notice of the true character of the transaction to a subsequent purchaser for 32 L.R.A.(N.S.)

\$102.29. That said pledge was embodied and set forth in a certain act executed before Crow Girard, notary public, which, in form, purported to be a *vente à réméré*, and which was recorded in the recorder's office of this parish under No. 1,449, as would more fully appear by reference to a certified copy of said act attached. That said act was intended by the parties thereto merely as a contract of security or pledge; and that since the execution thereof petitioner had continuously remained in possession of the property pledged, and had each year since the date thereof turned over to the said Gerac Brothers, and since their deaths, to their legal representatives, who were thereafter named, the whole or a portion of the crops raised on the land pledged as aforesaid in settlement of petitioner's indebtedness to them. That petitioner believed, and so averred, that the value of the produce turned over to said

value, without notice other than as given by this defeasance. Weide v. Gehl, 21 Minn. 449.

Under the California Code, a purchaser without notice from a grantee in a deed absolute on its face, but in fact a mortgage, is not affected by a defeasance executed by the grantee, but not acknowledged by him, and hence, although recorded, not notice to the purchaser. Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925.

Where grantee authorized to sell, or grantor acquiesces in sale.

A grantor in a deed absolute on its face, but intended as a mortgage, may, by his conduct, estop himself from asserting the mortgage character of the deed, as against a subsequent purchaser from the grantee. Thus, where he expressly consents to the sale by the grantee, he waives his right thereafter to claim that the deed is a mortgage. Blair v. Bass, 4 Blackf. 539; Deadman v. Yantis, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592; Wamsley v. Crook, 3 Neb. 344.

So, if the grantor knows of the sale of the land to a third person, who has no knowledge of the fact that the grantee of whom he is buying is in fact only a mortgagee, and the mortgagor does not disclose his claim in the property to the purchaser, and by his conduct and statements induces in his mind a belief that he, the mortgagor, has no claim therein, he is thereafter estopped from asserting any claim to the property. Tufts v. Tapley, 129 Mass. 380.

A wife who joined with her husband in a deed of real estate, absolute in form, but intended as a security for a debt of her husband, is not estopped to assert the true character of the instrument by merely receiving, without objection, the note to which the deed was collateral, from a subsequent purchaser of the premises from the grantee, where such purchaser had knowl-

Gerac Brothers or their legal representatives far exceeded in value the amount of petitioner's indebtedness to them, and that he was entitled to an acquittance therefor and the cancelation upon the records of the recorder's office of the act securing the same.

That John Gerac and Pierre Gerac, who composed the commercial firm of Gerac Brothers, were both dead, and that Mrs. Francesca Chavis, widow of Pierre Gerac, as surviving widow, in community with Pierre Gerac and Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, Louise Gerac, a *feme sole*, Felix Gerac, and Robert Ivan Gerac, as the heirs of Jean Gerac and Pierre Gerac, had not only refused to grant petitioner an acquittance of receipt for the indebtedness to the firm of Gerac Brothers, or to give any statement of the value of the produce turned over in settlement, but they had fraudulently and illegally slandered petitioner's title to the property hereinbefore described by claiming to be the owners of the same under and by virtue of the act of pledge, executed in the form of a redemption sale, No. 1,449 of the recorder's records, certified copy of which was attached, and causing to be inscribed on the records of the recorder's office an act of partition among themselves, wherein petitioner's property was assigned to Mrs. Ellen Gerac, wife of Rene Delhomme, as her share of the property, as would more fully appear by reference to said act, executed on May 30, 1908, and recorded under No. 37,232 in book Q 3, p. 37, a certified copy of which act was attached to the petition, and that the said Mrs. Ellen Gerac, wife of Rene Delhomme, had further slandered petitioner's title by executing, and causing to be inscribed on the records of said recorder's office, what purports to be a sale of petitioner's property to Louis Domongeaux, as would more fully appear by reference to said act, re-

corded in conveyance book R 3, p. 167, a certified copy of which was attached. That said acts were executed and recorded, as aforesaid, in fraud of petitioner's rights and to his injury, and he was entitled to have the inscription of said acts canceled upon the records of the recorder's office, and to recover of the parties herein made defendants, jointly and *in solido*, the sum of \$300 as damages occasioned to him by the slander of his title, as aforesaid. That all the parties made defendant were residents of the parish of Lafayette, Louisiana. He prayed that Mrs. Francesca Chavis, widow of Pierre Gerac, Sr., Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, and her said husband, to authorize and assist her, Louise Gerac, Ellen Gerac, wife of Rene Delhomme, and her said husband, to authorize and assist her, Felix Gerac, Pierre Gerac, Luc Raoul Gerac, and Robert Ivan Gerac, and also the said Louis Domongeaux, be duly cited, and that he have judgment against said defendants, decreeing him to be the true and lawful owner of the property hereinbefore described, and canceling the inscription of the act of pledge or mortgage as registered under No. 1,449, in the recorder's office, in book X, p. 329, and also canceling the act of partition and erasing the inscription thereof, as registered under No. 37,232, in book Q 3, p. 37, in so far as said act affected petitioner's property, and also canceling the inscription of the pretended act of sale to Louis Domongeaux, as registered in said office, under No. 37,686, in book R 3, p. 167, and condemning said defendants, jointly and *in solido*, to pay to petitioner the full sum of \$300 as damages as aforesaid, with legal interest on said sum from judicial demand until paid. He further prayed for all necessary orders, for costs, and for general relief.

Louis Domongeaux answered. After pleading the general issue, he admitted that

edge of the true character of the deed, and was not misled by the action of the wife. *State v. Mellette*, 16 S. D. 297, 92 N. W. 395.

The grantor in such a deed who consents to the exchange of such land for other land, with the understanding that his right to redeem shall exist as to land taken in exchange, is thereafter confined in his right of redemption to such land. *Over v. Carolus*, 171 Ill. 552, 49 N. E. 514.

Where an unrecorded defeasance contains a provision authorizing the grantee in a deed absolute on its face, but intended as a mortgage, to sell the land, or portions thereof, to purchasers in good faith and for full value, such purchasers of the property will be protected; but, in exercising such power of sale, the grantee must act 32 L.R.A. (N.S.)

with care and with regard to the interest of the mortgagor, and in a way to obtain the best price for the property. If the property is sold without such precaution, and is sacrificed or sold materially below its value, the sale will be set aside, or the purchaser decreed to hold the title subject to the equity of the mortgagor to redeem *Hart v. Condit*, 18 N. J. Eq. 362.

A deed absolute on its face, but containing a provision authorizing the sale by the grantee of the property mortgaged, if treated as a mortgage, is one authorizing the sale of the property by the grantee, and hence the grantor in such a deed cannot redeem same as a mortgage as to purchasers in good faith from the mortgagee. *Floyd v. Harrison*, 2 Rob. (Va.) 161.

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he purchased the property described in plaintiff's petition by purchase, as alleged by plaintiff, but respondent denied specially that plaintiff was in possession of said property as owner at the date of said purchase, or at any time after February 17, 1886, the date of the sale and delivery thereof to Gerac Brothers, by plaintiff. He averred: That in the act of sale, with the right of redemption, of February 17, 1886, by plaintiff to Gerac Brothers, of the property herein claimed and referred to by plaintiff in his petition, said property was declared to have been delivered to the vendee, and the plaintiff was estopped from contradicting the fact of delivery thereof as against respondent, who acquired in good faith and for a valuable consideration, on the faith of the public record. That he purchased said property from Mrs. Ellen Gerac, wife of Rene Delhomme, duly assisted by her husband, on October 28, 1908, for the sum of \$1,300 cash in hand paid, with full warranty of title, and with subrogation to all her rights and actions of warranty against previous owners.

That the said Mrs. Ellen Gerac acquired said property in the partition made between her and Mrs. Francesca Chavis, widow of Pierre Gerac, Sr., Henry Gerac, Mrs. Estelle Gerac, wife of Gustave Lacoste, Louise Gerac, a *feme sole*, Felix Gerac, Pierre Gerac, Luc Raoul Gerac, and Robert Ivan Gerac, the other defendants herein, on May 30, 1908, as alleged by plaintiff, with full warranty of title, at the valuation and at the price of \$1,120, and that said parties should be called in warranty to appear and defend this suit.

In view of the premises, respondent prayed that Mrs. Francesca Chavis, widow of Pierre Gerac, Sr., Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, and her said husband, to assist and authorize her, Louise Gerac, Felix Gerac, Pierre Gerac, Mrs. Ellen Gerac, wife of Rene Delhomme, and her said husband, to assist and authorize her, Luc Raoul Gerac, and Robert Ivan Gerac, residents of said parish, be called in warranty to appear and defend this suit, and, after due hearing, respondent have judgment recognizing him as the owner of the property herein claimed by plaintiff; that he be quieted in his title and possession, with all costs of court; and, should judgment be rendered against him, that he have judgment against the warrantors as rendered against him on the principal action, and for the sum of \$1,300, with 5 per cent per annum interest from October 28, 1908, with all costs of court, and for general relief, etc.

The other defendants answered. After pleading the general issue, they averred: 32 L.R.A. (N.S.)

That on February 17, 1886, plaintiff sold and delivered to Jean and Pierre Gerac, for an adequate price, the property described in plaintiff's petition, subject to a right of redemption, reserved by the plaintiff therein. That the plaintiff failed to exercise the equity of redemption by paying the price therefor and within the time fixed in said contract, and the said vendees thus became the irrevocable owners thereof. That the plaintiff herein was in possession of said property at said sale as a tenant of Jean and Pierre Gerac up to their death; and since then up to May 30, 1908, the date of the act of partition between respondent and Ellen Gerac, wife of Rene Delhomme, as a tenant of respondent and the said Ellen Gerac, who held said property as owners, as the surviving widow of Pierre Gerac, and as the heirs of Pierre Gerac and Jean Gerac, and at the institution of said suit as the tenant of Ellen Gerac, who acquired it in said partition. That Jean and Pierre Gerac were, at the date of said sale, engaged in commercial business in this parish, and thereafter continued to make advances of goods and supplies to the plaintiff, who occupied said land and cultivated it as their tenant up to the death of Jean Gerac.

That Pierre Gerac continued in said business after the death of Jean Gerac, and he also made advances of goods and supplies to the plaintiff, who still occupied and cultivated said land as his tenant. That all payments made by the plaintiff out of his two thirds of the proceeds of the cotton crop made on said land, if any, were for said advances. That respondents discontinued said business of Pierre Gerac after his death, and since then have only received from the plaintiff annually one third of the proceeds of the cotton crop made by said plaintiff on said land, as their tenant, save and except for the year 1908, when said plaintiff, for the first time, and during his possession thereof as lessee, as aforesaid, attempted to change the nature of his possession by claiming to be the owner thereof, and refusing to pay Ellen Gerac, who acquired said land in said partition of May 30, 1908, as aforesaid, the one third of the cotton crop made and cultivated thereon during the year 1908, and for which suit had been instituted against said plaintiff, and was then pending.

That the plaintiff herein could not, during his possession as lessee or tenant of respondent and of Ellen Gerac and husband, change the nature of that possession, and, having leased said property, as aforesaid, from respondent and their authors, the plaintiff was estopped from asserting title thereto. Respondents admitted that they

were surviving widow of Pierre Gerac, Sr., and the heirs of Pierre Gerac, as alleged by plaintiff. In view of the premises, respondents prayed that the title of Louis Domongeaux, as the vendee of Ellen Gerac, wife of Rene Delhomme, be recognized; that he be placed in possession and quieted therein, with all costs; and, in the alternative, if judgment be rendered against the said Louis Domongeaux, that defendants be decreed to pay as warrantors only the sum at which Ellen Gerac obtained said property in said partition, and for general relief.

The district court rendered judgment in favor of the plaintiff, but, on appeal to the court of appeal, that judgment was reversed. After an unsuccessful application for a rehearing, that judgment, under orders of this court, has been brought before it and is now before it for review. The court of appeal assigned the following reasons for its judgment:

"The first question to which our attention is directed by the appellant is the refusal of the trial judge to rule out all the parol evidence to show a different intent from that expressed in the act of sale, and to show that there was no money paid as the price of the sale, as recited in the act.

"The objection was that plaintiff, having signed the authentic act attacked as a sale for a cash price and with delivery of possession, could not contradict the act by parol; second, that having, since the sale and up to the period of redemption, worked the plantation (land) from Gerac Brothers and their legal representatives as lessee, cannot be permitted to change the status of his possession, or to contradict defendant's title.

"The objection appears to us to be well founded. The act which the plaintiff characterizes as a pledge, in the form of a sale, with the right of redemption, *vente à réméré*, is authentic in form. On its face it evidences a sale with a full warranty, made for a cash consideration in hand paid, for which the vendor gives full acquittance. It is declared that the purchasers acknowledge delivery and possession of the property conveyed. The only condition imposed is the right of redemption stipulated in the following words:

"The condition of this sale is such that if the said vendor shall pay and reimburse unto said Gerac Frères (Gerac Brothers), the price hereinafter mentioned, of two hundred and two ²/₁₀₀ dollars (\$202.29), before the 1st day of January, 1887, then this sale shall be null and void; otherwise, on failure to exercise his right of redemption, before said date, property shall be irrevocably vested in said Gerac Brothers.' 32 L.R.A. (N.S.)

"Here we have, then, a perfectly valid contract specially authorized under the law. Civil Code, arts. 2566-2588. It is purely a sale, with the right of redemption, evidenced by an authentic act, with nothing upon its face to suggest that the parties to it had any other intention in making it than that therein expressed. The authentic act is full proof of the agreement contained in it against the contracting parties, and their heirs or assigns, unless it be declared and proved a forgery. Civil Code, art. 2236.

"Parol evidence will not be admitted against or beyond what is contained in the act, nor on what may have been said before or at the time of making it, or since. Civil Code, art. 2275; *Calderwood v. Calderwood*, 23 La. Ann. 658, 659.

"Declaration of a party in an authentic act can be contradicted by parol testimony by such party only in cases of fraud, error, or violence. *McRae v. His Creditors*, 16 La. Ann. 305, on page 307.

"The instant case does not fall within the exception. We conclude that the parol testimony was inadmissible to vary or contradict the written act, and it was therefore improperly considered in determining the issues herein. The testimony of the notary and of the plaintiff as to the intention of the parties to the act will not, therefore, be regarded here in passing on the contention of the plaintiff that the sale was not intended as a bona fide sale, but merely as a security for debt. In *Lawler v. Cosgrove*, 39 La. Ann. 488, 2 So. 34, the supreme court says:

"It is settled beyond the possibility of a doubt that a bona fide sale of property for a valuable consideration, coupled with the pact of redemption, transfers the ownership to the purchaser, under a condition suspensive as to the vendor, resolutive as to the vendee.' See authorities cited therein.

"The right of redemption constitutes a resolutive and not a suspensive condition as to the purchaser, and he therefore becomes at once proprietor, and can exercise all the rights of property, including the right of disposition. 23 La. Ann. 658.

"Whether a sale with right of redemption is a bona fide sale,—that is, with an intention on the part of the vendor to sell, concurring with the intention on the part of the purchaser to buy,—and it be made for a valuable consideration, are questions which, in the absence of literal or written proof to vary or explain the authentic act evidencing it, must depend upon the facts and circumstances of the case. The sale with right of redemption being a contract authorized and regulated by law, the bur-

den of proof rests primarily on the vendor to show facts and circumstances tending to negative a bona fide sale. If it be shown that the sale was for an inadequate consideration, and unaccompanied by delivery of the thing sold, then the burden shifts to the vendee; for, without sufficient evidence to the contrary, such a sale will be treated as mere security for debt. *Howe v. Powell*, 40 La. Ann. 307, 4 So. 450; *Baker v. Smith*, 44 La. Ann. 925, 11 So. 585; *Davis v. Kendall*, 50 La. Ann. 1121, 24 So. 264; *Marbury v. Colbert*, 105 La. 467, 29 So. 871.

"The plaintiff has produced in evidence a receipt signed 'Gerac Frères' (Gerac Brothers), appended to an account, dated February 18, 1886, of amount due by himself to Gerac Brothers, as proof that the sale was intended to secure the amount due by himself to Gerac Brothers. This receipt is written in French, and reads: 'Recu par une vente à réméré payable dans un an pour solde de tout compte a ce jour. [Signed] Gerac Frères.' (Received by a sale with right of redemption payable in one year, in full settlement of all accounts up to this day.)

"This is not conclusive proof that the parties intended by the act a mere security, and not a bona fide sale with right of redemption; for a debtor may make a valid sale to his creditor in payment of his debt, stipulating the right of redemption, and, if he fails to pay the price in accordance with the terms of the contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser. *Bevens v. Weill*, 30 La. Ann. 185; *Soulié v. Ranson*, 29 La. Ann. 161; *Keough v. Meyers*, 43 La. Ann. 952, 9 So. 913.

"The receipt shows that Gerac Brothers considered the account paid and extinguished by the sale or *dation en paiement* with right of redemption, and the proof is that, though the plaintiff continued to deal with them at their store for years, old account, so settled, never figured again on their books.

"Measured by the value of property of the vicinage at the time of the sale, the price paid was adequate. It was not a *vile* or grossly inadequate price held in jurisprudence as one of the indicia that the contract was intended as mere security for debt, though in the form of a sale. It but remains to consider the question of possession, and whether the plaintiff paid to Gerac Brothers the price stipulated within the delay fixed for the exercise of the right of redemption. The plaintiff alleges and testifies that he remained in possession of the land continuously after the sale, and worked and cultivated the same. The bare

fact of possession is not disputed, but the nature of that possession is the point around which the controversy revolves.

"The defendants contend that the plaintiff remained in possession, not as owner, but as tenant or lessee of Gerac Brothers, and, after their deaths, of their legal representatives. A careful reading and appreciation of the testimony bearing on this point fully supports their position. The plaintiff himself admits that, while at first he turned over all the cotton raised on the plantation, later he delivered one third to Gerac Brothers and two thirds came to him. When asked why, after the death of the Geracs, of Gerac Brothers, he continued to give their representatives one third and kept for himself two thirds of the cotton, he answered: 'I followed the condition between me and Mr. Gerac. I followed the condition, although verbal.'

"This fully confirms the testimony of Henry Gerac, Pierre Gerac, Jr., and Mrs. Gustave Lacoste, children of Pierre Gerac, deceased, of Gerac Brothers, that the plaintiff, during the lifetime of their father, worked the land now claimed by him as tenant, yielding annually one third of the crop as rental.

"This act alone concludes the plaintiff, in the absence of error or fraud, and establishes the nature of his possession as the possession of his vendees and their assigns. Leasing the property by the vendor after the time for redeeming it has passed, in the absence of error or fraud, estops him from asserting title thereto. *Jackson v. Lemle*, 35 La. Ann. 855. Here not only is there no error or fraud alleged, much less proven, but the plaintiff himself frankly admits, under oath, that he continued to give one third of the crop raised on the land to the widow and usufructuary, in accordance with the verbal condition or agreement between himself and Mr. Gerac, his vendee. He is therefore estopped from asserting title to the land, or, at least, from denying the possession of his vendees through him. As to the payment of the price, the plaintiff does not assert positively that he has paid it, but avers that he delivered all the cotton made on the land to Gerac Brothers during a number of years, and he believes that the value thereof far exceeded the price of the property which he was to return to redeem it. The proof of the record is that the plaintiff continued to deal with Gerac Brothers and to receive advances on the crop from them, and that his share of the proceeds of the cotton delivered to Gerac Brothers was applied to the payment of the price for the redemption of the property. *Ibid.*

"We consider the evidence conclusive on this point, but, even if it were not, the result would be the same, for the burden of proof is upon the plaintiff to show the payment within the delay fixed, and in this he has signally failed. We have carefully considered every phase of this case, because somewhat loath to disturb the judgment appealed from, which means much to the plaintiff, an aged negro, tottering to the grave. Our appreciation of the law and the facts of the case point unerringly, we think, to the conclusion that the judgment below is erroneous, and must be reversed.

"For the foregoing reasons, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that the plaintiff's demand be rejected in its entirety, at his costs in both courts, and the defendant Louis Domongaux be, and he is hereby, recognized and declared to be the true owner of the land in controversy, fully described in the pleadings, and he is hereby quieted in the title and possession thereof."

Plaintiff makes a strong showing in the brief filed in his behalf in respect to the position taken by him in this case that the act, purporting to be a *vente à réméré*, was, in fact, intended as an act passed to secure payment of a debt due by the party named as vendor to the party appearing as vendee therein, and not an absolute sale. While the price declared in the act cannot be said to have been a *vile* price (that is, one not serious), we think it was below the real and actual value at the time of the act of the property transferred. The plaintiff has always remained in actual physical possession of the property since the so-called act of sale. Defendants urge that, although plaintiff has been in the physical possession of the property since the act of the 17th day of February, 1886, his status has always been that of a tenant. There is no direct evidence that the relation of landlord and tenant existed between plaintiff and declared vendee. No one swears to an actual knowledge of such fact. The evidence of such a relation is merely argued upon, presumptively based on, the fact that several years after the act was passed, the plaintiff consented to receive one third of the products of the farm, while the Geracs received two thirds, which is the usual agreement as to the consideration for a lease between a tenant working land on shares and the owner. The testimony shows that plaintiff shipped for several years to the Geracs the whole of the crop raised on the land, to be by them sold, and the proceeds of the same applied, so

plaintiff testifies, to the extinguishment of his indebtedness.

If this be true, it would appear that, if the plaintiff ever occupied the position of a tenant of the Geracs, he became so, not contemporaneously with the passing of the act, but at a later period, by some subsequent agreement. If in point of fact the contract of the 17th of February, 1886, evidenced originally a contract of security for money due, and not a contract of sale, the ownership of the property remained after the act in the plaintiff, and the title could be transferred or shifted only by written evidence, and not by parol proof of a verbal lease of the property as between the parties. The rule is that "once a mortgage, always a mortgage." That is, an act of mortgage cannot be converted into an act transferring ownership unless and until a subsequent contract to that effect be made between the parties, conforming in all essential features to the requirements of the law for a contract of that character.

After the passing of the contract of February 17, 1886, the Geracs dealt at their store with the plaintiff, and the latter appears to have become indebted to them in a large amount for goods, wares, and merchandise sold him, later than that date, distinct and separate from the debt to secure which the act of February 17th was passed. For this later debt Jolivet executed his note. The act of mortgage did not extend to nor cover that debt; it covering only the specific debt existing when the act was passed. We think it was to this last debt that plaintiff referred when he said that he consented that two thirds of the product of the crop, which were retained by the Geracs, might be imputed to it. We do not think that the plaintiff ever admitted that those two thirds were retained by them by reason of their being his lessors of the property on which the crops were produced. The Geracs have never made a settlement between them and plaintiff further than to get the latter to recognize an indebtedness due by him to them to the amount of the note.

The property was assessed for taxation in the name of the plaintiff for the years 1887, 1888, and 1889, and in the name of the Geracs for the years 1890 to 1902. In 1902 it was again assessed in the name of the plaintiff. In the year 1908 the plaintiff refused to deliver to Mrs. Delhomme one third of the crop, and she brought suit to recover it in the justice's court. That suit is still pending. Plaintiff then brought the present suit (November 13, 1908). On October 28, 1908, Mrs. Delhomme sold the property to Louis Domongaux. It appears that in 1897 (a short time before his

death) Mr. Gerac desired to sell this land to a Mr. Arceneaux, and the latter, having been advised that, in order to avoid a lawsuit, the signature of the plaintiff would have to be obtained, so informed Mr. Gerac, who stated that he knew this and would attend to it, but never did, and that he died three or four months after.

Plaintiff alleges in his pleadings that the act relied on as a sale did not conform to the intention of the parties, and he demands substantially a reformation of the contract so as to make matters conform to "the contract, and to make matters take their actual shape." The court of appeal was of the opinion that parol evidence was not admissible for that purpose, in the absence of an express charge of fraud, but we think the court carried the rule on that subject too far.

In *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775, the Supreme Court of the United States used the following language: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Russell v. Southard*, 12 How. 139, 13 L. ed. 927; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796; *Pierce v. Robinson*, 13 Cal. 110.

"A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was

said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower. *Russell v. Southard*, 12 How. 139, 13 L. ed. 927. Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in price paid will vitiate the proceeding."

The same views, even more forcibly expressed, were announced in *Brick v. Brick*, 98 U. S. 514, 25 L. ed. 256. Counsel refer the court to 27 Cyc. Law & Proc. pp. 1023, 1024; to 20 Am. & Eng. Enc. Law, 2d ed. p. 953; and counsel refers the court to 29 Am. & Eng. Enc. Law, 2d ed. p. 847; to 10 Current Law, p. 859; to *Leger v. Leger*, 118 La. 322, 42 So. 951; *Franklin v. Sewall*, 110 La. 294, 34 So. 448; *Baker v. Smith*, 44 La. Ann. 925, 11 So. 585; *Marbury v. Colbert*, 105 La. 467, 29 So. 871, and authorities; 7 Current Law, p. 1830; also *Rion v. Reeves*, 122 Ala. 650, 48 So. 138; *Collins v. Pellerin*, 5 La. Ann. 99; *Leblanc v. Bouchereau*, 16 La. Ann. 11; *Crozier v. Ragan*, 38 La. Ann. 154; *Ware v. Morris*, 23 La. Ann. 665; *Parmer v. Mangham*, 31 La. Ann. 348; *Howe v. Powell*, 40 La. Ann. 307, 4 So. 450. I personally am of the opinion that the act of February 17, 1886, was not what it purports to be (a sale with power of redemption), but was intended to evidence a security for a specific debt; that it did not convey the ownership of the property declared therein to be transferred, but that the ownership of the same remained in Jolivet, and it still remains in him. I am also of the opinion that the relation of landlord and tenant between the plaintiff and the Geracs has never existed. The record does not satisfactorily show the state of the accounts between the plaintiff and the Geracs, and it would be impossible for us to fix by it the situation of the parties as creditors and debtor. There is a feature of this case which has been passed by without much comment. It is how far the decision in the case is to be affected by the rights resulting from the sale of this property by Mrs. Delhomme to Louis Domongaux, on October 28, 1908. The act of February 17, 1886, was, on its face, an act of sale, with power of redemption. It was

recorded as such. Such a contract is recognized in law as a valid contract. The public had a right to act with it on the faith of the record. The attorney of the plaintiff testified that shortly before or shortly after Domongeaux bought the property from Mrs. Delhomme (he did not know which) he met Domongeaux and spoke to him of Jolivette's claims to the property, and that he said he knew all about it, and had taken an indemnity bond to fully protect him, from which he argues that Domongeaux was not a purchaser in good faith. Domongeaux purchased the property from Mrs. Delhomme under an act of sale with full warranty. The act of the 17th of February, 1886, purports to be an act of sale, recognizing and reciting that possession of the property had been delivered to the Geracs. It is not claimed that in point of fact Domongeaux knew of the actual relations between the Geracs and the plaintiff, or had heard of any admissions made by Gerac, Sr., before his death.

We are of the opinion that the act of the 17th of February, 1886, purporting, on its face, by authentic act, to be a sale with right of redemption, having been recorded as such, and no redemption of the property appearing on the records, although the delay for redemption had expired, Louis Domongeaux, who bought the property from Mrs. Delhomme on the faith of the record, is protected in his purchase from an attack on his title on the ground that the act purporting to be a sale with right of redemption was, in fact, an act of mortgage or security, securing a specific debt of the apparent vendor to the declared vendee in that act.

We are of the opinion that the judgment of the Court of Appeal brought up for review is correct, and it is hereby affirmed.

Breaux, Ch. J.: I concur in the decree.

Lane and Monroe, JJ., concur in the decree. Provosty, J., concurs in the decree for the reasons given by the Court of Appeal.

Petition for rehearing denied April 11, 1910.

ILLINOIS SUPREME COURT.
SOUTH PARK COMMISSIONERS
v.

MYRON L. PEARCE et al., Appts.
(248 Ill. 578, 94 N. E. 33.)

Assessment — adoption of former law — confirmation.

1. A provision in a statute conferring 32 L.R.A. (N.S.)

power upon park commissioners to levy assessments for street improvement in the manner in which they are empowered by law to assess and collect special taxes adopts a provision of a former law, that the assessment shall be confirmed by a designated court, although the former law related to matters other than street improvements.

Street — change for park purposes — assessment of abutting owners — validity.

2. An attempt by park commissioners with statutory authority to improve streets, conduct parks, and assess the cost of a first improvement on abutting property, to tear up pavements, curbs, sidewalks, and gutters which had been constructed at the expense of abutting owners, and which are adequate to ordinary traffic, and replace them by others at the expense of such owners, merely to secure greater uniformity and better adapt the street to the purposes of a pleasure driveway, is unreasonable, and will not be enforced.

(February 25, 1911.)

Note. — Power to improve streets for park purposes at expense of abutting owner.

The improvement of city streets for parkways, boulevards, and other similar park purposes, and the assessment of the cost thereof upon the property of abutting owners, is well within the power of municipal corporations as granted in the ordinary city charter authorizing municipal control of the construction, maintenance, and improvement of streets. The reported cases are in accord upon this question, although in some instances charter powers along this line are broader than in others. The apparent divergence of opinion in *SOUTH PARK COMRS. v. PEARCE* is to be accounted for by the fact that the park commission in that case was authorized to levy assessment against the abutting owners only for the cost of the first improvement of the streets under its control, and the streets in question had been improved by the city before they were taken under the control of the park commissioners, and were wholly adequate to ordinary street uses.

Improvements in a city street in the way of grading, macadamizing, and laying sidewalks are local and a special benefit to abutting owners, so as to warrant the assessment of the cost upon abutting property, although the street improved is a public pleasure drive constructed as a part of the park system. *Re Beechwood Ave.* 194 Pa. 86, 45 Atl. 127.

Legislative authority granting to a city power "to improve any street, highway, avenue, or alley, by grading, parking, curbing, paving, graveling, macadamizing, and guttering the same or any part thereof; and to assess the cost on abutting property," warrants the city in setting a curb along the edges of a strip of land running through

A PPEAL by defendants from a judgment of the Circuit Court for Cook County overruling their objections to the confirmation of a special assessment for the construction by plaintiffs of a boulevard improvement on certain streets in the city of Chicago. Reversed.

The facts are stated in the opinion.

Messrs. Joseph H. Fitch, William J. Donlin, and George W. Wilbur, for appellants:

The act of June 24, 1895, is a merger of prior acts in relation to special assessments for improvements by park commissioners.

People ex rel. Kern v. Nelson, 156 Ill. 364, 40 N. E. 957; People ex rel. Stuckart v. Knopf, 183 Ill. 410, 56 N. E. 155; English v. Danville, 150 Ill. 92, 36 N. E. 994.

The streets were improved when received,

and subsequent repairs or maintenance must be paid for by the tax fund, and not by special assessment.

Wistar v. Philadelphia, 80 Pa. 505, 21 Am. Rep. 112; Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; Scranton v. Sturges, 202 Pa. 182, 51 Atl. 764; Leake v. Philadelphia, 171 Pa. 125, 32 Atl. 1110; Wistar v. Philadelphia, 111 Pa. 604, 4 Atl. 511; Boyer v. Reading, 151 Pa. 185, 24 Atl. 1075; Harrisburg v. Segelbaum, 151 Pa. 172, 20 L.R.A. 834, 24 Atl. 1070; Williamsport v. Beck, 128 Pa. 147, 18 Atl. 320.

Messrs. Tolman, Redfield, & Sexton, for appellees:

The determination of the character of a local improvement by the proper municipal authorities should be sustained by the courts, unless it is manifest from the evi-

the center of a street and set aside for park purposes, and assessing the cost to abutting owners. Downing v. Des Moines, 124 Iowa, 289, 90 N. W. 1066. The court said it was not within their province to narrow and restrict the power thus broadly given, by holding that the parking authorized by the statute must be confined to that part of the street between the lot line and the driveway, or by denying the authority of the city, under this provision, to divide the driveway by a belt or strip of parking along the central line thereof. Further commenting on the extent of the authority granted, it was said: "It is the contention of the appellants that the powers given by the statute we have cited have reference only to such improvements as tend to make the street a better or more available avenue of public travel, and do not authorize improvements which are merely ornamental or beautiful. . . . It may be said, however, that the authority here expressly provided for the parking of streets and avenues can scarcely be reconciled with the proposition that all street improvements must be limited by the single consideration of the convenience or safety of the traveling public. The term 'parking' is incapable of any plausible definition which does not involve the idea of beautifying those portions of the street not necessarily occupied by walks and roadways."

Assessment of abutting property for the improvement of a boulevard or pleasure parkway, including paving, grading, sodding, lighting, draining, and planting of trees, was upheld in West Chicago Park Comrs. v. Farber, 171 Ill. 146, 49 N. E. 427, under statutes authorizing the levy of assessments on all property benefited by the purchase, opening, and improvement of parks, boulevards, and ways.

It is within the power of a municipal corporation to improve a street by constructing therein two macadamized roadways separated by a parkway graded, sodded, and planted to trees, and to assess the cost thereof upon the abutting owners. Thompson v. Highland Park, 187 Ill. 265, 58 N. E. 328.

The cost of paving and draining streets 32 L.R.A. (N.S.)

leading into a park, and making other necessary improvements in such streets in connection with work in the park itself, in order properly to complete such work, and make the streets suitable approaches to the park, may properly be assessed to the owners of the property abutting on the parts of the streets improved. Kittinger v. Buffalo, 148 N. Y. 332, 42 N. E. 803.

An assessment against abutting owners for the expense of improving, as a park boulevard, a certain street in Chicago, was upheld as within the power of the city, in Bass v. South Park Comrs. 171 Ill. 370, 49 N. E. 549, an assessment for such improvements upon contiguous property according to benefits not being objectionable as a special tax.

A charter provision empowering a city council "to lay out public streets, alleys, lanes, avenues, and highways, and extend, alter, widen, contract, straighten, and discontinue the same, purchase and lay out public parks and squares or grounds; third, to cause any street, alley, lane, avenue, or highway to be filled, graded, leveled, paved, curbed, walled, graveled, macadamized, or planked, and keep the same in repair," and to pay the expenses of any such improvement by a special assessment upon the real estate benefited thereby,—warrants the city council, by virtue of the general authority thus conferred, in grading a street and sodding over a portion in the center thereof not needed for public travel, and assessing the cost to the adjoining owners. Murphy v. Peoria, 119 Ill. 509, 9 N. E. 895. While the report of this case makes no reference to the improvement of the street as a park improvement, the nature of the improvement would seem to make the case of some practical value as an authority.

While the planting of trees upon city streets may not be, strictly speaking, an improvement for park purposes, the nature of such an improvement is very similar, and it has been held that the planting of trees upon the streets of a city is an improvement of recognized public benefit, and, under the authority of statutes expressly conferring

dence that their action is unreasonable or oppressive.

Chicago v. Marsh, 238 Ill. 254, 87 N. E. 319; *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Belleville v. Herzler*, 225 Ill. 404, 80 N. E. 269; *Belleville v. Pfingsten*, 225 Ill. 293, 80 N. E. 266.

The powers of the South park commissioners in respect to boulevard improvements cannot be measured by the powers of the city of Chicago.

Barber Asphalt Paving Co. v. South Park Comrs. 233 Ill. 362, 84 N. E. 243.

Dunn, J., delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Cook county confirming a special assessment for the construction by the South park commissioners of a boulevard improvement of a system of streets in the city of Chicago beginning at Michigan avenue and Sixteenth street, extending east and south to Thirty-Third street, and including, successively, parts of Sixteenth street, Prairie avenue, Twenty-Ninth street, and South Park avenue. The objections which, it is urged, should have prevented the confirmation of the assessment, are that the circuit court had no jurisdiction of the proceedings, the commissioners had no power to make the improvement by special assessment, the ordinance is unreasonable, and the finding on the assessment of benefits is contrary to the evidence. An act of the general assembly of June 24, 1895, vested all boards of park commissioners with power to levy special assessments for the improvement of boulevards or streets under their control, and provided for a method of procedure in conformity with the procedure provided for the levying of special assessments by cities and villages, so far as the latter might be applicable. Hurd's Rev. Stat. 1909, p. 1614. Section 7 of that act requires the petition for the assessment to

be filed in the county court, and it is claimed by the appellants that the jurisdiction of that court is exclusive. They insist, first, that no statute prior to that of June 24, 1895, conferred upon the circuit court jurisdiction of the subject-matter; and, second, that all prior statutes are merged in that of June 24, 1895, so far as they relate to the authority of park commissioners to levy special assessments for local improvements.

The act incorporating the South park commissioners conferred no power to make a special assessment for the improvement of streets or boulevards. No such power existed prior to April 9, 1879, when an act was passed to enable park commissioners "to take, regulate, control, and improve public streets leading to public parks, to pay for the improvement thereof, and in that behalf to make and collect a special assessment or special tax on contiguous property." This act granted to boards of park commissioners "all the power and authority now or hereafter granted to them respectively, relative to the levy, assessment, and collection of taxes, or assessment for corporate purposes." Hurd's Rev. Stat. 1909, § 2, p. 1588. On June 21, 1895, an act having a similar object was passed, which empowered park commissioners to pay for the improvement of streets by levying a special tax or special assessment "in the manner in which said board of park commissioners or park authorities are now or may be hereafter empowered by law to levy, assess, and collect special taxes on contiguous property or special assessments for benefits in other cases." Hurd's Rev. Stat. 1909, § 2, p. 1608. The power which had before the passage of these acts been granted to boards of park commissioners relative to the levy of assessments for corporate purposes, and the manner in which such boards were then empowered by law to levy special assessments for benefits in other cases than the improvement of streets, were such as

the power, improvements of that kind have been made, and the cost assessed to abutting owners. *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841.

But the cost of the improvement of a city street through the center of which runs a strip of land known and used as a park, and owned by the city, may not be assessed wholly to the abutting owners, to the exclusion of the city itself, where the ordinance authorizing the improvement provides for assessing the expense against abutting owners, "except so much thereof as is occupied by the public grounds owned by said city bordering thereon, and one half of the roadway bordering the same." *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071. Note the following from the opinion in this case: "It must be borne in mind 32 L.R.A. (N.S.)

that we are here concerned with a case where the dedication for park purposes was made before the public acquired a right to the entire space for street purposes. We would have a different proposition if the entire space had once been dedicated as a street, and the city had subsequently made the park improvement."

It was held in *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315, that assessments for walks could not be levied against owners of property abutting on a street surrounding a park, where the strip of land forming the street had been deeded to the city by the donors of the park with the condition that the city at its own expense should lay out and improve the street, and forever keep the same in good order and repair.

W. A. S.

were authorized by an act of June 16, 1871, "to enable the corporate authorities of two or more towns, for park purposes, to issue bonds in renewal of bonds heretofore issued by them, and to provide for the payment of the same, to make, revise, and collect a special assessment on contiguous property for benefits by reason of the location of parks and boulevards, and to make necessary changes in their location." Hurd's Rev. Stat. 1909, p. 1572. Section 3 of this act provides the manner of procedure by which the commissioners were empowered to levy the assessment, and required the return of the assessment to the circuit court for confirmation, and this was the only manner in which, prior to June 24, 1895, park commissioners were authorized to levy an assessment, in any case, for corporate purposes. The act did not authorize the levy of a special assessment for the improvement of streets, but it did provide a manner of levying a special assessment for corporate purposes, and, when the later statute authorized the levy of a special assessment for the improvement of streets in the manner in which the levy of special assessments in other cases was authorized, it adopted for use in levying an assessment for street improvements the only method existing for levying an assessment in any case.

It is insisted, however, that the act of June 24, 1895, is a substitute for all prior acts relating to special assessments for street improvements by park boards. Section 4 of the act provides that "when the ordinance under which said improvements is ordered to be made shall provide that such improvement shall be made by special assessment, the proceedings for the making and levying of the same shall be as provided hereinafter in this act." The act is a general revision of the subject of special assessments by park boards for street improvements, and, in the absence of any saving clause, would operate to repeal the provisions of the former statute on that subject. In § 2, however, it is provided that "the power and authority hereby vested are hereby declared to be additional to, and not in limitation of, any power and authority heretofore vested in said park commissioners or park authorities." This is an express declaration that the method provided in the act was not intended as a substitute for that theretofore existing, and that the jurisdiction conferred upon the county court was not to supersede, but to be concurrent with, that already existing in the circuit court.

By both the act of April 9, 1879, and that of June 24, 1895, park commissioners are authorized to improve streets under their

control, and to levy a special assessment to pay the cost of their first improvement, but not the cost of their subsequent care, maintenance, and repair. The appellants insist that, because the streets in question had been paved and otherwise improved by the city of Chicago before they were taken under the control of the South park commissioners, the latter had no power to make this improvement by special assessment. The statute expressly authorizes the improvement of any street taken under the control of the park commissioners in such manner as the commissioners deem best, and the payment for such first improvement by special assessment. The improvement mentioned is one made by the commissioners, and does not refer to the former condition of the streets. The streets involved had been improved by pavements, curbs, sidewalks, and gutters. On Prairie avenue between Sixteenth street and Twenty-Second street was an asphalt pavement in good repair, part of it recently built, and none of it over six years old, with curbs, sidewalks, and gutters. For all purposes of ordinary traffic this portion of the street was in such condition that no improvement thereof was needed. It was only the making of what is spoken of as a boulevard improvement, as contemplated in the ordinance, which necessitated any change in this condition. The grade was not entirely uniform, the driveway not so serviceable for fast-moving pleasure vehicles as it was proposed to make it, the width of the pavement and of the sidewalks was not uniform, and, while the conditions of the street as a street were not such as to require any change, they were not up to the standard of a boulevard improvement. The ordinance therefore proposed to tear up and destroy a good pavement, good sidewalks, curbs, and gutters recently put down at the expense of the property owners, and to replace them, also at the expense of the property owners, with substantially similar improvements made with reference to uniformity of construction, slightly changing grades and crowns, and other details, to adapt the streets better to the purposes of a pleasure driveway. The ordinance is unreasonable in thus imposing upon property owners the burden of paying for a pleasure driveway and the ornamentation and embellishment of a boulevard, when there is already a complete system of street improvements recently put in, and in good condition. *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12; *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65; *Chicago Union Traction Co. v. Chicago*, 208 Ill. 187, 70 N. E. 234. If the public authorities deem it

best for the public interest, under such circumstances, to make an improvement of the character here contemplated, it is only reasonable that it should be done at the public expense. Property already provided with street improvements as above indicated should not in such case be subject to special assessment any further than if it had not become a part of the park system, but had remained under the jurisdiction of the city.

The judgment of the confirmation as to the property of the appellants is reversed.

ARKANSAS SUPREME COURT.

NATHAN STEELMAN, Appt.,

v.

R. M. ATCHLEY, Receiver of Dallas County Bank.

(— Ark. —, 135 S. W. 902.)

Bank — insolvency — set-off of deposit — unmaturing note.

A depositor may set off his deposit account against his note in the hands of the bank's receiver, although the note had not matured when the insolvency occurred, notwithstanding a statute forbidding preferences by insolvents.

(March 13, 1911.)

APPEAL by intervener from a decree of the Chancery Court for Dallas County denying his prayer that the amount of his deposit in the defendant bank be allowed him as a set-off against his note in the hands of the bank's receiver. Reversed.

Statement by Kirby, J.:

Nathan Steelman alleged by way of intervention that he executed his note on the 5th day of April, 1908, to the Dallas County Bank for \$200, and at the same time a mortgage to secure the payment thereof; that on the 15th day of July, 1909, he paid a sum on said note reducing the amount to \$204.55, for which he executed a renewal note on July 15, 1909, and directed the paid note mailed him, which was not done, and that the receiver of the bank is now holding both his notes; that the defendant bank closed its doors on about the 19th of February, 1910, on which date the intervener had on deposit in said bank the sum of \$218.02; that the note for \$204.55, with interest thereon to the said 19th day of February, 1910, amounted to the sum of \$217.71, leaving a balance due him of

31 cents, prayed judgment for the surrender and cancelation of the old paid note, and that the sum of \$218.12 be allowed him as a set-off as against said note executed in renewal thereof, and for judgment for 31 cents balance against said receiver and bank, etc. The receiver answered, denying any knowledge of the execution of the note dated July 15, 1909, for \$204.55, in renewal of the former note, and also that intervener had on deposit in the bank said sum of \$218.12, as claimed by his statement; denied that he was entitled to any credits on said notes; denied on information that he was entitled to the credits on the notes as claimed, and his right to judgment for 31 cents or any other amount. The court found from the intervention, answer, and oral evidence, that Nathan Steelman on the 15th day of April, 1908, was indebted to the Dallas County Bank on his promissory note in the sum of \$200, with 10 per cent interest from date, which was secured by a deed of trust; that on the 15th day of July, 1909, he executed his promissory note payable to the order of said bank for the sum of \$204.55 with interest, and secured same by deed of trust; that said last note and deed of trust were executed and given to the bank in lieu of and full settlement of the first note and deed of trust, dated April 5, 1908; that the note of July 15, 1909, for \$204.55, is the property of the bank due and unpaid, and a valid claim of said bank against said intervener, and authorized the receiver to institute suit to enforce the payment of same within ninety days, if it was not sooner paid; that on February 15, 1910, there was on deposit to the credit of said intervener, as shown by the receiver's statement, the sum of \$43.95. The court further found that he had placed as general deposits in said bank the following amounts, not shown on said statement, to wit: January 21, 1910, \$10; January 29, 1910, \$15; February 2, 1910, \$38.75; February 9, 1910, \$10; February 16, 1910, \$100.40,—amounting in all to the sum of \$218.12. That said sum so deposited immediately became the money of the bank, and intervener a creditor of the bank by reason of said deposit. That said sum placed on general deposit by said intervener constituted a part of the assets and property of the bank, was held by the receiver to be distributed *pro rata* towards the payment of the claims of the creditors of the bank. That said sum of \$218.12 did not constitute a set-off in favor of intervener against said note executed by him on July 15, 1909, for the sum of \$204.55. Further, the said Dallas County Bank is an insolvent corporation, and the court decreed that the note for \$200, dated

Note.—As to effect of immaturity of claim at the time of insolvency proceedings upon the right of set-off, see note to Richardson v. Anderson, 25 L.R.A.(N.S.) 393. 32 L.R.A.(N.S.)

April 5, 1908, be surrendered or delivered to intervener, but denied intervener's prayer that the sum of \$218.12, the amount of his deposits in said bank, be allowed him as a set-off against said note of July 15, 1909. From this decree intervener appealed.

Messrs. Morton & Morton for appellant.

Messrs. McMillan & McMillan, for appellee:

The note of appellant was an asset in the hands of the receiver; the appellant, by reason of the deposits, became a creditor of the bank, and is not entitled to use the deposits as a set-off against the note.

Carroll County Bank v. Rhodes, 69 Ark. 47, 63 S. W. 68; Himstedt v. German Bank, 46 Ark. 540; Henry v. Conley, 48 Ark. 267, 3 S. W. 181; Merchants' & P. Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Halpern v. Clarendon Hardwood Lumber Co. 64 Ark. 136, 40 S. W. 784; Richeson v. National Bank, — Ark. —, 132 S. W. 913; Bradshaw v. Bank of Little Rock, 76 Ark. 504, 89 S. W. 316; Hale v. Phillips, 68 Ark. 389, 59 S. W. 35.

Kirby, J., delivered the opinion of the court:

Did the court err in denying appellant the right to set off the amount of his deposit in said bank at the time of its failure against his said note held by the receiver of the insolvent bank? The bank became the debtor of appellant upon his general deposit of funds therein to the amount thereof, and bound by an implied contract to repay same upon his demand or order. Carroll County Bank v. Rhodes, 69 Ark. 47, 63 S. W. 68; Himstedt v. German Bank, 46 Ark. 537; Warren v. Nix, — Ark. —, 135 S. W. 896. He was the bank's debtor upon the note executed to it for the sum thereof, and the bank was his debtor for the sum of his deposits therein, and, if a suit had been brought for the collection of his note before the bank's failure, there is no question but that he could have set off against such demand the amount of his said deposits due him by the bank. Kirby's Dig. §§ 6098, 6101.

Did the appointment of a receiver deprive him of such right? We think not. Assignees and receivers of insolvents are not regarded as purchasers for value without notice, but rather as personal representatives of the insolvents, and standing in their shoes so far as their assets are concerned, and take same subject to set-offs, liens, and encumbrances as they existed at the time of their appointment. Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 32 L.R.A.(N.S.)

13 Sup. Ct. Rep. 148; Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822; Green v. Conrad, 114 Mo. 651, 21 S. W. 839. "Choses in action pass to . . . [a receiver] subject to the equitable right of set-off then existing, so that a debtor of the insolvent who has such a right is not bound to pay what he owes, and takes his chances with the other creditors, but is bound to pay only the balance." 34 Cyc. Law & Proc. pp. 195, 196. "Mutual claims that are due bank and depositor may be set off against each other. The bank's authority to do this is transmitted to the receiver, while the depositor's defenses are not impaired by the bank's insolvency." 2 Bolles, Modern Law of Bkg. p. 854, No. 212-4. See also Scott v. Armstrong, supra; Booth v. Prete, 81 Conn. 636, 20 L.R.A.(N.S.) 863, 71 Atl. 938, 15 A. & E. Ann. Cas. 306; St. Paul & M. Trust Co. v. Leck, 47 Am. St. Rep. 576, and note (57 Minn. 87, 58 N. W. 826); State v. Brobston, 94 Ga. 95, 47 Am. St. Rep. 138, 21 S. E. 146; Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404.

It is not shown in this case whether the appellant's note to the bank was due at the time of the insolvency or not, but this would not prevent his right to set-off. "A depositor may have his deposit set off against paper that has not matured at the time of the bank's insolvency, whether state or national, because the deposit was due at the time of the assignment," etc. 2 Bolles, Modern Law of Bkg. p. 858.

There is no question in this case but that the transaction was bona fide, the loan having been procured long before the bank's insolvency, and secured by a deed of trust; and it could not in any event be regarded as having been obtained by appellant in contemplation of its insolvency. Under the doctrine of these cases and the right to set off, the receiver of the insolvent bank was only entitled to collect from appellant the amount of his note to it after deducting the amount due by the bank to him on his general deposit at the time of the receiver's appointment, and, since the amount due appellant from the bank exceeded the amount which was due from him to the bank at that time by 31 cents, he was entitled to a decree allowing his set-off in the sum claimed, and for the said sum of 31 cents against the receiver. Such allowance of the set-off does not operate as a preference obtained by him within the meaning of the insolvency act. Kirby's Dig. § 951.

The chancellor erred in denying intervener's right to the set-off, and the decree is reversed and the cause remanded, with directions to enter a decree in accordance with this opinion.

UNITED STATES SUPREME COURT.

NOBLE STATE BANK, Plff. in Err.,
v.

C. N. HASKELL et al.

(219 U. S. 104, 55 L. ed. —, 31, Sup. Ct. Rep. 186.)

Constitutional law — reserved right to amend corporate charter — creating depositor's guaranty fund.

1. Contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case it or any other bank existing under the state laws becomes insolvent, unless such statute deprives the bank of liberty or property without due process of law.

Same — police power — due process of law.

2. The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law.

Same — regulating banking.

3. The police power of a state extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe.

On petition for rehearing.

Eminent domain — public use — creating bank guaranty fund.

4. The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is for a public use, although, judged from the proximate effect of the taking, the use seems to be a private one.

(January 3, 1911.)

Note. — Before the decision of the United States Supreme Court in this case, upholding the constitutionality of the Oklahoma bank guaranty law with reference to state banks, the circuit court of appeals, eighth circuit, in *Abilene Nat. Bank v. Dolley*, post, 1065, had upheld the Kansas bank guaranty law, as against the objection that it discriminated against national banks. It has been thought that a comparison of the opinions in these cases might be of interest to the profession.
32 L.R.A. (N.S.)

ERROR to the Oklahoma Supreme Court to review a decree affirming a decree of the District Court for Logan County dismissing the petition in a suit to enjoin the collection from a state bank of an assessment for the purpose of creating a depositors' guaranty fund. Affirmed.

The facts are stated in the opinion.

Messrs. C. B. Ames, J. B. Dudley, and D. T. Flynn, for plaintiff in error:

In taking the plaintiff's property, the law impairs the obligation of contracts, and, being a taking without due process of law, cannot be upheld as an amendment of the plaintiff's charter.

Fletcher v. Peck, 6 Cranch, 135, 3 L. ed. 177; *Sinking Fund Cases*, 99 U. S. 720, 748, 25 L. ed. 501, 512; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Opinion of Justices*, 66 N. H. 629, 33 Atl. 1079; *Hill v. Glasgow R. Co.* 41 Fed. 615; *Atchison, T. & S. F. R. Co. v. Campbell*, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; *Re Warren*, 52 Mich. 557, 18 N. W. 356; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Ireland v. Palestine, B. N. P. & N. W. Turnp. Co.* 19 Ohio St. 369; *Mays v. Seaboard Air Line R. Co.* 75 S. C. 455, 56 S. E. 30; *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253.

The governor, when acting as a member of the state banking board, is subject to the control of the courts.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Rolston v. Missouri Fund Comrs.* (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 13 Sup. Ct. Rep. 418; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; 14 A. & E. Ann. Cas. 764.

It is the purpose of the defendants to compel the plaintiff to pay the assessment required by the law. It therefore shows a sufficient state of facts to justify relief by injunction.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 13 Sup. Ct. Rep. 418.

Mr. T. G. Chambers, also for plaintiff in error:

Private property cannot be taken for private use by the amendment of corporate charters.

Woodward v. Central Vermont R. Co. 180 Mass. 599, 62 N. E. 1051; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Mays v. Seaboard Air Line R. Co. 75 S. C. 455, 56 S. E. 30.

Messrs. Charles West, Attorney General, E. G. Spillman, and W. C. Reeves, for defendants, in error:

The security of the public in its dealings with banks is a governmental function, and the creation of a mutual reserve fund is a safety to the public and a compulsory benefit to the banks.

Freund, Pol. Power, §§ 40, 400, 401.

A modification of a common-law rule is not a deprivation of property.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 421, 46 N. W. 970; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Tenney v. Lenz, 16 Wis. 566; Van Horn v. People, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Wilton v. Weston, 48 Conn. 325; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 210; Swift v. Calnan, 102 Iowa, 206, 37 L.R.A. 402, 63 Am. St. Rep. 443, 71 N. W. 233; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 140; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phoenix Assur. Co. v. Fire Dept. 117 Ala. 631, 42 L.R.A. 468, 23 So. 843.

The exercise of the police power violates no vested rights.

Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; New York, N. H. & H. 32 L.R.A. (N.S.)

R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Cummings v. Spaunhorst, 5 Mo. App. 21; Atty. Gen. v. North America L. Ins. Co. 82 N. Y. 172.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding against the governor of the state of Oklahoma and other officials who constitute the state banking board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the board, and directs it to levy upon every bank existing under the laws of the state an assessment of 1 per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the guaranty fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks, consistently with article 1, § 10, and the 14th Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the supreme court of the state. 22 Okla. 48, 97 Pac. 590.

The reference to article 1, § 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman v. Smith*, 1 Black, 587, 17 L. ed. 163. Whether it does so or not is the only question in the case.

In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a

scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolimus mutare* as against the lawmaking power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; *Bacon v. Walker*, 204 U. S. 311, 315, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 289. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. 32 L.R.A. (N.S.)

Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 20 Sup. Ct. Rep. 633. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. *Danby Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the

opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560. It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664; *Com. v. Vrooman*, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; *Myers v. Irwin*, 2 Serg. & R. 368; *Myers v. Manhattan Bank*, 20 Ohio, 283, 302; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course, objections under the state Constitution are not open here.

Judgment affirmed.

A petition for rehearing having been filed, Mr. Justice Holmes, on February 20, 1911, handed down the following amended opinion:

Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered seems to have conveyed a wrong impression of the opinion of the court in some details, 32 L.R.A.(N.S.)

we add a few words to what was said when the case was decided. We fully understand the practical importance of the question, and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174, were cited to establish, not that property might be taken for a private use, but that, among the public uses for which it might be taken, were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reasons for holding that such a condition may be imposed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ABILENE NATIONAL BANK et al.

v.

J. N. DOLLEY, Bank Commissioner of
State of Kansas, et al., Appts.

(102 C. C. A. 607, 179 Fed. 461.)

Banks — guaranty fund — discrimination against national bank.

1. National banks in a state are not unconstitutionally denied the equal protection of the laws by a state statute permit-

Note. — Constitutionality of bank guaranty law.

As to power to prohibit or impose conditions upon the right of individuals to engage in banking business, see note to *State v. Richcreek*, 5 L.R.A.(N.S.) 874, and later cases *Weed v. Bergh*, 25 L.R.A.(N.S.) 1217, and *Marymont v. Nevada State Bkg. Board*, ante, 477.

Laws requiring banks to contribute to a common fund to be used to pay depositors or creditors of failed banks are not of recent origin in this country. Such laws have

ting state banks to contribute to a guaranty fund for the security of depositors.

Same — impairing efficiency of national bank.

2. A state law permitting state banks to contribute to a fund to guarantee their deposits is not invalid because the plan will tend to attract depositors from national banks, and therefore impair their efficiency as instrumentalities of the national government.

(May 20, 1910.)

in the past been in force in New York, Vermont, and perhaps other states, and have later been repealed. But although they have come up before the courts for construction (*People v. Walker*, 17 N. Y. 502; *Re Reciprocity Bank*, 22 N. Y. 9; *Elwood v. State*, 23 Vt. 701; *Danby Bank v. State Treasurer*, 30 Vt. 92), their constitutionality does not seem to have been questioned until very recently.

The legislature of Oklahoma passed an act establishing a depositors' guaranty fund to insure depositors against loss when a bank should become insolvent, which fund was created by an assessment on each bank based on the amount of its daily average deposits. The constitutionality of the act being challenged by one of the state banks, it was held in *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590, that the act was not in conflict with that section of the Constitution of Oklahoma which provides that "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry," in that it deprived the bank of the enjoyment of the gains of its own industry, for the benefit of depositors of other banks in which it had no interest.

It was further held that said act, in providing for the assessment, did not deprive the bank of its property without due process of law, in violation of the Constitution of Oklahoma and of the United States; nor did it deny to the bank the equal protection of the laws, in violation of the Constitution of the United States. *Ibid*.

It was also held that the act did not impair the obligation of the contract represented by the charter of the bank, contrary to the Constitution of the state of Oklahoma and of the United States, since the charter was granted subject to alteration, suspension, or repeal at the discretion of the legislature. The Constitution of the state, moreover, contained the provision that "the legislature shall have power to alter, amend, annul, revoke, or repeal any harter of incorporation, . . . whenever, in its opinion, it may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the incorporators." Construing the words "in such manner, however, that no injustice shall be done to the incorporators," the court said: "The provision of the Oklahoma Constitution does not limit the power, but regulates or directs the manner." *Ibid*.

It was also ruled that the act did not

A PPEAL by defendants from an order of the Circuit Court of the United States for the District of Kansas granting a temporary injunction to enjoin defendants from carrying into effect a statute known as the "bank depositors' guaranty act." *Reversed*.

The facts are stated in the opinion.

Argued before Van Devanter, Hook, and Adams, Circuit Judges.

Messrs. A. C. Mitchell, G. H. Buck-

provide for the taking of private property for a private use without the consent of the owner; nor for the taking of private property for a public use without just compensation, contrary to the Constitution of the state, since each bank gets a reciprocal benefit from the existence of the guaranty fund, in that unnecessary runs upon, and withdrawals from, the bank are prevented. *Ibid*.

Noble State Bank v. Haskell was affirmed by the Supreme Court of the United States in 219 U. S. 104, 55 L. ed. —, ante, 1062, 31 Sup. Ct. Rep. 186, opinion explained on rehearing in 219 U. S. 575, 55 L. ed. —, ante, 1065, 31 Sup. Ct. Rep. 299, which held that the act under consideration did not deprive the bank of liberty or property without due process of law, and was a valid exercise of the police power. And in *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. —, 31 Sup. Ct. Rep. 189, the Supreme Court followed their decision in *Noble State Bank v. Haskell*, *supra*, and reversed the decision of the United States circuit court for the district of Nebraska, in 172 Fed. 909, which held the Nebraska bank guaranty law unconstitutional.

In *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. —, 31 Sup. Ct. Rep. 189, affirming 175 Fed. 365, the Supreme Court of the United States, in upholding the bank guaranty law of Kansas, said that it was none the less a valid exercise of the police power because it was left optional with the banks whether they would avail themselves of its privileges by contributing to the guaranty fund; that an unconstitutional discrimination does not result from the preference of ordinary depositors over other creditors, as one of the chief objects and justification of such laws is securing the currency of checks; that unincorporated banks, and banks having a surplus of less than 10 per cent, are not unconstitutionally discriminated against because not allowed to participate in the advantages of the law.

A state statute providing for the creation of a fund to pay the depositors of failed banks of the state is not unconstitutional because national banks have no power to avail themselves of its privileges. *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590, affirmed in 219 U. S. 104, 55 L. ed. —, ante, 1062, 31 Sup. Ct. Rep. 186. To like effect is *ABILENE NAT. BANK v. DOLLEY*.

R. A. E

man, and Fred S. Jackson, Attorney General, for appellants.

Messrs. B. P. Waggener, J. W. Glead, and John L. Hunt, with Messrs. John L. Webster and Chester I. Long, for appellees.

Hook, Circuit Judge, delivered the opinion of the court:

One hundred and fifty national banks domiciled and doing business in Kansas sued the bank commissioner and the treasurer of that state to enjoin them from carrying into effect a Kansas statute, approved March 6, 1909, known as the "bank depositors' guaranty act" (Laws 1909, chap. 61). At the instance of the banks the circuit court granted a temporary injunction, and the state officers took this appeal.

The questions before us require no more than a brief outline of the provisions of the statute. There are many details of the guaranty scheme of which much complaint is made; but we think they are so clearly matters with which the national banks have no legal concern, or are so manifestly within the legislative province of the state, it is unnecessary to mention them. The statute authorizes banks incorporated under the laws of the state, and possessing prescribed qualifications, to join in contributing to and maintaining a fund for securing certain classes of their depositors against loss. The administration of the law is committed to the bank commissioner; the custody of the fund to the state treasurer. Whether a bank shall become a party to the scheme is optional, not compulsory. Its desire to join is signified by a resolution of its board of directors, authorized by its stockholders. If, upon an examination of its affairs by the bank commissioner, it is found to be qualified, it then contributes to the permanent guaranty fund a sum in bonds or cash proportioned to the deposits to be guaranteed, and receives a certificate that it has complied with the provisions of the act, and "that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas." The permanent fund is raised to a fixed amount by the initial payments, and, if necessary, by annual assessments of one twentieth of 1 per cent of the guaranteed deposits in each bank, less capital and surplus; and any depletion of the fund caused by payments to depositors in insolvent banks is cared for by like assessments, not exceeding five in any calendar year. When a guaranteed bank, so called, becomes insolvent, the bank commissioner takes charge, winds up its affairs, and applies its assets and the moneys realized from the liability of its stockholders. When these are exhaust-

ed, balances still due guaranteed depositors are paid in full from the guaranty fund if it is sufficient, and, if not, then by continued assessments, not exceeding five annually, as above stated, upon all banks which are parties to the plan. It is also provided that national banks may avail themselves of the act upon compliance with the prescribed conditions.

The visitatorial power of the state bank commissioner over the guaranteed banks, and his control of their liquidation in case of insolvency, including the authority to appoint receivers, are radically inconsistent with the jurisdiction of the Comptroller of the Currency conferred by Congress over national banks. There are other points of conflict in the operation of the Kansas statute and the national banking laws, and it is obvious that the national banks cannot lawfully avail themselves of the provisions of the state enactment. Without further and appropriate legislation by Congress, they cannot throw off the duties and obligations prescribed by the law of their creation, or enter into engagements that will subject their corporate affairs to the supervision and control of another sovereignty. This view was expressed by the Attorney General of the United States in an opinion delivered April 6, 1909. The Kansas statute should, therefore, be regarded as though it related exclusively to banks incorporated under the laws of the state.

In their final analysis the objections of the national banks to the Kansas statute are reduced to two propositions: First, that, since they cannot avail themselves of the provisions of the statute, it operates to deny them the equal protection of the laws, contrary to the 14th Amendment to the Constitution; and, second, that the effect of the guaranty plan will be to attract depositors from the national banks to the guaranteed state banks, and will therefore impair the efficiency of the former as instrumentalities of the national government. Counsel admit this to be their position. The Federal questions presented by these propositions constitute the ground of jurisdiction of the circuit court, and upon their soundness rests the temporary injunction it granted.

The national banks owe their existence to the laws of the United States, and, in respect of the things which pertain to supervision and control by the sovereignty which created them, they are as much beyond the jurisdiction of Kansas as though they were domiciled in Maine or California. Their exclusion from the operation of the statute in question is not from any design on the part of the state to discriminate against them, but results from the limita-

tion of governmental powers. Because of their origin and the paramount authority of Congress, they are not, in matters inhering in the character of their corporate structures, within the legislative province of the state. The state can neither take away the essential powers granted them by Congress, nor confer others that are inconsistent. Its legislation is necessarily limited to objects within its jurisdiction. The 14th Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A conclusive answer to the objection to the Kansas statute now being considered would seem clearly to appear from the face of the Amendment itself. A most extraordinary condition would exist if the legislation of the states, properly confined within its appropriate sphere, were to be held invalid because it does not extend to and embrace objects beyond their jurisdiction. A legislative *impasse* would be created. Neither the nation nor the states could move forward; the former, because power over matters purely of state concern is not conferred by the Constitution, and the latter, because, under the construction now urged upon us, they can affect none, if they cannot affect equally all, within and without their jurisdiction. Of course, such a construction is inadmissible. As Mr. Justice Field observed in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161: "The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application."

The Amendment does not profess to secure to all persons in the United States, nor all persons in the same state, the benefit of the same laws. Great diversities in the character of laws may exist in two states separated by an imaginary line, and there may also be such diversities in different parts of the same state. *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989. Jurisdictional limits are an obvious and sufficient reason for lack of universal uniformity in legislation. The equality clause of the Amendment does not require indiscriminate operation of state laws, but proceeds upon due consideration of the relations of persons to the state and to the legislation in question. "It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liability imposed." *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 32 L.R.A. (N.S.)

18 Sup. Ct. Rep. 594; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, it was said: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the Amendment."

Such has been the consistent holding of the Supreme Court. This is not the ordinary case of classification for legislative purposes. The power of a state to classify implies jurisdiction of the various objects to be classified, and the voluntary selection of some of them for inclusion within the law. Even in such cases a classification, when made, will be upheld, whenever it is not purely arbitrary or capricious, but proceeds upon some difference which has a just and reasonable relation to the purpose sought to be accomplished. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. But were this a case of classification, what line of division between corporations included and those excluded from the operation of a statute could be more clear or more necessary than that which marks the very boundary of the legislative power? A state has the right to confer corporate powers upon its own corporations, and its action cannot be held in contravention of the equality clause of the 14th Amendment merely because like corporations of the United States cannot, by reason of their organic structure and the duties they owe their creator, avail themselves of them. The state of Kansas did not single out national banks as the special object of hostile or discriminative legislation, and no such conclusion can be helped out by averments of intention in a bill of complaint.

It is urged that the statute is void because the effect of its operation will impair the efficiency of the national banks, as instrumentalities of the national government, by attracting depositors from them to the guaranteed state banks. If this contention is sound, and the statute falls, then all state legislation designed to improve banking methods, and to maintain the local institutions on a sound basis and secure the depositors from loss, is likewise void. Indeed, it will be impossible to uphold even the creation of banking corporations by the states, for it can be said with equal, if not greater, reason that, by merely giving them corporate existence and allowing them to enter the field of competition for

business, they deprive the national banks of depositors they would otherwise secure, and thereby impair their efficiency. To state the proposition contended for is to demonstrate its unsoundness.

That Congress may create corporations for the execution of the powers conferred by the Constitution is well settled, and the corporations so created are fitly termed agencies or instrumentalities of the government. Familiar examples are national banks for carrying on the fiscal operations of the United States, and railroads and bridges for promoting interstate commerce. *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. Rep. 86; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Luxton v. North River Bridge Co.* 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891. It is doubtful that it ever occurred to a railroad corporation chartered by Congress, to urge that a state statute providing for public aid to a railroad corporation organized under the laws of the state was void because its ultimate effect would be to create an unfair competition, and deprive the former of business, thereby lessening its efficiency as a governmental agency. The contention made here is not different in principle. Congress may prescribe the powers and legislate concerning the corporations it creates; but it has never attempted to set an unalterable copy in those particulars for corporations organized under state laws.

The effect of the Kansas statute upon the business of the national banks will at the most be indirect and incidental. Whether there will be any appreciable effect at all depends upon the individual views of depositors, which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance in a case like this. Ground for complaint would exist if the statute had, for instance, made it an offense to deposit funds in national banks, or subjected them to a higher rate of taxation than that imposed on like deposits in state institutions, or in some other perceptible way had evinced an evil and discriminating purpose, or an attempt to subject them to rules inconsistent with those prescribed by Congress. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502, is an illustration. There a New York statute giving deposits of a certain character a preference in the distribution of the as-

sets of insolvent banks was held to be in conflict with the Federal law providing for ratable dividends, and therefore void when attempted to be applied to an insolvent national bank. We have not considered the merits of the guaranty plan, whether practically beneficent, experimental, or illusory. Such matters are for the state legislature. Our province is confined to the question whether the exercise of its power is within constitutional limits so far as the national banks are concerned. We think the objections they urge are so clearly without foundation, the temporary injunction was improvidently granted.

The order is accordingly reversed.

Petition for writ of certiorari denied by the United States Supreme Court, October 24, 1910, 218 U. S. 673, 54 L. ed. 1205, 31 Sup. Ct. Rep. 223.

COLORADO SUPREME COURT.

R. D. McCLELLAND

v.

PEOPLE OF THE STATE OF COLORADO.

(— Colo. —, 113 Pac. 640.)

Perjury — subornation — immaterial testimony — delinquency of child.

Sending out of the state a child charged with delinquency, in order to enable it to avoid the publicity of a trial, is not a contribution to the delinquency, unless made so by statute, so as to render one guilty of subornation of perjury in procuring a witness to swear falsely at the trial of an information charging such offense, that accused was not the one who aided the escape of the child, in the absence of anything to show that the perjured testimony was otherwise material to the issues in the prosecution.

(February 6, 1911.)

ERROR to the District Court for Fremont County convicting defendant of subornation of perjury. Reversed.

The facts are stated in the opinion.

Messrs. Edwin N. Burdick and George Humbert, for plaintiff in error:

The information does not show wherein the testimony was material or false. This was fatal.

United States v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947; *Com. v. Douglass*, 5 Met. 243; *People v. Ross*, 103 Cal. 425, 37 Pac. 379; *Miller v. State*, 43 Tex. Crim.

Note.—As to whether charge of subornation of perjury may be based on false testimony which is immaterial, see note to *People v. Teal*, 25 L.R.A. (N.S.) 120.

Rep. 307, 65 S. W. 909; *United States v. Evans*, 10 Sawy. 132, 10 Fed. 912; *Young v. People*, 134 Ill. 38, 24 N. E. 1070; *Coyne v. People*, 124 Ill. 17, 7 Am. St. Rep. 324, 14 N. E. 668; *State v. Geer*, 48 Kan. 752, 30 Pac. 237.

The alleged facts were not material to the issues involved.

Com. v. Douglass, 5 Met. 241; *Coyne v. People*, 124 Ill. 17, 7 Am. St. Rep. 324, 14 N. E. 668; *Smith v. State*, 125 Ind. 440, 25 N. E. 598.

The evidence introduced in this case does not show or tend to show that the alleged false testimony upon which charge of subornation of perjury was predicated was in any wise material to the issue involved in the trial in the course of which said testimony was given.

3 Greenl. Ev. § 197; *People v. Ah Sing*, 95 Cal. 657, 30 Pac. 797; *Young v. People*, 134 Ill. 37, 24 N. E. 1070; *Bledsoe v. State*, 64 Ark. 474, 42 S. W. 899; *Nelson v. State*, 32 Ark. 192; *Heflin v. State*, 88 Ga. 151, 30 Am. St. Rep. 147, 14 S. E. 112; *State v. Aikens*, 32 Iowa, 403; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *State v. Dineen*, 203 Mo. 628, 102 S. W. 480.

The mere fact that the testimony was introduced does not create any presumption that such testimony was material.

Nelson v. State, 32 Ark. 192; *Com. v. Pollard*, 12 Met. 225; *Rich v. United States*, 1 Okla. 354, 33 Pac. 804; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Wharton, Crim. Law*, 32; *State v. Dineen*, 203 Mo. 628, 102 S. W. 480; *People v. Teal*, 190 N. Y. 372, 25 L.R.A.(N.S.) 120, 89 N. E. 1086, 17 A. & E. Ann. Cas. 1175.

Messrs. John T. Barnett, Attorney General, James Grafton Rogers, and Eugene A. Moran, for the People.

White, J., delivered the opinion of the court:

R. D. McClelland, plaintiff in error, was convicted of subornation of perjury by procuring one Charlie Crowder to commit perjury upon the trial of the former in the county court of Fremont county, upon an information charging him with the offense of contributing to, and encouraging, juvenile delinquency. After a motion for a new trial was interposed and overruled, the court pronounced judgment, sentencing the defendant to serve a term in the state penitentiary, and he prosecutes this suit to reverse that judgment.

The alleged crime was based upon, and grew out of, the following facts: February 15, 1909, a girl, aged fifteen years, named Nellie Hart, was charged, in the county court of Fremont county, with being a delinquent and incorrigible child under the 32 L.R.A.(N.S.)

statute. She was thereupon taken, in company with her mother, before the judge of said court, who continued the cause until February 20th, and ordered the girl to appear on that date for trial. The girl and her mother had shortly before moved into, and were then residing in, a rooming house in Canon City, owned by defendant. February 18th they called upon defendant and consulted him relative to Nellie's approaching trial, the mother expressing herself averse to the notoriety such trial would necessarily occasion. The defendant thereupon suggested that Nellie be sent out of the jurisdiction of the court, as the easiest way of avoiding the publicity of the trial, and the consequent notoriety attending the same. The plan suggested was agreed upon, and defendant, with an effort to conceal his actions, took Nellie, accompanied by her mother, to the depot, procured a ticket to Emporia, Kansas, signing the name of "Nellie Marsh" as the purchaser thereof, checked Nellie Hart's trunk to that point, placed her aboard the night train, and supplied her with the ticket upon which she traveled to Emporia, where she took up her abode with some relatives of defendant. Nellie Hart failing to appear in the county court upon February 20th, the date set for her trial, an investigation was made, and McClelland's connection with her disappearance was disclosed, and he was thereupon formally charged in the county court with contributing to her delinquency. Upon that charge McClelland was tried, and called Crowder as a witness in his defense, who testified, in substance, that the former had no part in the departure of Nellie Hart, and was not present at the time, and had nothing whatever to do therewith; that he, Crowder, and not McClelland, had done the several things, assisting her to leave Canon City and go to Emporia, which it was charged in the information McClelland in person had done. This is the alleged perjured testimony, and defendant is said to have suborned Crowder to give it.

To constitute the crime of subornation of perjury, one party must procure another to commit perjury, and the party thus procured must actually commit the crime of perjury, and, to support a conviction therefor, it is essential to allege and prove that perjury has in fact been committed by the party so procured. 2 Wharton, Crim. Law. § 1329; *Smith v. State*, 125 Ind. 440, 443, 25 N. E. 598. It cannot be committed unless the person taking the oath wilfully and corruptly swears to what is false in a material material to the issue or point in question. Mills's Anno. Stat. § 1270; 2 Wharton, Crim. Law. § 1330.

It is equally essential upon the trial to

prove the facts showing the materiality of the false statements or testimony. The proof should show how and wherein the matter upon which the perjury is assigned was material to the issue or point in question. The rule is aptly stated in *Com. v. Pollard*, 12 Met. 225, 229, where it is said: "The oath must not only be wilfully false, but it must be material to the issue; for if it be of no importance and immaterial, though false, it is not perjury, because it does not affect the issue; and it lies on the prosecution to prove that it is thus material." And in 3 Greenleaf on Evidence, § 197, as follows: "Where the perjury is assigned in the evidence given in the cause, it will be necessary, not only to produce the record, but to give evidence of so much of the state of the cause, and its precise posture at the time of the prisoner's testifying, as will show the materiality of his testimony." The evidence constituting the alleged perjury must have been material to the matter then being investigated, or the point in question before the court, and it devolves upon the people, upon trial, to show its materiality. While the test of materiality does not require the false testimony to be directly pertinent to the main issue or point in question, it does require that it have a legitimate tendency to prove or disprove some material fact in the chain of evidence; that is, that it be directly or circumstantially material. It is equally true that its materiality must be established by evidence, either direct or circumstantial, and cannot be left to presumption. *Nelson v. State*, 32 Ark. 192; *State v. Aikens*, 32 Iowa, 403; *Mackin v. People*, 115 Ill. 312, 327, 56 Am. Rep. 167, 3 N. E. 222, 6 Am. Crim. Rep. 556. The rule stated in *Dilcher v. State*, 39 Ohio St. 130, 133, and adopted by this court in *Thompson v. People*, 26 Colo. 496, 502, 59 Pac. 51, 53, is as follows: "A witness may be guilty of perjury not only by swearing corruptly and falsely to the fact which is immediately in issue, but also to any material circumstance which legitimately tends to prove or disprove such fact, or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact." These rules of law are applicable to the case at bar, and, applying them to the facts, it is clearly evident the verdict and judgment herein cannot be upheld. The falsity of Crowder's testimony and his knowledge thereof may be conceded, yet there is an entire absence of evidence showing, or tending to show, the materiality of the alleged false matter testified to by him upon the issue or point in question, in the case in the county court, wherein such testimony was given. The issue in that case was as to the delinquency of Nellie Hart, 32 L.R.A. (N.S.)

and McClelland's acts in connection therewith. The words a "delinquent child" are defined in § 586, Rev. Stat. 1908, and, in order to be guilty of contributing to juvenile delinquency, one must encourage, aid, or assist a child coming within the terms of the statute, to commit one or more of the various acts therein mentioned. Rev. Stat. § 598. The information for contributing to juvenile delinquency could not, whatever its allegations, be broader than the statute upon which it was based. While it is true that information, after alleging the specific offense of contributing to juvenile delinquency, also alleges that defendant caused Nellie Hart to violate the orders and directions of the juvenile court by failing to appear in said court on the 20th day of February, 1909, yet her failure in that respect, and defendant's actions relative thereto, do not necessarily enter into or constitute any of the elements of the offense, and the evidence in the case at bar wholly fails to show their relevancy. Neither the information in the county court, except inferentially, nor the one at bar, alleges, nor does the proof here show, that the departure of Nellie Hart from Canon City, her failure to appear and be in court, or her visit in Emporia, in any wise caused her to be or become an incorrigible or delinquent child within the meaning of the law. Neither does the record show that the alleged perjured testimony tended to prove or disprove the fact which was at issue in the county court, nor does it appear that it had the effect to strengthen or corroborate the testimony upon the main fact there at issue. In the case of *Thompson v. People*, supra, the perjured testimony assigned in the information was that Thompson upon the trial of one Cremar, upon the charge of having murdered one Myers, testified that he saw Myers hand someone a pistol at or immediately prior to the time of the vital encounter. The prosecution was confronted with precisely the situation that confronted the prosecution in the case at bar. It was impossible in that case, as it is in this, to determine from the information alone whether the false testimony was material to any issue in the trial; but there the prosecution met the situation by introducing so much of the testimony taken in the murder trial, where the perjury was alleged to have been committed, as to show the materiality of the false testimony. The people in that case introduced evidence which had been given in the murder trial, that Cremar, as an officer, did the shooting in attempting to take Myers, who was resisting arrest; that Myers struck Cremar several times, and finally got him by one hand and reached back as if to pull a pistol; that one Ryan had sworn that immediately

before the shooting by Cremar, he saw Myers pull from his hip pocket a revolver and hold it up; that Thompson had testified that he saw Myers and Cremar when they came out of the building, and saw Myers hand a pistol to someone and say, "Here, take this." The materiality of such testimony to the point in issue in the murder case is readily apparent. The fact of the deceased having or not having a revolver at the time of the encounter was a material fact upon the issue of self-defense, and hence evidence tending to prove or disprove that fact was essentially material.

It is true the acts covered by Crowder's testimony might have had a legitimate tendency to prove or disprove a material fact in the contributing to juvenile delinquency case, but, in order to show in the case at bar that it was material in that case, it was essential in this to produce the record of that case, and so much of the evidence given therein as to show clearly the materiality of the false testimony. This was not done in the case at bar. From the record here the only thing we know of that case is that an information charging juvenile delinquency was filed, and that Crowder in the trial of the case upon that information gave the alleged false testimony. This was wholly insufficient. The existence of a fact cannot be established by simply showing that it may or may not have existed; nor can it be said the materiality of the alleged false testimony was established, when it appears that under some circumstances such testimony may have been material, and under other circumstances it could not have been. *People v. Ah Sing*, 95 Cal. 657, 30 Pac. 797; *Young v. People*, 134 Ill. 37, 24 N. E. 1070; *Bledsoe v. State*, 64 Ark. 474, 42 S. W. 899; *Nelson v. State and State v. Aikens*, supra.

Suppose, in the information upon which the defendant was tried in the county court, the specific offense of contributing to juvenile delinquency was charged, and it was also alleged therein that defendant caused Nellie Hart to refuse to sign a note, or caused her to do some act not criminal in itself, and a witness called testifies falsely concerning the acts of defendant relative thereto; how can it be said that such false testimony was material to the matter at issue or point in question? The evidence herein on behalf of the people not only fails to show the materiality of the alleged false testimony, but clearly discloses its immateriality. Moreover, it shows that the sole purpose of Nellie Hart in leaving Canon City and going to Emporia was to avoid the notoriety of a trial. Furthermore, such departure and visit was with the full consent and approval of her mother, the natural

32 L.R.A. (N.S.)

guardian of the child, and into whose custody and control the court had permitted her to remain. The theory of the prosecution was that inducing Nellie Hart to disobey the order of the court and leave its jurisdiction was an act of juvenile delinquency, but that theory can in no wise affect the matter. The legislature alone has the power to define criminal offenses, and designate the acts constituting them. It has not made the character of disobedience here under consideration a crime, or an element of the offense of juvenile delinquency, and to show its materiality in the proof of the charge, evidence was necessary. While it was not essential that defendant should have actually contributed to juvenile delinquency to make false testimony corruptly given upon his trial therefor perjured, it was essential that he be charged with the offense, and the particular testimony claimed to have been perjured have some tendency, either directly or indirectly, to support the charge. Inducing the girl to violate the order of the court was a serious interference with the administration of justice, and the person or persons responsible therefor should have been punished as provided by law; but the law does not permit the conviction of a person of one crime by showing that such person is guilty of another and different crime, or is accessory to a contempt of court. It may be the law should make whatever is sworn falsely and deliberately in open court the subject of perjury, or, at least, as is done in many jurisdictions, affix a penalty for intentional false swearing, without regard to the materiality of the testimony, yet it has not done so in this state; and we, not being empowered to legislate, must apply the law as we find it. The facts were undisputed, and the court as requested should have instructed the jury to acquit the defendant. The judgment is therefore reversed.

Campbell, Ch. J., and Musser, J., concur.

NORTH DAKOTA SUPREME COURT.

PETER C. ERICKSON, Appt.,

v.

PETER P. RUSS et al., Resp'ts.

(— N. D. —, 129 N. W. 1025.)

Lien — waiver — personal judgment.

1. Recovery of a judgment against the debtor in a suit at law does not waive the right to a lien, nor bar an equitable action to enforce the same.

Headnotes by BURKE, J.

Same — enforcement.

2. In the absence of statutory requirement, the lienor is not required to exhaust his remedy at law before resorting to the security of his lien.

Same — remedy — construction of statutes.

3. The remedy for the enforcement of a mechanics' lien by foreclosure as prescribed by § 6245, Rev. Codes 1905, is not governed by § 7481, Rev. Codes 1905, relating to foreclosure of real-estate mortgages.

(January 25, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Billings County sustaining a demurrer to the complaint in an action to foreclose a mechanics' lien. Reversed.

The facts are stated in the opinion.

Mr. Joseph Denoyer for appellant.

Mr. J. A. Miller for respondent Peter P. Russ.

Burke, J., delivered the opinion of the court:

The facts in this case, as stated in the complaint and admitted by the demurrer, are as follows: On or about the 19th day of March, 1906, the defendant was the owner of lot 4, block 2, original township of Beach, Billings county, North Dakota, and upon that day made a contract with the plaintiff, whereunder the said plaintiff performed certain work and labor upon the said lot in the way of excavating for a cistern and cellar. That said work was of the agreed value of \$70, and was completed by April 1, 1906. That upon the 28th day of April, 1906, the plaintiff took the necessary steps to secure a mechanics' lien upon

Note. — Recovering personal judgment against owner as waiver of mechanics' lien.

The rule of *ERICKSON v. RUSS* that the recovery of a personal judgment against the debtor does not amount to a waiver of the right to a mechanic's lien is supported by the weight of authority. That rule is said to be based upon two reasons or theories. First: Because obtaining judgment merges the claim but not the security; this is true because the debt and the security are each distinct and separate, and waiver affects the security while merger affects the debt. The effect, then, is merely to change the relation of the security which becomes a security for a judgment instead of for the original debt; Second: because the taking of a personal judgment is not an acceptance of a higher security and to effect an extinguishment at law the creditor must gain a higher security, that is, the thing substituted must be more beneficial to the creditor than the original thing contracted for. The original debts were simple-contract debts for the security of which the mechanics' lien acts created liens. This raises the security to the rank of a mortgage. Therefore, the entering of a judgment is not a taking of a higher security, and therefore not a waiver or extinguishment of a mechanic's lien. These conclusions are amply supported by the following cases: *Spence v. Etter*, 8 Ark. 69; *Germania Bldg. & L. Asso. v. Wagner*, 61 Cal. 349; *Sorg v. Crandall*, 129 Ill. App. 255, affirmed in 233 Ill. 79, 84 N. E. 181; *Re Thompson*, 2 Browne (Pa.) 297; *Crean v. McFee*, 2 Miles (Pa.) 214; *Culver v. Elwell*, 73 Ill. 536, wherein the pendency on appeal, after judgment against the owner, of an action brought under statute on the claim was held not to bar enforcement of the lien on the ground that a party may have two recoveries for the same cause, the right to enforce the lien being regarded as cumulative; and *Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549, 54 N. W. 720, where- 32 L.R.A. (N.S.)

in it was held that a materialman will not waive his lien by taking a personal judgment against the debtor for the amount of his claim, especially where the circumstances clearly show an intent to pursue and rely upon the lien.

And under a statute providing that no remedy given by the mechanic's lien act shall prevent the enforcing of any other remedy, except as otherwise provided, and in the absence of a provision to the contrary, it has been held that the remedy upon a mechanic's lien and the remedy upon the debt are distinct and concurrent and may be pursued at the same time or in succession. *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267. And under such a statute it has been expressly held that recovery of a judgment for the debt does not bar the creditor's right to enforce a mechanic's lien therefor. *Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395.

But in Missouri, where a judgment has the effect of merging the original cause of action in the judgment, extinguishing such cause, and the allowance by an assignee for the benefit of creditors of the demand of a creditor of the assignor is a judgment, it is held that a lien claimant by voluntarily merging his lien account in a judgment is precluded from employing the account as a basis for enforcing a mechanic's lien on the ground that the account is extinguished although the indebtedness continues by virtue of the unpaid judgment. *Wycoff v. Epworth Hotel Constr. & Real Estate Co.* 146 Mo. App. 554, 125 S. W. 550; *Hayden Slate Co. v. National Cornice & Iron Co.* 62 Mo. App. 569.

And in *Garland v. Bear Lake & River Waterworks & Irrig. Co.* 9 Utah, 350, 34 Pac. 368, it was held that where a contractor has a claim for a mechanic's lien and there is a controversy about the correctness of a part of the claim and he brings an action of debt to settle that part, he waives the right to have that claim included in the mechanic's lien. G. J. C.

the said premises. That said lien is still in force and unsatisfied, and is the property of the plaintiff. That on the 19th day of May, 1906, the plaintiff started a suit at law upon the said debt against the defendant Peter P. Russ alone, and finally recovered a judgment, which is still owned by the plaintiff and unsatisfied. That during the time the work was being done, the defendant Peter P. Russ transferred the said premises to the defendant Mary L. Russ. March 10, 1909, the plaintiff commenced an action in equity to foreclose the said mechanics' lien, making both Peter P. Russ and Mary L. Russ defendants. The defendants filed separate demurrers to the complaint, alleging that it appeared from the face of the said complaint that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained, and the plaintiff has appealed from the said orders.

The defendant Peter P. Russ makes but one objection to the complaint, which he states in his brief as follows: "The plaintiff has not exhausted his remedy for the collection of this debt, and until there is an allegation in his complaint that an execution has been issued and returned unsatisfied, he cannot maintain this action." In this contention the defendant is clearly wrong. The purpose of the mechanics' lien statute is to give to a certain class of creditors security upon the product of their labor or material, to which they may resort, irrespective of the ordinary remedies at law. The lien does not destroy any contractual relation of indebtedness that may arise, and the debt which would exist if there were no mechanics' lien may be enforced like any other debt, by an action at law in proper part.

Neither is the lien waived or merged upon the obtaining of a judgment at law upon the debt. Until the lienor has realized upon said judgment, or parted with the ownership thereof, it does not act to destroy his lien. *Germania Bldg. & L. Asso. v. Wagner*, 61 Cal. 349; *Brennan v. Swasey*, 16 Cal. 141, 76 Am. Dec. 507; *McNiel v. Borland*, 23 Cal. 144; *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539; *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170; *Gibbs v. Tally*, — Cal. —, 63 Pac. 168; *Delahay v. Clement*, 4 Ill. 201; *Wake v. Canadian Pacific Lumber Co.* 8 B. C. 358; *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267; *Olson v. O'Malia*, 75 Ill. App. 387; *Ehlers v. Elder*, 51 Miss. 495; *Gridley v. Rowland*, 1 E. D. Smith, 670; *Raven v. Smith*, 71 Hun, 197, 24 N. Y. Supp. 601, Id. 148 N. Y. 415, 43 N. E. 63; *Webb v. Van Zandt* (C. Pl. Gen. T.) 16 Abb. Pr. 190; *Power v. Onward Constr. Co.* (Sup. Ct. Spec. T.) 39 Misc. 707, 80 N. Y. 32 L.R.A. (N.S.)

Supp. 950; *Murray v. Rapley*, 30 Ark. 568; *Potvin v. Wickersham*, 15 Wash. 646, 47 Pac. 25; *Salt Lake Lithographing Co. v. Ibex Mine & Smelting Co.* 15 Utah, 440, 62 Am. St. Rep. 944, 49 Pac. 768; *Roberts v. Wilcoxson*, 36 Ark. 355; *Brock v. Bruce*, 5 Cal. 279, 280; *Hunt v. Darling*, 26 R. I. 480, 69 L.R.A. 497, 59 Atl. 398, 3 A. & E. Ann. Cas. 1008; *Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395; *Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549, 54 N. W. 720; *Vandyne v. Vanness*, 5 N. J. Eq. 485; *Anderson v. Huff*, 49 N. J. Eq. 349, 23 Atl. 654; *Fisher v. Rush*, 71 Pa. 40; *Fox v. Seal*, 22 Wall. 424, 22 L. ed. 774; *Cordova v. Hood*, 17 Wall. 1, 21 L. ed. 587. Neither is the lienor under any obligation to pursue his remedy at law before resorting to the security of his lien.

Defendant, however, contends that the foreclosure of mechanics' liens must be governed by the provisions of our Code relating to the foreclosure of real-estate mortgages, and, inasmuch as § 7481, Rev. Codes 1905, requires that an execution be returned unsatisfied in a similar case upon the foreclosure of a real-estate mortgage by action, a similar requirement is imposed upon one foreclosing a mechanics' lien. In this the defendant is also wrong. Section 6245, Rev. Codes 1905, prescribes the action to be taken in foreclosure of mechanics' liens, and reads: "Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. Whenever, in the sale of the property subject to the lien, there is a deficiency of the proceeds, judgment may be entered for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages." We do not believe that the last sentence, providing for the entry of a deficiency judgment in like manner and with like effect as in actions for the foreclosure of mortgages, can be construed to mean that the whole procedure must be the same. See *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

Our attention has been called to the cases of *Finlayson v. Crooka*, 47 Minn. 74, 49 N. W. 398, 645, and *Barbig v. Kick* (Com. Pl.) 70 N. Y. S. R. 470, 33 N. Y. Supp. 676. These cases were decided under statutes providing that a mechanics' lien shall be enforced in the same manner as an action to foreclose a real-estate mortgage. As

already pointed out, we have a very different statute, and those cases do not apply.

The demurrer should have been overruled, and the District Court is directed to so order.

All concur.

MAINE SUPREME JUDICIAL COURT.

ELLEN B. DOTEN

v.

CARROLL E. BARTLETT.

(— Me. —, 78 Atl. 456.)

Way — necessity — overcoming presumption.

1. The presumption of intention to include in a grant a right of access to a highway, which arises when the land granted is cut off from a highway by remaining land of the grantor or that of strangers, is overcome where one boundary of the land granted is stated by the deed to be upon other land of the grantee, which has access to a highway.

Estoppel — deed — recitals — way of necessity.

2. A purchaser of a tract of land cut off from a highway by remaining land of the grantor and that of strangers, who accepts a deed reciting that the grant is bounded on one side by land of the grantee, and executes a purchase money mortgage containing the same recital, is estopped, as against a subsequent grantee of the re-

Note. — Way of necessity where other possible modes of access exist.

This subject is treated in the note to *Corea v. Higuera*, 17 L.R.A.(N.S.) 1018, since the time of which note few cases in point seem to have arisen.

It seems to be "well settled that where a party has one way by which he can reach a public highway, and which affords him reasonable facilities for possessing, using, and enjoying his own premises, he is not entitled to another way, as a way of necessity." *McIlquham v. Anthony Wilkinson Live Stock Co.* — Wyo. —, 104 Pac. 20.

So, there is no implied reservation of a way of necessity over land conveyed by a simple warranty deed, where the grantor has and uses, at the sufferance of the grantee, a way across other lands of the latter, over which he may go to his remaining land. *Dabney v. Child*, 95 Miss. 585, 48 So. 897.

And a way of necessity to a highway which arises by implied grant, over the remaining lands of a grantor, when he conveys a part of his estate entirely surrounded by the lands of others, and the part retained by him, ceases when a public road is subsequently established and becomes available for use from the granted land to such highway. *Sassman v. Collins*, — Tex. Civ. App. —, 115 S. W. 337. 32 L.R.A.(N.S.)

mainder of the grantor's tract, from claiming that the recital was a mistake, and that he had no access to the highway, and therefore was entitled to a way of necessity.

(December 7, 1910.)

REPORT by the Supreme Judicial Court for Androskoggin County for the opinion of the law court of an action brought to recover damages for an alleged trespass by defendant upon plaintiff's property. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Newell & Skelton, for plaintiff:

The intention of the parties, and especially of the grantor, governs in the construction of the deed.

13 Cyc. Law & Proc. p. 601, and note 52, pp. 609, 610; *Lincoln v. Wilder*, 29 Me. 169.

The defendant is estopped from setting up right of way by necessity.

13 Cyc. Law & Proc. pp. 608, 611, 612; *Bradford v. Cressey*, 45 Me. 9; *Proctor v. Maine C. R. Co.* 96 Me. 458, 52 Atl. 933; *Torrey v. Bank of Orleans*, 9 Paige, 659; *Demeyer v. Legg*, 18 Barb. 20.

Messrs. McGillicuddy & Morey for defendant.

Cornish, J., delivered the opinion of the court:

The rights of the parties in this case depend upon the construction to be placed upon a deed from Amos D. Crowley to Ar-

A vendee of standing timber on certain swamp lands on a plantation has no implied right of passage on and over the vendor's plantation, under which he can construct a railroad along the most convenient route over the vendor's land for skidding and removing the timber, where the parties have by contract stipulated that the timber is to be removed by means of a canal of certain dimensions, to be constructed along a certain course through the vendor's swamp lands to a navigable stream. *Baldwin Lumber Co. v. Todd*, 124 La. 543, 50 So. 526.

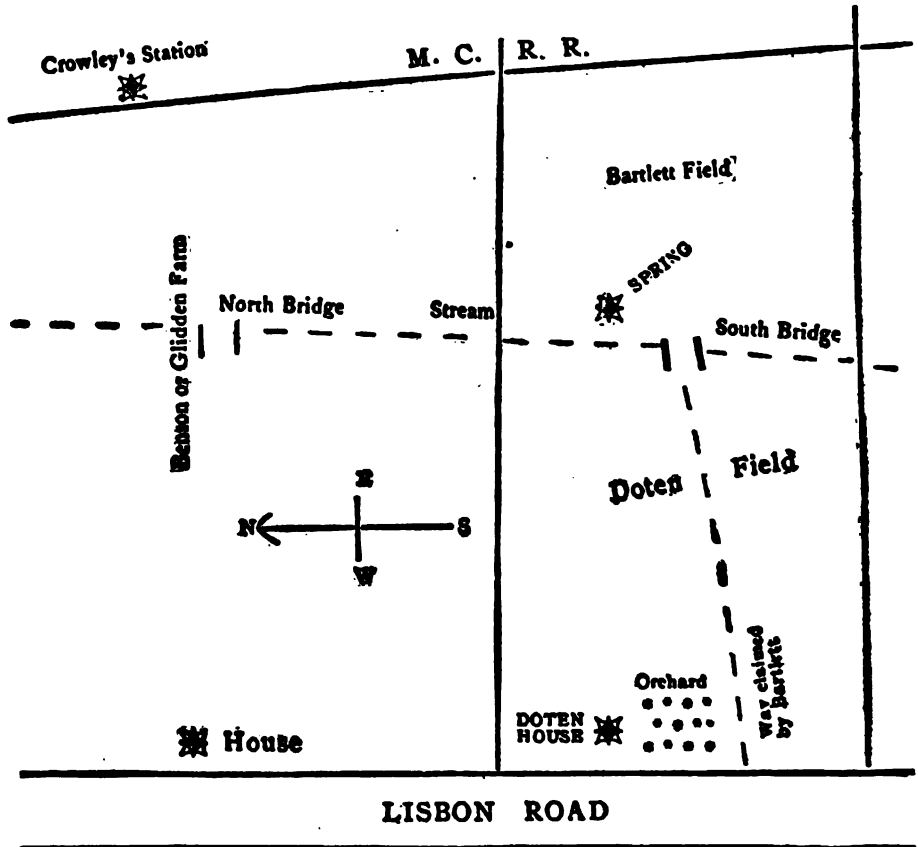
Where a hotel owner leases for restaurant purposes a room on the ground floor of the hotel, adjoining the rotunda of the hotel, and connected therewith by a doorway, and fronting and having its main entrance on a public street, the lease not in terms including the right to use the door between the rotunda of the hotel and the restaurant, no right of way by implication arises through this door, into and through the lobby of the hotel and through its main entrance, although, through the closing of the door, the restaurant may lose a considerable patronage from the hotel. *Jemo v. Tourist Hotel Co.* 55 Wash. 595, 30 L.R.A. (N.S.) 926, 104 Pac. 820, 19 A. & E. Ann. Cas. 1199. A. C. W.

thur F. and Carroll E. Bartlett, dated May 11, 1903. This deed conveyed a rear lot, the grantor still retaining the front lot, adjoining the Lisbon road. The plaintiff has succeeded to the title of Amos D. Crowley in the front lot, and the defendant is now the sole owner of the lot in the rear. The defendant claims the right to cross the plaintiff's lot to reach the highway, under a right of way of necessity. The plaintiff denies this right, and has brought this action of trespass to test the question.

The following diagram will aid in a clear understanding of the locus:

cross and recross on the bridge used by me across No Name Pond stream in order that the said Jordan may get to land above conveyed, that lies on the easterly side of said stream." The Crowley bridge was the south bridge marked on the plan. April 12, 1895, Emma F. Benson, the mother of Arthur F. and Carroll E. Bartlett, obtained title to the foregoing premises, including the right of way over the Crowley or south bridge, and conveyed the same to one Glidden in August, 1909, reserving a narrow strip adjoining the Maine Central Railroad.

On May 11, 1903, eight years after Mrs. Benson had purchased the land on the



The history of the title so far as it is material to the issue is this: All the premises delineated on this plan were at one time owned by Amos D. Crowley, who, on July 17, 1880, conveyed the north parcel marked "Benson or Glidden farm" to George H. Jordan. This land, as was the remaining land of Crowley, was bisected by No Name Pond stream, and, as there was then no bridge across this stream on this land conveyed, Crowley in this deed expressly granted to Jordan "the right to

32 L.R.A. (N.S.) north, Amos D. Crowley conveyed to the two sons, Arthur F. and Carroll E. Bartlett, the rear lot, marked "Bartlett field" on the plan, and the same was mortgaged back to Crowley as security for part payment of the purchase price. In this deed, which was accepted by the Bartletts, the northern boundary was given as follows: "Beginning on the easterly bank of No Name Pond brook, so called, at the end of the fence dividing land of this grantor from land now owned by these grantees, thence run-

ning easterly along the lines of said fence to land of Maine Central Railroad Company," etc. In the mortgage which was executed by the Bartletts, the same boundary is given as follows: "Beginning on the easterly bank of No Name Pond brook, so called, at the end of the fence dividing land this day purchased of this grantee from land north of the same owned by these grantors, thence running easterly along the line of said fence," etc. As a matter of fact the title to the land on the north was not in the Bartletts, but was still in their mother, Mrs. Benson, who had moved to Lewiston leaving the sons in full occupation, and they continued to occupy the place until it was sold to Glidden in August, 1909. It also appears that prior to this Bartlett deed the north bridge had been built by them across the stream connecting the rear and front lots of the Benson property, and that when the Bartlett deed was given the field conveyed was inaccessible except over lands of other parties.

The precise question involved is whether, under the facts in this case, the defendant, as the now sole owner of the Bartlett field, has a right of way of necessity over the intervening land of the original grantor, Crowley, now owned by the plaintiff, in order to reach the highway. The defendant strenuously claims such a right; the plaintiff as strenuously denies it.

1. The basis of a right of way of necessity is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way, but it is evidence of the grantor's intention to convey one. "Necessity is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as it does the way by grant; the only difference between the two is that one is granted in express words, and the other only by implication." *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302. As this court said in *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743: "This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant, indicative of the intention of the parties."

The presumption, however, is one of fact, and whether or not the grant is to be implied in a given case depends upon the terms of the deed and the facts in that case. To illustrate: If property in land has been severed by voluntary deed or statutory conveyance, and one portion is inaccessible except by passing over the other, or by trespassing on the lands of a stranger, and

there is nothing in the deed indicating a contrary intention, a grant of a right of way of necessity is presumed between the parties, for it is not to be presumed that the parties intended the grantee to have no beneficial enjoyment of the estate. But we can conceive of a case where the owner of the front lot would be willing to convey the rear lot provided there should be no right of way over the front lot, and the grantee would be willing to take his chances of procuring an outlet over some other adjoining land. Under such circumstances the deed might convey the rear lot, and distinctly recite that there was granted no right of way of necessity or otherwise over the front lot. There can be no doubt that in such a deed there would be no implied grant, and the grantee would acquire simply what he had purchased,—the lot without the way.

The question then resolves itself into a construction of this deed, viewed in the light of the surrounding circumstances. On which side of the line does it fall? Did the parties intend that a right of way be granted or not? Clearly not. The deed expressly bound the premises conveyed, on the north by land owned by the grantees. That northern land extended to the highway. Therefore the grantees could have access to the highway from their newly purchased lot over their own land, and the necessity of passing over the land of the plaintiff could not arise. *Leonard v. Leonard*, 2 Allen, 543. For it must be necessity, and not convenience, that furnishes a basis for the implication. *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Stevens v. Orr*, 69 Me. 323; *Kingsley v. Gouldsborough Land Improv. Co.* 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074; *Hildreth v. Googins*, 91 Me. 229, 39 Atl. 550.

2. The defendant, however, contends that this recital of ownership in the adjoining land was untrue, and that, as a matter of fact, the grantees had no right over any of the land surrounding the lot purchased, unless it be a way of necessity over the grantor's land, and therefore the implication of such a grant should stand notwithstanding the recital in the deed.

But the law will not permit the defendant to maintain this claim. He is estopped by the recitals in the deed which he accepted and under which he claims, and in the mortgage in which he himself joined and gave to the grantor. "Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting, as against the other and his privies, any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it." 16 Cyc. Law & Proc. p. 685. To work such

estoppel, the recital must be precise, clear, and unambiguous, and must relate to a material fact. *Clafin v. Boston & A. R. Co.* 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659. Where these requirements are met, the law will not permit one who has in a solemn manner admitted a matter to be true, to allege it to be false. *Campbell v. Knights*, 24 Me. 332.

The Bartletts admitted by the recitals in the deed and mortgage that they were owners of the adjoining lot. So far as they and all persons claiming under them are concerned, that statement must stand as an incontrovertible fact, and whatever rights legitimately arise on such admitted facts may be at all times asserted. This recital of ownership overcame the presumption of a right of way of necessity, and left the grantor Crowley in possession of the remainder of the lot free from such easement. He may well have relied upon it, and understood that no such easement would or could ever be claimed. And the evidence in this case strengthens this view, because the defendant admitted in the presence of several witnesses that when his brother and himself purchased the property, Crowley supposed that they "owned the other place." This supposition on his part they did not attempt to correct, but, on the other hand, deliberately confirmed it by the statements in the deed and mortgage. It is too late for the defendant now to deny the truth of those recitals, especially when the title to the Crowley lot has come to the plaintiff, an innocent purchaser, who, by examination of the records, could have had no notice of such an implied grant, but, relying on the recitals, could have reached only the opposite conclusion.

Judgment for the plaintiff for \$1 damages, and costs.

MONTANA SUPREME COURT.

STATE OF MONTANA EX REL. M. H. GERRY, Jr., Park Commissioner, Appt.,
v.

FRANK J. EDWARDS, Mayor, et al.,
Respts.

(42 Mont. 135, 111 Pac. 734.)

Municipal corporation — taxes — park board — power to levy.

A board of park commissioners to be appointed by the governor is not a corporate authority of a municipal corporation, within the meaning of a constitutional provision that the legislature shall not levy taxes upon the inhabitants or property in the city or town for municipal purposes, but may vest in the corporate authorities there-
32 L.R.A.(N.S.)

of the power to assess and collect such taxes.

(October 25, 1910.)

PPEAL by relator from a judgment of the District Court for Lewis and Clark County dismissing a petition for a writ of mandamus to compel a levy of taxes. Affirmed.

The facts are stated in the opinion.

Messrs. Albert J. Galen, Attorney General, and E. C. Day for appellant.

Mr. Edward Horsky for respondents.

Holloway, J., delivered the opinion of the court:

On September 29, 1910, the board of park commissioners of the city of Helena, through M. H. Gerry, Jr., one of its members, presented to the district court of Lewis and Clark county an affidavit in which it is recited that the persons named are the duly appointed, qualified, and acting members of the board, and, together with the mayor of the city of Helena, constitute such board: that pursuant to the provisions of § 3319, Rev. Codes, the board met in regular session, and made an estimate of the amount of money which will be necessary to carry on the work of the board for the ensuing

Note. — To what boards or bodies may the power of taxation be delegated.

This question is treated in the note to *Valley v. Grand Forks Park Comrs.* 15 L.R.A.(N.S.) 61, since the time of which note but one case in point, aside from *STATE EX REL. GERRY V. EDWARDS*, has been found.

In *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207, cited in *STATE EX REL. GERRY V. EDWARDS*, it was held, in the absence of any express constitutional limitation, that the legislature, being vested with all legislative power, could delegate to a board of park commissioners to be appointed by the mayor, without confirmation, composed of three freeholders, residents of the city, the power to levy a tax on all property in the city, to create a general park fund to be used by them in creating and maintaining parks and boulevards in the city. It will be noted that the decision in this case is based upon the proposition that the Kansas Constitution limits, rather than confers, legislative power, which is the "theory of absolute legislative control," discussed in *STATE EX REL. GERRY V. EDWARDS*, upon which theory legislative delegation of the power of taxation for local purposes is upheld, in the absence of an express constitutional provision violated by it, rather than condemned in the absence of express constitutional warrant for it, as it would be upon "the theory of local self-government," adopted in Montana, under which limitations upon the legislative power are implied.
A. C. W.

year; that such amount is \$11,500, and is actually necessary for the work of the board; that to raise this sum will require a tax levy of not more than 1 mill on the dollar of the assessed valuation of the taxable property of the city; that such amount was duly certified to the city council of the city of Helena, on a date prior to the time when the city council was required to make the annual levy of taxes for city purposes; that when the city council met on September 19, 1910, to make the levy of taxes for city purposes, it failed and refused, and has ever since failed and refused, to make any levy whatever for park purposes, or to meet the requirements of the park board. Upon the filing of this affidavit, an alternative writ of mandate was issued, and upon the return thereof the mayor and councilmen filed a joint demurrer and a joint motion to quash the writ. The demurrer and motion were sustained, the proceedings dismissed, and a judgment rendered and entered in favor of the defendants, from which judgment this appeal is prosecuted.

There is hereby presented for our determination the question of the validity of an act of the seventh legislative assembly, entitled, "An Act Creating a Board of Park Commissioners as a Department of the City Government in Cities of the First Class, Defining Its Powers and Duties, Fixing the Term of Office of Commissioners, and Providing for Their Appointment by the Governor," approved March 7, 1901 (Laws 1901, p. 73); and this must be determined by the proper solution of the two other questions:

(1) What did the framers of the Constitution mean by "corporate authorities?" (2) What view was entertained by the framers of our Constitution as to the status of cities in this state?

1. The purpose of this act, as indicated by the title, is to create a board of park commissioners in all cities of the first class. The board is composed of the mayor and six other members, who are appointed by the governor. The act provides for the organization of the board, and enumerates its duties and powers and the duties of the clerk. Section 2 of the act provides: "Said board of park commissioners shall have the following powers and be charged with the following duties: . . . (6) To raise by taxation such a sum each year as the board shall determine to be necessary to defray the expenses of carrying out the work of said board, not exceeding, however, in any one year, a sum, equal to an assessment of one tenth of 1 per cent upon all of the taxable property of the city, as the same appears by the assessment roll of the county for said year." Section 5 of the act (§ 3322, Rev. Codes) provides that every year, 32 L.R.A. (N.S.)

on or before the day when the city council is required to make the annual tax levy for city purposes, the park board shall make an estimate of the amount of money necessary to be raised for park purposes, and shall certify the amount of such estimate to the city council, and "thereupon it shall be the duty of the city council to cause the sum stated in said certificate to be included in the assessment of city taxes for said year," etc. It is not necessary to refer to the other provisions of the act at this time. Subdivision 6 of § 2 of the act above in express terms vests in this board of park commissioners the power and authority to levy taxes for park purposes upon all taxable property within the city. There is not any discretion whatever left in the city council with respect to this item of taxation. When the council receives the certified estimate from the park board, it is compelled to raise the amount of funds necessary to meet the requirements of the board, or, in other words, the city council is the mere agent of the board for the purpose of collecting the tax.

(a) Section 4 of article 12 of the Constitution of Montana provides: "The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation, for county, town, or municipal purposes, but it may by law invest in the corporate authorities thereof powers to assess and collect taxes for such purposes." If this board of park commissioners is one of the corporate authorities of the city, within the meaning of those words as used in the Constitution above, then this act does not violate the letter of the Constitution, otherwise it does; and the determination of this must rest upon the proper definition of those words, as understood and used by the framers of the Constitution in 1889. What were those words intended to mean? This question is not a new one. It has received the attention of the courts during the last half century. Many years before the adoption of our Constitution, the words "corporate authorities," as used in § 4, art. 12, above, had been given a judicial definition. In 1869 the supreme court of Illinois, in *Harward v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130, was called upon to determine the meaning of those words as used in the Constitution of Illinois, in the same connection as they are used in our Constitution above. In that case the statute under consideration created a board, named the members, and gave to the board taxing power. After much consideration of the question, the court expressed its determination as follows: "As the object of this constitutional clause was to prevent the legislature from

granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that by the phrase 'corporate authorities' must be understood those municipal officers who are either directly elected by such population, or appointed in some mode to which they have given their assent." This was approved in *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People ex rel. South Park v. Chicago*, 51 Ill. 58; *Lovington v. Wider*, 53 Ill. 302, and the definition of the words, as thus given, is referred to with approval in many other cases. In the absence of any definite information as to the meaning which the framers of our Constitution attached to the words "corporate authorities," it is a fair presumption that they used them with reference to the meaning which they had acquired in other states having the same constitutional provision.

(b) The framers of the Constitution must have understood the rule of law, which is universally recognized, that the exercise of the taxing power is the exercise of legislative authority; and, when they determined that the power to levy taxes for city purposes should be exercised only by the corporate authorities of the city, they must have meant by the "corporate authorities" those who constitute the legislative branch of the city government,—at this time, the mayor and city council. In Nebraska an act of the legislature of 1881 provided that the corporate authorities of a city should have the power to license, regulate, and prohibit the liquor traffic in the city. Viewing this exercise of power as a legislative act, the supreme court of Nebraska, in *State ex rel. Fairchild v. Andrews*, 11 Neb. 523, 10 N. W. 410, said: "By the term 'corporate authorities,' as we understand it, is evidently meant those officers of cities and villages to whom is given the ordinance-making power, which in cities of the second class, to which Crete belongs, are the mayor and council thereof."

2. What view did the framers of our Constitution take of city government, so far as the taxing power is concerned? Many years prior to the adoption of our Constitution, the question of the relation of a city to the state legislative branch of government, as affected by the exercise of the taxing power for local municipal purposes, had led to extensive litigation, with the result that two well-defined theories had been developed, viz.: (a) the theory of absolute legislative control; and (b) the theory of local self-government.

(a) Speaking of this first theory, Gray, in his *Limitations of Taxing Power* (§ 651), says: "The courts which assert the wider powers of the legislature in matters of local

interest regard the local subdivisions purely as agencies of the state. They carry the doctrine that the legislature is supreme in matters of taxation to its fullest extent. They regard the state legislatures as having the whole legislative power of the state, without any implied exceptions in favor of local self-government." The states which adopt this view are Delaware (*Coyle v. Gray McIntire*, 7 Houst. (Del.) 44, 40 Am. St. Rep. 109, 30 Atl. 728); Georgia (*Churchill v. Walker*, 68 Ga. 681); Kansas (*Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207); Nebraska (*Redell v. Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; *Texas (Brown v. Galveston)*, 97 Tex. 1, 75 S. W. 488); Pennsylvania (*Philadelphia v. Fox*, 64 Pa. 169); and North Carolina (*Harriass v. Wright*, 121 N. C. 172, 28 S. E. 269). A reference to the Constitution of each of the foregoing states discloses that there is not any limitation therein on the power of the legislature to control matters relating to municipal taxation, unless it be to fix a limit beyond which the tax levy shall not extend; and every one of the foregoing cases was decided upon the theory that, since the Constitution did not limit the exercise of the taxing power of the legislature in municipal affairs, the legislature could provide by law for the exercise of that power by means of any agency it should choose to create, even though in the selection of such agency the people to be taxed did not have any voice.

Ohio, Nevada, New York, Rhode Island, and Colorado are erroneously classed by some jurists and textwriters with the states above, and the cases cited to justify this classification are: *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *Newport v. Horton*, 22 R. I. 196, 50 L.R.A. 330, 47 Atl. 312; *Re Senate Bill*, 12 Colo. 188, 21 Pac. 481. The Ohio case and the case from Rhode Island involve the right of the state through the legislature to provide boards of police commissioners, and each is decided upon a principle to which reference will be made hereafter.

In the Nevada case it is held that an act incorporating Carson City and naming the provisional or initiatory board of trustees was valid, but upon the subject of local self-government it was said: "Nevertheless the principle of local self-government has always been recognized, to a certain extent, by the legislature of this state in the passage of statutes creating and providing for the government of municipal corporations; and the selection of officers and agents to administer the affairs of such corporations has generally been intrusted to the electors of

the respective municipalities, or their appointment committed to the authorities thereof; and it cannot, with propriety, be said that the legislature have wholly disregarded this principle in the passage of the act under consideration, because by § 3 of the act the entire government of the city is vested in a board of trustees, to consist of five members who are required to 'be actual residents and owners of real estate in the city, and to be chosen by the qualified electors thereof.' The court properly makes the distinction between the provisional officers who are merely agents of the legislature to set in motion the machinery of government, and the permanent officers of the city,—a distinction that is recognized by the authorities generally. *Mechem*, Pub. Off. § 123.

In the early New York case above, it was held that the legislature might compel a city to subscribe for shares of stock of a railroad company in aid of the construction of a railroad, and the decision is apparently based upon the theory that the building of the road was a public improvement in which the people generally were interested; but in the recent case of *Rathbone v. Wirth*, 6 App. Div. 277, 40 N. Y. Supp. 535, the supreme court of that state quotes with approval from Black on Constitutional Law, § 131, the following: "The principal of local self-government is regarded as fundamental in American political institutions. It means that local affairs shall be decided upon and regulated by local authorities, and that the citizens of particular districts have the right to determine upon their own public concerns, . . . without being controlled by the general public or the state at large. For this purpose municipal corporations are established, and are invested with rights and powers of government subordinate to the general authority of the state, but exclusive within their sphere. It is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand and be most competent to manage them. The continued and permanent existence of local government is therefore assumed in all the state Constitutions, and is a matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute. The institution of local self-government is not an American invention, but is traditional in England, and is justly regarded as one of the most valuable safeguards against tyranny and oppression. It is but an extension of this idea, that the government of the United States should be intrusted with only such powers and rights

as concern the welfare of the whole country, while the individual states are left to the uncontrolled regulation of their internal affairs."

Responding to a request from the legislature, the supreme court of Colorado expressed the opinion that an act creating a board of public works for the city of Denver, the members of which were to be appointed by the governor, was not violative of the Constitution of Colorado; but in the course of the opinion it is said: "There is strong reason for recognizing, so far as may be compatible with the general public interests, the right of local self-government in cities and towns; but this is, with us, generally a matter pertaining to the policy or wisdom of proposed legislation, rather than a question of constitutional construction. We must not, however, be understood as saying that any and every direct legislative interference with local municipal affairs would be free from constitutional objection."

(b) The theory of local self-government: In *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, the supreme court of Michigan asserts the inherent independence of the cities of that state in matters of purely local concern. The question of the exercise of the taxing power was not directly involved. The Constitution of Michigan then did not in express terms limit the authority or control of the legislature over cities, but the eminent members of that court, Cooley, Campbell, Christiancy, and Graves, held that there was implied in the Constitution the right of the inhabitants of a city to local self-government with respect to matters of purely local concern. In *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, the validity of an act of the legislature creating a park board for the city of Detroit, naming the members and defining the duties and powers of the board, was in question. Among others, the board was given the power to purchase land for park purposes, and, upon certifying the amount necessary to make such purchases to the council, the council was required to provide the money by the issuance and sale of city bonds. Because of the fact that, in the selection of the board, the people of the city did not have any voice; because the city council was not given any discretion in the matter of raising the funds for the board; and because of the fact that the exercise of such authority by the legislature would destroy the right of the residents of the city to local self-government, the supreme court of Michigan refused to compel the city council to furnish the funds demanded by the board, and in doing so held that the act of the legislature

was unconstitutional. These two decisions by the Michigan court are everywhere cited as leading cases upholding the theory of local self-government. The doctrine is reiterated in *Blades v. Water Comrs.* 122 Mich. 386, 81 N. W. 271. The view entertained by the Michigan court is adopted and asserted in Illinois (*People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278); in Indiana (*State ex rel. Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65); in Iowa (*State ex rel. White v. Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204); in Kentucky (*Lexington v. Thompson*, 113 Ky. 540, 57 L.R.A. 775, 101 Am. St. Rep. 361, 68 S. W. 477); in Alabama (*Schultes v. Eberly*, 82 Ala. 242, 2 So. 345); in North Dakota (*Vallelly v. Park Comrs.* 16 N. D. 25, 15 L.R.A. (N.S.) 61, 11 N. W. 615); and in California (*People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677). The courts of these states have not agreed altogether as to the particular ground for the decisions, but all have asserted the doctrine of local self-government in municipal affairs.

With these two theories thus established, the same question in principle as the one which confronts us came before this court in 1897, in *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L.R.A. 412, 49 Pac. 382. The question arose directly with reference to the validity of subdivision 64 of § 4800 of the Political Code of 1895 (Rev. Codes, § 3259), which made it mandatory for a city in which there was installed a water system to procure the existing plant, if it desired to own or control a water supply of its own. In other words, the legislature sought to coerce a city to procure a particular water supply. The court, speaking through Chief Justice Pemberton, said: "To purchase such plant or system necessarily requires the city or town to incur an indebtedness. When an indebtedness is incurred by a city or town, it necessarily requires the assessment of taxes upon the property of the inhabitants, and the collection thereof, to meet and discharge such indebtedness. Is such indebtedness or obligation such a one as the state has the right to impose upon a city or town, or compel a city or town to assume, without its consent? A city or town is bound to do and perform, and may be compelled to perform, certain public duties. But there are certain local and private obligations and offices which a city or town may or may not perform, and which they cannot be compelled by the state to perform." The court then reviewed at great length the decision of the Michigan court in *People ex rel. Park Comrs. v. Detroit*, above, and the decision from Illinois in *People ex rel. McCagg v.* 32 L.R.A. (N.S.)

Chicago, above, and with respect to them, said: "These two decisions from which we have quoted so largely, delivered by two of the ablest jurists that this country has produced, are leading cases upon the questions involved in this appeal. These two distinguished judges declare that the cases have been exhaustively argued by the best lawyers of the respective states. These cases are, in our judgment, absolutely conclusive of the one question presented by this appeal, namely, the constitutionality of the compulsory statute under which this action is prosecuted." Finally, the court held that, in so far as the act then in question sought to impose upon a city an obligation against its will, it was violative of our Constitution and void, and, concluding the opinion, said: "We think the two provisos of the law under discussion are in violation of the clauses of the Constitution quoted and referred to above, as well as the spirit of our governmental system, which recognize 'that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.' The law is not supported by any moral obligation, but is rather a violation of law, equity, the Constitution, as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is essential to its validity, whether the parties be natural or artificial persons. We are at a loss to find any theory of law, equity, or justice upon which we can conscientiously sustain the constitutionality of the statute in question."

It will thus be seen that the theory of local self-government in matters of purely private concern, as distinguished from the theory of absolute legislative control, was adopted in this state as early as 1897, and we think rightly so. We must assume that the framers of our Constitution had a purpose in view in denying to the legislature the right to levy taxes upon the property or people of any city for city purposes; and it cannot be imagined that they intended that what they had declared could not be done directly could nevertheless be accomplished by indirection. If the legislature can create this park board and authorize the governor to appoint the members, by the same token of authority the legislature itself could have named in the bill the members of such board, and, had it done so, then, in effect, it would have answered the framers of the Constitution by saying: We have not levied taxes upon the people and property of this city for park purposes directly, but we propose to accomplish the same result by creating this board as our agent to do so.

In treating of our system of government,

Bryce, in his work entitled "The American Commonwealth" (vol. 2, 1908 ed. p. 555), says: "Nothing has more contributed to give strength and flexibility to the government of the United States, or to train the masses of the people to work their democratic institutions, than the existence everywhere in the Northern States of self-governing administrative units, such as townships, small enough to enlist the personal interest and be subject to the personal watchfulness and control of the ordinary citizen. Abuses have indeed sprung up in the cities, and in the case of the largest among them have become formidable, partly because the principle of local control has not been sufficiently adhered to. Nevertheless the system of local government as a whole has been not merely beneficial, but indispensable, and well deserves the study of those who in Europe are alive to the evils of centralization, and perceive that those evils will not necessarily diminish with a further democratization of such countries as England, Germany, and Italy."

We cannot conceive of any purpose which the framers of our Constitution had in drafting § 4, art. 12, above, except to secure to the people of these cities that measure of local self-government which they enjoyed at the time the Constitution was framed and adopted.

The several constitutional limitations upon the authority of the legislature over city affairs, the adoption of the initiative and referendum as applied to municipal legislation (Rev. Codes, §§ 3266-3276, inclusive), and the decision by this court in the case cited above, indicate that it is the public policy of this state to confide to the citizens of municipalities the right of local self-control to the utmost extent compatible with an orderly system of state government. The decision in *Helena Consol. Water Co. v. Steele*, above, then, is conclusive of this case, if the purpose sought to be promoted by the creation of this park board is one of private concern to the city, as distinguished from one in which the people of the state have an interest in common with the citizens of Helena.

In *Gray on Limitations of Taxing Power*, § 638, it is said that there are "cases in which the right of local self-government is asserted, but in which the courts differ as to what are matters of purely local concern." We fail to see what general interest the people of this state as a whole have in the public parks of the city of Helena. Primarily, at least, such parks are for the adornment of the city and for the pleasure and recreation of its people. While visitors may enjoy them freely as a matter of right, yet if that bare, intangible right is

sufficient to create the public interest of the entire people of the state in these parks, then it is difficult to understand what is meant by the purely local and private concerns of a city. In *People ex rel. Park Comrs. v. Detroit*, above, the question arose over the right of the state to control the public parks of Detroit through the agency of a park board, and the court determined that such parks are purely local concerns of the city, in which the people of the state do not share a common interest. The same thing is asserted in *People ex rel. McCagg v. Chicago*, above; and these are the two cases chiefly relied upon by this court in *Helena Consolidated Water Co. v. Steele*, above, to justify the conclusion that a municipal water supply is likewise a strictly local or private concern of the city, as distinguished from one in which the people generally have a common interest.

Reference is made to the decision of this court in *State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940, wherein we upheld the validity of a statute creating a police commission. That case is typical of many asserting that the people of the state generally have such an interest in the preservation of the peace and good order of society in every portion of the state that the legislature may exercise a supervision over the police department of any city within the state. That police regulation is not a matter of purely local concern is recognized generally; and in the case above we held that a police officer is not a city officer, but occupies a dual position, exercising some functions of a state officer and some of purely local character.

In all of the states asserting the doctrine of local self-government, the distinction is made between the affairs of a city which are of a public nature—that is, those in which the people of the state have, with the people of the city, a common interest—and those private municipal affairs which are of a purely local character, and primarily affect only the inhabitants of the particular city. All these courts recognize the right of the state, through its legislative department, to coerce a city in the performance of a public duty, as distinguished from one of a private or local nature.

Our conclusion is that this park board is not a corporate authority of the city of Helena, within the meaning of the Constitution; that the purpose it was created to promote is a purely local or private concern of the city; and that, in bestowing upon individuals in whose selection the people have had no voice the power to levy taxes upon the people who must pay them, and in attempting to coerce these people against their will to pay such taxes, the legislature not

only violated the provisions of § 4 of article 12, above, but did equal violence to the theory of local self-government, which has been established in this state as one of the fundamental principles of our government. The judgment of the District Court is affirmed.

Affirmed.

Smith, J., concurs. Brantly, Ch. J., being absent, takes no part in the foregoing decision.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES M. ALCOTT, Plff. in Err.,
v.

PUBLIC SERVICE CORPORATION OF
NEW JERSEY.

(78 N. J. L. 482, 74 Atl. 499.)

Evidence—conditions before and after accident.

In an action for damages for an injury claimed to have been sustained because of negligence of defendant in permitting a dangerous and defective condition of a crossing switch between street car tracks, which alleged condition should, by proper inspection,

Headnote by PARKER, J.

Note.—Admissibility of evidence of condition before and after accident, of property whose defects are alleged to have caused injury.

I. Evidence as to prior conditions.

- a. Railroads, 1085.
- b. Streets, highways, and bridges, 1090.
- c. Elevators, 1093.
- d. Electricity, 1094.
- e. Explosions, 1094.
- f. Mines and tunnels, 1095.
- g. Machinery, 1096.
- h. Falling things, 1097.
- i. Miscellaneous, 1097.
- j. Where evidence is inadmissible.
 1. Where conditions were not the same, 1097.
 2. Where prior conditions were not connected with the accident, 1098.
 3. For lapse of time, 1099.
 4. Where defendant did not control prior conditions, 1099.
 5. On account of pleading, 1099.
 6. For lack of notice, 1100.
 7. As presenting collateral issues, 1100.

II. Evidence of prior accidents.

- a. In general, 1101.
- b. Railroads, 1102.

tion, have been discovered, and by proper diligence have been remedied, evidence of the same condition existing within a reasonable time both before and after the injury sued for is admissible in corroboration of evidence that such condition existed at the time of such injury, and such evidence as to its previous existence is also available to show its persistence for such a length of time that defendant, with due diligence, should have discovered and rectified it.

(November 15, 1909.)

Error to the Supreme Court to review a judgment reversing a judgment of the Circuit Court for Camden County in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts were stated by the supreme court as follows:

The plaintiff was driving a loaded wagon on Broadway, between Walnut and Newton avenues, in Camden, in April, 1906. He had frequently driven over the same route, and was familiar with the locality. Upon this occasion, as he approached a cross-over, used by defendant company as part of its track system to switch cars to an adjoining track, he turned to the right, with the view of leaving the track for the purpose of passing a team ahead of him. Instead of

II. Continued.

- c. Elevators, 1103.
- d. Electricity, 1103.
- e. Machinery, 1103.
- f. Streets and highways, 1104.
- g. Mines, 1108.
- h. Miscellaneous, 1108.
- i. Where the conditions were not the same, 1108.
- j. Where defendant had not notice, 1109.
- k. As controlled by the condition in issue, 1109.
- l. Iowa cases, 1109.
- m. Alabama cases, 1112.
- n. Massachusetts cases, 1112.
- o. Maine cases, 1114.
- p. Virginia cases, 1115.
- q. Oregon and Wisconsin cases, 1115.

r. Missouri cases, 1116.

III. Condition subsequent to the accident.

- a. Generally, 1117.
- b. Where the condition had changed, 1124.

IV. Evidence of repairs made or precautions taken after an accident.

- a. Generally, 1127.
- b. Pennsylvania cases, 1134.
- c. Minnesota cases, 1135.
- d. Georgia cases, 1138.
- e. Kansas cases, 1137.
- f. Illinois cases, 1137.
- g. Washington cases, 1139.

leaving the track, however, his wheels skidded or slid along the track until one of the wheels came in contact with what is called "the mate" in the switching device, at which point the wheel became locked and the wagon suddenly stopped, throwing the plaintiff from his seat, causing him the injuries which form the basis of this suit.

Mr. John W. Westcott for plaintiff in error.

Mr. E. A. Armstrong for defendant in error.

Parker, J., delivered the opinion of the court:

Judgment in favor of the plaintiff in error was reversed in the supreme court on the ground that the proof showed without

contradiction that the switching device in which plaintiff's wagon wheel seems to have caught was of standard pattern, in common use, and had been properly laid and inspected. The propriety of that determination is now before us for review. The circumstances of the accident are set forth in the opinion of the supreme court, and need not be here repeated in detail.

We think that court erred in holding that the evidence showed proper inspection of the switch so conclusively as to remove that element of the case from the consideration of the jury. A legitimate theory of the causation of the accident is that when plaintiff turned his horses off the street car track, and the front wheels of the heavy omnibus skidded along the track without

IV. Continued.

- h. As evidence in rebuttal, 1139.
- i. To show control and duty, 1142.
- j. For the purpose of identification and description, 1142.
- k. To show ability, possibility, 1144.

- l. Exceptional cases, 1145.

V. Fires. 1146.

VI. Animals.

- a. Frightening other horses, previously, 1159.
- b. Disposition of this animal previously, 1159.
- c. Subsequent disposition, 1160.

VII. Subsequent accidents, 1160.

VIII. Negative evidence, 1161.

I. Evidence as to prior conditions.

a. Railroads.

The rule seems to be that evidence of prior conditions will be admissible, where it directly relates to the instrumentality in question, and is not too remote in point of time, and is not prohibited by the rules of variance as between pleading and proof. Some cases reject such proof as bringing in collateral issues, and as tending to confuse and prejudice the jury and surprise the defendant. There is reason in excluding such evidence when it relates exclusively to prior negligence, but it is generally admissible when applied to an instrumentality the condition of which is defective, and continues so down to the time of the accident.

In *ALCOTT v. PUBLIC SERVICE CORP.* it was held that evidence of the condition existing prior to the injury was admissible to corroborate the evidence of the condition at the time of the injury, and also to show notice. This is in accord with the general rule.

So evidence tending to show the defective condition of the crossing some months previously, and that one of the horses driven by the witness was caught in the same way and at the same place, was held admissible to constitute notice, in an action *L.R.A.(N.S.)*

tion for injuries to a horse at a railroad crossing. *Toledo, St. L. & K. C. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. 1019.

And in an action for the death of plaintiff's intestate, caused by his being run over by a railroad train at a crossing, it was held that evidence showing that the gate keeper at the crossing was asleep two hours and a half before the accident was admissible as tending to show that he was asleep at the time of the accident. *Baltimore & P. R. Co. v. Carrington*, 3 App. D. C. 101.

And where a man was killed at a railroad crossing, evidence by witnesses who had often traveled across, the crossing in question, describing the crossing and the various objects that interfered with the view, and also narrow escapes from being injured by trains while passing over this crossing, was held admissible. *Chicago & N. W. R. Co. v. Netolicky*, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665. This was for the purpose of showing the nature of the crossing and the difficulty of discovering whether a train was approaching, but not for the purpose of showing negligence on the part of the company on former occasions.

And evidence that at various times prior to an accident, cars similar to those involved in it had been heard and felt to scrape together when passing each other at or near the place where this accident occurred, was held admissible in an action for injuries to a person's hand which was caught between the cars. *Staples v. Rhode Island Suburban R. Co.* — R. I. —, 67 Atl. 431.

Evidence as to the throttle valve of an engine being out of repair for some time prior to, and continuing so to the time of, the accident, was held competent to show negligence on the part of defendant, in an action for injuries to a yard switchman, caused by reason of the engine moving while he was engaged in coupling some coal cars. *Chicago & E. I. R. Co. v. Rung*, 104 Ill. 641.

And evidence as to the unsafe condition of the machinery prior to the injury was held admissible, in an action for the

leaving it, the tire of the right wheel, which was $\frac{1\frac{1}{2}}$ of an inch thick, and projected outward from the fellow $\frac{1}{2}$ of an inch, caught under the "butt" or end of the piece known as the "mate." Manifestly this could not have happened unless the mate either was or was capable of being raised above the main rail at least the thickness of the tire. That this fact would indicate that the appliance was in bad order is inferable from the evidence of one of the witnesses for the defendant company, who testified that the mate was constructed to fit closely into the side of the rail, lapping both above and below the tram or horizontal tread, with a play of $\frac{1}{2}$ of an inch both above and below, so that, if pressed up closely against the under side of the rail, the tongue would be

$\frac{1}{2}$ of an inch above the rail, but no more. If, then, it was raised about $\frac{1}{2}$ of an inch, as the jury might have found on the evidence, an inference that it was in bad order was clearly permissible. There was other evidence to the same effect. The plaintiff, for example, testified: That the "iron and all was raised;" that one end had settled, and the other end had raised; that the pavement next to the rail was in bad order. There was also evidence tending to show that the switch was out of order some days prior to the accident in question. This evidence was objected to by defendant, and an exception that was taken to its admission will be dealt with presently. Taken with the other evidence, a jury question was presented whether the switch was out of

death of a brakeman, caused by a boiler of the locomotive exploding while the train was in motion. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

In *Adams v. New York, N. H. & H. R. Co.* 199 Mass. 470, 85 N. E. 585, the evidence showed that several days before an accident to the engineer, he noticed and reported that the breast beam of the engine had fallen. The court did not discuss this evidence, but held that therefore the plaintiff was guilty of contributory negligence.

And in an action for injuries caused to an engineer by a collision, evidence that the engine, within a week before the accident, was not in good condition, and was worn out, was held admissible. *Maryland, D. & V. R. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005.

Evidence showing when the locomotive was built, and that it had, during its years of service, run over half a million miles, and that prior to this time it had collided with another engine, was held admissible to show the defective condition of the boiler, in an action for the death of intestate, caused by its explosion. *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435.

The condition of a railroad track two weeks prior to a train wreck is evidence for defendant, where the changes in the meantime are shown. *Stewart v. Louisville & N. R. Co.* 136 Ky. 717, 125 S. W. 154.

And evidence of the condition of a street car track prior to an accident, and that cars lurched in passing this point, is admissible when there has been no change in the condition. *Nashville R. Co. v. Howard*, 112 Tenn. 107, 64 L.R.A. 437, 78 S. W. 1098.

And in an action for injuries caused by the derailling of a train, it was held that evidence as to the condition of the track at the place of the accident six weeks prior thereto was admissible. *Ft. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686. The court said that if the condition had changed, the defendant could have shown it.
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In an action by a passenger for injuries by the derailling of a train, evidence as to the general condition of the road for some time prior to the injury was held admissible. *Texas & P. R. Co. v. De Milley*, 60 Tex. 104. The court said: "For the purpose of showing that the defect from which the injury resulted was negligently permitted to remain, and that due care was not taken to keep the road in good order, evidence as to the general bad condition of the road at and about the place where the injury occurred, for some time prior thereto, was certainly admissible; as was it to show knowledge to the appellant of such defects, and its indisposition promptly to remedy them."

And where a locomotive engineer was killed in an accident, evidence that on the day of the accident, prior thereto, the track walker told a section boss that the track was spread at the place of the accident.—"You had better look after it,"—was held admissible. *Texas & P. R. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. The court said: "The evidence clearly indicates that the statement was made by a servant of defendant, whose duty it was to ascertain the condition of the track, and report it to other servants whose duty it was to repair it. The statement was part of the *res gestæ* and admissible."

In *Brouillette v. Connecticut River R. Co.* 162 Mass. 198, 38 N. E. 507, where a brakeman, in crossing a track, tripped on an electrical wire on the track near a switch, the evidence showed that a witness saw this wire loop, about 6 inches above the track, a month prior to the accident. The court did not discuss the admissibility of this evidence.

Evidence that, six months prior to the accident, the track was out of repair, and that this condition continued down to the time of the accident, was held admissible, in an action for injuries caused by a large piece of coal being thrown from the tender, hitting plaintiff. *Dean v. Kansas City, St. L. & C. R. Co.* 199 Mo. 386, 97 S. W. 910.

And in an action for injuries caused by a defective track, evidence tending to show

order and had been allowed to become so by negligence of the defendant, notwithstanding testimony on the part of the defendant that inspections were regularly made, and that it was found in good condition.

The judgment of the supreme court, reversing the trial court, should therefore be reversed unless justified by some error at the trial that would vitiate the judgment in the trial court. Two points are urged by defendant in error: That the trial court admitted testimony of other accidents at this same switch shortly before and shortly after the accident to plaintiff; and that the court charged, in effect, that this testimony might be considered as throwing light on the question whether the switch was out of order at the time of the plain-

tiff's accident. It is claimed, on the authority of *Bobbink v. Erie R. Co.* 75 N. J. L. 913, 69 Atl. 204, decided by this court, that the testimony was improper, and that the court should not have alluded to it in the charge. We think that the weight of later authority and the better reasoning favor the view that the action of the trial court was proper. One witness testified that his wagon was stopped in a similar manner, by the wheel catching in the switch, some thirteen days before plaintiff had that experience. Another witness testified that three days after the accident, as a result of his own wagon catching in the switch, he examined it, and his description of it at that time corresponded closely

its defective condition about three days prior to the accident was admitted. *Wornden v. Humeston & S. R. Co.* 76 Iowa, 310, 41 N. W. 26.

And evidence showing a railroad track to have been in the same bad condition some days before and four months after an accident occurred was held admissible, in an action for injuries caused by a flange on the car wheel breaking on account of bad track. *Jacksonville Southeastern R. Co. v. Southworth*, 32 Ill. App. 307, affirmed in 135 Ill. 250, 25 N. E. 1093.

And evidence that tracks were not properly constructed, and that other engines and cars had jumped the same track before and after the accident involved in the action, near the same place, was held competent in an action for the death of a brakeman, caused by a train jumping a track at a curve. *St. Louis Bridge Co. v. Fellows*, 52 Ill. App. 504.

In an action against a street railway company to recover damages for personal injuries resulting in the death of the plaintiff's intestate, caused by rails projecting several inches above the surface of the roadway, it was held that evidence of the condition of the road for some time prior to the accident was admissible to establish negligence in failure to repair. *Cunningham v. Fair Haven & W. R. Co.* 72 Conn. 244, 43 Atl. 1047.

And where an accident was caused by a worn-out rail, evidence that the general condition of that portion of the road which included the place where the accident occurred had been bad for a long time, and that the rails had been in use for a great many years, was held admissible. *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1.

In an action for injuries caused by being thrown from a trolley car that jumped the track, evidence that other cars had left the track at or about this place, under similar conditions, was held admissible. *Brooklyn Street R. Co. v. Kelley*, 6 Ohio C. C. 155, 3 Ohio C. D. 79. This was for the purpose of showing notice to defendant and the dangerous condition of the track, 32 L.R.A. (N.S.)

And in an action for injuries caused by a train jumping a track, evidence of the condition of the ties within a reasonable time before and after the accident was held competent, to justify the inference that the ties were in a bad condition at the time of the accident. *Swadley v. Missouri P. R. Co.* 118 Mo. 268, 40 Am. St. Rep. 366, 24 S. W. 140.

And evidence that another rail was found broken, only several hours before the accident, at the same place, was held competent to show the defective condition of the railroad, in an action for injuries caused by a train jumping a track. *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836.

And where a car, in tipping at a dump, suddenly swung back, injuring plaintiff, evidence by an expert for the defense, that a car in good condition would do the same, and that he had seen it done, was held competent. *Donahoe v. New York & N. E. R. Co.* 159 Mass. 125, 34 N. E. 87.

In an action for causing the death of a brakeman by reason of excessive speed of a train, evidence that the speed was excessive a mile and one half from the place of accident, on a down grade, was held competent. *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41.

And evidence as to the speed of other trains over a defective track before and after an accident was held admissible to show whether the train in the accident was going too fast or not, in an action for injuries caused by a defective track. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

And evidence of the excessive speed of an engine while crossing a public highway during the month prior to the happening of the accident involved in the suit was held competent. *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218. This was to prove the customary speed. The court said: "The question before the jury was whether the speed of the train on that day, at the time and place of the accident, was so great as to amount to negligence on the part of appel-

with plaintiff's description of it at the time of the accident in question.

Prof. Wigmore, in the sixteenth edition of *Greenleaf on Evidence* (vol. 1, p. 81), lays down the doctrine that "where the matter in issue is the existence of a condition, quality, capacity, tendency, or the like, of an inanimate object,—dangerousness, . . . etc.,—there are three chief modes of evidencing this circumstantially. One consists in showing the prior or subsequent existence of the thing, place, condition, etc., and thence inferring its existence at the time in question. . . . Still another consists in showing particular instances on other occasions in which the condition, quality, tendency, etc., of the thing in question has been exhibited, and thence inferring the

general existence of that quality, etc. . . . The natural limitation of this sort of evidence is that the prior or subsequent time must be so near that nothing may be supposed to have occurred to cause a change, and the distance of time will depend entirely on the thing whose existence is in question." He adds that "in evidencing a quality, tendency, capacity, etc., by instances of its effects or exhibitions or operations on other occasions, the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question; because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances." He

lants. There was some variation in the evidence as to the exact rate of speed on that occasion. The evidence here objected to was by way of comparison; that, by knowing how the vestibule train ran on other days about that time, particularly close before the day of the accident, the jury might have some aid in judging how fast the train did run on the day in question."

In an action for the death of a flagman, caused by excessive speed and defective brakes, evidence as to the habitual high speed of this same engine, when run previously by the same engineer, on the same street, was held to be of doubtful admissibility. *Savannah, F. & W. R. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 9 S. E. 471. The court said: "Upon so doubtful a question we think the court did not err in admitting the evidence."

And the defective condition of brakes on a trolley car for months preceding and continuing to within ten days of an accident was held to be admissible in evidence, in *Frankfort & V. Traction Co. v. Hulette*, 32 Ky. L. Rep. 732, 106 S. W. 1193.

So, where plaintiff was knocked from the car by the brake releasing itself. *Bowers v. Star Logging & Lumber Co.* 41 Or. 301, 68 Pac. 516.

And the same was held where the brake failed to respond, and the brakeman was killed, in *Union P. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650. This was for the purpose of showing knowledge.

And in an action for injuries resulting in death to a brakeman, it was held that evidence of a defective brake on the car four days prior to the accident was admissible. *Terre Haute Electric Co. v. Kieley*, 35 Ind. App. 180, 72 N. E. 658.

Evidence that there were no brake carrier-irons on the car when it was repaired shortly before an accident, and that it was in the same condition shortly after the accident, was admissible in an action for death caused by defective condition of the brake on the train. *St. Louis, P. & N. R. Co. v. Dorsey*, 189 Ill. 251, 59 N. E. 593.

And evidence as to defective condition of the brakes on a street car prior to the time

of an accident, caused by failure to stop, when plaintiff's horse was frightened, was held competent, when such condition continued down to the time of the accident. *Rochford City R. Co. v. Blake*, 173 Ill. 354, 64 Am. St. Rep. 122, 50 N. E. 1070.

And where an injury was caused by a trestle on an inclined railway falling, evidence that, shortly before, some of the props had been removed, was held to be admissible. *Fraser-Johnson Brick Co. v. Baird*, — Tex. Civ. App. —, 128 S. W. 460.

In an action for injuries to an employee caused by a defective switch, evidence by an employee who had been in the service within two months prior to the accident, that there had been no switch locks, was held competent where defendant's evidence showed that locks had been used for six months. *Birmingham R. & Electric Co. v. Baylor*, 101 Ala. 488, 13 So. 793.

And evidence as to the defective condition of the switch rail for several months prior to the accident, and continuing down to within a few days of it, was held admissible, in *St. Louis, I. M. & S. R. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678.

And evidence as to the condition of the switches three weeks before the accident is admissible for the purpose of showing that defendant had notice of the condition before the accident, in an action for injuries caused by a defective switch. *Pauck v. St. Louis Dressed Beef & Provision Co.* 166 Mo. 639, 66 S. W. 1070.

In an action for injuries by reason of a defective telltale, evidence as to the defective condition of the telltales in the yard at various times shortly before this accident is admissible. *McGarrity v. New York, N. H. & H. R. Co.* 25 R. I. 269, 55 Atl. 718. In this case it was said: "For while it is true, as held by this court in *Agulino v. New York, N. H. & H. R. Co.* 21 R. I. 263, 43 Atl. 63, that, in an action of negligence, the plaintiff cannot be permitted to show facts and circumstances connected with other accidents or other occasions, which would tend to raise collateral issues, yet it is not the law that only the particular facts and circumstances

concedes that the logical objection to this sort of evidence is the tendency to unfair surprise and confusion of issues; that, in addition, the tendency of the courts has been to exclude this class of evidence in cases of deliberate experiment to test the particular quality, and in cases where it has been sought to show, in defense, that the place, or appliance, or what not, had long been in use without accident, and *ergo* must be safe. Experimental evidence was excluded in *Libby, McNeill, & Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. W. 801; and the plan of showing safety by previous absence of accident was condemned by our supreme court in *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260; and outside of this state, in such

immediately connected with the happening of an accident can be shown in evidence. On the contrary, the plaintiff may properly show the condition of the machine or appliance by which the injury was caused before the time of the accident, for the purpose of proving that the defendant knew, or ought to have known, of the danger connected therewith, and was negligent in not remedying the defect."

And evidence that an electric light globe had been broken in a similar way previously is admissible in an action against a trolley company, where the trolley pole of the car slipped and struck a glass globe, causing a piece of glass to hit plaintiff. *Nelson v. Union R. Co.* 26 R. I. 251, 58 Atl. 780.

And where plaintiff was frightened by the falling of a live trolley wire, and jumped from the car, and was injured, evidence of the wire breaking frequently the fall before is admissible. *Richmond R. & Electric Co. v. Bowles*, 92 Va. 738, 24 S. E. 388.

And in an action for injuries caused by catching the foot in a ring in the floor of a car, evidence was held competent to show that the car had been in that condition for a long time before, as tending to show knowledge. *Kingman v. Lynn & B. R. Co.* 181 Mass. 387, 64 N. E. 70.

The condition of a grate riser on a car step seven months prior to an accident was held to be admissible, in *Corcoran v. Albuquerque Traction Co.* — N. M. —, 103 Pac. 645. The court applied the rule that where a condition was once shown to exist, it would be presumed to have continued.

In an action for injuries caused by a defective jack, evidence of its prior condition for years, and that it was worn out, was held competent, where the jack was produced on the trial, and its condition at the time of the accident was shown. *Missouri, K. & T. R. Co. v. Young*, 4 Kan. App. 219, 45 Pac. 963.

And where a board projecting from a lumber pile struck a car, injuring a workman therein, evidence that seven days prior thereto a car struck the lumber pile, and a plank fell out, was held competent to 32 L.R.A. (N.S.)

cases as *Baltimore & Y. Turnp. Road v. Leonhardt*, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346; *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613; *Lewis v. Smith*, 107 Mass. 334, and *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37, although countenance is given to it in *Dougan v. Champlain Transp. Co.* 56 N. Y. 1.

The learned author continues (page 87): "The use that has come most into controversy is that of other injuries at a highway, track, or machine, as evidence of its dangerous character, . . . the doctrines of unfair surprise and confusion of issues . . . have been thought to have an especial bearing here; and for some time . . . much distrust of this sort of evidence was shown. The almost universal

show knowledge on the part of the railroad company, where the conditions had not changed. *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 480.

And in an action for personal injuries caused by a roof of a roundhouse giving way while plaintiff was working thereon, evidence that during the month prior to the accident, glass and metal which were part of the roof were seen frequently falling to the floor of the roundhouse, was held competent. *Lamb v. Philadelphia & R. R. Co.* 217 Pa. 564, 66 Atl. 762.

And evidence that a cattle guard had been covered with snow and ice four days prior to the injury to plaintiff's horse, and had continued in that condition, was held competent, in *Robinson v. Chicago, R. I. & P. R. Co.* 79 Iowa, 495, 44 N. W. 718 (following *Grahlman v. Chicago, St. P. & K. C. R. Co.* 78 Iowa, 564, 5 L.R.A. 813, 43 N. W. 520).

And evidence of the failure of the railroad to maintain proper cattle guards, and that other horses had been seen, prior to this accident, passing freely over cattle guards of the same construction in use in the same vicinity, was held admissible to show failure of railroad to have safe cattle guards, in an action for killing two of plaintiff's horses by a train. *Lake Erie & W. R. Co. v. Murray*, 69 Ill. App. 274.

And evidence showing conditions of a cattle-guard fence one year prior to, and continuing the same down to the time of, an accident was held competent in an action for killing horses. *Chicago & E. I. R. Co. v. Chipman*, 87 Ill. App. 292.

And in an action for the killing of horses through the defective condition of a cattle guard, evidence of the condition prior and subsequent to the accident was held admissible to show its condition at the time of the accident. *Miller v. Northern P. R. Co.* 36 Minn. 296, 30 N. W. 892. In this case, in view of the nature of the defects, the evidence was clearly admissible. The rotting of the timbers, and the filling up of the pit with sand, were the result of a considerable lapse of time, and not of some sudden and recent occurrence.

attitude of the courts at the present time, however (apart from minor peculiarities), is to admit such evidence, subject to the limitations already described. . . . The other instances of injuries thus offered in evidence may concern defects in highways or defects in railroad tracks, machines, premises, and the like." In *Collins v. Dorchester*, 6 Cush. 396, decided in 1850, it was held that the existence of a defect in a highway claimed to have caused injury to plaintiff could not be shown by evidence of a similar injury to another person at the same place. The doctrine of this case is said by Professor Wigmore to be in effect repudiated in Massachusetts, and the remarks of the court in *Bemis v. Temple*, 162 Mass. 342, 345, 26 L.R.A. 254, 38 N. E.

972, seem to point that way. At all events, the admission of evidence of this class is supported by such cases as: *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840, decided in 1883 (a suit for injury resulting from a defective sidewalk, in which evidence of other accidents at the same place was held proper, as showing both the danger of the place and notice thereof to the defendant); *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145. 17 N. E. 584 (involving injuries to a freight brakeman from being struck by an overhead bridge, in which evidence of similar injuries previously occurring was permitted, to show notice to the company of the danger); *Salem Stone & Lime Co. v. Griffin*,

b. Streets, highways, and bridges.

The general rule is that evidence of the condition of streets, highways, and bridges prior to the accident will be admissible where the condition was the same as at the time of the accident. Some cases allow proof to extend over a very long period of time.

Evidence of the defective construction and condition of a bridge prior to an accident was held to be admissible, in *Woodbury v. Owosso*, 64 Mich. 239, 31 N. W. 130.

So of a street. *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111.

And where the condition of a sidewalk before and after an accident was the same as at the time of the accident, evidence as to its condition was held to be admissible. *Norton v. Kramer*, 180 Mo. 536, 79 S. W. 699.

At least, to show notice of its condition. *Lynch v. Buffalo*, 6 Misc. 583, 27 N. Y. Supp. 303.

And that other persons had tripped previously in the same hole in a defective plank sidewalk was held to be admissible in evidence. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

And where plaintiff, turning to avoid a pile of boxes, fell in an opening in the sidewalk, evidence that boxes were on the sidewalk at various times prior to the accident was held sufficient to prove notice. *Galesburg v. Higley*, 61 Ill. 287.

The length of time the walk had been in use, the decayed condition of the walk at other points near by, and that the city authorities had repaired the same at different times, was held admissible to show a state of facts from which notice might and should be fairly inferred. *Shelbyville v. Brant*, 61 Ill. App. 153 (following *McLeansboro v. Lay*, 29 Ill. App. 478; *Wheaton v. Hadley*, 30 Ill. App. 564; *Brownlee v. Alexis*, 39 Ill. App. 135; *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053).

And evidence that, prior to the accident, there were a good many holes in the dock, and that it was generally out of repair, 32 L.R.A. (N.S.)

and that they were repaired before this accident, was held admissible to show notice, where plaintiff was injured by stepping in a hole in a dock. *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586.

And where plaintiff, in the night, stepped off the sidewalk into an opening 20 feet deep, evidence that there was at one time a high board fence at that place was held admissible. *Chicago v. Baker*, 195 Ill. 51. 62 N. E. 892, affirming 95 Ill. App. 413. This was on the ground that the plaintiff had the right to prove all the surroundings of the place where the accident happened, not only at the immediate time, but within reasonable limits prior thereto.

In *Sturmwald v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995, in an action for injuries caused by a pedestrian stepping on the covering of a hole in the sidewalk made by the owner of a building, the court said: "It was undoubtedly proper for the defendants to show that a defect in the covering had been repaired before, and not after, the accident."

And evidence that the cellar doors on the sidewalk were left open frequently prior to this accident, where plaintiff fell through, was held competent evidence, in an action against the city. *Chapman v. Macon*, 55 Ga. 566.

In *Corts v. District of Columbia*, 7 Mackey, 277, the evidence showed that there was a declivity on a sidewalk that had long existed, that it was covered with snow and ice, and as a natural consequence would be slippery and dangerous.

And evidence by a witness who had seen a sluice in the highway before the accident was held competent to show that no change had been made. *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

A lid on a sewer trap was defective in having only one lug to support it, and would turn if stepped upon. Evidence of the absence of a lug to support it, with evidence of rust and dirt, was admitted to show that it had been in this condition for some time before the accident. *District of Columbia v. Payne*, 13 App. D. C. 500.

And that a witness had observed the con-

139 Ind. 141, 38 N. E. 411 (involving a similar ruling); and *Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216, 37 N. E. 696 (a highway case, in which evidence of similar accidents was permitted, both as to notice and to show the dangerous character of the place in question). In *Baird v. Daly*, 68 N. Y. 547, plaintiff's scow was partly swamped while in tow of defendant's tug, and the question was whether it was the fault of the scow or the tug. Plaintiff testified that the scow had been towed before safely with heavier loads, and it was held error to overrule questions on cross-examination, tending to show that the scow had previously been sunk by accident. In *Hoyt v. New York, L. E. & W. R. Co.* 118 N. Y. 399, 23 N. E. 565, plaintiff claimed

that he had been thrown from his wagon on account of its being partially tipped over, owing to a hole negligently allowed to remain at one of the railroad crossings of defendant. Offer to prove that the very next day plaintiff's wagon had a similar accident at another place, where there was no hole, and that, as an inference from this, the trouble was not with the crossing, but with the wagon, was overruled. This was held error, and the judgment reversed; the court advisedly putting the decision "in line with that numerous class of cases that, where a defect is shown to exist, that fact may be legitimately strengthened by proof of other and similar effects both before and after the effects were produced which form

dition of a street and a trench prior to an accident, and had driven around the same to avoid it, was held admissible in evidence, in *Sherman v. Oneonta*, 49 N. Y. S. R. 267, 21 N. Y. Supp. 137.

And evidence that a culvert had previously given way was held to be admissible for the purpose of showing that the culvert was defectively constructed, and notice, in *Willey v. Portsmouth*, 35 N. H. 303. The court said: "The case of *Collins v. Dorchester*, 6 Cush. 396, is cited in support of the objection to this evidence, but we think the cases are not parallel. The evidence in that case tended to show that a similar accident had happened to the witness without his fault. Here the evidence tended to show the defective construction of the bridge, and that the town authorities were aware of the fact. The evidence was not offered to show the defect complained of, which does not seem to have been disputed, but to show the knowledge of the authorities of the bad construction of the bridge; and nothing in the decision referred to is in conflict with that."

In *Stone v. Hubbardston*, 100 Mass. 49, it was said: "The evidence that there was a stone in the mouth of the culvert, which caused the water to overflow the road, tended to show the effect of a stone in that position in producing an accumulation of ice in the highway, and was therefore admissible, in connection with evidence that the same or similar stone was in the same position at the time of the accident, to show the cause and the character of the condition of the highway."

And in an action for an injury caused by coming in contact with the projecting foot-board of a truck, evidence was held competent to show that the truck had been in the street for an unnecessary length of time. *Bradford v. Self*, 21 App. Div. 151, 47 N. Y. Supp. 508.

And where stones were deposited in a street and removed every two hours, evidence of the continuity of the obstructed condition was held to be admissible. *Vance* 32 L.R.A. (N.S.)

v. Kansas City, 123 Mo. App. 644, 100 S. W. 1101.

Evidence as to the condition in the nighttime of a dangerous trench, and absence of light prior to the accident forming the basis of the action, was held to be admissible, as tending to show the condition at the time of the accident, and to give notice, in *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095.

Evidence for plaintiff that an excavation was being made on the side of a cross walk on the day prior to the accident, coupled with evidence as to its condition at the time of the accident, was held to be admissible. *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803.

And that a witness saw the hole in the street a day or two before the accident was held to be admissible in evidence. *Berry v. Greenville*, 84 S. C. 122, 65 S. E. 1030, 19 A. & E. Ann. Cas. 978. In this case the answer admitted that the hole was in the street. The issue was as to whether it was negligent to leave it there.

And evidence as to the defective condition of a sidewalk the Saturday before the accident, which occurred on Monday, was held to be admissible. *Sheren v. Lowell*, 104 Mass. 24.

And the general bad condition of a corduroy road two days prior to this accident was held to be admissible in evidence. *Conrad v. Ellington*, 104 Wis. 367, 80 N. W. 456.

And proof that ice and snow had accumulated on a sidewalk for several days prior to an accident was held to be admissible. *Smith v. Lowell*, 139 Mass. 336, 1 N. E. 412.

Where the evidence showed an excavation from the curb into the street, some 16 feet long and 20 feet deep, made under authority from the city, other evidence of the absence of lights for several nights prior to an accident was held to be immaterial as the city was bound to use care and diligence. *Gable v. Toledo*, 16 Ohio C. C. 515, 9 Ohio C. D. 63. The court said:

the subject of the trial,"—citing a number of cases.

The case of *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55, is cited by Professor Wigmore as a leading case. It was a suit against the municipality for defect in the highway. The defect alleged was a pile of lumber that was likely to frighten horses, and plaintiff's claim was that his horse was frightened by the lumber and backed off a bridge in consequence. Evidence that another horse had been similarly frightened by the same lumber was excluded. The court, in a long opinion by Justice Doe, held that the exclusion was erroneous, and reversed the judgment, incidentally criticizing the rule in *Collins v.*

Dorchester, as not called for by the facts in that case.

Temperance Hall Asso. v. Giles has been cited in a number of our later decisions, but only twice on the admissibility of evidence as to the occurrence or nonoccurrence of other accidents under similar circumstances: First, in *Continental Match Co. v. Swett*, 61 N. J. L. 457, at page 458, 38 Atl. 969, where it was distinguished and the court noted that there were exceptions to the rule it lays down; the second time, in *Bobbink v. Erie R. Co.* 75 N. J. L. 913, 69 Atl. 204, already cited. In the *Continental Match Co. Case* it was held in the supreme court that the discharge of a workman for incompetency as a defense to an action for breach of contract of employment might be sup-

"If it were a case in which it were necessary to bring to the city knowledge of the dangerous condition of the street, then the testimony would clearly have been competent, and should have been admitted."

The condition of the road one week prior and one day subsequent to an accident was held admissible in evidence. The first showing notice, where the conditions had not changed. *Burt v. Utah Light & P. Co.* 26 Utah, 157, 72 Pac. 497. In this case defendant's pipe ran water on the road, which froze and caused the injury.

And where a cart on the highway struck a pipe belonging to a natural gas company, evidence that the pipe had been out of place for two weeks prior to the accident was held admissible to show notice and that it was dangerous. *Potter v. Natural Gas Co.* 183 Pa. 575, 39 Atl. 7.

In an action for damages from a defective sidewalk, evidence that it had been in that condition for three or four weeks was held competent. *Strehmann v. Chicago*, 93 Ill. App. 206.

A witness had seen loose planks in a sidewalk the month before an accident, and plaintiff had pointed out to him the same place as the one where he fell. Such evidence was held to be admissible to show the insufficiency at the place of the accident. *Ruscher v. Stanley*, 120 Wis. 380, 98 N. W. 223.

Evidence that a hole was in a pavement for two months prior to the accident was held to be proof of negligence. *Robinson v. Wilmington*, 8 Houst. (Del.) 409, 32 Atl. 347.

The obstruction of a street by piles of iron for some months prior to an accident was held proper to be shown in evidence. *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615.

And evidence as to the condition of a sidewalk several months prior to the accident was held competent, especially where its condition was substantially the same as at the time of the accident. *Belvidere v. Crichton*, 81 Ill. App. 595.

In *Witt v. Latimer*, 139 Iowa, 273, 117 32 L.R.A. (N.S.)

N. W. 680, the evidence showed that there were holes in the sidewalk for several months prior to the accident, and that the walk was repaired prior and after the accident. There was no objection made to this evidence.

That the sidewalk was in a rotten condition for five months prior to an accident was held to be admissible in evidence. *Butts v. Eaton Rapids*, 116 Mich. 539, 74 N. W. 872.

In an action for injuries caused by a defective sidewalk, evidence offered to prove the bad condition of this sidewalk "six months or more" prior to the accident was held to be admissible to show notice. But evidence that it was out of repair for three years was stricken out. *Huff v. Marshall*, 97 Mo. App. 542, 71 S. W. 477.

And where a billboard blew down, injuring plaintiff, evidence that the braces had been defective for a year, continuing down to the time of the accident, was held to be admissible. *Bemis v. Omaha*, 81 Neb. 352, 116 N. W. 31.

In an action against a contractor who, in making a subway, had taken up and relaid a sidewalk which caved in and injured plaintiff, evidence that the excavation "slid" in the summer previous was held admissible to show the kind of ground at that place. *Rockwell v. McGovern*, 202 Mass. 6, 23 L.R.A. (N.S.) 1022, 88 N. E. 436.

And where a sidewalk was out of repair a year before an accident, evidence that then some repairs were made prior to the accident, and the walk was improved, was held to be admissible. *De Forest v. Utica*, 69 N. Y. 614.

Evidence that a sidewalk was out of repair a year prior to the accident was held admissible, in *Brownlee v. Alexis*, 39 Ill. App. 135.

In *Larmon v. District of Columbia*, 5 Mackey, 330, the evidence showed that the hole in the sidewalk had existed for more than a year.

And evidence that a cover to a cesspool in a highway had been off five times within a year prior to an accident was held to

ported by proof that his work in another factory, with similar materials, and under similar circumstances, was unsatisfactory. The precise point decided in *Temperance Hall Asso. v. Giles* is not now in question, and we are not required to decide whether it was rightly decided in that aspect. *Bob-bink v. Erie R. Co.* is also clearly distinguishable, as there was no claim in that case that there was any defect in the crossing frog, but only that it might be improved upon; and the rejection of the evidence offered to show this was based on the ground that the rule of law, under the circumstances, required no more than the adoption of an appliance in general use, which the frog in question was conclusively shown to be.

be admissible, as bearing on the question whether the defect might have been remedied by reasonable care. *Post v. Boston*, 141 Mass. 189, 4 N. E. 815.

Where a sluiceway was deficient, and caused the water to wash holes in the road, evidence as to its continuous defective condition for two years prior to an accident was held to be admissible. *Cook v. Barton*, 66 Vt. 65, 28 Atl. 631.

In *Scheel v. Detroit*, 130 Mich. 51, 89 N. W. 554, 90 N. W. 274, the court refused plaintiff leave to show that a cross walk was in defective condition prior to 1897, where the accident happened in 1899. The plaintiff evidently had shown the condition for the two years prior to the accident.

Evidence extending over three years prior to an accident, showing that the sidewalk was defective, was held to be admissible, to show notice, in *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

Evidence as to the condition of a sidewalk for three years prior to an accident is admissible, where the condition has not changed. *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

The defective condition of a sidewalk for a long time before and after an accident was held admissible, where the condition was unchanged. *Roney v. Des Moines*, — Iowa, —, 130 N. W. 396; *Bloomington v. Bay*, 42 Ill. 503.

The condition as to accumulation of ice and snow for years preceding the accident at the place where it occurred was held to be admissible, in *Hanousek v. Marshalltown*, 130 Iowa, 550, 107 N. W. 603. The court said: "If the walk at that place, owing to the surrounding conditions, was always icy and frequently dangerous in freezing weather, it might well be inferred that the city was aware of this, and therefore negligent in not requiring the defect to be remedied."

Evidence that the place on the sidewalk had been out of repair for many years prior to the accident was held competent, in *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095.

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Reverting to the case at bar, we are of opinion that the evidence of a similar accident at the same place some few days before was proper both as supporting the plaintiff's evidence as to the condition of the switch at the time of his accident, and as tending to show that that condition had persisted so long that, with proper care and inspection, it should have been remedied before the plaintiff sustained his injury; and that, as to the evidence of its similar condition two or three days afterwards, this was justified as corroborative of the plaintiff's testimony relative to that condition.

The case of *Annapolis Gas & Electric Light Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534, is cited against the admissibility of evidence as to later conditions. The

And that a city inspector had examined an awning seven years prior to an accident, and reported the posts defective and unsafe, was held to be admissible in evidence. *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386. The court said there would be no presumption that repairs had been made on a device once shown to be defective.

And where plaintiff slipped on vegetable matter at a market-house sidewalk, evidence that the same had been kept in bad condition for ten years was held admissible. *O'Dwyer v. Northern Market Co.* 30 App. D. C. 244.

But evidence as to the width of a road in 1881 was held inadmissible, where the question was as to its width in 1868. *Whitney v. Londonderry*, 54 Vt. 41.

And where a bridge had been repaired frequently during three years prior to an accident, evidence of bad condition should have been limited to the time after such repairs. *Elgin v. Nofs*, 96 Ill. App. 291.

c. Elevators.

In an elevator accident case, evidence that a witness had repaired the elevator six months prior to the accident, and that it was unskilfully constructed, dangerous, and in bad repair, was held admissible. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117. The court said: "The time was not so remote, under the circumstances of this case, as to authorize the exclusion of the evidence, and we think the objection bears more directly upon the weight than the admissibility of the evidence. The court instructed the jury not to consider the testimony of this witness, unless other evidence showed that the machinery was in practically the same condition at the time of the accident."

And in an action for injuries from an elevator, evidence showing the condition as far back as two years prior and down to within a few days of the injury was held admissible. *Orcutt v. Century Bldg. Co.* 214 Mo. 35, 112 S. W. 532. The court said: "It tended to show that the elevator would not run properly, that the cable was

facts, as stated by the court, were that a live electric light wire was strung along the side of a bridge over the water, and at a distance of 9 feet 5 inches from the floor of the bridge. "The evidence tended to show," says the opinion, "that the wire, as originally constructed, was properly placed and located as to the safety of the public, because it was beyond the reach of those properly using the bridge." Plaintiff was on the bridge at night, and in grabbing for his hat, which blew off, he seized the wire and received a shock. The court said it was incumbent on him to show by competent evidence that the wire sagged at the time of the accident and the place of the injury, and that evidence that he had visited the place the next day and found the wire slack was inadmissible, and that this

was no evidence that it was slack at the time of the accident. We cannot agree with the learned court on this point. The fact that a man, in reaching for his hat which has blown off, reaches an electric wire normally suspended over 9 feet up in the air, seems to be rather satisfactory proof that the wire in question must have sagged somewhat. This being so, his examination the next day, the earliest time when he could see it, was no more than corroborative of the necessary inference from the occurrence of the accident.

So, in the case at bar, the evidence of an accident to the witness after the plaintiff's accident simply led up to the investigation made by such witness to discover what caused the accident to himself, and was thus only incidental, and not harmful.

rusty and rotten; that bolts were loose; that the guide shoes were constantly getting out of place; and that the rod governing the safety appliances was so bent they would not properly perform their functions."

And evidence that an elevator door was kept open at times prior to an accident, on account of the lock being defective, was held competent, as tending to show a previous and continuous defective condition, and also to show notice and knowledge of the defective condition of the lock. *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42.

In an action for injuries caused by the falling of an elevator, evidence that the elevator had previously shown dangerous irregularity in its operation was held competent. *Casterton v. American Blower Co.* 142 Mich. 407, 106 N. W. 61.

In *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 192, evidence that an elevator car, while in operation, jumped and jolted, and that, on the morning of the day on the afternoon of which he was injured, it started and stopped irregularly, was allowed in the case. No objection was made to this evidence; on the contrary, it was attempted to be used to show contributory negligence in operating the elevator at the time of the accident.

And where a longshoreman was injured by a guy rope on a crane breaking, it was proved that the same rope broke the day before. *The Carolina*, 30 Fed. 199.

And evidence that a dummy-waiter rope had been broken and repaired several months prior to the time plaintiff was injured by its falling was held admissible on the ground of notice and negligence. *Vandecar v. Universal Trust Co.* 80 App. Div. 274, 80 N. Y. Supp. 290.

And evidence that on two different occasions, shortly before the accident in question, an employee reported the unsafe condition of the crane, and was discharged, was held competent to prove notice of the unsafe condition of the crane, in an action 32 L.R.A. (N.S.)

for injuries. *Ashley Wire Co. v. Mercier*, 61 Ill. App. 485.

d. Electricity.

Evidence that telegraph poles and wires were frequently down for a few months before an accident caused by a wire entangling and frightening a horse was held admissible. *Randall v. Northwestern Tel. Co.* 54 Wis. 142, 41 Am. Rep. 17, 11 N. W. 419.

And in an action for injury, causing death, from electricity, evidence that the telephone wire was overcharged with electricity on prior occasions was held competent. *East Tennessee Teleph. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171, 20 Ky. L. Rep. 1330, 38 S. W. 131.

And evidence of the condition of electric wires two weeks prior to an accident was held to be admissible. *Consolidated Gas Electric Light & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

That electric lights had frequently gone out in a mill for five years previous to the accident in question was held to be admissible in evidence, where plaintiff, in shifting a belt, was left in the dark, and caught in the machinery. *Rondeau v. Sayles*, 30 R. I. 228, 74 Atl. 785.

e. Explosions.

After an explosion causing death, a witness testified that one of the tanks in which the explosion occurred only a few days before this accident had given forth fire. This was admissible to show notice and negligence. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 87 N. E. 567.

In an action for gas explosion, evidence that, at different times prior thereto, the odor of gas was present near the place of the explosion, that notice was given the defendant, that men were digging for breaks in their pipes, and that their tools were marked with the initials of defendant, was held to show notice on the part of the de-

The material part of his evidence was that he found, on examination, as a result of his accident, certain conditions substantially identical with those that plaintiff testified to, and at a period of time so close to the plaintiff's accident, though after it, that an inference was justified, though subject to contradiction and open to explanation, that the same condition obtained at the time plaintiff was injured. There was no error, therefore, in the admission of this testimony; and, as it was properly admitted, it follows as of course that comment on it by the court in the aspects we have noted was also proper. The charge of the court on this point was as follows: "It has appeared from the testimony in this case that other accidents have occurred at this place. That testimony was intro-

duced not for the purpose of showing any liability on the part of the company beyond this case, but simply as it might throw light upon the question of whether this track—this mate—was out of order at the time when this accident occurred; because the jury might infer that, if an accident occurred just before or just after this occurred, that there must be something wrong with the track." In view of the propriety of the evidence, this was unexceptionable.

There was therefore no error at the trial in any of the aspects we have discussed, and no other point has been brought before us for review.

It follows, therefore, that the judgment of the Supreme Court must be reversed, and that of the Circuit Court affirmed.

fendant; and if any of this was remote as to the occasions testified to, its admission was held to be within the discretion of the justice. *Lewis v. Boston Gaslight Co.* 165 Mass. 411, 43 N. E. 178.

And evidence of recurring explosions in a boiler, not explained, previous to an injury, was held competent, where the conditions had not changed, in order to show defendant's knowledge of defects and condition, and that the boiler had been impaired by previous use. *Chicago G. W. R. Co. v. McDonough*, 88 C. C. A. 517, 161 Fed. 657.

And in an action for causing death by a defective boiler, it was held that evidence as to the condition of the packing rings a year or two prior to the accident was admissible, coupled with evidence that the condition continued the same down to the accident. *Shea v. Pacific Power Co.* 145 Cal. 680, 79 Pac. 373.

In *Carr v. American Locomotive Co.* 29 R. I. 276, 70 Atl. 196 (prior appeal, 26 R. I. 180, 58 Atl. 678), plaintiff was burnt by oil from an oil heater used for riveting, when the valve stem blew out, spattering oil. Evidence of prior trouble with this burner valve was held to be admissible as bearing on the question of negligence in not repairing the defect. See *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338, subdiv. 1a.

f. Mines and tunnels.

Reports of a mine inspector, made under a statute, one made one month, and one made nine days, prior to an accident, showing the dangerous condition of the mine, were held to be admissible in evidence. *Black Diamond Coal & Min. Co. v. Price*, 33 Ky. L. Rep. 334, 108 S. W. 345.

And in an action for the death of an employee from poor ventilation in a mine, evidence as to ventilation for months before the death, as shown by the mine inspectors' reports, was held competent. *Andrius v. Pineville Coal Co.* 121 Ky. 724, 90 S. W. 233. Kentucky Stat. 1903, § 2725, provides that a copy of the mine inspectors' 32 L.R.A. (N.S.)

report shall be evidence in any court in that state.

And the faulty operation of a mine electric fan prior to an explosion was held to be properly admissible in evidence. *Sterns Coal Co. v. Evans*, 33 Ky. L. Rep. 755, 111 S. W. 302. Kentucky Stat. 1903, § 2731, provides for ventilation of mines so as to expel noxious gases.

And evidence of the condition of the mine for a year prior to an accident was held admissible to show notice, where the condition remained unchanged to the time of the accident. *Island Coal Co. v. Neal*, 15 Ind. App. 15, 42 N. E. 953, 43 N. E. 463.

Where the roof of a tunnel had fallen at different times prior to the accident in question, evidence of the same was held to be admissible, as tending to show the necessity of timbering. *Sargent v. Union Fuel Co.* — Utah. —, 108 Pac. 928.

And the condition and formation of the roof of a mine several months prior to an accident was held to be admissible in evidence, where the condition was practically the same. *Arras v. Standard Plaster Co.* 121 App. Div. 61, 105 N. Y. Supp. 440.

Evidence showing the fall of the roof in a mine several days prior to an accident was held competent to show that a dangerous condition existed several days, as notice to defendant. *McCarthy v. Spring Valley Coal Co.* 232 Ill. 473, 83 N. E. 557.

And evidence that, three months prior to the accident, the roof of the passway of a mine was loose and in a dangerous condition, was held competent in an action for injuries received while going through the pass way by the falling of a large piece of slate. *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214.

Evidence of the condition of the room just prior to, and soon after, an accident to a miner is competent. *Pana Coal Co. v. Becker*, 130 Ill. App. 40.

And evidence that the cage was lowered into the mine in a negligent manner at a rate of speed in excess of that forbidden by the statute, several times prior to the accident, was held admissible, in an action

for injuries, but only to show that the engineer knew that he was exceeding the statute, or was habitually negligent. *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131.

And where a miner was injured by rails on a car falling down the shaft, evidence that, on prior occasions, the car jerked in going down the shaft, was held competent, where one of the issues was, that the slipping of the rails was caused by the jerking of the car. *Johnson v. Union Pacific Coal Co.* 28 Utah, 46, 67 L.R.A. 506, 76 Pac. 1089.

And where an employee was injured by the defective working of a grip on a car, evidence was allowed, showing that the steel cable had been for some weeks before the accident in a defective condition, that it had been patched, and that some of the strands were loose and frayed, causing the same kind of difficulty that occurred in this case. *Revolinski v. Adams Coal Co.* 118 Wis. 324, 95 N. W. 122. This evidence was held competent notwithstanding that the wire had been repaired on several prior occasions.

Illinois mines act, § 28, requires a light at a landing. Evidence that on other occasions prior to the accident in question, the light was dim, because the lamp was dirty, was held competent to show condition and wilfulness. *Robertson v. Donk Bros. Coal & Coke Co.* 143 Ill. App. 391.

g. Machinery.

That a rip saw was out of repair three weeks prior to an accident was held to be admissible in evidence, where such condition continued to the time of the accident. *Reich v. Iron Clad Mfg. Co.* 120 App. Div. 445, 104 N. Y. Supp. 1069.

And where plaintiff was injured by the flyback of a rip saw, evidence showing the cause of other flybacks on this rip saw during the same month of the accident was held to be admissible. *Van Doorn v. Heap*, 160 Mich. 199, 125 N. W. 11.

And in an action for injuries caused by a defective saw, evidence as to the condition of the saw from four to six months prior to the time of the accident was held competent, where the condition remained unchanged during the interim. *Dunekake v. Beyer*, 25 Ky. L. Rep. 2001, 79 S. W. 209.

In *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407, 28 N. E. 352, in an action for injuries caused by a defective sawing machine, evidence showed that the defendant's foreman knew, several days before the accident, that the machine had "run away," or started up when no one was near.

And in an action for death caused by defective machinery, evidence that witness had very nearly fallen into the same cog before, and that he had reported it to the foreman, was held admissible to show defendant's knowledge of the defect. *Mead v. Ashland Steel Co.* 125 Ky. 114, 100 S. W. 821.

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And evidence of the defective condition of a machine prior and up to a day before an accident was held admissible, in the absence of any evidence showing that it had been repaired. *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9, 57 N. E. 864.

And in an action for personal injuries, claimed to have been caused by a defective machine, evidence that, prior to the accident, plaintiff had heard the machine clicking, and reported the fact to the foreman, was held competent to show notice. *Kaplan v. New York Biscuit Co.* 5 App. Div. 60, 38 N. Y. Supp. 1049.

In an action for injuries caused by being spattered by caustic acid and gum, it was held permissible to show in rebuttal that the habit of the machine was to spatter down to just before the accident, not only as to defendant's knowledge of the danger, but also as to the behavior of the machine at the time of the accident. *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074.

And where the defendant claimed that the machinery had uniformly proved adequate prior to the accident, it was held that evidence to the contrary was admissible. *Myers v. Hudson Iron Co.* 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631. This accident was caused by the brake on the gear for lowering the bucket being out of order, and unsafe and defective.

And where a boy stepped on a platform of a threshing machine, and was injured by reason of his foot slipping in a hole, evidence that the hole was in the platform the day before the accident was held admissible. *Williams v. Gobble*, 106 Tenn. 367, 61 S. W. 51.

And evidence that a paper-cutting machine had been in a fire some years prior to an accident, and, when restored, had been in bad condition, and was in such condition a few days prior to the accident, was held admissible. *Brunger v. Pioneer Roll Paper Co.* 6 Cal. App. 691, 92 Pac. 1043.

And where a man was injured by a stamping press, evidence that shortly before the accident it was out of order was held competent. *Sopherstein v. Bertels*, 178 Pa. 401, 35 Atl. 1000.

In an action for damages from a collision, caused by defects in the steering gear, the evidence showed that a short time before the collision the gear refused to operate, and it was taken apart and attempted to be repaired, but the workman failed to discover the cause of the defect. *The European*, 52 L. T. N. S. 868, 33 Week. Rep. 937, 54 L. J. Prob. N. S. 61, L. R. 10 Prob. Div. 99, 5 Asp. Mar. L. Cas. 417.

And evidence that eight months prior to the accident in question, the condition of the machine was defective, and remained so down to the time of the accident, was held admissible to prove negligence on the part of the defendant. *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188.

In an action for injuries caused by a defective cutting machine repeating, evidence showing the condition of the machine two

years prior to the accident, which was admitted, was held immaterial error, where no specific objection was made, and the only change made was a friction strap, repaired. *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496, 56 N. E. 704.

And that a wire-cutting press had repeated two months prior to the accident in question was held to be admissible in evidence, to show defective condition and notice. *Donovan v. Chase Shawmut Co.* 201 Mass. 357, 87 N. E. 580.

In *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, 86 N. E. 310, where a loom started prematurely, and caught the operator's arm, the evidence showed that three months before the machine gave trouble, that it was repaired by the "fixer," but did not run right, shafting would heat; that it was fixed again, and ran all right for a week before the accident. The court said: "In most cases of the automatic starting of machines from a state of rest, there has been some evidence of a previous similar starting, with notice of which the defendant might have been charged. . . . But it is not necessary, in order to establish negligence of the defendant, that it should have had express notice of the precise irregularity which resulted in the injury."

And in an action for damages for injuries caused by a cutting machine, it was held competent for an operator to testify that the machine had started from a stop about two years previous to the accident, where no exception was made to the evidence. *Packer v. Thomson-Houston Electric Co.* *supra*.

h. Falling things.

Evidence that a basket from a cash-carrying machine had fallen on previous occasions, shortly before this accident, was held admissible to constitute notice, in an action for injuries to a saleswoman by the falling of the basket. *Stock v. LeBoutillier*, 18 Misc. 349, 41 N. Y. Supp. 649.

And evidence that models had previously fallen from the top of a certain show case was held competent to show that a figure so placed would be liable to overturn and fall. *Cavanagh v. O'Neill*, 27 App. Div. 48, 50 N. Y. Supp. 207, affirmed in 161 N. Y. 657, 57 N. E. 1108.

In an action for damages by the falling of a wall, evidence of the condition of the wall four days prior to the accident was held competent, where there was no evidence of a change in its condition. *Murdock v. Brown*, 16 Mo. App. 548.

In an action for injuries caused by a gas pipe falling through an opening in an upper floor, from a pile of waste, and striking plaintiff, evidence as to the condition of the upper floor and absence of guard, just prior to his complaint to defendant, and five days prior to the accident, was held admissible. *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 724, 109 N. W. 475.

And in an action for injuries received in handling heavy iron plates, evidence that

plates had fallen previously while this kind of clamps was used was held admissible to show the danger and the duty of the master to warn the plaintiff. *Ashcraft v. Davenport Locomotive Works*, — Iowa, —, 126 N. W. 1111.

i. Miscellaneous.

In *Ferris v. Hershheim Bros.* 51 La. Ann. 178, 24 So. 771, where a factory girl fell down a flight of stairs, the evidence showed that others had caught and tripped on these steps on prior occasions. The defendant removed all the zinc covering after the accident, before it could be examined.

And evidence that defendant had previously warned others of the danger of an unguarded trapdoor on his premises was held competent, where plaintiff was injured by falling therethrough. *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84.

In an action for injuries, evidence was held admissible to show that the seat on which plaintiff worked had tipped before, and that this fact was known to the head man, or overseer. *Spaulding v. Forbes Lithograph Mfg. Co.* 171 Mass. 271, 68 Am. St. Rep. 424, 50 N. E. 543.

And where a child was drowned in a creek, after the city had excavated the channel, evidence of the child's mother that, previous to this excavation, she had never heard of any accident at that place, was held to be admissible. Other evidence showed that the stream had been safe before any change. *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

And where a scow was being towed, and some cattle were drowned, evidence on cross-examination as to how many times the scow had been sunk by accident in the fall of each year prior was held competent. *Baird v. Daly*, 68 N. Y. 547.

j. Where evidence is inadmissible.

1. Where conditions were not the same.

But evidence of prior conditions is inadmissible, where the conditions are not shown to have been the same as at the time of the accident.

Evidence of a previously employed operator, showing the condition of a machine when she worked some time before an accident, was held incompetent. *Willson v. Logan*, 139 Ill. App. 204. In this case the court said: "While formerly in the employ of defendants, she had not been employed by them at any of the times when plaintiff worked there. Notwithstanding she worked the machine and had knowledge of its condition, such working and knowledge were at a time previous to the time of appellee's employment and working upon the machine. The inquiry should have been directed to the condition of the machine at the time of the accident to plaintiff. Of this condition Mrs. Berquist had no knowledge. She was necessarily ignorant as to what changes had been made in the meantime. The machine had been moved from

the place it was in when she operated it to another building; it had been used by various persons unknown to her."

In an action for injuries, caused by a slippery step on a locomotive, evidence as to its condition a month prior or a week after the accident was held incompetent, where there was no showing that the condition was the same as at the time of the accident. *Powers v. Boston & M. R. Co.* 175 Mass. 466, 56 N. E. 710.

And in an action for the death of deceased, caused by a railroad car leaving the track on an unfinished bridge, and falling on him, evidence of the condition of the ties the day before the accident was held incompetent, as the inquiry should have been directed to the condition of the bridge at the time of the accident. *Keatley v. Illinois C. R. Co.* 94 Iowa, 685, 63 N. W. 560. In this case the court said: "There is no claim made by any witness that the condition was the same twenty-four hours before the accident that it was when the accident happened. The evidence is undisputed that the iron gang moved the ties back and forth during the day, to enable the men to get down under the track to rivet the ironwork."

And evidence as to the previous condition of a sidewalk, where changes had been made, was held to be inadmissible. *Hebert v. Northampton*, 152 Mass. 266, 25 N. E. 467.

And where a brakeman was injured in jumping from a train, as it approached a burning trestle, evidence that some months previously large quantities of driftwood floated on to the right of way and lodged against the trestle was held inadmissible. *Root v. Kansas City Southern R. Co.* 195 Mo. 348, 6 L.R.A. (N.S.) 212, 92 S. W. 621.

2. Where prior conditions were not connected with the accident.

Evidence of prior conditions is inadmissible, where such prior condition is not shown to have been connected with the cause of the accident.

So evidence that something more than a week before the accident in question a place in the roof of a mine fell was held inadmissible where it was not near the place of accident, and was under different conditions. *Sugar Creek Coal Min. Co. v. Peterson*, 177 Ill. 324, 52 N. E. 475.

In an action against a gas light company, for gas escaping through the sewers into plaintiff's house, evidence that from the same leak, the gas had gone into another house across the street, was held incompetent. *Emerson v. Lowell Gaslight Co.* 6 Allen, 146, 83 Am. Dec. 621.

In an action for injuries caused by a piece of iron pin chipping off, and striking plaintiff in his eye, evidence of improperly tempering the drifting pins, a month prior to the accident, was held inadmissible, where the pin used was not shown to be one of these. *Goransson v. Riter-Conlev Mfg.* 32 L.R.A. (N.S.)

Co. 186 Mo. 300, 85 S. W. 338. The court said: "It appeared that the fellow workman who so testified also said that, while working with the plaintiff, he drew the temper from some of the pins, and threw the others away, and it did not appear whether or not the pin the plaintiff was using was one that such witness had attempted to draw the temper out of."

And in an action for injuries caused by a shaft, or arbor, falling upon plaintiff, evidence that other similar arbors in the same room fell prior to the accident was held incompetent. *Gaar, S. & Co. v. Wilson*, 21 Ind. App. 91, 51 N. E. 502.

Evidence as to whether or not a station was lighted in the evenings before and after an accident was held inadmissible, as too remote; especially as the question whether it was well lighted or not had nothing to do with the accident. *Agulino v. New York. N. H. & H. R. Co.* 21 R. I. 263, 43 Atl. 63.

And where a man on a trolley pole was thrown to the ground by reason of an eyebolt breaking, causing the pole to vibrate, evidence that other eyebolts were defective and had broken on the day previous to the accident was held incompetent. *Doyle v. White*, 9 App. Div. 521, 41 N. Y. Supp. 628. The court said: "There was no claim made by the counsel that he intended to prove the circumstances under which the breaking occurred, or that it was of such a character as to call the attention of the defendant to any defect in the eyebolts."

And in an action for injuries caused by falling in a hole in defendant's platform, evidence that there were other holes in the platform some four or five weeks prior to the accident was held inadmissible. *Louisville & N. R. Co. v. Henry*, 19 Ky. L. Rep. 1783, 44 S. W. 428.

And in an action for injuries while riding on an elevator, evidence of the defective condition of a similar elevator prior thereto, and an accident therein, was held inadmissible. *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424.

In an action for death of plaintiff's intestate, caused by coming in contact with a live wire, evidence was held inadmissible to show that the insulation of defendant's wires were defective at other points or on other occasions, as it was too remote and misleading. *United Electric Light & P. Co. v. State*, 100 Md. 634, 60 Atl. 248.

In an action for injuries caused by water escaping from a railroad tank, a question whether the witness knew of water escaping from the North tank at Wadsworth, when the valve was not intentionally pulled, was held incompetent, because there was no evidence to justify a finding that the water came into the car at or near Wadsworth, and because the question did not fix a time at or prior to the accident. *Spencer v. Chicago, M. & St. P. R. Co.* 105 Wis. 311, 81 N. W. 407.

In an action for injuries caused by putting a truck on an elevator, evidence of a belt slipping previously was held incompetent, where the defect in the elevator did

not cause the accident. *Marnin v. Kitson Mach. Co.* 159 Mass. 156, 34 N. E. 89.

That a furnace obstructed a sidewalk the day before an accident, but was removed that night, was held inadmissible in evidence. *Donaldson v. Boston*, 10 Gray, 508. The furnace was brought back the next day, when the accident occurred.

And where the cause of action relied upon was a defect in a pulley, in consequence of which the machinery would continue to revolve after it should have stopped, and this accident was caused when plaintiff put his foot on a cogwheel, evidence of the occasional failure to stop on previous occasions was held to be inadmissible, as this would not be a basis for the inference of negligence under the circumstances in this case. *Leffler v. Anheuser-Busch Brewing Assn.* 127 Mo. App. 488, 106 S. W. 105.

3. For lapse of time.

The question of the lapse of time is a sufficient reason for excluding evidence of prior conditions, where they are not shown to be the same as at the time of the accident.

In an action for injuries causing death by a machine running at excessive speed, breaking and hitting deceased, it was held that the fact that the company had, on several occasions some months or years before the accident, operated the edger at excessive speed, was incompetent to show that they did so at the time of the accident. *Stecher Cooperage Works v. Steadman*, 78 Ark. 381, 94 S. W. 41.

And in an action for killing a brakeman by reason of a defective switch, evidence of its condition twenty-one months before and two months afterward was held incompetent. *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808.

And evidence that the elevator was in a defective condition, and that some years prior to this accident, this same elevator had fallen from the top floor to the basement, was held incompetent in an action for injuries caused by the falling of an elevator. *Woelfel Leather Co. v. Thomas*, 68 Ill. App. 394.

And evidence that ice was on the sidewalk a week prior to this accident, and that the sidewalk continued in the same condition down to the time in question, was held inadmissible, because plaintiff testified that the day before the accident it snowed 4 inches, then rained, then there was a thaw. *Woodcock v. Worcester*, 138 Mass. 268.

And that there was grease on a railroad station platform five months prior to the accident in question was held to be inadmissible in evidence, as this was too remote. *Newcomb v. New York C. & H. R. R. Co.* 169 Mo. 409, 69 S. W. 348.

And evidence as to the defective condition of the highway where the accident occurred a year before was held to be inadmissible. *B'air v. Pelham*, 118 Mass. 420, 32 L.R.A. (N.S.)

And a photograph of a sidewalk crossing a railroad track, taken by an amateur two years prior to the accident, was held inadmissible. *Chicago v. Vesey*, 105 Ill. App. 191.

And proof that a highway was out of repair by reason of snowdrifts at a time prior to this accident was held inadmissible. *Burr v. Plymouth*, 48 Conn. 460. The court said: "Proof that it was out of repair by reason of snow for any time previous thereto went but little way to prove that it was so out of repair at the time of the injury. Snow is not a perpetual obstruction in this climate; it disappears by natural laws, and many times suddenly; and a blockade of to-day may be removed to-morrow by the action of the elements."

4. Where defendant did not control prior conditions.

In an action against a telephone company, to recover for injuries caused by plaintiff's foot catching in a loose telephone wire, concealed in the grass, evidence that some months prior thereto, a wire fell off of the light pole near the place of the accident, and several people encountered the loose wire, at that place, was held insufficient, as it was not proved that defendant owned the wire. *Lee v. Maryland Teleph. & Teleg. Co.* 97 Md. 692, 55 Atl. 680.

5. On account of pleading.

Evidence that plaintiff borrowed props from another miner just before the time of the injury, or at any other time, was held incompetent, in an action for injuries caused by an insufficient number of props. *Pana Coal Co. v. Becker*, 130 Ill. App. 40. In this case, Illinois Rev. Stat. chap. 93, § 16, provides that the mine manager shall always provide a sufficient supply of props when demanded. The court said: "The negligence alleged is that the company failed to provide props after a sufficient demand. The fact that appellee borrowed and another miner loaned props just before the time of the injury, or at any other time, could not tend to establish a demand upon the manager or his failure to comply. It could, at most, only tend to show an act not counted on, which would not, of itself, be negligence, and could only be competent evidence against appellant in the event that the mine manager knew of its existence."

Evidence that, prior to the accident in question, the safety catches were found removed from the cages used in the mine, was held incompetent, in an action for injuries caused by the fall of a cage in a mine, where the cause of action was not the absence of a catch, but a defective catch. *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242.

In *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944, where the city admitted notice of the condition of a defective sidewalk, it was said that in such a case no "evidence should be received which is too remote to

bear on the question whether the walk was defective at the very time of the accident." In this case a witness testified as to the condition two years before, and that it was the same at the time of the accident.

6. *For lack of notice.*

In some cases evidence of prior conditions was refused on the ground of lack of notice to defendant.

Evidence that the window was broken prior to the accident, and that notice was given to defendant a week prior to same, was held inadmissible in an action for injuries received by an explosion of gases through a defective window, where defendant did not know of the break. *Fisher v. Nubian Iron Enamel Co.* 60 Ill. App. 568. The workman had gone into a small room to dish out some boiling varnish; across the area way was a broken window, and another workman had a lantern there, which caused the explosion. After rejecting the evidence above, the court said: "Omitting consideration of it, however, as the court below must have done, there is no evidence that the condition of the window was known to the appellee."

And in an action for injuries by stumbling on a sleeper, projecting from a pile of sleepers placed by a contractor, on a wharf, evidence showing that the clerk of the wharf company had called the attention of the defendant's employees to this sleeper, a short time prior, and evidence that the sleeper had been removed after the accident, where there was no evidence that defendant's attention had been called to the condition, was rejected by the court; this was held discretionary. *Murphy v. Stanley*, 130 Mass. 133.

7. *As presenting collateral issues.*

Some cases excluded such evidence on the ground that it presented collateral issues. This is the correct rule where the evidence related to the negligence of an operator, but where the accident was caused by a condition, and this had continued for a time, the weight of authority is that the evidence of such condition at a time prior, and not too remote, will be admissible.

In an action for injuries caused by being thrown from a wagon by a collision with defendants' wagon, while going down a hill, evidence offered to show that defendants had at other times, frequently, in like manner overloaded their wagon, and gone down the hill at an unusual speed, was held incompetent. *Whitney v. Gross*, 140 Mass. 232, 5 N. E. 619. The court said: "It is clear that, upon the issue whether, at the time of the accident, the defendants' wagon was so overloaded that their horse could not control it, evidence that the defendants had at other times, frequently or infrequently, in like manner overloaded their wagon, would not be competent."

In *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S. W. 675, where a child was killed by a barrel falling from a window, it was

held that evidence of other barrels that had fallen or had been thrown from the window, at other times previous to this, was not admissible; it was further held, however, that there was sufficient evidence to sustain plaintiff's claim. The court said: "In certain classes of negligence cases, evidence of other negligent acts besides the one charged has been received, as tending to prove negligence in the act charged. It is said the collateral act may be proved if the inference may be drawn from it that the act charged was or was not negligent; but a study of the cases reveals, we think, that the admissibility of proof of the collateral act depends finally on the cogency of the proof it affords regarding the main issue.—on whether it is so closely related to the main issue that its value as evidence is high enough to justify disregarding the objections to the reception of proof of collateral acts."

And in an action for injuries caused by falling down an elevator shaft, evidence tending to show that, prior to the accident, at different times the hall was dark, and that the elevator gates were left open, causing other accidents, was held inadmissible. *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262. This was on the ground that it presented collateral issues. The court said: "It was immaterial to the issue whether, on some particular day or night previous to the plaintiff's injury, the gates to the elevator had been closed or not; whether there had been sufficient light in the hall or not; or whether some individual had or had not been exposed to injury and had escaped. If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them."

And in an action for injuries caused by insufficient light in a hallway, it was held that the question as to whether or not it might have been lighted other days during the month, or at any other time, was incompetent. *Muller v. Hale*, 138 Cal. 163, 70 Pac. 81. In this case the court said: "We think the court did not err in its rulings on these questions. The question was as to the hall being lighted on that day and at the time the plaintiff called to take the elevator; not whether it might have been lighted some other day during the month of January, 1900, or any other year."

In *Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92, evidence of the existence of a private crossing at the place of accident, prior to the construction of the railroad, and also subsequently to the time of injury, was excluded on the ground of irrelevancy. The court said: "The precise question at issue was the state and condition of the place at the time when the collision took place, and whether there was then a crossing in use over the track of the railroad, which would require a greater degree of caution in the exercise of due care by the serv-

ants of the defendants than at other places on their road, where no crossing existed. This the plaintiff was allowed very fully to show."

In *Maguire v. Middlesex R. Co.* 115 Mass. 239, which was an action for injuries caused by the driver of a horse car running his horse and then suddenly stopping the car, evidence that this had occurred on several previous occasions was held incompetent. The court said: "The fact that the same driver had at some other times been guilty of careless or unskilful management could have no legitimate bearing upon the question as to the care or skill exhibited at the time in controversy."

II. Evidence of prior accidents.

a. In general.

Evidence of prior accidents is, under proper circumstances, admissible to charge defendant with notice of unsafe conditions. The mere fact of prior accidents is not sufficient to establish unsafe conditions, and evidence of them is therefore not admissible unless coupled with evidence of actual conditions. On the other hand, where the mere description of the premises is sufficient to enable the jury intelligently to determine whether or not they were defective, evidence of prior accidents is not needed, and is therefore excluded because tending to create collateral issues and divert the attention of the jury. But where a mere description of the premises may leave it uncertain whether or not they are unsafe, evidence of the experience of persons in their use is admissible, with the exception that negative evidence that they have been safely used by numerous persons is excluded. The ordinary experience of mankind is that the highways, railroads, and appliances generally furnished for use are safe; and if an attempted use of a particular place or appliance is attended with an undue proportion of accidents, a strong presumption arises that it is not ordinarily safe. On the other hand, people may use an unsafe place or appliance for a long time without accident, and therefore the fact that accidents have not happened is of very little probative force. Thus, in *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260, a person attempting to leave a public entertainment held in defendant's hall fell into an area leading to the cellar, and was injured; and the court held that defendant's offer to show that the place had been used by ten thousand persons a year without injury was inadmissible. The Connecticut court, however, in *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194, held such evidence to be admissible under peculiar circumstances. Plaintiff fell on a sidewalk, and sought to show the presence there of a formation of ice extending across the whole walk, of such a nature that if her description was true, it must have rendered the place practically unusable. The court said one important question was whether, if the ice was there, it was or was not in a

slippery and dangerous condition; and held that evidence that no one else had slipped there or experienced any inconvenience in passing was strong proof that the condition did not exist, and was admissible.

The general rule, therefore, is that where the conditions were the same, evidence of prior accidents is admissible as to the condition of the place or the working of an appliance, to show that either was dangerous, and also to show notice to the defendant of the condition of the same. The evidence should be directed to the conditions, and not to the negligence in the use of the same.

Evidence of prior accidents is not admissible for the purpose of showing negligence, where the question does not depend upon the condition of the premises, but upon some act of the defendant, more or less personal in its nature.

In *Cohn v. New York C. & H. R. R. Co.* 6 App. Div. 106, 39 N. Y. Supp. 986, a child was killed at a highway crossing by being struck by a locomotive. Evidence was admitted of an accident at that crossing some years before. The court held that this was inadmissible, because it did not refer to the condition of the crossing, but to the negligence of the defendant. The court stated that "there are two classes of cases in which such evidence is admissible: In the first, as to the condition of a place, or to the working of an appliance, to show that either was dangerous; in the second, to show notice to the person who had control of the place or appliance. It is doubtless competent to show that horses or persons frequently caught their feet at a crossing or continually slipped on a sidewalk, to show that the crossing or sidewalk was in a dangerous condition. But the principle upon which such evidence is admitted in that class of cases has no application to the case at bar. In the cases taken as examples, evidence of the character stated would constitute evidence of the defendant's negligence, for it would be negligence to maintain a crossing or sidewalk in such condition as to endanger persons passing over it. But in the case at bar, while the occurrence of many accidents at the crossing might tend to prove the danger of the crossing, it would not tend to prove the negligence of the defendant, because the defendant has the legal right to maintain its railroad at the place in question, though dangerous. Negligence could be predicated only of the manner in which the defendant ran its trains over the crossing. Of course, this was a thing that constantly varied, and evidence that the train was run carelessly on one occasion would not be evidence that it was so run on another occasion."

In an action for injuries caused by a horse being frightened by an engine at a crossing, evidence that several accidents had happened at the crossing was held inadmissible to show negligence on the part of defendant in failing to keep a flagman. *Hutcherson v. Louisville & N. R. Co.* 21 Ky. L. Rep. 733, 52 S. W. 955. The court said: "So the negligence relied upon by

the plaintiff to entitle him to recover was the failure of those in charge of the train to give proper signals of its approach. Without going into a discussion of the question as to whether it would be proper in some cases to admit the character of the testimony offered, it is sufficient to say in this case that we do not think it was proper. If the injury resulted from the failure to give proper signals of the approach of the train, not the condition of the crossing, it would be immaterial as to what was the condition of the crossing that caused injuries to others. The fact that those in charge of other trains approaching the crossing had failed to give signals would not be admissible as evidence conducing to show that those in charge of the train that is alleged to have caused plaintiff's injury failed to give necessary signals of its approach."

b. Railroads.

Evidence of the frequency with which stools turned and caused alighting passengers from cars to fall is admissible to show their defective condition and notice of it by defendant. *Missouri, K. & T. R. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500.

Evidence tending to prove a prior accident in the same place was held competent to show notice to defendant, where the conditions were similar, in an action for injuries while alighting from a car, by slipping between the platform of the car and that of the station. *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368. It was held that evidence of other accidents in other places would be inadmissible, unless the conditions were shown to have been the same.

And where the defendant claimed that the station platform was safe, and that it was not negligent, because of long use without accident, plaintiff could show that others had stepped off one platform to another previously without knowing that there was a difference in the planes, and that there was a step. *Fisher v. Boston & M. R. Co.* 75 N. H. 184, 72 Atl. 212. The court said: "While it did not appear that injury had resulted in any other case, the fact that persons 'stepped off from one elevation to the other without noticing that there were any steps there' indicated the probability of injury to someone; and the instances were sufficiently numerous to authorize the conclusion that knowledge of them must have come to the defendant's employees."

And in an action for falling off of a platform, thereby receiving injuries, evidence that, prior to the accident, two other persons, a man and a woman, had also fallen from the same portion of the platform, under circumstances of a similar character, was held competent to show that the place was unsafe and dangerous. *Missouri P. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582.

And in an action for death caused by the

insecure condition of the rails holding a derrick of a railroad, it was held that evidence of a similar accident five years prior, on the same substructure, and that no repairs had since been made upon the substructure, and that defendant knew of it, was admissible to show the insecure condition of the substructure. *Dyas v. Southern P. Co.* 140 Cal. 296, 73 Pac. 972.

Evidence as to the defective condition of a flange guard on the floor of a trolley car, for some time prior to an accident caused thereby, and a previous accident by the same cause, was held competent, as illustrating the character of the defect. *Chase v. Jamestown Street R. Co.* 38 N. Y. S. R. 054, 15 N. Y. Supp. 35.

And in an action for death caused by a defective switch and broken rail, evidence of similar previous accidents at the same switch, under the same conditions, was held admissible to show the defective condition of the track at the time of the accident. *Clapp v. Minneapolis & St. L. R. Co.* 36 Minn. 6, 1 Am. St. Rep. 629, 29 N. W. 340.

And where a trolley car jumped the track and injured a passenger sitting on the platform at the station shed, evidence that such car had jumped the track at other times on the same run previously was held admissible, to show defective car and notice. *East St. Louis & Suburban R. Co. v. Zink*, 229 Ill. 180, 82 N. E. 283, affirming 133 Ill. App. 127.

In an action for injuries caused by a train running off of a track, evidence showing that previous accidents had occurred in the same vicinity was properly submitted to the jury. *Union P. R. Co. v. Hand*, 7 Kan. 380. The court said: "There was much conflicting testimony as to the condition of the road, and it was not improper to permit the plaintiff, who was a stranger, to show the condition of the road two or three weeks previous to the accident. It may have been somewhat remote, but really went to show the condition of the road at one time, and by other testimony tending to show that it remained in the same condition up to near the time of the accident, was proper to go to the jury. If a plaintiff was confined to the precise moment of an accident to prove the condition of the road, he would in almost every case be helpless: he must be allowed some latitude; and in this case it did not go too far. The same remarks apply to the testimony as to the accidents occurring in March, to other trains."

And evidence that there had been prior accidents at a switch crossing which was out of repair and which upset plaintiff's sleigh was held admissible. *Woolley v. Grand Street & N. R. Co.* 83 N. Y. 121. The court said: "That fact was competent to be laid before the jury. It might be explained as from other cause than the switch; but, as a fact, we do not see why, in the first instance, it was not competent. The plaintiff had a right to show that the switch caused harm to others. One step on the way to that was to show that, at the

place where the switch was, others had been harmed."

And in an action against a railroad for injuries caused by a horse having his foot caught at a crossing, evidence that similar accidents had previously occurred by reason of the same defect was held admissible. *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588.

And where a trolley pole was near the car tracks, evidence showing contact by another with the pole previous to the accident in question was held to be admissible. *Finley v. Louisville R. Co.* 31 Ky. L. Rep. 740, 103 S. W. 343.

And in an action by a motorman against a street railroad company, for negligence in not supplying sand boxes, to be used to prevent the cars from slipping on the ice, evidence that other runaways had occurred previously on the same hill, under similar circumstances, from the same cause, was held competent to show notice. *Mayer v. Detroit, Y. A. A. & J. R. Co.* 142 Mich. 459, 105 N. W. 888.

In an action for injuries to a child by a turntable, evidence that another child had been injured but a short time before this accident, and no effort was made to secure it, so that children could not use it, was held admissible. *Gulf, C. & S. F. R. Co. v. Evanisch*, 63 Tex. 54.

c. Elevators.

In an action for injuries from a defective elevator, evidence showing that other accidents had occurred previously, from the same condition, was held competent to show defendants' knowledge of defects. *Crigler v. Ford*, 26 Ky. L. Rep. 784, 82 S. W. 509. In this case the court said: "The proof showed that the defects at the time of the injury were the same as at the time of the previous accidents. It was competent for the reason, also, that this elevator was owned and in the possession of appellants during all this time, and the facts with reference to its condition were peculiarly within their knowledge; and if repairs had been made within the time referred to, it was within the power of appellants to introduce such evidence. It did not devolve upon the appellee to prove that they did not make the repairs."

And evidence that another person, prior to the accident, had been caught in an elevator door, was held competent to show knowledge. *Auld v. Manhattan L. Ins. Co.* 34 App. Div. 491, 54 N. Y. Supp. 222, affirmed in 165 N. Y. 610, 58 N. E. 1085.

And evidence was held competent to prove that a similar accident occurred shortly before the one which happened to the plaintiff, as tending to show knowledge to defendants of some defect, in an action for injuries caused by the fall of an elevator. *Glassman v. Surplus*, 53 Misc. 586, 103 N. Y. Supp. 789.

And evidence that a similar accident to the elevator occurred about three months prior to the accident in question was held 32 L.R.A. (N.S.)

admissible, as tending to show the dangerous condition of the elevator, and notice. *Ibid.*

And in an action for an injury caused by the falling of a hoisting apparatus in the store of defendant, it was held that evidence of a prior fall of the cage was admissible to show that defendant knew of the defect. *Malone v. Hawley*, 46 Cal. 409.

And evidence that another person had been injured in a similar manner by the same machinery was held admissible to show that the crane windlass was dangerous, in an action for injuries received from the unskilful handling of machinery. *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288.

d. Electricity.

Evidence of previous accidents to employees of a factory, several hours before this accident, offered to show the condition of the wires, was held admissible in an action for the death of plaintiff's husband, caused by coming in contact with live wires. *Goddard v.ENZler*, 123 Ill. App. 108.

e. Machinery.

Evidence of previous accidents in a saw-mill from unguarded cogwheels was held competent to show the defective and dangerous condition of the cogwheels and notice to defendant. *Hansen v. Seattle Lumber Co.* 41 Wash. 349, 83 Pac. 102.

And evidence of other previous accidents, at the same place and under the same conditions, was held competent, where a boy, picking up waste paper under a machine, was drawn into the machine. *Wyman v. Orr*, 47 App. Div. 136, 62 N. Y. Supp. 195. The court said: "This is not the case of another accident happening in a known place of danger, or from an obvious and apparent source of danger, but of an accident which discloses the existence of a dangerous place,—one which discloses a source of danger."

And in an action for injuries caused by studs falling from a broken belt, evidence of a similar accident a few days before, where studs flew out from the same part and hit persons, was held competent. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789.

Evidence showing that other persons had been caught by the same cogwheels prior to the accident in question, while working at the same place and at the same work as plaintiff, was held competent for the purpose of showing the dangerous location, and to fix the defendant with notice of the danger. *Dorsett v. Clement-Ross Mfg. Co.* 131 N. C. 254, 42 S. E. 612.

Evidence tending to show that other boys near plaintiff's age were injured while working at machines constructed and operated the same as the one in question, in the same room, was held competent, for the purpose of showing the dangerous character of the machine, and tending to show knowledge thereof on the part of the defendant. *Leathers v. Blackwell Durham Tobacco Co.*

the plaintiff to entitle him to recover was the failure of those in charge of the train to give proper signals of its approach. Without going into a discussion of the question as to whether it would be proper in some cases to admit the character of the testimony offered, it is sufficient to say in this case that we do not think it was proper. If the injury resulted from the failure to give proper signals of the approach of the train, not the condition of the crossing, it would be immaterial as to what was the condition of the crossing that caused injuries to others. The fact that those in charge of other trains approaching the crossing had failed to give signals would not be admissible as evidence conducing to show that those in charge of the train that is alleged to have caused plaintiff's injury failed to give necessary signals of its approach."

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In an action for injuries to a child by a turntable, evidence that another child had been injured but a short time before this accident, and no effort was made to secure it, so that children could not use it, was held admissible. *Gulf, C. & S. F. R. Co. v. Evanisch*, 63 Tex. 54.

c. Elevators.

In an action for injuries from a defective elevator, evidence showing that other accidents had occurred previously, from the same condition, was held competent to show defendants' knowledge of defects. *Crigler v. Ford*, 26 Ky. L. Rep. 784, 82 S. W. 599. In this case the court said: "The proof showed that the defects at the time of the injury were the same as at the time of the previous accidents. It was competent for the reason, also, that this elevator was owned and in the possession of appellants during all this time, and the facts with reference to its condition were peculiarly within their knowledge; and if repairs had been made within the time referred to, it was within the power of appellants to introduce such evidence. It did not devolve upon the appellee to prove that they did not make the repairs."

And evidence that another person, prior to the accident, had been caught in an elevator door, was held competent to show knowledge. *Auld v. Manhattan L. Ins. Co.* 34 App. Div. 491, 54 N. Y. Supp. 222, affirmed in 165 N. Y. 610, 58 N. E. 1085.

And evidence was held competent to prove that a similar accident occurred shortly before the one which happened to the plaintiff, as tending to show knowledge to defendants of some defect, in an action for injuries caused by the fall of an elevator. *Glassman v. Surpliss*, 53 Misc. 586, 103 N. Y. Supp. 789.

And evidence that a similar accident to the elevator occurred about three months prior to the accident in question was held 32 L.R.A. (N.S.)

admissible, as tending to show the dangerous condition of the elevator, and notice. *Ibid.*

And in an action for an injury caused by the falling of a hoisting apparatus in the store of defendant, it was held that evidence of a prior fall of the cage was admissible to show that defendant knew of the defect. *Malone v. Hawley*, 46 Cal. 409.

And evidence that another person had been injured in a similar manner by the same machinery was held admissible to show that the crane windlass was dangerous, in an action for injuries received from the unskilful handling of machinery. *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288.

d. Electricity.

Evidence of previous accidents to employees of a factory, several hours before this accident, offered to show the condition of the wires, was held admissible in an action for the death of plaintiff's husband, caused by coming in contact with live wires. *Goddard v. Enzler*, 123 Ill. App. 108.

e. Machinery.

Evidence of previous accidents in a saw-mill from unguarded cogwheels was held competent to show the defective and dangerous condition of the cogwheels and notice to defendant. *Hansen v. Seattle Lumber Co.* 41 Wash. 349, 83 Pac. 102.

And evidence of other previous accidents, at the same place and under the same conditions, was held competent, where a boy, picking up waste paper under a machine, was drawn into the machine. *Wyman v. Orr*, 47 App. Div. 136, 62 N. Y. Supp. 195. The court said: "This is not the case of another accident happening in a known place of danger, or from an obvious and apparent source of danger, but of an accident which discloses the existence of a dangerous place,—one which discloses a source of danger."

And in an action for injuries caused by studs falling from a broken belt, evidence of a similar accident a few days before, where studs flew out from the same part and hit persons, was held competent. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789.

Evidence showing that other persons had been caught by the same cogwheels prior to the accident in question, while working at the same place and at the same work as plaintiff, was held competent for the purpose of showing the dangerous location, and to fix the defendant with notice of the danger. *Dorsett v. Clement-Ross Mfg. Co.* 131 N. C. 254, 42 S. E. 612.

Evidence tending to show that other boys near plaintiff's age were injured while working at machines constructed and operated the same as the one in question, in the same room, was held competent, for the purpose of showing the dangerous character of the machine, and tending to show knowledge thereof on the part of the defendant. *Leathers v. Blackwell Durham Tobacco Co.*

144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11.

And evidence that, on a former occasion, while the machine was being operated by another, it worked in a manner similar to that when plaintiff was injured, was held competent to prove the defective condition of the machine, and to give notice. Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 49 Am. St. Rep. 686, 35 N. E. 55. The court said: "The authorities on the question are conflicting. The courts of Massachusetts and some of the other states hold that such evidence is not within the issue, but collateral to it, and should be rejected. Collins v. Dorchester, 6 Cush. 396; Aldrich v. Pelham, 1 Gray, 510; Phillips v. Willow, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731. But reason and the weight of authority are the other way."

And evidence that about a month prior, a similar accident had occurred on the same machine, and partial repairs were made, but the lock screw had not been replaced, was held admissible to show negligence on the part of defendant, in an action for injuries caused by a defective machine. Franke v. Hanly, 215 Ill. 216, 74 N. E. 130.

Evidence of previous accidents was held to be admissible in rebuttal, where defendant's witnesses testified that it would be impossible for a boy to have his hand drawn under the plunger. Chicago Anderson Pressed Brick Co. v. Reininger, 41 Ill. App. 324, affirmed in 140 Ill. 334, 33 Am. St. Rep. 249, 29 N. E. 1106. That it was in rebuttal was held to take the evidence out of the rule announced in Kolb v. Chicago Stamping Co. 33 Ill. App. 488.

Evidence that some months prior, another employee had been injured by the same set screw, under the same circumstances, was held admissible. Walker v. Newton Falls Paper Co. 111 App. Div. 20, 97 N. Y. Supp. 521. In this case the court said: "The appellant complains that the court improperly allowed the plaintiff to show that a prior accident had been caused by this same set screw; but it appeared that it happened under substantially the same circumstances as those existing at the time the plaintiff was injured, and in a similar manner. It was not error, therefore, to receive the evidence."

And evidence that, prior to an accident by a planing machine, another person had been injured, and the conditions were the same, was held admissible, as this tended to show reasonable ground to apprehend like danger if the knives should not be covered at any subsequent time. Turner v. Goldsboro Lumber Co. 119 N. C. 387, 26 S. E. 23.

f. Streets and highways.

In view of what has been alleged to be a conflict of authority upon this question which, in some few cases, may prove to be such, it is necessary to examine the facts of each case with some care. In so doing it will be seen that there is in fact little 32 L.R.A.(N.S.)

conflict, but that there are certain well marked but fine distinctions which must be kept in mind in order to know where the line runs. A leading case on one side of the line is District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840. In that case a portion of the street allotted to sidewalk had been cut down below the grade of the other portion, and steps constructed to connect the two levels, without railings or barriers. The action was brought to hold the District liable for injury to one who had fallen down the steps. Here was a condition which had been created or permitted by the public authorities and it might not be clear to the average jurymen, from a mere description of the place, whether it was a defect for which the District would be liable or not. Upon this question the effect of the place upon the traveling public might be very material; in fact, the only real evidence upon the question of defect *vel non* which could be attained. For this purpose the court held evidence of previous accidents to be admissible. It said that the point of the objection was "that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents; no question was raised as to the extent of the injuries received: no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character,—at least, it is some evidence to that effect." The court also held the evidence to be admissible as tending to show notice of the defect to the city. It will be observed that the evidence in this case was a legitimate part of plaintiff's case, and that it might not have been possible to prove that the place was in a defective condition without such evidence. On the other hand, in most cases where the evidence has been rejected, the mere description of the place would enable the jury to determine whether or not it was defective, so that the evidence of other accidents was unnecessary; or the attempt was made to show a defective condition by mere proof of accidents, without describing the *locus in quo*; which, of course, had no tendency to prove the ultimate fact, thus making the evidence in its true sense collateral. The courts have not in all cases made this distinction clear, and in some cases have not observed it; but, in the main, the cases which have admitted or rejected evidence of other accidents fall on one side or the other of this line.

So the fact that another person tripped at the same place on a wooden sidewalk which was alleged to be decayed and unsafe, eight months previous to the accident in question, was held to be admissible, as tend-

ing to show notice to the town of the defective condition of the walk because of its long continuance. *Alberts v. Vernon*, 96 Mich. 549, 55 N. W. 1022.

In *Gregory v. Detroit United R. Co.* 138 Mich. 368, 101 N. W. 540, the court states that such testimony is only admissible to show notice and knowledge of the defects. But in that case plaintiff's cutter was overturned by catching on defendant's rail in a street, and the court said that the sole question was as to the condition of the street, and whether its condition showed negligence. On this question proof of prior accidents was immaterial. So, in *Corcoran v. Detroit*, 95 Mich. 84, 54 N. W. 692, where a witness had described the bad condition of a highway where an accident occurred, the court ruled that the fact that he had broken his buggy there was immaterial.

In *Gilmer v. Atlanta*, 77 Ga. 688, plaintiff tripped on the roots of a tree, which had been left projecting above the sidewalk, and the court held that evidence that another had fallen over the same roots was admissible. The court said that the rule in Georgia was that what sheds light on the truth of the transaction should go to the jury, letting them pass upon its weight; and that the fact that another fell from the same cause is certainly a circumstance showing that the sidewalk will, occasion falls.

In *Quinlan v. Utica*, 11 Hun, 217, affirmed in 74 N. Y. 603, plaintiff was injured by falling upon a sidewalk which seems to have been in the same condition at the time of the accident as it was when constructed, and the question was whether or not it was safe. The condition of the walk was fully described by witnesses, and photographs, measurements, and a model of the surface of the walk, showing its elevations and depressions, were put in evidence. Evidence was then offered tending to show that other persons had fallen upon the walk, upon the ground that it tended to show that the walk, tested by actual use, had been demonstrated to be in an unsafe and improper condition. The court admitted the evidence upon this ground, stating that "upon an issue as to the utility, proper condition, or safety of any work of human construction for practical use, evidence tending to show how the article has served when put to the use for which it was designed would seem to bear directly upon the issue, and often may be of the most satisfactory and conclusive character."

In *Pomfrey v. Saratoga Springs*, 104 N. Y. 469, a witness testifying to the condition of the walk where the accident occurred was permitted to state that she knew, because she fell there once herself.

That other accidents had happened from an icy sidewalk just before and after this accident was held to be admissible in evidence, to show what the condition in fact was. *Masters v. Troy*, 50 Hun, 485, 3 N. Y. Supp. 450.

And where the previous accident was just 32 L.R.A. (N.S.)

before this one. *Russell v. Toledo*, 19 Ohio C. C. 418, 10 Ohio C. D. 367.

And an hour previous. *Gillrie v. Lockport*, 12 N. Y. S. R. 707.

And about two years previous. *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357.

Evidence of an accident two months prior to the one in question was held admissible to show the defect, in an action for injuries sustained from a fall resulting from a defective sidewalk. *Osborne v. Detroit*, 32 Fed. 30. The court said that the Massachusetts cases held that this evidence is not admissible, but the weight of authority is the other way.

And evidence of many other similar accidents previous to the one in controversy was held admissible, as showing the dangerous condition of the sidewalk, in an action for injuries. *Scott v. New Orleans*, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373.

Where the city had erected a drinking fountain in a public street, and the bridle of a horse became caught on a spout, so that it was pulled off and the horse ran away, to the injury of the driver, evidence of similar accidents was admitted to show that the structure was unsafe. *Bloomington v. Legg*, 161 Ill. 9, 42 Am. St. Rep. 216, 37 N. E. 690. In this case the court said: "This court has held such evidence competent, not for the purpose of showing independent acts of negligence, but as tending to show the common cause of these accidents is a dangerous, unsafe thing. Where an issue is made as to the safety of any machinery or work of man's construction which is for practical use, the manner in which it has served that purpose when put to that use would be a matter material to the issue, and ordinary experience of that practical use, and the effect of such use, bear directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue." The evidence was also held admissible to show notice to defendant.

And the same rule was applied with respect to a stake driven into a sidewalk. *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624.

In case of an accident due to a cover in a coal hole set in a sidewalk, which was alleged to have made the walk unsafe, evidence that several people had fallen at the same place was held admissible for the same reasons stated in the cases immediately preceding. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1070.

Where plaintiff fell on a sidewalk having a smooth surface and steep incline, evidence that other accidents had previously occurred there was held admissible. *Aurora v. Brown*, 12 Ill. App. 122. The court said: "The defect claimed in the walk was that it was so smooth that it was dangerous to travel, on account of travelers slipping down upon it. How could it be told whether men's feet would slip while passing over it unless by experiment or trial, or to what extent or how badly they

would slide?" The court then states that if the attempt was made to show that prudent persons might fall into a hole in the walk, collateral issues would be raised in every case as to whether the persons falling were prudent, and continues: "But where it is attempted to be shown what has happened to others, simply to illustrate a physical fact before or after the occurrence being investigated, if the conditions are the same, we can see no objection to the admission of the evidence."

The same principle was applied in *Kankakee v. Phipps*, 135 Ill. App. 585, and *Rowlands v. Elgin*, 66 Ill. App. 66.

The court lost sight of the distinction in *North Chicago Street R. Co. v. Hudson*, 44 Ill. App. 60, and made an erroneous ruling to the effect that evidence of other accidents at the same place, while the crossing was in the same condition, was incompetent, in an action to recover the value of a horse, lost through having his foot caught in crossing a street railway track. In this case the court said: "The cases conflict as to whether such evidence is admissible. *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358. But this court is committed to the doctrine that it is not. *Kolb v. Chicago Stamping Co.* 33 Ill. App. 488; *Chicago Anderson Pressed Brick Co. v. Reininger*, 41 Ill. App. 324. Whatever inference in favor of the admissibility of such evidence in general might be drawn from *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418, in *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613, is fairly rebutted."

In *Kolb v. Chicago Stamping Co.* 33 Ill. App. 488, where a boy was injured while working on a die press by putting his foot on the pedal, evidence to show that other boys had been hurt by similar machines in the same shop was held to be not competent. The court said: "*Non constat* that they were not injured entirely by their own fault or carelessness. The admission of such evidence would require the trial of their cases in this suit." It is evident that that case properly fell in the other class because the evidence was not offered simply to illustrate a physical fact, but to show injuries which might have resulted from any one of several causes. Its rule is not applicable in the *Hudson Case*. Moreover, in the *Reininger Case*, evidence that the hands of other boys had been drawn into a machine was admitted in rebuttal of opinions that they could not be. In the *Powers Case*, evidence of a prior accident was held proper to charge the city with notice. In the *Hodges Case*, defendant, to meet a charge of negligence in the construction and operation of an elevator, offered evidence that no prior accident had ever occurred in its use. The court, in holding this to be inadmissible, said proof of improper construction and negligent operation would not be rebutted by proof that such construction had never before happened to result in an accident or disaster.

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In *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98, where death was caused by drowning because of the alleged negligence of the city in not placing barriers or warnings of danger at a place where a canal was in proximity to a public street, evidence of previous accidents was held competent. There seems to have been no question of the dangerous character of the place, and the evidence seems to have been admitted on the question of notice; but the court quite fully discusses the question, and disapproves of the early Massachusetts doctrine.

But in an action against a gravel road company for permitting its road to become obstructed so that plaintiff, to pass the obstruction, was compelled to drive outside the road, in attempting to do which his carriage was overturned, to his injury, evidence that other carriages were overturned in making the same attempt is inadmissible. *Ramsey v. Rushville & M. Gravel Road Co.* 81 Ind. 394. The court said: "This offered evidence was outside of and foreign to the issues in this cause, and, as it seems to us, was clearly incompetent."

That other persons had previously fallen on the sidewalk was held to be admissible in evidence as tending to establish the condition of the walk and notice to the city. *Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Yates v. Covington*, 119 Ky. 228, 83 S. W. 592.

Or notice alone. *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

Evidence of other similar accidents was held admissible, in *Madison Twp. v. Scott*, 9 Kan. App. 871, 61 Pac. 967.

Similar accidents from the same cause were permitted to be shown in *Burrows v. Lake Crystal*, 61 Minn. 357, 63 N. W. 745, to prove notice. The court said: "Whether the evidence was competent as evidence in the nature of experiment to prove the defect itself, under the rule laid down in *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358, or whether it is too uncertain that the conditions in each case are sufficiently similar to allow it to come within that rule, we do not decide. Wagon wheels, locomotive wheels, and other machinery act with more uniformity and certainty than do different people's legs, and whether such experiments with the latter are competent to prove the existence of a defect in a sidewalk, we need not decide."

Where other persons had fallen previously on account of the same obstructions on a sidewalk, this was held to be admissible in evidence. *Friedman v. New York*, 63 Misc. 310, 116 N. Y. Supp. 750.

In *Terry v. Perry*, 199 N. Y. 79, — L.R.A. (N.S.) —, 92 N. E. 91, which was a sidewalk accident case, the court said: "In cases where the depression or difference in grade is slight, even where, under the rules of this court, they are so slight that, as a matter of law, they are not ordinarily

sufficient on which to base a recovery against a municipality, evidence of the experience of others in tripping or falling over the same is competent for the purpose of showing, if true, that there is something peculiar or unusual about the formation of the difference in grade or of the depression that makes it dangerous to an extent that an ordinarily prudent person in charge of sidewalks, with knowledge of such peculiar depression, would repair it."

Evidence of previous accidents from the same sidewalk was held to be admissible, although the defendant stipulated to admit notice. *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674. The court said: "While this class of evidence, as pertinent to the subject of notice, may not have been necessary under the admission of appellant, yet we think it was admissible upon another theory, viz., that it tended to be descriptive of the condition of the sidewalk."

In *Hubbard v. Concord*, 35 N. H. 52, 60 Am. Dec. 520, evidence that other persons, in passing upon the sidewalk at the place of the accident in controversy, had slipped there, was held incompetent to show the dangerous condition of the sidewalk. But some doubt is cast upon this case in *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55, the court saying: "We have carefully examined such authorities as our attention has been called to, some of the most important of which are *Hubbard v. Concord*, supra (where evidence of other people slipping on the ice complained of was, on the authority of *Collins v. Dorchester*, 6 Cush. 396, and *Aldrich v. Pelham*, 1 Gray, 510, held incompetent by one of the two judges sitting in the case, the judge who delivered the judgment yielding his own opinion to avoid the consequence of an equal division, and in deference to his senior associate, by whom the point was not thoroughly examined, and where their attention was chiefly occupied by 'other more important questions') . . . and have come to the conclusion that, in this case, the exclusion of the evidence on the ground of its incompetency as a matter of law cannot be sustained."

In *District of Columbia v. Duryee*, 29 App. D. C. 327, 10 A. & E. Ann. Cas. 675, evidence of previous accidents caused by falling over a short hitching post on the sidewalk was received.

And that other persons had stumbled previously over a stump in a street was held to be admissible in evidence. *Lundbeck v. Brooklyn*, 26 App. Div. 595, 50 N. Y. Supp. 421.

And evidence of other persons falling over a water gate projecting from the sidewalk in a street was held competent. *Burns v. Schenectady*, 24 Hun, 10.

That other people stumbled over a plank laid by the city on a sidewalk to cover a hole made to lay pipes in was held to be admissible in evidence. *Fordham v. Gouverneur*, 160 N. Y. 541, 55 N. E. 290.

And where a witness had told a member of the board that he had had an accident in

the road, which was prior to the one in controversy, this was held competent to show notice. *Little v. Iron River*, 102 Wis. 250, 78 N. W. 416.

And that other horses had slipped previously at the same place in a highway was held to be admissible in evidence. *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489.

And evidence that an accident prior to the one in question happened at the same place, and subsequent to this accident a guard rail or fence was placed along the defect, was held competent, where the jury were properly cautioned in regard to evidence of repairs. *Card v. Columbia Twp.* 191 Pa. 254, 43 Atl. 217.

And that other persons, during several years prior to the accident in question, had run against a tree on a highway, was held to be admissible in evidence, as tending to show that the tree was in dangerous proximity to the traveled path of the highway. *Griffin v. Auburn*, 58 N. H. 121.

And where a vehicle was upset from an obstruction in the street, evidence of a similar accident, the night before, was held to be admissible. *Magee v. Troy*, 48 Hun, 383, 1 N. Y. Supp. 24. The court said: "The admissibility of such evidence has been much contested, but the clear weight of authority is in its favor."

And that other accidents had happened two years before to vehicles at the same place in a highway, for want of barriers, was held to be admissible in evidence where the conditions were the same. This was limited to show defective condition and notice, but not negligence. *Ashtabula v. Bartram*, 3 Ohio C. C. 640, 2 Ohio C. D. 372.

Where the conditions were the same, evidence of other accidents to gentle horses from lack of a railing at a dangerous place was held to be admissible. *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650. The court said the matter was in the discretion of the court.

So in regard to the fact that other accidents had previously occurred at the same place on a road for lack of protecting barriers. *Georgetown & D. R. Turnp. Road Co. v. Cannon*, 7 Ky. L. Rep. 379; *Same v. Same*, 12 Ky. L. Rep. 257.

And evidence of a previous accident under similar circumstances was held competent to show that the city had notice of the insufficiency of light on the bridge, in an action for the death of plaintiff's son, caused by falling through an opening. *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

And evidence that a child had been seen to walk backwards into a cellar door opening on a sidewalk, and another similar instance five or six years prior thereto, was held admissible, as bearing remotely upon the question as to the reasonable safety of defendant's sidewalk according to the system adopted by it in regard to cellars thereon in front of business houses. *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95.

And evidence that other persons stepped into the same hole was held admissible to charge defendant with notice, in an action for injuries caused by falling into a hole on a defective sidewalk. *Moore v. Kalamazoo*, 109 Mich. 176, 86 N. W. 1089.

So with the fact that other persons had met with previous accidents at the same hole in a street, while driving. *Dallas v. McCullough*, — Tex. Civ. App., 95 S. W. 1121.

g. Mines.

In an action for the death of an employee struck by falling rocks in a mine, evidence of a previous similar accident was held admissible to show knowledge that the existing conditions were dangerous. *Hotchkiss Min. & Reduction Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331.

And evidence as to a machine in a mine becoming out of repair six weeks prior to an accident, from foul air, was held competent. *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374. The court said: "There was ample evidence tending to show that the compressor was not kept in a reasonably safe condition; that its condition was known to defendant's superintendent, who was not a fellow servant of the plaintiff; and that the superintendent neglected to take proper precautions to prevent such accidents as the one causing the plaintiff's injury."

h. Miscellaneous.

In an action for injuries caused by blasting steel ingots, throwing pieces some distance, and injuring plaintiff at a quarry, evidence proving frequent similar conditions occasioned by previous blasts was held admissible. *Baker v. Hagey*, 177 Pa. 128, 55 Am. St. Rep. 712, 35 Atl. 705.

And evidence of prior explosions of the same boiler was held admissible to show probable life of the boiler tubes, where the conditions were the same. *Chicago G. W. R. Co. v. McDonough*, 88 C. C. A. 517, 161 Fed. 657.

In an action of negligence, it was held that evidence of previous accidents was competent to prove knowledge of dangerous condition and negligence, where a fire extinguisher was kept in an insecure place on a stairway, and was knocked out of the window, injuring plaintiff. *Stair v. Kane*, 84 C. C. A. 126, 156 Fed. 100.

And in an action for injuries caused by falling over pipes in a dark cellar, where evidence was received of a similar accident a few days prior thereto, and that one of the workmen had then said that he was sorry, it was held that this was immaterial error. *Mount v. Brooklyn Union Gas Co.* 72 App. Div. 440, 76 N. Y. Supp. 633.

And evidence of previous accidents in an ash pit trap was held admissible to show knowledge on the part of the defendant of the dangerous character of the pit. With- 32 L.R.A. (N.S.)

ers v. Brooklyn Real Estate Exchange, 106 App. Div. 255, 94 N. Y. Supp. 328.

And evidence that, prior to the injury, another person was injured at the same place, in the same way, being caught between a dormer window and the carriage on a tramway, was held admissible to show notice of the dangerous condition. *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411.

But where evidence of prior accidents was received, the court should have limited this in the instruction at the time to showing defective condition and notice, but not as applicable to negligence. *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560, 40 Am. St. Rep. 686, 35 N. E. 55; *Circleville v. Sohn*, 20 Ohio C. C. 368, 11 Ohio C. D. 193.

i. Where the conditions were not the same.

Such evidence is not admissible where the conditions have changed.

In *Sherman v. Kortright*, 52 Barb. 267, it was held that evidence of previous accidents at the same place in the highway within a week and within two months was inadmissible (1) as this would not show the condition at the time of the accident; (2) this would bring in a collateral issue; (3) the water breaks that were put in this road and caused this accident were made a day prior thereto.

And previous accidents were held to be inadmissible in evidence where changes were made in the condition of the sidewalk between the accidents. *Vander Velde v. Leroy*, 140 Mich. 359, 103 N. W. 812.

And where plaintiff claimed he was injured by a train being derailed by a dip in the track, evidence of prior similar accidents at the same place was held to be inadmissible, where the conditions of cars, and operation, and track were not shown to be the same. This would bring in collateral issues. *Overcash v. Charlotte Electric R. Light & P. Co.* 144 N. C. 572, 57 S. E. 377, 12 A. & E. Ann. Cas. 1040.

And where it was not shown that a previous similar accident was produced by the same cause, it was held to be inadmissible in evidence. *Brauer v. New York*, 74 App. Div. 210, 77 N. Y. Supp. 602. In this case both accidents were caused by a pile of bricks in a road.

And other previous accidents to an elevator were held inadmissible in evidence, where they were not produced by a like cause. *Ryan v. Cortland Carriage Goods Co.* 133 App. Div. 467, 118 N. Y. Supp. 56.

But the mere fact that the accidents were a few feet apart on the same highway, where like conditions prevailed, does not render the evidence inadmissible. *Bailey v. Trumbull*, 31 Conn. 582.

In *Gustafson v. Young*, 91 App. Div. 433, 86 N. Y. Supp. 851, it was held that evidence of previous accidents in the operation of a building was inadmissible. The court said: "Three or four weeks intervened the prior accident and the one in

question. During that period the work would naturally change the character of the structure, even from day to day. If it did not in this case, then it was the duty of the plaintiff to show that it did not. The mere fact that the work was progressive does not warrant the conclusion that the structure, at the end of four weeks, was more dangerous, for the work was only destructive towards reconstruction. The learned counsel for the respondent argues that evidence of similar accidents occurring upon the premises is proper, for the purpose of showing that the defendant had notice of the danger, citing *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Cleveland v. New Jersey S. Co.* 68 N. Y. 306; and *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 26 N. E. 373. And we are also cited to *Bailey v. Rome, W. & O. R. Co.* 139 N. Y. 302, 34 N. E. 918, where the court held that the plaintiff could prove that other brakes on the car were defective, as bearing on the question of inspection of the particular defective brake of which complaint was made. None of these decisions is in point. The vice in the ruling consists in admitting evidence of a prior accident without attendant proof that the physical conditions were materially the same. *Dye v. Delaware, L. & W. R. Co.* 130 N. Y. 671, 29 N. E. 320; *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368; *Morrow v. Westchester Electric R. Co.* 54 App. Div. 592, 67 N. Y. Supp. 21, affirmed in 172 N. Y. 638, 65 N. E. 1119.

And, in *Morrow v. Westchester Electric R. Co.* 54 App. Div. 592, 67 N. Y. Supp. 21, affirmed in 172 N. Y. 638, 65 N. E. 1119, evidence of previous similar accidents to street cars was held inadmissible, in an action for injuries to a passenger where a car was derailed, and it was not shown that the conditions were similar in the other accidents. This case approves *Wooley v. Grant Street & N. R. Co.* 83 N. Y. 121, but distinguishes it, saying: "The location of the switch, the manner of its construction, and the fact that it stood above the level of the street, were all in evidence; it was also in evidence that the plaintiff's mishap occurred at this particular switch, and evidence of the previous accidents was admissible to show that the defendant must have had notice of the dangers which its continued use in the then condition entailed. There were no such facts before the jury in the case at bar, and the exclusion of the evidence was proper."

And, in an action against the owner of premises for injuries caused by stumbling on a board sidewalk, which had been taken up while building was in progress, an offer to prove other previous accidents was properly excluded, where the time or condition was not shown. *Ster v. Tuety*, 45 Hun, 49.

j. Where defendant had not notice.

Evidence of prior accidents is excluded where notice of the same has not been brought home to the defendant.
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This was held with reference to accidents on a turntable. *Bridger v. Asheville & S. R. Co.* 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860.

And in an action for damages for injuries caused by falling in a passageway in a boarding and lodging house, evidence of a similar accident six weeks prior, from the same cause, was held inadmissible. *Martinez v. Planel*, 36 Cal. 578. There was no evidence offered of defendant's knowledge. The court said: "That was *res inter alios acta*,—a collateral issue, which the defendants could not be required to try in this case. If it was competent for the plaintiffs to prove that other persons had met with like accidents at the same place, it would be competent for the defendants to rebut it, and there would be no end, or might be no end, to the issues to be tried. This rule is too well established to need more than a citation of authorities."

In an action for injuries caused by a drain valve in a boiler opening and scalding plaintiff, who was repairing the same, it was held that evidence that, after the accident, the secretary reported that a similar accident occurred at the same place some eighteen months prior to this accident, was inadmissible. *Roche v. Llewellyn Iron Works Co.* 140 Cal. 503, 74 Pac. 147. The court said: "The defendant could not be held to have had knowledge of the prior accident merely because it might, by inquiry, have acquired such knowledge, for it was under no duty to make the inquiry." This was on the ground that subsequent notice of a prior accident, received after a later accident, cannot be received as proof of knowledge of prior condition.

In an action caused by a carriage being broken and plaintiff being thrown violently upon the sidewalk while crossing a railroad, it was held that evidence of the defective roadbed and tracks was competent. Evidence of similar accidents three years prior and one year after this accident at the same place was held inadmissible. *Jacques v. Bridgeport Horse R. Co.* 41 Conn. 61, 19 Am. Rep. 483. In this case no attempt was made to show that defendant had knowledge of the prior accidents.

k. As controlled by the condition in issue.

In *Harrison v. New York C. & H. R. R. Co.* 195 N. Y. 86, 87 N. E. 802, an action for death occasioned by defective telltales at a low bridge, evidence of previous accidents was held inadmissible in this case. The court said: "The admission of this evidence was also erroneous. There are certain cases in which proof of this character is admissible to show that an appliance or place is dangerous, and also to show notice to the defendant of such danger. *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368. No such issue, however, was involved in this case. Unquestionably the presence of the bridge constituted a danger to anyone standing on

the top of the cars. This was not in issue; the measurements showed it. Such, however, is frequently the case with railroad bridges, and the defendant could not be held liable for the construction of the bridge, for that was a danger the risk of which was assumed by the servants."

In an action for causing the death of a brakeman by a low bridge as he was on the top of a car, evidence that a brakeman was knocked off by such bridge while climbing up the side of the car two years before was held inadmissible. *Schlaff v. Louisville & N. R. Co.* 100 Ala. 377, 14 So. 105. This was because the position of the brakeman was required to be on top of the car, unless he was injured while he was climbing to that position, which was not alleged.

Where the plaintiff, while coupling cars, was injured by reason of their overlapping, evidence of previous similar accidents was held inadmissible. *Dye v. Delaware, L. & W. R. Co.* 130 N. Y. 671, 29 N. E. 320. The court said: "It has been held that such evidence is competent in a class of cases where it is important to show that the defendant had notice, or was warned of the dangerous character of municipal sidewalks, or of the inadequacy of facilities provided for the passage of passengers to and from trains over the company's premises. *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357; *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368. 'But the exceptions to the rule have not been, and should not be, so far extended as to permit such testimony in a case where it can have no bearing whatever on the issues; otherwise the general rule, which is well grounded, would be overthrown. In the case before us it did not tend in any degree whatever to the establishment or support of plaintiff's cause of action to show that the defendant had knowledge of the dangers incident to the coupling of cars, such as those which were the occasion of plaintiff's injury.'" In this case it was an obvious physical fact that if the bumpers did not meet, there was nothing to prevent the cars coming together. The defendant admitted this fact and the danger, claiming that this was well known to every switchman. "It would have been different had the defendant said that there was no danger as the cars were constructed. Then accidents would have been proper evidence of danger, and of knowledge of the danger." Appellant's brief, court of appeals.

And that other persons had been injured by falling over the same stepping stone as plaintiff was held immaterial, where the evidence did not show that the same was dangerous, and the stone was not any more exposed than was essential. *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273.

1. Iowa cases.

The question first arose in Iowa in a 32 L.R.A. (N.S.)

case in which a horse was injured by catching its foot between the rail and planking at a railroad crossing. In this case all that was necessary to show the defect was the space left in relation to the size of horses' feet; and the fact of other accidents would furnish little additional aid to the jury. Within the general rule, therefore, evidence with regard to them was not admissible, and the court so ruled. But, in so doing, it cited the early Massachusetts cases, and intimated that all evidence of this character was inadmissible, as raising collateral issues. *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735.

In *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894, the plaintiff fell into an unguarded area along the sidewalk. The conditions were such that, as in the *Hudson Case*, a mere description of the place was sufficient to enable the jury to determine whether or not the city had been negligent in permitting it to remain; but the court, applying the reasoning of the *Hudson Case*, held evidence of other accidents to be inadmissible even to charge defendant with notice. By so doing, the court departed from sound doctrine, and intimated that the result might have been different had it not been for the *Hudson Case*.

In *Smith v. Des Moines*, 84 Iowa, 685, 51 N. W. 77, plaintiff fell on a board sidewalk at a place where some boards were missing. This is the condition in which proof of other accidents is usually held not admissible; but the court, without referring to its former decisions, stated that it was unable to see that there was any error in admitting the evidence, but said that, in any event, the ruling was of so little consequence in the case that it would not reverse on account of it.

In *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319, the court followed the *Smith Case*, and held that the evidence that other persons were seen to stumble at the place on a sidewalk where plaintiff was injured, previous to the accident, was admissible. The court said: "The testimony tended to show the condition of the walk, and was material for that purpose, when taken with other evidence, to show that the condition continued until the accident occurred." But the walk was a wooden one, in bad condition, which might clearly have been shown by direct testimony; and the ruling was therefore of doubtful soundness.

In *Croddy v. Chicago, R. I. & P. R. Co.* 91 Iowa, 598, 60 N. W. 214, the court rightly ruled that, in an action for the killing of a colt, evidence that, prior to this accident, other stock had been killed at the same crossing, was incompetent. In this case there was no claim of defects, but merely of negligence generally.

In *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688, plaintiff fell on a step connecting a sidewalk with a cross walk, and alleged negligence in permitting snow and ice to accumulate upon it, and in per-

mitting it to slope. Whether or not these conditions were defects might easily be determined without reference to other accidents, but the court, without noticing the Smith and Hunt cases, said: "Counsel cite no case decided by this court which would justify the admission of such evidence. Whatever may be the rule in other jurisdictions, it is well settled in this state, that, in such a case, evidence of similar disconnected acts is not admissible.

In *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341, plaintiff was injured by tripping over a loose board in a sidewalk, and the question of the apparent conflict in the Iowa cases was first noticed by the court. It said: "It is insisted that the evidence of other accidents was not admissible; and this is correct, where such evidence is relied upon as substantive proof of an actionable defect. . . . But in the case at bar the evidence was offered to show the existence of this particular loose board in the walk prior to plaintiff's injury, and the manner in which it was discovered by the witnesses. For this purpose the testimony was properly admissible. . . . Three of the authorities . . . cited by appellant are cases where the defect complained of was in the original construction; and in the other (*Croddy v. Chicago, R. I. & P. R. Co.*), which involved an accident at a railway crossing, one element of the negligence complained of was the excessive speed of the train. It is manifest that in none of these instances does the same reason obtain for admitting this kind of evidence as in the case at bar, where the defect was caused by time and changing conditions, and notice of it to defendant had to be shown; and when also the evidence related to it specifically, and not to a general bad condition of the walk." It is apparent from this reasoning that the court had not discovered the thread which appears to run through the cases elsewhere.

In *Wilberding v. Dubuque*, 111 Iowa, 484, 82 N. W. 957, the court corrected its error in the Mathews Case, and held that where others had tripped previously at the same place in a defective sidewalk, evidence of the same was admissible on the question of notice to the city of the defective condition. In this case it was said: "In the earlier cases in which the court held similar evidence not admissible, it does not appear that the evidence was offered for the purpose herein stated, and the court does not seem to have had this precise thought in mind." But the court cites the Smith, Hunt, and Frohs Cases as admitting the evidence to show notice. There is nothing in the reports of those cases indicating that such was the purpose for which the evidence was offered except an incidental remark in the Frohs Case.

So, in *Yeager v. Spirit Lake*, 115 Iowa, 93, 88 N. W. 1095, evidence that another person was injured on the same walk, but 12 L.R.A. (N.S.)

not at the same place, and had served notice on the town, was held competent.

That other accidents had happened at the place on the sidewalk where plaintiff was injured was held admissible in *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379, solely for the purpose of calling witness's attention to the sidewalk.

The correct distinction in the matter is well brought out in *Potter v. Cave*, 123 Iowa, 98, 98 N. W. 569, where a customer in a store fell down an unguarded stairway. In such case defendant's liability would depend on whether or not the stairway was in fact unsafe. This could be ascertained by testimony as to surroundings and conditions, without regard to what others had or had not done. The court held that evidence of other similar accidents, of which defendant had notice, was properly excluded, saying: "The question was not as to whether defendant had reason to believe the stairway to be dangerous, but whether it was in fact maintained in a dangerous condition. If dangerous in fact, his knowledge would be immaterial." The distinction between this case and *District of Columbia v. Armes*, 107 U. S. 619, 27 L. ed. 618, 2 Sup. Ct. Rep. 840, is somewhat hazy, and it may be that the rule cannot be definitely stated independently of the facts as they appear at the trial. But it would seem that if the question whether or not a given structure is safe or unsafe cannot be determined by inspection or common experience, but only by particular experience with it, evidence of such particular experience must, of necessity, be admissible. It may also be that common experience will determine this question with respect to a stairway in a store, while experiment will be necessary to determine it with respect to an unusual construction of a sidewalk.

This distinction is again brought out by *O'Mara v. Newton & N. W. R. Co.* 140 Iowa, 190, 118 N. W. 377, in which a horse crossed cattle guards and was injured by a train, and evidence that other stock had passed over the same guards previously was held to be admissible. The court said: "While in general the happening of similar accidents in no way connected with the accident in controversy, and not shown to have occurred under similar conditions, or for similar causes, may not be admissible for the purpose of showing the negligence of a defendant with reference to such accident . . . here the question was not as to the cause of the accident, about which there was no controversy, but as to whether the cattle guard was reasonably sufficient. The purpose of a cattle guard is to prevent stock from passing along the right of way from the portion thereof which is in the highway to that portion which is inclosed, and the fact that in general it does not serve to afford such restraint is certainly evidence that it is not reasonably sufficient for the purpose for which it is required . . . And certainly the

fact that the particular guard in question has been shown to be insufficient to deter stock in general from crossing may be properly submitted for the consideration of the jury." In such case the jury might have a complete and accurate description of the cattle guard before it, and be no wiser as to whether or not it would turn stock. Evidence that it did not do so would be conclusive upon the question.

In *Heinmiller v. Winston Bros.* 131 Iowa, 32, 6 L.R.A. (N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102, plaintiff's horse was frightened by a steam shovel near a highway, and evidence was admitted that other horses had been frightened under similar circumstances by the same shovel. The court said there could be no liability unless the shovel was reasonably calculated to frighten horses. Plaintiff was bound to prove such fact, "and we know of no better way of doing so than by testimony showing that other ordinarily gentle horses were in fact frightened by it." "The appellants rely on *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, and other like cases against railway companies and cities, in which it is held that evidence of a prior accident at the same place is inadmissible for the purpose of proving that the way was defective. The decisions are all bottomed on the ground that such testimony concerns collateral facts which the defendants were not bound to meet. We think a distinction may be made between such cases and the instant one. In the former, the ultimate questions were whether defects existed. If they did, it was immaterial whether others had been injured thereby; while here it must be proven that the shovel was calculated to produce a certain effect on a certain class of animals."

In *Kirchoff v. Hohnsbehn Creamery Supply Co.* — Iowa, —, 123 N. W. 210, where it was held error to permit defendant's manager to testify that there had never been an accident on the machine causing the injury in question before the one which formed the basis of the action, it was said: *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 531, 44 Am. Rep. 692, 13 N. W. 735; *Bell v. Chicago, B. & Q. R. Co.* 64 Iowa, 321, 20 N. W. 456; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; *Croddy v. Chicago, R. I. & P. R. Co.* 91 Iowa, 598, 60 N. W. 214; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341; *Potter v. Cave*, 123 Iowa, 98, 98 N. W. 569, "are to the effect that proof of like accidents may not be received as substantive evidence of that in controversy." The court further said that there was no issue as to defendant's knowledge. It was charged with notice of the statute requiring the covering of the machine, so that the only design of this evidence must have been to disprove that the accident was the result of the negligence mentioned. It was not admissible for that purpose. 32 L.R.A. (N.S.)

m. Alabama cases.

In this state a case allowing evidence of previous accidents was properly criticized in a subsequent case, because the conditions were not shown to be the same. The criticizing case quotes *Collins v. Dorchester*, 6 Cush. 397, which is an authority against such evidence. Since then the prior case has been approved, and the last expression of the court in that state is in accord with the weight of authority.

In an action for injuries caused by a passenger car on a freight train jumping the track, evidence by a conductor that the freight train had run off of the track seven or eight times the month preceding the injury was competent. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15, a. c. on subsequent appeal 49 Ala. 305.

And evidence that other persons fell on the same projection of rails on a sidewalk, while it was in the same condition, was held admissible to prove its dangerous condition, in an action for injuries caused by falling on a defective sidewalk. It was further held that rebutting negative evidence was also admissible. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

But evidence that other persons previously had fallen at the same place where plaintiff was injured was held inadmissible to show the defective condition of the sidewalk. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424. There was no showing made as to whether or not the condition was the same, or as to the time of prior accidents. The court said: "If there is anything in the case of *Birmingham Union R. Co. v. Alexander*, supra, which expresses a contrary rule, it must be modified as herein declared." This case cites with approval *Collins v. Dorchester*, supra.

In an action for an injury caused by a defective guard rail at a crossing, which caught the wheel of a wagon, evidence that the same condition had caused other accidents three weeks prior was held admissible. *Southern R. Co. v. Posey*, 124 Ala. 486, 26 So. 914. In this case the court said: "As tending to show that an unsafe condition of the crossing existed at the time of the accident, it was competent to prove that the same condition had caused other accidents or difficulty, and for that purpose Robuck's experience with the same projection of the guard rail about three weeks before the accident in question, as testified to by him, was admissible in evidence. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Phelps v. Winona & St. P. R. Co.* 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273.

n. Massachusetts cases.

The rule in this state appears to be that evidence of prior accidents will be held to be inadmissible, and the cases consistently hold this by a line of authorities. It

appears, however, that the courts are not satisfied with this rule, even if they do not criticize it. In *Shea v. Glendale Elastic Fabrics Co.* 162 Mass. 463, 38 N. E. 1123, the court allowed evidence that other employees were similarly affected previously by lead poisoning. Massachusetts cases have allowed without discussion evidence that the machinery in question had repeated, or had acted as on the occasion in question. In this state an exception appears to the rule in case of frightening horses, and evidence of previous frights to other horses from the same object is held to be admissible.

In *Aldrich v. Pelham*, 1 Gray, 510, the court held that to show that a highway alleged to be too narrow was of sufficient width, evidence was not admissible to show that wagons had passed each other at the place of accident in safety. The court said the width of the road is a circumstance which can be ascertained with the greatest ease and certainty by actual measurement. It appears, therefore, that the evidence offered would not only introduce collateral issues, but was not the best. The court relies on *Collins v. Dorchester*, 6 Cush. 396. In this latter case it was said: "It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. *Standish v. Washburn*, 21 Pick. 237. In the *Collins Case* an accident was alleged to have occurred because of the absence of a rail on top of posts marking a road through a marsh, and evidence of a prior similar accident was held to be inadmissible for the purpose of proving that the road was defective, although the trial judge intimated that the evidence might be admissible to show notice to the town. It will thus be seen that the ruling seems to have been that mere evidence of the happening of an accident was no proof of negligence in maintaining the road. This flit with other cases, where proof of accident might be admitted and still not be in con- cidents under other circumstances has been held to be competent to show negligence in maintaining the place in question.

In *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55, the court commented on *Collins v. Dorchester*, 6 Cush. 396, and the cases following it, as follows: "The question was whether, in the undisputed condition of the road, the absence of such a railing, exposing travelers to the danger of their wheels going outside of and locking upon the posts, was a defect. No experiment or experience of the plaintiff, or *Sprague*, or anyone else, was necessary to show that the posts were capable of being run against. It does not appear that any such experiment or experience would assist the judgment of the jury on the question whether, in the undisputed condition of the road, the posts were likely to

be run against. Such a case is no authority for holding that the disputed horse-frightening capacity of a certain pile of lumber cannot be shown by experience. . . . In *Collins v. Dorchester*, supra, an experiment was not necessary to prove an undisputed fact. In *Aldrich v. Pelham*, 1 Gray, 510, and *Kidder v. Dunstable*, 11 Gray, 342, it was considered settled by *Collins v. Dorchester*, that a disputed fact could not be proved by experiment. In this view of the unsound foundation of authorities tending to sustain the ruling in this case, they cannot be regarded as of great weight."

In the case of *Kidder v. Dunstable*, the accident occurred by two teams trying to pass each other in a drifted road; and the town offered testimony that other teams had done so in safety, which the court, without discussion, and in reliance on the *Collins* and *Aldrich Cases*, held to be inadmissible. It would seem that the fact that other teams had passed in safety at the place in question, before or after the accident, would have very little bearing on the question of the negligence of the town with respect to a drifted road, and this distinction is carefully pointed out by the New Hampshire court, which was dealing with the question of the likelihood of a particular pile of lumber frightening horses, and therefore rendering the road in which it was piled unsafe. The two questions are quite distinct, as is recognized by the Massachusetts court.

In *Hinckley v. Barnstable*, 109 Mass. 126, it was said: "Accordingly it is held that evidence that accidents or difficulties had occurred at the same place, but at a different time, is inadmissible, because it raises a collateral issue."

And in *Menard v. Boston & M. R. Co.* 150 Mass. 380, 23 N. E. 214, it was held that evidence that other accidents had occurred at the same crossing within a short time was properly excluded.

And in *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605, which involved a sidewalk accident, defendant sought to show by a keeper of a store near the place in question that he had never heard of a prior accident because of the defect. The court held this evidence to be inadmissible, saying: "To admit such testimony would raise a collateral issue, which would have no legitimate bearing on the principal fact in dispute. The defendant contends that the evidence was admissible on the question whether the defect might have been remedied by the exercise of reasonable care and diligence on the part of the city. This hole in the flagging existed when the flagging was laid, five or six years before the accident. During this time it was more or less filled in with dirt, which was liable to be swept out when the sidewalk was swept. It could hardly be contended that such a condition of things could not be remedied by the exercise of reasonable care and diligence. However this may be, it

the top of the cars. This was not in issue; the measurements showed it. Such, however, is frequently the case with railroad bridges, and the defendant could not be held liable for the construction of the bridge, for that was a danger the risk of which was assumed by the servants."

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case in which a horse was injured by catching its foot between the rail and planking at a railroad crossing. In this case all that was necessary to show the defect was the space left in relation to the size of horses' feet; and the fact of other accidents would furnish little additional aid to the jury. Within the general rule, therefore, evidence with regard to them was not admissible, and the court so ruled. But, in so doing, it cited the early Massachusetts cases, and intimated that all evidence of this character was inadmissible, as raising collateral issues. *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735.

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In *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688, plaintiff fell on a step connecting a sidewalk with a cross walk, and alleged negligence in permitting snow and ice to accumulate upon it, and in per-

mitting it to slope. Whether or not these conditions were defects might easily be determined without reference to other accidents, but the court, without noticing the Smith and Hunt cases, said: "Counsel cite no case decided by this court which would justify the admission of such evidence. Whatever may be the rule in other jurisdictions, it is well settled in this state, that, in such a case, evidence of similar disconnected acts is not admissible.

In *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341, plaintiff was injured by tripping over a loose board in a sidewalk, and the question of the apparent conflict in the Iowa cases was first noticed by the court. It said: "It is insisted that the evidence of other accidents was not admissible; and this is correct, where such evidence is relied upon as substantive proof of an actionable defect. . . . But in the case at bar the evidence was offered to show the existence of this particular loose board in the walk prior to plaintiff's injury, and the manner in which it was discovered by the witnesses. For this purpose the testimony was properly admissible. . . . Three of the authorities . . . cited by appellant are cases where the defect complained of was in the original construction; and in the other (*Croddy v. Chicago, R. I. & P. R. Co.*), which involved an accident at a railway crossing, one element of the negligence complained of was the excessive speed of the train. It is manifest that in none of these instances does the same reason obtain for admitting this kind of evidence as in the case at bar, where the defect was caused by time and changing conditions, and notice of it to defendant had to be shown; and when also the evidence related to it specifically, and not to a general bad condition of the walk." It is apparent from this reasoning that the court had not discovered the thread which appears to run through the cases elsewhere.

In *Wilberding v. Dubuque*, 111 Iowa, 484, 82 N. W. 957, the court corrected its error in the *Mathews Case*, and held that where others had tripped previously at the same place in a defective sidewalk, evidence of the same was admissible on the question of notice to the city of the defective condition. In this case it was said: "In the earlier cases in which the court held similar evidence not admissible, it does not appear that the evidence was offered for the purpose herein stated, and the court does not seem to have had this precise thought in mind." But the court cites the Smith, Hunt, and *Frohs Cases* as admitting the evidence to show notice. There is nothing in the reports of those cases indicating that such was the purpose for which the evidence was offered except an incidental remark in the *Frohs Case*.

So, in *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095, evidence that another person was injured on the same walk, but 32 L.R.A. (N.S.)

not at the same place, and had served notice on the town, was held competent.

That other accidents had happened at the place on the sidewalk where plaintiff was injured was held admissible in *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379, solely for the purpose of calling witness's attention to the sidewalk.

The correct distinction in the matter is well brought out in *Potter v. Cave*, 123 Iowa, 98, 98 N. W. 569, where a customer in a store fell down an unguarded stairway. In such case defendant's liability would depend on whether or not the stairway was in fact unsafe. This could be ascertained by testimony as to surroundings and conditions, without regard to what others had or had not done. The court held that evidence of other similar accidents, of which defendant had notice, was properly excluded, saying: "The question was not as to whether defendant had reason to believe the stairway to be dangerous, but whether it was in fact maintained in a dangerous condition. If dangerous in fact, his knowledge would be immaterial." The distinction between this case and *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840, is somewhat hazy, and it may be that the rule cannot be definitely stated independently of the facts as they appear at the trial. But it would seem that if the question whether or not a given structure is safe or unsafe cannot be determined by inspection or common experience, but only by particular experience with it, evidence of such particular experience must, of necessity, be admissible. It may also be that common experience will determine this question with respect to a stairway in a store, while experiment will be necessary to determine it with respect to an unusual construction of a sidewalk.

This distinction is again brought out by *O'Mara v. Newton & N. W. R. Co.* 140 Iowa, 190, 118 N. W. 377, in which a horse crossed cattle guards and was injured by a train, and evidence that other stock had passed over the same guards previously was held to be admissible. The court said: "While in general the happening of similar accidents in no way connected with the accident in controversy, and not shown to have occurred under similar conditions, or for similar causes, may not be admissible for the purpose of showing the negligence of a defendant with reference to such accident. . . . here the question was not as to the cause of the accident, about which there was no controversy, but as to whether the cattle guard was reasonably sufficient. The purpose of a cattle guard is to prevent stock from passing along the right of way from the portion thereof which is in the highway to that portion which is inclosed, and the fact that in general it does not serve to afford such restraint is certainly evidence that it is not reasonably sufficient for the purpose for which it is required. . . . And certainly the

fact that the particular guard in question has been shown to be insufficient to deter stock in general from crossing may be properly submitted for the consideration of the jury." In such case the jury might have a complete and accurate description of the cattle guard before it, and be no wiser as to whether or not it would turn stock. Evidence that it did not do so would be conclusive upon the question.

In *Heinmiller v. Winston Bros.* 131 Iowa, 32, 6 L.R.A. (N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102, plaintiff's horse was frightened by a steam shovel near a highway, and evidence was admitted that other horses had been frightened under similar circumstances by the same shovel. The court said there could be no liability unless the shovel was reasonably calculated to frighten horses. Plaintiff was bound to prove such fact, "and we know of no better way of doing so than by testimony showing that other ordinarily gentle horses were in fact frightened by it." "The appellants rely on *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, and other like cases against railway companies and cities, in which it is held that evidence of a prior accident at the same place is inadmissible for the purpose of proving that the way was defective. The decisions are all bottomed on the ground that such testimony concerns collateral facts which the defendants were not bound to meet. We think a distinction may be made between such cases and the instant one. In the former, the ultimate questions were whether defects existed. If they did, it was immaterial whether others had been injured thereby; while here it must be proven that the shovel was calculated to produce a certain effect on a certain class of animals."

In *Kirchoff v. Hohnsbehn Creamery Supply Co.* — Iowa, —, 123 N. W. 210, where it was held error to permit defendant's manager to testify that there had never been an accident on the machine causing the injury in question before the one which formed the basis of the action, it was said: *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 531, 44 Am. Rep. 692, 13 N. W. 735; *Bell v. Chicago, B. & Q. R. Co.* 64 Iowa, 321, 20 N. W. 456; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; *Croddy v. Chicago, R. I. & P. R. Co.* 91 Iowa, 598, 60 N. W. 214; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Frohs v. DuBuque*, 109 Iowa, 219, 80 N. W. 341; *Potter v. Cave*, 123 Iowa, 98, 98 N. W. 569, "are to the effect that proof of like accidents may not be received as substantive evidence of that in controversy." The court further said that there was no issue as to defendant's knowledge. It was charged with notice of the statute requiring the covering of the machine, so that the only design of this evidence must have been to disprove that the accident was the result of the negligence mentioned. It was not admissible for that purpose. 32 L.R.A. (N.S.)

m. Alabama cases.

In this state a case allowing evidence of previous accidents was properly criticized in a subsequent case, because the conditions were not shown to be the same. The criticizing case quotes *Collins v. Dorchester*, 6 Cush. 397, which is an authority against such evidence. Since then the prior case has been approved, and the last expression of the court in that state is in accord with the weight of authority.

In an action for injuries caused by a passenger car on a freight train jumping the track, evidence by a conductor that the freight train had run off of the track seven or eight times the month preceding the injury was competent. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15, a. c. on subsequent appeal 49 Ala. 305.

And evidence that other persons fell on the same projection of rails on a sidewalk, while it was in the same condition, was held admissible to prove its dangerous condition, in an action for injuries caused by falling on a defective sidewalk. It was further held that rebutting negative evidence was also admissible. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

But evidence that other persons previously had fallen at the same place where plaintiff was injured was held inadmissible to show the defective condition of the sidewalk. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424. There was no showing made as to whether or not the condition was the same, or as to the time of prior accidents. The court said: "If there is anything in the case of *Birmingham Union R. Co. v. Alexander*, supra, which expresses a contrary rule, it must be modified as herein declared." This case cites with approval *Collins v. Dorchester*, supra.

In an action for an injury caused by a defective guard rail at a crossing, which caught the wheel of a wagon, evidence that the same condition had caused other accidents three weeks prior was held admissible. *Southern R. Co. v. Posey*, 124 Ala. 486, 26 So. 914. In this case the court said: "As tending to show that an unsafe condition of the crossing existed at the time of the accident, it was competent to prove that the same condition had caused other accidents or difficulty, and for that purpose Robuck's experience with the same projection of the guard rail about three weeks before the accident in question, as testified to by him, was admissible in evidence. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Phelps v. Winona & St. P. R. Co.* 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273.

n. Massachusetts cases.

The rule in this state appears to be that evidence of prior accidents will be held to be inadmissible, and the cases consistently hold this by a line of authorities. It

appears, however, that the courts are not satisfied with this rule, even if they do not criticize it. In *Shea v. Glendale Elastic Fabrics Co.* 162 Mass. 463, 38 N. E. 1123, the court allowed evidence that other employees were similarly affected previously by lead poisoning. Massachusetts cases have allowed without discussion evidence that the machinery in question had repeated, or had acted as on the occasion in question. In this state an exception appears to the rule in case of frightening horses, and evidence of previous frights to other horses from the same object is held to be admissible.

In *Aldrich v. Pelham*, 1 Gray, 510, the court held that to show that a highway alleged to be too narrow was of sufficient width, evidence was not admissible to show that wagons had passed each other at the place of accident in safety. The court said the width of the road is a circumstance which can be ascertained with the greatest ease and certainty by actual measurement. It appears, therefore, that the evidence offered would not only introduce collateral issues, but was not the best. The court relies on *Collins v. Dorchester*, 6 Cush. 396. In this latter case it was said: "It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. *Standish v. Washburn*, 21 Pick. 237. In the *Collins Case* an accident was alleged to have occurred because of the absence of a rail on top of posts marking a road through a marsh, and evidence of a prior similar accident was held to be inadmissible for the purpose of proving that the road was defective, although the trial judge intimated that the evidence might be admissible to show notice to the town. It will thus be seen that the ruling seems to have been that mere evidence of the happening of an accident was no proof of negligence in maintaining the road. This flirts with other cases, where proof of accident might be admitted and still not be in coincidence under other circumstances has been held to be competent to show negligence in maintaining the place in question.

In *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55, the court commented on *Collins v. Dorchester*, 6 Cush. 396, and the cases following it, as follows: "The question was whether, in the undisputed condition of the road, the absence of such a railing, exposing travelers to the danger of their wheels going outside of and locking upon the posts, was a defect. No experiment or experience of the plaintiff, or Sprague, or anyone else, was necessary to show that the posts were capable of being run against. It does not appear that any such experiment or experience would assist the judgment of the jury on the question whether, in the undisputed condition of the road, the posts were likely to

be run against. Such a case is no authority for holding that the disputed horse-frightening capacity of a certain pile of lumber cannot be shown by experience.

. . . In *Collins v. Dorchester*, supra, an experiment was not necessary to prove an undisputed fact. In *Aldrich v. Pelham*, 1 Gray, 510, and *Kidder v. Dunstable*, 11 Gray, 342, it was considered settled by *Collins v. Dorchester*, that a disputed fact could not be proved by experiment. In this view of the unsound foundation of authorities tending to sustain the ruling in this case, they cannot be regarded as of great weight."

In the case of *Kidder v. Dunstable*, the accident occurred by two teams trying to pass each other in a drifted road; and the town offered testimony that other teams had done so in safety, which the court, without discussion, and in reliance on the *Collins* and *Aldrich Cases*, held to be inadmissible. It would seem that the fact that other teams had passed in safety at the place in question, before or after the accident, would have very little bearing on the question of the negligence of the town with respect to a drifted road, and this distinction is carefully pointed out by the New Hampshire court, which was dealing with the question of the likelihood of a particular pile of lumber frightening horses, and therefore rendering the road in which it was piled unsafe. The two questions are quite distinct, as is recognized by the Massachusetts court.

In *Hinckley v. Barnstable*, 109 Mass. 126, it was said: "Accordingly it is held that evidence that accidents or difficulties had occurred at the same place, but at a different time, is inadmissible, because it raises a collateral issue."

And in *Menard v. Boston & M. R. Co.* 150 Mass. 380, 23 N. E. 214, it was held that evidence that other accidents had occurred at the same crossing within a short time was properly excluded.

And in *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605, which involved a sidewalk accident, defendant sought to show by a keeper of a store near the place in question that he had never heard of a prior accident because of the defect. The court held this evidence to be inadmissible, saying: "To admit such testimony would raise a collateral issue, which would have no legitimate bearing on the principal fact in dispute. The defendant contends that the evidence was admissible on the question whether the defect might have been remedied by the exercise of reasonable care and diligence on the part of the city. This hole in the flagging existed when the flagging was laid, five or six years before the accident. During this time it was more or less filled in with dirt, which was liable to be swept out when the sidewalk was swept. It could hardly be contended that such a condition of things could not be remedied by the exercise of reasonable care and diligence. However this may be, it

is enough to say that the evidence sought to be introduced has no legitimate bearing upon this issue."

In an action for injuries by falling on a step of a staircase, evidence that there was a previous accident was held immaterial, and was excluded, where other evidence showed that the step was loose about two months prior to the accident. *Dean v. Murphy*, 169 Mass. 413, 48 N. E. 283. In this case the court said: "The presiding justice might well consider the question and the offer as tending to draw the attention of the jury from the material question as to the condition of the steps, and to prejudice the defendant by compelling him to disprove or to explain an accident of which he was not shown to have had any previous information, and which, as an accident, was not material to the question at issue."

And in *Grebenstein v. Stone & W. Engineering Corp.* 205 Mass. 431, 91 N. E. 411, which was for injuries from electric wires, the court said: "Evidence of the previous accident to the plaintiff was incompetent. It had no proper bearing upon any of the issues in the case." The case does not show whether this previous accident was at this place or not.

An example of a character of case which depends not so much on a defect in the place as on that of negligence generally is *Walker v. Williamson*, 205 Mass. 514, 91 N. E. 885, where a block used in connection with defendant's business fell from a table and injured an employee. The court said that proof that the block had fallen before did not add anything to the value of the description of the block and of its use, and could be properly excluded, in the opinion of the presiding judge.

But evidence offered to show that other persons, some of whom worked at the same time, in the same room with plaintiff, and under similar conditions, were ill from lead poisoning, and that a few months prior and a few months after the incident in question, other persons who worked in the mill were also sick from the same cause, was held competent, in an action for injuries to health. *Shea v. Glendale Elastic Fabrics Co.* 162 Mass. 463, 38 N. E. 1123. In this case the court places the responsibility as to the admissibility of such evidence in the discretion of the trial court, and cites with approval the leading case of *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840. The court said: "If it seems probable that a line of inquiry will lead into side issues not anticipated by the parties, and which will be likely to distract and confuse the jury, and unreasonably protract the trial, the questions should be excluded; but if, on proofs of identity or likeness of conditions, a fact will have important probative force, it should not be excluded if its relation to the case can easily be shown."

In *Bemis v. Temple*, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970, the court allowed evidence to show that ordinarily gentle

horses were frightened by a flag on other occasions, and claimed that this was the rule, without exception. It distinguished the cases refusing evidence of previous accidents in actions for defective highways, saying: "The ground on which these cases were decided is, that such collateral inquiries would be opened before the evidence could be properly received as would multiply issues for the trial of which the parties had had no opportunity to prepare, and would lead away from the main issue, and tend to confuse the jury. In most of these cases the facts and circumstances of other accidents were so diverse and complicated that the decisions rest on grounds which are generally deemed satisfactory."

A careful discrimination will show that the Massachusetts cases are not, on their facts, opposed to the general rule, but that, when the evidence has been rejected, it had little or no bearing on the main question at issue.

o. Maine cases.

Maine has laid down the rule positively that evidence of other accidents would not be admissible to prove defective conditions in cases similar to the earlier Massachusetts cases, where the evidence was properly excluded, but in which the court may have used more general language than was called for by the cases under decision. The first case seems to be that of *Hubbard v. Androscoggin & K. R. Co.* 39 Me. 506, in which an action was brought against a railroad company for changing the grade of a highway in such a way as to interfere with plaintiff's access. Plaintiff offered evidence that, on two occasions, the carriages of travelers had been upset in attempting to pass from the highway to his premises. This evidence was admitted in the lower court, but held to have been erroneously so on appeal. The Appellate court said: "The condition of the road, as left by the defendants, was a matter for the consideration of the jury. That condition was to be ascertained from the testimony of witnesses. If the fact that one or more persons had been upset in driving over the road in question were to be regarded as admissible in evidence, then it would necessarily be proper to receive testimony to show that the accidents which may have occurred were the results of carelessness or negligence on the part of those sustaining the injuries of which complaint is made. It would be equally proper to show the number of carriages which may have safely passed over. But if proof of this description should be received, then the opposing party would obviously have the right of showing that in all of those instances extraordinary care had been used, for the purpose of rebutting the inference which might otherwise arise, that the road was safe and convenient. As many distinct issues might thus be raised as there were instances of carriages passing over the road. The attention of the

jury would thus be diverted from the questions really in dispute, and directed to what is entirely collateral. Neither can such evidence be regarded as necessary. The width of the road, the smoothness of its surface, its elevations and depressions, the obstructions remaining thereon and their size and position, are all susceptible of exact admeasurement, and from these facts, as disclosed with more or less of accuracy, it will be for the jury to determine how far and to what extent the condition of the road may have been the cause of injury to the party complaining." In that case it will be observed the rejected evidence related to a particular condition which was capable of full proof without the necessity of showing the accidents. Another class of cases often cited upon this question involves simply the question of negligent use of property, as in *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262, which involved liability for leaving an elevator door open in a dimly lighted passage, to plaintiff's injury. Here there was merely a question of negligence, upon which evidence of negligence on other occasions would have no bearing, and was therefore inadmissible.

So, in *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810, 5 Atl. 71, which was an attempt to hold a contractor liable for a defect in a cross walk which caused injury to plaintiff, it was held error to permit evidence that numerous persons had driven over the walk without injury.

In *Bremner v. New Castle*, 83 Me. 415, 23 Am. St. Rep. 782, 22 Atl. 382, the court, while purporting to follow its earlier cases and those of Massachusetts, pushes the doctrine further than it had been carried in the former cases, and further than other courts have been willing to go. In that case there was an alleged defect in a plank in a bridge, which caused plaintiff's injury. The court held that the fact that other persons had been injured at the same place on account of this plank was inadmissible. The court seems to have lost sight of the true distinction here. There was no question as to the condition of the plank, but the question was whether or not it was a defect. Upon this question its effect upon travelers generally may have been material. On the other hand, it would not have been competent to show a defective condition by proving the occurrence of accidents, without more.

That the court had recognized this distinction is shown by the previous case of *Hill v. Portland & R. R. Co.* 55 Me. 438, 92 Am. Dec. 601, where, to show liability for sounding a whistle, evidence was held admissible to the effect that other gentle horses had frequently been frightened by it, previous to the accident. The court said: "We think the defendants might have proved, if they could, that the whistle had been in use for years, and that no horse had ever been alarmed by it. And so, as bearing on the same points, the plaintiff

might show what effect had actually been produced by it on the horses."

So also the court had held in *Crocker v. McGregor*, 70 Me. 282, 49 Am. Rep. 611, that evidence that shortly before and after an accident to plaintiff, other horses were frightened by the steam from a mill, was competent. The court said: "Evidence showing that it naturally frightened ordinary horses when being driven by it was competent to show its effect upon the public travel, its character, and its capacity to do mischief. Its effect on horses was not dependent upon the acts of men, which may be the result of incapacity or negligence, but was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is therefore distinguishable from cases against towns for injury from defects in a highway, in which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues."

p. Virginia cases.

Moore v. Richmond, 85 Va. 538, 8 S. E. 387, was an action to hold the city liable for injury caused by falling into a hole in a sidewalk; and the court excluded evidence that another person had fallen into the same hole at about the same time, on the ground that the fact sought to be proved was collateral to the matter in issue. There should be no question that a hole in a sidewalk was a defect, and it was useless to show other accidents to enable the jury to arrive at that conclusion.

q. Oregon and Wisconsin cases.

In *Davis v. Oregon & C. R. Co.* 8 Or. 172, where a passenger on a ferryboat stepped off as it approached the shore, and was drowned, because of the alleged gross negligence of defendant in failing to have sufficient light and a guard, and also because of unskilful management, evidence of a prior accident at the same place, under similar circumstances, was held inadmissible. This was on the ground that it would bring in collateral issues. In this case the court said: "Every case of this nature must depend on its own facts and circumstances. If the appellant should be allowed to prove that another accident had occurred there under similar circumstances, at some prior date, the other side would have been entitled to inquire into the circumstances of that transaction. The tendency of such evidence would have been to mislead and confuse the jury."

In *Phillips v. Willow*, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731, plaintiff was injured by the overturning of the cutter in which she was riding by striking a stone which was alleged to be in or very near the traveled track of the highway, and to con-

stitute a defect or dangerous obstruction thereof. To establish these contentions, other persons were allowed to testify that they had struck the same stone and nearly tipped over. This case is clearly within the class in which such evidence is not admissible, the court saying: "The witnesses could describe the stone, its size and relation to the traveled track, and leave to the jury the question whether it amounted to a defect, or was of a dangerous character to travelers. This is not a case appropriate for giving the results of experience, nor to inquire as to who have met or who have avoided accidents at the *locus in quo*." But the court, in discussing the question, uses the argument against the admission of collateral evidence in all cases of this character, saying, *inter alia*: "It is apparent that if this testimony was relevant to prove a defect, as was said in *Bloor v. Delafield*, 69 Wis. 273, 34 N. W. 115, it would have been competent to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect." The court, however, stated that the evidence was not introduced to show notice, for which purpose it might have been admissible.

The *Bloor Case* was an action brought to recover damages for injuries caused by the frightening of a horse by a mortar box left within the limits of the highway. The defendant offered evidence to show that numerous horses had been driven past it without being frightened. The court held that this was properly rejected on the ground that it would raise numerous collateral issues, but it expressly states that these horses were driven past in daylight, and the fact that they were not frightened would have no tendency to prove that a horse would not be frightened after dusk, at the time when the injury for which the action was brought happened. This case is well within the rule of the cases generally, which exclude negative evidence of this character.

In *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256, however, the court appears to push its doctrine beyond the division line, and commit itself to the position that in no case is evidence of other accidents admissible to show defects. In that case, plaintiff fell on a sloping icy sidewalk, and the court, in holding that evidence of similar accidents to others was inadmissible, quoted as follows: The rule seems to be well settled "that the fact that other persons than the plaintiff got hurt at a particular place does not tend to prove that the defect was of such a dangerous character as to make it negligence on the part of the municipal officers not to take measures to remedy it." That may be true, but, as shown by the many cases cited above, it is evidence that the condition shown was not safe, and the question of its effect is for the jury. In that case the court said: "For the purpose of showing notice of a 32 L.R.A. (N.S.)

defect in a highway on the part of the authorities, evidence of previous accidents at the same place, similar to the one complained of, may be admissible; but, even in that case, such evidence should be limited strictly to the question of notice."

And in *Barrett v. Hammond*, 87 Wis. 654, 58 N. W. 1053, the court commits itself unreservedly against the admission of such evidence by holding that, for the purpose of showing the bad condition of a board walk on which plaintiff fell, evidence that others had tripped and fallen because of loose boards was inadmissible. Very few courts go to this extent.

r. Missouri cases.

In *Goble v. Kansas City*, 148 Mo. 475, 50 S. W. 84, plaintiff fell by stepping into a hole in a sidewalk, and the court excluded evidence that others had fallen by stepping into the same hole. The court, in its argument, favors the exclusion of all such evidence, but this is one of the cases where such evidence is not necessary. The court said the question in issue was the condition of the walk; and, if defective, did the defect cause plaintiff's injury while using the walk with proper and reasonable care? Testimony as to the condition of the walk was all that was necessary to enable the jury to reach its conclusion.

In *Smart v. Kansas City*, 91 Mo. App. 591, plaintiff fell over an iron cover to a coal hole, which, with its supports, stuck up nearly 6 inches above the walk. The court, following the *Goble Case*, refused to permit evidence of falls by other persons. There seems to have been no question that the obstruction was in fact a defect, so that the case is within the rule of the *Goble Case*, and the court says the question is not so much whether a defect is such that one could fall over it, as it is whether in the particular instance complained of, the injured person would have fallen over it if exercising ordinary care in the particular circumstance in which he was placed. "The fact that a man falls on a sidewalk shows that he can fall there, but it does not show any of several other conditions necessary to make a case against the municipality. It thus leads to an investigation of a number of collateral issues, which should, when possible, be avoided."

But that the court did not intend fully to adopt the rule excluding evidence of other accidents is apparent from *Charlton v. St. Louis & S. F. R. Co.* 200 Mo. 413, 98 S. W. 529, where a brakeman was knocked from a car by a stand pipe, and evidence that others had collided with it was held admissible. Here was a known structure, and one way of showing whether or not it was dangerous was to prove the brakemen's experience with it. This case and the prior one well illustrate the two sides of the rule.

Of a similar nature, for the purpose of showing the character of a pile of boards

in a highway, which frightened plaintiff's horse, evidence that other horses were frightened by the same lumber pile was held admissible. *Golden v. Chicago, R. I. & P. R. Co.* 84 Mo. App. 59. The court said if leaving an object in a highway which is calculated to frighten horses is a wrong, and the question is made whether the object is so calculated, what better evidence can be had than that of actual experiment?

So, where plaintiff was injured by being carried over an embankment as the same had been constructed by a city as part of its highway, its character being one of the objects of inquiry in the case, evidence of other similar accidents was held admissible to show its dangerous character in its unguarded condition. *Golden v. Clinton*, 54 Mo. App. 114.

Edwards v. Barber Asphalt Paving Co. 92 Mo. App. 226, in which the driver of an automatic dump wagon was injured by the wagon dumping at the wrong time because of an alleged defect in the fastening, is justified in its ruling excluding evidence of other accidents in the use of the same wagon by the statement that the fastening was as simple as can well be imagined. Its construction, whether safe or unsafe, was open to the observation and understanding of any man of ordinary sense. If this is true, there was no occasion for evidence of other accidents to show that it was unsafe.

Where an employee of defendant was caught by the hair in a shaft and injured, she offered evidence that another girl had been injured under similar circumstances, "for the purpose of showing that the location of the shaft was dangerous to employees, and for the further purpose of showing notice of the danger to defendant. The court said: "Evidence of a similar character was admitted in *Rogers v. Meyerson Printing Co.* 103 Mo. App. 683, 78 S. W. 79; *Franklin v. Missouri, K. & T. R. Co.* 97 Mo. App. 473, 71 S. W. 540; *Golden v. Clinton*, 54 Mo. App. 100; *District of Columbia v. Armes*, 107 U. S. 520, 27 L. ed. 619, 2 Sup. Ct. Rep. 840; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418. The rule established by the authorities cited is that although isolated instances of negligence are not competent proof, yet where such instances go to show the existence of a condition, they are competent. In this case, it went to show the dangerous character of the unguarded shaft." *McGinnis v. R. M. Rigby Printing Co.* 122 Mo. App. 227, 99 S. W. 4.

In *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S. W. 675, the court rules that negligence in dropping a barrel from a building, to the injury of a passer-by, cannot be established by the fact that they had been dropped on former occasions. The court discusses the prior cases, but this evidence is not admissible within any of the rules.

In *Winkle v. Peck Dry Goods Co.* 132 Mo. App. 666, 112 S. W. 1026, where a

small elevator used to carry goods from floor to floor fell when overloaded, and killed an employee by the rebound of the counterweight, evidence of its fall on previous occasions, under similar circumstances, was held admissible to show, first, that it was in a defective condition, and second, that defendant had actual or constructive notice of the defects. Speaking of the rule excluding evidence of disconnected acts of negligence, the court said: "The rule is founded on the idea that as such acts have no direct bearing on the issue of negligence in a given case, they are collateral and irrelevant; but it has no application to master and servant cases where prior occurrences sought to be shown appear to have a direct bearing on the questions of whether the instrumentality from which the servant received his injury was in a defective condition, and of the master's knowledge, either actual or constructive, of the existence of such condition."

III. Condition subsequent to the accident.

a. Generally.

The rule seems to be that where the condition has not changed, the evidence will be admissible. But unless the evidence relates to a time so close to the accident that it is apparent the condition has not changed, evidence as to the condition at a later period will not be received. The exceptions to this are where, from the substance of the matter, the lapse of time would not make any material difference. So, evidence of the condition at a subsequent period is held admissible, in rebuttal of evidence.

Where a yard master was riding on the footboard of an engine, and was injured by the same striking a rock carelessly left near the track, evidence showing the height of the footboard was held admissible, where there had been no change in its condition. *Galveston, H. & H. R. Co. v. Bohan*, — Tex. Civ. App. —, 47 S. W. 1050.

And where there was no change in the condition of a railroad track between May and December, evidence of the condition of the ties, showing tendency to cause the train to sway, was held to be admissible, where a mail clerk had been struck by a mail crane. *Missouri, K. & T. R. Co. v. Williams*, — Tex. —, 125 S. W. 881.

And where there was an accident overturning a carriage, evidence that afterwards the transom bolt was found to be broken was held to be admissible. *Martin v. Towle*, 59 N. H. 31. The court said that if this did not show that the defendant was guilty of negligence in not providing a suitable carriage, it was simply immaterial.

And in an action for personal injuries caused by plaintiff's arm being caught in a "clothes drier" machine, evidence as to the condition of the belt at the time of trial was held admissible, where it was substantially in the same condition as it was

when the accident occurred. *Thiel v. Kennedy*, 82 Minn. 142, 84 N. W. 657.

And in an action for injuries caused by a machine repeating, evidence for defendant of the condition of the machine at the time of trial was held competent, where there was no change in the condition of the machine. *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972.

Evidence as to the good condition of a heel-pressing machine at the time of the trial was held to be admissible, where the condition was the same as at the time of the accident. *Ibid.*

And where an employee was injured at a crossing in the city, and the controversy was as to the line of the plank crossing, evidence by a witness that he had examined the crossing at the time of the trial, that he did not know whether it was in the same condition as at the time of the accident, but that apparently it had not been altered, that he saw nothing to indicate that any change had been made, that it seemed to be an old crossing, that he measured it by stepping, was held admissible. *Galveston, H. & S. A. R. Co. v. McAdams*, 37 Tex. Civ. App. 575, 84 S. W. 1076.

The condition of a railroad and highway crossing at the time of the trial was held proper to be proved by evidence, where the condition had not changed. *Pennsylvania Co. v. Frund*, 4 Ind. App. 460, 30 N. E. 1116.

In an action for negligence caused by overflow, it was held that evidence of damage since the commencement of the action was competent, where the circumstances were similar, in order to give the jury information as to the previous injury. *Polly v. McCall*, 37 Ala. 20.

Measurements of a depression in a highway, made some time after an accident, were held admissible, where other evidence showed the comparison as to its condition at the time of the accident. *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 480, 39 N. W. 516.

Where the conditions were shown to be the same, evidence of measurements of the size of a log after it had been removed from a highway was held to be admissible. *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130.

Where a sidewalk was torn up after an accident, evidence that the materials were rotten was held admissible, as bearing on the time of the accident. *Jackson v. Grinnell*, 144 Iowa, 232, 122 N. W. 911; *Duncan v. Grand Rapids*, 121 Wis. 626, 99 N. W. 317.

Where the condition of a sidewalk was shown to have been unchanged, evidence as to such condition after an accident was held to be admissible. *Harrison v. Ayrshire*, 123 Iowa, 528, 99 N. W. 132.

In an action for injuries received by being thrown out of a wagon by reason of a defective seat, evidence of the unsafe condition of the seat afterwards was held competent, where the condition had not

changed. *Erickson v. Barber Bros.* 83 Iowa, 307, 49 N. W. 838.

Evidence of subsequent changed condition of electric wires was held to be admissible when fairly tending to show the actual conditions existing at the time of the accident. *Consolidated Gas Electric Light & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

And in an action for injuries caused by an electric shock, evidence of witnesses that they had received a shock subsequent to that received by plaintiff was held admissible, as tending to show the condition of a chain as to insulation at the time of the accident. *Moran v. Corliss Steam Engine Co.* 21 R. I. 386, 45 L.R.A. 267, 43 Atl. 874.

And where evidence of mode of operation of a freight elevator after an accident was offered, and there had been no change from its previous condition at the time of the accident, it was held admissible, in an action for injuries caused by a defective elevator. *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 50 N. E. 877, 52 N. E. 399. The court said: "As to its manner of being operated, it was proper to prove the manner of construction of said elevator, and how it was and could be operated before and at the time of the accident. And when it had not been changed in any way, but is the same after the accident as before, evidence of its construction and how it could be operated after the accident was properly admitted to prove its condition, construction, and how it could be operated before the accident."

In an action for injuries caused by a defective elevator, evidence of the defective condition after the accident was held admissible, where there was no proof that the condition had changed. *Dronney v. Doherty*, 186 Mass. 205, 71 N. E. 547. The court said: "The defendants, however, did not suggest that any change had occurred; and if such an examination could have been made immediately after the accident, for the purpose of ascertaining its cause, and the result given in evidence, the intervening of one day between the event and the inspection by the experts, with the presumption that the condition of things remained the same, was sufficiently connected in time to permit the introduction of this testimony describing the structural features and state of repair of the elevator, as they then appeared; and, taken in connection with the previous evidence, it all tended to show the situation existing at the time of the injury."

And in an action for injuries, alleging that plaintiff was injured by a fall of a shaft, evidence was held admissible that, on a subsequent examination, the broken end of the shaft disclosed dark streaks, showing that there had been a flaw. *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046.

In the following cases evidence of subsequent condition was held to be admissible:

Evidence showing that a car which had caused the injury to plaintiff by jumping

the track had jumped the track the same night, at different places. *East St. Louis & Suburban R. Co. v. Zink*, 133 Ill. App. 127.

Where a man attempting to board a street car received an electric shock, causing him to fall and to receive an injury, evidence that on the day of the accident another person received an electric shock upon taking hold of the hand hold on that car. *Dallas Consol. Electric Street R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315.

Evidence that, after an accident, on the same day, a witness found the turntable unlocked, as tending to show that the children found the turntable unlocked before the accident. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880.

The condition of a hand-hold screws and wood on a car immediately after an accident. *Gutridge v. Missouri P. R. Co.* 105 Mo. 520, 16 S. W. 943.

And evidence of the condition of boiler tubes immediately following an explosion, where the objection was not properly made. But it was said, in regard to striking out: "We would not be understood as holding that, if that had been properly requested, the refusal to do so would have been reversible error." *Chicago G. W. R. Co. v. McDonough*, 88 C. C. A. 517, 161 Fed. 657. It was claimed by defendant that the condition of the pipes as to thickness and warping had been changed by the explosion.

In an action for injuries from a defective hand car, evidence of the condition of the car immediately after the accident, where the condition had not changed. *Weldon v. Omaha, K. C. & E. R. Co.* 93 Mo. App. 668, 67 S. W. 698.

Evidence of the condition shortly after an accident, where a post supporting a shed on a sidewalk gave way by reason of the sidewalk caving in. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. The disputed point was whether or not the material used for sidewalk filling was proper.

A photograph of a stump in the street was held admissible, where the stump had been removed to a lot shortly after the accident, and was then brought back and placed in the same position as at the time of the accident, for the purpose of being photographed. *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402.

The admission of photographs in evidence solely to assist the attorney in making his argument was held not error. *Considine v. Dubuque*, 126 Iowa, 283, 102 N. W. 102. In this case the court said: "The evidence shows that the photographs exhibited the exact condition of the sidewalk and the driveway at the time plaintiff received his injuries, save that there was no snow or ice on the ground. We think they were admissible. But as the trial court did not admit them save for the purpose of illustration, there is nothing of which defendant may justly complain."

Evidence as to the condition of a side-
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walk shortly after an accident was held to be admissible. *Abilene v. Hendricks*, 38 Kan. 196, 13 Pac. 121.

And where the sidewalk stringers were examined shortly after an accident, and found rotten, the fact that the examination was made after removal by defendant was held not to exclude such evidence, as the question of repairs was only incidental. *Alberts v. Vernon*, 90 Mich. 549, 55 N. W. 1022.

Evidence as to the rotten condition of the plank in the sidewalk that caused the accident, shortly thereafter, was held to be admissible, as such condition would practically be unchanged. *Clark v. Cedar Rapids*, 129 Iowa, 358, 105 N. W. 651.

Evidence of the condition of machinery, in having unprotected belting shortly after an accident, was held admissible, where the condition had not changed. *American Lead Pencil Co. v. Davis*, 108 Tenn. 251, 66 S. W. 1129.

And evidence of the condition of a boiler shortly after its explosion was held admissible, where there had been no change in its condition. *Chicago G. W. R. Co. v. McDonough*, supra.

And in an action for killing cattle, evidence showing that there were breaks in the fence shortly after the accident, and cattle hair thereon, was held admissible, notwithstanding the fence had been recently repaired. *Townsend v. Northern P. R. Co.* 29 Wash. 185, 69 Pac. 750.

And where stock escaped through a gate on the track, evidence that shortly after the injury to plaintiff's horse, the gate would open by working it back and forward, was held to be admissible. *Brown v. Quincy, O. & K. C. R. Co.* 127 Mo. App. 614, 106 S. W. 551.

In an action for injuries caused by being run over by a street car, evidence as to the dirty condition of the glass in the headlight of that car, shortly afterwards, was held competent. *Moldenhauer v. Minneapolis Street R. Co.* 80 Minn. 426, 83 N. W. 381.

Evidence as to the defective condition of the rails and ties of a railroad shortly after the accident was held admissible to show defects at the time of the accident, in an action for injuries resulting from negligence in running a train at a high rate of speed. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960.

And the condition of a defective car step soon after an accident was held to be admissible in evidence, where the circumstances were such as to justify the inference that it was the same as at the time of the injury. *Corcoran v. Albuquerque Traction Co.* — N. M. —, 103 Pac. 645.

And where a walk was taken up soon after an accident, evidence as to its rotten condition was held to be admissible. *Brown v. Owosso*, 130 Mich. 107, 89 N. W. 568.

And where a miner was killed by the falling of the roof of a mine, evidence that there were no cross bars to the props in

the room just after the accident was held admissible. *Springfield Coal Min. Co. v. Gedutis*, 227 Ill. 9, 81 N. E. 9, affirming 127 Ill. App. 327.

And where a man was injured by the operation of a hand car, it was held that if the brake was in bad condition a short while after the injury, plaintiff could have proven this, as tending to show a like condition at the time of the injury. *Austin & N. W. R. Co. v. Flannagan*, — Tex. Civ. App. —, 40 S. W. 1043. The court said: "But, however, this court is not prepared to follow that line of cases which establish the proposition that it is inadmissible to prove that the defect had been remedied since the accident. The reasons given in those decisions that deny the admissibility of evidence in this respect do not seem to us to be sound. Therefore we are not inclined to follow those cases."

Evidence as to the situation of an electric wire five minutes after an accident was held admissible. *Gloucester Electric Co. v. Kankas*, 56 C. C. A. 640, 120 Fed. 490. The court said: "Of course, if there was a substantial or radical change, it would not be competent. If the change was immaterial, or slight, in respect to displacement or the situation, it would still have some tendency to show its condition when it caused the injury. The presiding judge must necessarily pass upon the question of remoteness, and the question of fact whether the condition is the same, or substantially the same, as at the moment of the accident, or so near the condition as to have some tendency to show how it was then. The strain to which the wire was subjected may have made some slight change in the situation of the wire, but, under the circumstances described, not so substantial a change, in our opinion, as to render the evidence incompetent."

Evidence that a switch lock was not locked fifteen minutes after an accident was allowed in an action for injuries caused by a train jumping the track. *Henderson v. Chicago, B. & Q. R. Co.* 73 Ill. App. 57. No objection appears to have been made.

Evidence as to the condition of brake rods twenty minutes after a collision was held competent, as the lapse of time was brief, and there was no proof of alteration in the rods. *Woods v. Long Island R. Co.* 11 App. Div. 16, 42 N. Y. Supp. 140, affirmed in 159 N. Y. 546, 54 N. E. 1095.

And evidence as to the defective condition of an elevator three quarters of an hour after an accident was held admissible. *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669.

And where a boy stumbled on some blocks on a railway platform, and was thrown under the cars, evidence that the obstructions were on the platform an hour and a half after the accident was held admissible. *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

And evidence as to the condition of a coal hole in a sidewalk an hour and a half after the accident was held admissible, as 32 L.R.A. (N.S.)

there could have been no substantial change in the condition. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079.

Evidence as to the condition of the drawbar of a train two hours after the accident was held competent to show its defective condition, in an action for injuries caused by a drawbar of a train breaking and throwing a brakeman under the wheels. *Chicago & N. W. R. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657.

In an action for tripping on a mat and falling down stairs, evidence of the defective condition of the mat and unguarded stairs, four hours after the accident, was held admissible. *Toland v. Paine Furniture Co.* 179 Mass. 501, 61 N. E. 52.

The condition of the switch four hours after an accident was held to be admissible in evidence, where the condition had not changed. *Reynolds v. Metropolitan Street R. Co.* 136 Mo. App. 282, 116 S. W. 1135.

Where a train was derailed from ice on the track, coming from a stream banked up by a small bridge, evidence that, four or five hours after the accident, a cake of ice was on or near the track, was held admissible. *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990.

In an action for injuries caused to a passenger by having caught his foot in a hole in the platform, evidence that ten hours after the accident such a hole was in that place was held competent evidence. *Texas Midland R. Co. v. Brown*, — Tex. Civ. App. —, 58 S. W. 44. The court said: "The remoteness of the examination from the time of the accident is very material on the question of the weight to be given to the circumstance, but does not affect the admissibility of the evidence, unless it is so very remote as to be wholly immaterial."

Evidence of the condition of the manway of a mine, thirteen hours after the accident, as to the existence of white damp in the manway, was held competent, where there could have been no other cause for the existence of white damp than a shot in the manway but one hour and a half before plaintiff's intestate had entered it. *Foley v. Pioneer Min. & Mfg. Co.* 144 Ala. 178, 40 So. 273.

And where objection as immaterial and irrelevant was made to evidence as to the conditions of acid escaping from a car into the street, several hours after an injury to a horse, and because the conditions were not shown to be the same, it was held that the objection applied more to the weight of evidence than to its competency. *Gulf, C. & S. F. R. Co. v. Fowler*, — Tex. Civ. App. —, 122 S. W. 593.

The condition of rotten sidewalk planks the day after an accident was held to be admissible in evidence. *Teasdale v. Malone*. 17 App. Div. 185, 45 N. Y. Supp. 360.

And where a witness examined a boiler with a torch after an explosion, and found the crown sheet heavily incrustated with scale, and brought away a bolt so incrustated, evidence that the superintendent refused to

allow further examination the next morning was held to be admissible. *Chicago & E. I. R. Co. v. Raines*, 203 Ill. 417, 67 N. E. 840.

And that plaintiff examined the defective plank the morning after she was injured by the same, and described its then condition, was held to be admissible in evidence. *Fuller v. Jackson*, 92 Mich. 197, 52 N. W. 1075.

Evidence as to the condition of the street on the morning after an accident was held competent, where paving stones had been removed and there was no barricade. *Tompert v. Hastings Pavement Co.* 35 App. Div. 578, 55 N. Y. Supp. 177.

And where the street was dangerous for vehicles, evidence of its condition the morning after an accident was held to be admissible. *Ibid.*

Where an accident on a sidewalk occurred between 12 P. M. and 1 A. M., evidence as to its condition early the next morning was held to be admissible. *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743.

And the rejection of evidence as to the icy condition of a sidewalk the next morning after an accident was held to be error. *Comstock v. Schuylerville*, 139 App. Div. 378, 124 N. Y. Supp. 92.

Where the condition of a sidewalk was unchanged, evidence of its condition the next day following the accident was held to be admissible. *Monroeville v. Wehl*, 13 Ohio C. C. 689, 6 Ohio C. D. 188; *Linley v. Detroit*, 131 Mich. 8, 90 N. W. 665.

Evidence as to the condition of a stair on the morning after an accident was held admissible. *Peil v. Reinhart*, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077. This was on the ground that, without proof to the contrary, it was reasonable to assume that its then condition was substantially the same as at the time in question.

The day after an elevator accident, witnesses went to the store and asked to see the guard rail, and it could not be found. It was held that this was competent evidence. It was not claimed that there was any change in the conditions. *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086.

And where plaintiff was riding on the footboard of an engine, and was injured by the engine being thrown off of the track at a derailing switch, evidence of a witness as to the character of the ground around the switch, and freedom from grass and weeds the morning after the accident, was held admissible on behalf of the defendant, where there had been no change in the condition. *St. Louis Southwestern R. Co. v. Arnold*, 39 Tex. Civ. App. 161, 87 S. W. 173.

Evidence as to the condition of a railroad track the day after an accident was held admissible, where there had been no change in its condition. *Byrne v. Brooklyn City & N. R. Co.* 6 Misc. 260, 26 N. Y. Supp. 760.

In an action against a railroad for having a defective crossing causing the upsetting of a wagon which had cramped in turn-

ing on the track, evidence on the part of the defendant, that the next day the same wagon had defects in it which nearly caused the same result, was held competent. *Hoyt v. New York, L. E. & W. R. Co.* 118 N. Y. 399, 23 N. E. 565.

And evidence that next morning spikes were found projecting out of the rail where plaintiff's foot had caught was held admissible. *Louisville & N. R. Co. v. Lowe*, 158 Ala. 391, 48 So. 90.

Evidence as to the decayed condition of the awning two days after the accident, where the condition had not changed, was held admissible, to show the defective condition of the awning, in an action for injuries caused by its falling. *Lewy Art Co. v. Agricola*, — Ala. —, 53 So. 145.

And where coal ashes had been filled in a rut in a road after an accident, evidence that two days after the accident the ashes were removed and the rut examined, and there had been no important change in the same, was held to be admissible. *Larson v. Eau Claire*, 92 Wis. 86, 65 N. W. 731.

And where an accident occurred on a sidewalk Saturday, evidence as to the condition of the sidewalk on the following Monday was held to be admissible. *De Forest v. Utica*, 69 N. Y. 614.

And evidence for defendant as to the condition of a sidewalk two days after an accident was held to be admissible, where there was no change in the condition. *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl. 822.

The condition of a sidewalk a day or two after an accident was held to be admissible in evidence, where the boards were rotten and loose, as showing the condition at the time of the accident. *Wissler v. Atlantic*, 123 Iowa, 11, 98 N. W. 131.

And where there was a dispute as to whether or not an accident was caused by a defective switch rail point, evidence that a broken or bent switch rail point was removed a day or two after the accident was held admissible. *Place v. Grand Trunk R. Co.* 82 Vt. 42, 71 Atl. 836. The court said: "It is the general rule that evidence of repairs made after an accident has occurred is incompetent to show antecedent negligence on the part of a railroad company."

And where two of the selectmen of the town testified to the perfect condition of a road two weeks prior to an accident, evidence that, two days after the accident, the road was in bad condition, was held to be admissible, in rebuttal. *Walker v. Westfield*, 39 Vt. 246.

And where an engine was examined two or three days after a fire, evidence of the condition was held to be admissible to show its condition at the time of the fire, although the appearance indicated the recent repair of the netting. *Byers v. Baltimore & O. R. Co.* 222 Pa. 547, 72 Atl. 245. The court said: "And the further showing that a few days later the wire netting in the spark arrester exhibited signs of recent repair, taken in connection with the proof of large sparks thrown out upon the day of the fire, fairly warranted the inference that

there had been an opening in the spark arrester, which was subsequently covered by the patch which the plaintiff said he saw. For that purpose the testimony was clearly admissible."

In an action to recover damages for the killing of stock upon defendant's track, at a point where a fence ought to have been kept in good condition, evidence showing the condition of a gate in controversy two or three days after the accident was held competent, where it was not shown that the condition had changed. *Mackie v. Central R. Co.* 54 Iowa, 540, 6 N. W. 723.

And evidence as to the condition of clamps on a bolt-cutting machine, two or three days after an accident, was held admissible. *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188.

In an action for injury caused by a defective building falling and injuring plaintiff, evidence as to the condition and whereabouts of the timbers in the building three days thereafter was held to be admissible in evidence. *Treusch v. Kamke*, 63 Md. 278.

And in an action for injuries caused by the falling of a wall, evidence by a carpenter, after he had examined the ruins, three days after the accident, as to the thickness of the walls, was held competent. *Ibid.*

Evidence that insulation of wires was defective three days after an accident was held admissible, where the condition was unchanged. *Harroun v. Brush Electric Light Co.* 12 App. Div. 126, 42 N. Y. Supp. 716.

And that a guy wire and service wire were in contact three days after the death of a lineman, caused by electricity, was held proper evidence, where this condition continued from the time of the accident. *Snyder v. Mutual Teleph. Co.* 135 Iowa, 215, 14 L.R.A. (N.S.) 321, 112 N. W. 776.

Evidence that three or six days after the accident, the engineer made a report that the air pump controlling the brakes should be fixed, was held competent for the purpose of showing the defective condition of the machinery. *Union P. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650.

In an action for injuries caused by falling on a defective sidewalk, a photograph taken four days after the accident, and offered as evidence at the trial, was held admissible to prove plaintiff's testimony. *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921.

And where the holes in a culvert were filled the day of the accident, evidence of plaintiff that he removed the filling four days thereafter, and measured the holes, was held to be admissible, where the evidence showed that they were in substantially the same condition. *Herrick v. Holland*, 83 Vt. 502, 77 Atl. 6.

Where an elevator fell, and this might have been caused by a slack cable jumping the drum without striking a safety lever, evidence that four days after the accident a wrench or block of wood was found under 32 L.R.A. (N.S.)

the slack cable device was held admissible, where the use of such block would have prevented the cable device from working. *Starer v. Stern*, 100 App. Div. 393, 91 N. Y. Supp. 821.

In an action by a property owner for injuries to his premises by the overflow of a sewer, it was held that evidence showing that four days after the overflow accumulations of sand and other material were found in the sewer, and must have been there a long time, was admissible. *District of Columbia v. Gray*, 6 App. D. C. 314. The court said: "The space of four days was a sufficiently short period of time, in connection with proof of the character of the obstruction that was found to exist, to justify the inference of the pre-existence of the obstruction at the time of the injury."

In an action for injuries caused by the jumping of a circular-saw table, evidence for defendant, that six days after the accident, the table did not jump, was held competent, where the condition had not changed. *Roskee v. Mt. Tom Sulphite Pulp Co.* 169 Mass. 528, 48 N. E. 706.

Evidence that about six or ten days after the accident in question, the engine lever again flew out, was held admissible to show its defective condition. *Alabama G. S. R. Co. v. Yount*, 165 Ala. 537, 51 So. 737.

And where a passenger was injured by reason of a railroad train jumping the track, a plat of the ground and track, made eight days after the accident, was held to be admissible in evidence, where the condition had not changed. *Logan v. Metropolitan Street R. Co.* 183 Mo. 582, 82 S. W. 126.

And where plaintiff was injured by a defective hand car, and testified that he had not known the condition of the car at the time he was injured, but examined it some eight or ten days after, and found it in the condition alleged, it was held that this evidence was admissible, as there was no inference deducible from it that it was not in the same condition when the accident occurred as it was when plaintiff examined it. *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151.

Evidence that ten days after an accident, a guard rail at a deep cut on a street was absent, was held admissible, where its absence was the cause of the accident. *Johnson v. Sioux City*, 114 Iowa, 137, 86 N. W. 212.

Evidence of the condition of timbers ten or twelve days after the accident was held admissible, where the culvert and roadway remained in the same condition as at the time of the accident. *Miller v. North Adams*, 182 Mass. 569, 66 N. E. 197.

In an action for injuries caused by falling down a stairway, evidence of the condition of the stairway, extending from the day of the accident to ten or twelve days thereafter, was held competent, where the evidence showed that the condition was unchanged. *Arndt v. Bourke*, 120 Mich. 263, 79 N. W. 190.

And, where a sidewalk was torn up after an accident, evidence as to its rotten condition a week after the accident was held to be admissible. *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121.

The admission of evidence of the condition of a sidewalk one week after an accident, where it had not changed, was held to be immaterial, as it would be only cumulative. *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31.

Where the condition of a sidewalk had not changed, evidence as to its condition a week after an accident was held to be admissible. *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394.

The condition of a board from a sidewalk one week after an accident was held to be admissible in evidence, where the condition had not changed. *Plummer v. Milan*, 79 Mo. App. 439.

And evidence as to the condition of the machine a week after the accident was properly admitted, where it was shown that the machine was then in the same condition as at the time of the accident, in an action for injuries caused by a defective machine. *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 600.

Evidence of the condition of a brake carrier iron the day of the accident, and about a week after the same, where the condition had not changed, identified as being that put on the car prior to the accident, in an action for the death of a brakeman was held competent. *St. Louis, P. & N. R. Co. v. Dorsey*, 89 Ill. App. 555.

And where the condition of a defective road was not changed, evidence as to its condition two weeks after an accident was held to be admissible. *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696.

And evidence of the condition of a sidewalk as to rotten stringers two weeks after an accident was held to be admissible, especially when the nature of the defect would not have changed. *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068.

The condition of a walk two weeks after an accident was held to be admissible in evidence, where the condition had not changed. *Williams v. Lansing*, 162 Mich. 169, 115 N. W. 961.

And in an action for injuries caused by derailment of a train, caused by defective rails and ties, evidence that three weeks after the accident the condition was broken rails and rotten ties was held competent, as tending to show their condition when the accident occurred. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274.

That a sidewalk was in a rotten condition four weeks after an accident was held to be admissible in evidence. *Johnson v. St. Paul*, 52 Minn. 364, 54 N. W. 735.

Evidence of the narrow width of a highway nine months after an accident was held to be admissible, where the condition had not changed. *Brooks v. Petersham*, 16 Gray, 181.

In an action for injuries from an electric shock, evidence that nine months after-

wards a guard wire was not in use was held admissible, where the evidence tended to show no change in the condition. *Western U. Teleg. Co. v. Thorn*, 12 C. C. A. 104, 28 U. S. App. 123, 64 Fed. 287. This was held to shift the burden of proof on the defendant.

Evidence as to the condition of a street railroad track ten months after an accident was held admissible, where there was no change in the condition. *Byrne v. Brooklyn City & N. R. Co.* 6 Misc. 260, 26 N. Y. Supp. 760.

And in an action for injuries resulting in death, caused by getting a foot caught in a switch, evidence of the defective condition of a "split switch" fourteen months after the accident was held admissible, where there had been no change made in the condition. *Brooke v. Chicago, R. I. & P. R. Co.* 81 Iowa, 504, 47 N. W. 74.

And where a train was derailed by reason of defective flange wheels, evidence that a witness who was on the train gathered some of the broken flanges and placed them in a heap at the time of the accident, and used some taken from such a pile several months thereafter, at the trial, was held competent. *Roberts v. Port Blakely Mill Co.* 30 Wash. 25, 70 Pac. 111.

The condition of a gutter and crossing a year after an accident was held proper to be shown in evidence, where the condition had not changed. *Indianapolis v. Scott*, 72 Ind. 196.

And where an abandoned canal overflowed, evidence as to its dimensions one year and a half after the flood was held admissible, where its condition had not changed. *Jones v. De Coursey*, 12 App. Div. 164, 42 N. Y. Supp. 578.

In an action for injuries caused while trying to replace a belt on a pulley, evidence that two years after the accident, the ladder on which plaintiff stood had one leg shorter than the other, was held admissible, where there was no change in the ladder. *Laplante v. Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 204. The court said: "The testimony on its face seems to describe the structural characteristics of the ladder, and not to mean that a piece had been broken from one leg. Indeed, the language of the witness might have been understood to mean that the ladder was made with one leg longer than the other."

And where evidence of the condition of a sidewalk two years after an accident was received, it was held harmless error, as there was no dispute that the condition of the walk was the same then as at the time of the accident. *Brewer v. New York*, 31 App. Div. 244, 52 N. Y. Supp. 865.

And where the jury viewed a defective sluiceway in the road two years after an accident, evidence that its condition had not changed was held to be admissible. *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

And that the timbers of a sidewalk were in a rotten condition six weeks after an accident was held to be admissible in evidence, notwithstanding it was incidentally

proved that they were torn up for repairs. *Miller v. Canton*, 123 Mo. App. 325, 100 S. W. 571.

In *Richardson v. Marceline*, 73 Mo. App. 360, it was said: "If, ten weeks after the injury happened, the stringers and boards placed thereon were so decayed that the nails would not hold them together, or if the nails were so eaten by rust that they would not do duty in fastening the boards securely to the stringers, it seems to us that this was some evidence, though perhaps slight, from which the jury were justified in deducing the inference that the walk was in a defective and insecure condition at the time of the injury."

And where a brakeman was injured while riding on the pilot of an engine, and was thrown off by a defective joint in the track, evidence that a month after the accident such a joint was in the rail, and there were no indications that any changes had been made in it within the six weeks prior to that time, was held admissible. *San Antonio & A. P. R. Co. v. Beam*, — Tex. Civ. App. —, 50 S. W. 411.

Evidence as to the condition of a sidewalk one month after an accident was held admissible, where there had been no change in the condition. *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831.

In an action for injuries caused by being thrown from a wagon at a street railroad crossing, on account of the rail projecting, it was held that evidence showing the condition of the railroad from one to five months after the accident was competent, where the condition was unchanged. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

Evidence as to the condition of a telephone pole two months after a lineman was injured by electricity was held admissible, where there had been no change in the condition. *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 71.

A photograph of a defective highway, taken three months after an accident, was held to be admissible in evidence, where it was verified as a true representation, to assist the jury in understanding the case. *Blair v. Pelham*, 118 Mass. 420.

And where a plank guard to a sidewalk was insufficient, evidence as to its split and broken condition four months after the accident, from frequent nailing, was held admissible. *Cramer v. Burlington*, 49 Iowa, 213.

And where a bracket fell from a building and injured plaintiff, evidence as to the mode of fastening on the building, from an examination five months after the accident, was held to be admissible, where the condition had not changed. *Joyce v. Black*, 226 Pa. 408, 27 L.R.A. (N.S.) 863, 75 Atl. 602.

Evidence showing the condition of the roadbed ties and rails at the time of repairs, six months after the accident, was held competent, as showing battered rails and rotten ties, in an action for injuries caused by a train running at a rapid speed over an imperfect track. *Jackson-* 32 L.R.A. (N.S.)

ville Southeastern R. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093. That repairs were made was taken from the consideration of the jury. The court said: "The proof tended to show that the roadbed and track remained in about the same condition from the date of the accident, during the summer of 1887, to the time of which these witnesses speak. While, as a general rule, evidence of defects in the track so long after the injury would not be admissible, yet, being connected with other proof showing that the condition remained substantially the same, it becomes competent."

Proof that the condition of the sidewalk had not changed for six months after an accident was held admissible. *Bailey v. Centerville*, supra.

In an action for injuries sustained by the falling of an electric-light pole which had rotted beneath the surface, evidence of other poles which had been in the ground the same length of time, taken up six months after the accident, was held competent to show the condition of the pole at the time of injury. *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232.

And a photograph of a hole in a street, taken six months after an accident, was held to be admissible in evidence, where the evidence showed that the hole was deeper at the time of the accident than when the photograph was taken. *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227.

And where an expert examined a sidewalk six months after an accident, evidence by him that the stringers were rotten, and "they were not suitable to hold a nail for a year or more," was held to be admissible. *Williams v. Lansing*, 152 Mich. 169, 115 N. W. 961.

Where a person was killed at a railroad crossing, evidence as to the condition of lights over two years after the accident was held admissible, where the conditions were the same. *Houston & T. C. R. Co. v. Waller*, 56 Tex. 331. The court said: "If, however, by a change in the location of the lights, especially of what seems to have been the main one, a stationary headlight, the circumstances were materially altered, we do not see that the testimony of these witnesses as to what they saw or could not see was relevant or admissible."

b. Where the condition had changed.

The rule is that where the condition has changed, evidence as to the later condition will be held inadmissible. The exception is where evidence of such condition is necessary in rebuttal, or to explain a photograph of the place.

In an action for personal injuries caused by a defective step on an engine, evidence as to the condition of the step a week after the accident was properly excluded, where it was not shown to be in the same condition as at the time of the accident. *Powers v. Boston & M. R. Co.* 175 Mass. 466, 56 N. E. 710.

That there was grease on the railroad station platform two weeks after this accident was held to be inadmissible in evidence, as this was too far after the accident. *Newcomb v. New York C. & H. R. Co.* 169 Mo. 409, 69 S. W. 348.

And the presence of floating defects like cinders at the place for passengers to alight, some four weeks after an accident was held to be inadmissible in evidence. *Missouri, K. & T. R. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500.

Evidence of an engineer, that a month after an accident caused by the swaying of a trolley car close to a trolley pole, other cars at the same place had a vertical oscillation of 12 to 16 inches, was held incompetent, where the conditions were not shown to be the same. *Schmidt v. Coney Island & B. R. Co.* 26 App. Div. 391, 49 N. Y. Supp. 777.

That a railroad platform was out of condition three months after an accident was held inadmissible, in the absence of proof that the condition was unchanged. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874.

The exhibition of a broken rail six months after an accident was held improper. *Stewart v. Everts*, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092. The court said: "It is evident that after such exposure, no inexperienced man could tell whether there were any flaws in the iron at the places where it was broken; and it is equally clear that the inexperienced jurors would not be competent, from mere inspection, to determine the quality of the iron at the time of the breakage. The only object of the introduction of this evidence to the jury must have been to allow them to judge, from the present appearance of the pieces of iron exhibited, whether, at the time they were broken from the rail, such rail was a good and sound rail; and for that purpose we think it was clearly incompetent."

And evidence as to the height of rails at a joint eighteen months after an accident was held inadmissible, in the absence of proof showing that conditions were the same as at the time of the accident. *Redus v. Milner Coal & R. Co.* 148 Ala. 665, 41 So. 634.

And evidence as to the condition of a brake appliance thirteen months after an accident was held inadmissible, where the condition was not shown to be the same. *East Tennessee & W. N. C. R. Co. v. Lindamood*, 109 Tenn. 407, 74 S. W. 112.

In an action for injuries to a passenger from a derailment of the train, evidence for defendant, that thirteen months after the accident the same rails were in the track as were in at the time of the accident, was stricken out. *Cronk v. Wabash R. Co.* 123 Iowa, 349, 98 N. W. 884. The court said: "It was immaterial what the condition of the track was at the time of the trial, thirteen months after the accident."

Evidence of the subsequent condition of a railroad station platform some months after an accident was held inadmissible, 32 L.R.A. (N.S.)

where it was not shown that it was in the same condition as at the time of the accident. *Pennsylvania Co. v. Marion*, supra.

In an action for injuries caused by the derailment of an engine, evidence that another engine, after the accident, ran over the track in the same way, and was derailed, was held inadmissible, where the engines were not alike, and the track was not in the same condition. *Bach v. Iowa C. R. Co.* 112 Iowa, 241, 83 N. W. 959.

And in an action for injuries sustained in an accident on a railroad, evidence of the road and track a mile and a half from the place of the accident was held incompetent. *Sidekum v. Wabash, St. L. & P. R. Co.* 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701. The court said: "In the recent case of *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 509, 4 S. W. 389, a somewhat analogous question was involved. This court there announced its disinclination to adhere to the rule in all its strictness, which is held in numerous cases, and which limits the party to the precise time, or the exact place, of the occurrence."

That a witness pointed out a defective step on a car to a third party in the month of May following an accident to a passenger boarding a car was held inadmissible in evidence. *Texas Midland R. Co. v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213. The case does not show when the accident occurred.

In an action for damages for personal injuries to a passenger on a freight train, who jumped to save himself, where the side rods of the engine had broken, it was held that evidence as to the condition of brasses holding the side rods, picked up near the track, was insufficient to obtain a new trial, where the condition of the brasses at the time of the accident was not shown. *Beery v. Chicago & N. W. R. Co.* 73 Wis. 197, 40 N. W. 687.

And in an action for causing the death of a fireman by reason of a culvert being inadequate at the time of a storm, evidence as to the condition of the culvert a long time after the accident was held to be inadmissible. *Stoher v. St. Louis, I. M. & S. R. Co.* supra.

In an action for injuries caused by a train running at excessive speed over a defective roadbed, evidence that a year after the accident the witness saw pieces of a broken rail and rotten ties, estimated as one to five, was improperly received. But objection could not be made in the appellate court for the first time. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960. In this case the court said: "This witness was on the train derailed, and assisted appellee and other injured passengers out of the wreck. He testified that he then saw pieces of broken rail and some rotten ties, but that his attention was not particularly directed to them. He estimated the number of rotten ties in the roadbed at one out of every five. It turned out on cross-examination that this estimate was, in part, at least, based upon an

examination of the ties and track made by him shortly before the trial. It is sufficient that no objection was interposed to this evidence, or motion made to exclude the same from the jury, and the objection comes too late on appeal."

And photographs taken a year after an accident, showing the wear on rails at a switch and crossing, were held inadmissible in evidence. *Marshall v. Old Colony Street R. Co.* 198 Mass. 18, 83 N. E. 860.

In an action for injuries received by falling into a railroad cut, a photograph taken two years after the accident, where the situation had changed, was held incompetent. *Hampton v. Norfolk & W. R. Co.* 120 N. C. 534, 35 L.R.A. 808, 27 S. E. 96.

A brakeman was injured by the falling of a bridge. The water was so high that an examination could not be made until some months later, when the conditions had been changed by the water and rebuilding. It was held that evidence as to its condition at that time was inadmissible. *Johns v. Pennsylvania R. Co.* 226 Pa. 319, 28 L.R.A. (N.S.) 591, 75 Atl. 408.

Evidence as to the condition of a railroad culvert being filled with debris, years after an accident derailing a train, where the track was flooded, was held to be inadmissible. *Stoher v. St. Louis, I. M. & S. R. Co.* 91 Mo. 509, 4 S. W. 389.

In an action for the death of a brakeman, caused by his collision with a switch, evidence that, after the accident, the switch was found bent toward the track, was held not evidence that it was out of plumb before the deceased came in contact with it. *Dacey v. New York, N. H. & H. R. Co.* 168 Mass. 479, 47 N. E. 418.

In an action for the killing of cattle on defendant's railroad track, on account of a defective fence, evidence of subsequent conditions was held inadmissible, where the conditions were not shown to have been the same. *Brentner v. Chicago, M. & St. P. R. Co.* 58 Iowa, 625, 12 N. W. 615.

In *Sills v. Ft. Worth & D. C. R. Co.* — Tex. Civ. App. —, 28 S. W. 908, where a train was derailed by reason of sand accumulating on the track, evidence that, subsequent to the accident, the track was covered with sand, was held inadmissible. The court said: "The fact that the accident was due to an accumulation of sand at that point was not disputed. Therefore the sole question in this connection is whether the testimony excluded, because it had reference to a period subsequent to the accident, throws or tends to throw light upon the issue whether the company was guilty of negligence in permitting the accumulation of the sand at that time. We answer this question in the negative. It is not perceived how the fact that sand blown by wind accumulated at the point in question once, twice, or thrice, after the accident, tends in any way to prove that the accumulation of sand at the time of the accident was due to the negligence of the company." 32 L.R.A. (N.S.)

Photographs of the sidewalk, taken the day after the injury, were held inadmissible, where the condition was not shown to have been the same. *Crandall v. Dubuque*, 136 Iowa, 663, 112 N. W. 555.

And that a manhole cover for a sewer was found out of place two days after an accident to a horse that had stepped on the same was held insufficient evidence of its previous condition. *Whitney v. Lowell*, 151 Mass. 212, 24 N. E. 47.

And where plaintiff offered to prove the thickness of ice on a pavement seventeen and nineteen days after an accident, it was held that such evidence would not be competent for the direct purpose of showing the dimensions of the ridge of ice on the day of the accident, unless the condition was shown to be the same. *Berrenberg v. Boston*, 137 Mass. 231, 50 Am. Rep. 296.

Exclusion of evidence of the condition of the street some days subsequent to the one in question, in the absence of proof that such condition had remained unchanged since or at or prior to the accident, was held not erroneous. *Davis v. Alexander City*, 137 Ala. 206, 33 So. 863.

And the reception of evidence as to the condition of a hole in a sidewalk six weeks after an accident was held to be error. But in this case it was immaterial, as the condition was unchanged. *Dallas v. Jones*, — Tex. Civ. App. —, 54 S. W. 606.

And the refusal of evidence as to the condition of a street long after plaintiff was injured was held proper. *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

In *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210, which was an action for injuries caused by stumbling on a water-meter box in the sidewalk, the court excluded evidence of the condition of the cover after the accident.

And where rails protruded above a plank crossing, evidence as to the condition subsequent to the accident, and as to other subsequent accidents, was held inadmissible. *Chicago v. Vesey*, 105 Ill. App. 191.

And where measurements were made of a road a year after an accident, and changes had been made in the road, evidence in regard to the measurements was held to be inadmissible. *Prahl v. Waupaca*, 109 Wis. 299, 85 N. W. 350.

And where there was no evidence showing that the condition of a defective sidewalk had not changed, evidence as to its subsequent condition was held inadmissible. *Hoyt v. Des Moines*, 76 Iowa, 430, 41 N. W. 63.

That the sidewalk in question was in good condition one year after the accident was held to be inadmissible in evidence. *Ottawa v. Black*, 10 Kan. App. 439, 61 Pac. 985; *Edwards v. Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323.

Evidence that, three months after the accident happened, another span of the bridge was deemed unsafe, requiring a new bridge, was held not admissible in an ac-

tion for injuries caused by the fall of one span of a bridge. *Wabash County v. Pearson*, 129 Ind. 456, 28 N. E. 1120.

In an action for injuries from electric wires, evidence that the next morning the wires were in bad condition, uninsulated and sagging down, was held to be inadmissible. *Annapolis Gas & Electric Light Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534.

And evidence that three weeks after the accident a person received a shock was held incompetent in an action for the death of plaintiff's husband by coming in contact with electric wires. *Goddard v. Enzler*, 123 Ill. App. 108.

In an action for injuries caused by an electric shock at a telephone, evidence of another shock received by another person was held inadmissible, as the condition of another telephone at another time was purely a collateral matter, and would throw no light on the case in question. *Brucker v. Gainesboro Teleph. Co.* 125 Ky. 92, 100 S. W. 240.

Evidence of an expert as to electric wires on a bridge one year after an injury was held inadmissible, where other evidence showed the situation at the time of the injury. *Nelson v. Branford Lighting & Water Co.* 75 Conn. 548, 54 Atl. 303. This was held to be within the discretion of the court.

That gas was found in a trench, near a pipe, ten months after a death caused by noxious gas, was held to be inadmissible in evidence. *State use of Joyce v. Flanagan*, 111 Md. 481, 74 Atl. 818.

And that a mine was found free of gas the day after an explosion was held to be inadmissible in evidence, as the explosion would have cleared the mine of foul gases. *Edwards v. Lam*, 132 Ky. 32, 116 S. W. 283, 119 S. W. 175, 131 S. W. 795.

Evidence as to the condition of a hoisting machine several months after an accident was held incompetent, when it was not shown that it was then in substantially the same condition as at the time of the accident. *Henkel v. Stahl*, 9 Ohio C. D. 397, 18 Ohio C. C. 831.

Where a boom on a vessel was mounted on a crotch, and the boom fell and injured plaintiff, evidence of the ship surveyor, that, two or three days after the accident, he had examined the crotch and cleats, and found them in good condition, was held inadmissible, as it had not appeared that the appliances had remained unchanged. *The Edwin*, 87 Fed. 540.

And where a workman was injured by the fall of iron while being hoisted, evidence as to the condition of the engine months afterwards was held to be inadmissible. *Warren v. Jeunesse*, — Ky. —, 122 S. W. 862.

And evidence as to the condition after an accident, of beading on a plate-glass window that fell on plaintiff, was held inadmissible, where it was not shown to be in the same condition as at the time of the accident. *Stewart & Co. v. Harman*, 108 32 L.R.A.(N.S.)

Md. 446, 20 L.R.A.(N.S.) 228, 70 Atl. 333.

Where an accident was caused by a dark place in a stairway December 13th, at 4:30 P. M. evidence that, on the 18th of March, subsequently, it was light enough to read fine print in the hallway, was held to be inadmissible. *Bretsch v. Carsten*, 82 App. Div. 399, 81 N. Y. Supp. 868.

IV. Evidence of repairs made or precautions taken after an accident.

a. Generally.

The weight of authority and the rule is that evidence of repairs or alterations made after an accident is not admissible. Pennsylvania, Minnesota, and Georgia held the contrary; but these cases have been overruled by later cases. Kansas holds that such evidence is admissible. In Illinois there is some conflict of authority, the majority of the cases and the later cases holding that it is not admissible. One of the early cases followed the cases in Minnesota and Pennsylvania which have been since overruled. The rule adopted in the majority of cases is on the theory that if precautions taken would be evidence of previous improper conditions, no one would make improvements after an accident, as this would be used against him. Another reason is that the matter in issue is, What was the condition at the time of the accident? and evidence of conditions subsequent, when changes have been made, brings into the case collateral matters. Such evidence is, however, held admissible in rebuttal, and to show control and duty, and for the purpose of identification and description, and sometimes to show practicality.

Admitting evidence that, after the accident, a target switch was substituted for the common one, was held error. *Salters v. Delaware & H. Canal Co.* 3 Hun, 338. The court said: "What the defendants did afterward was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury. But the question appears to be settled by authority, and not open for discussion in this court."

And evidence that repairs were made to a switch after the derailment of a train, caused by a defective switch, was held inadmissible. *Aldrich v. Concord & M. R. Co.* 67 N. H. 250, 29 Atl. 408.

And in an action for injuries while uncoupling moving cars, caused by plaintiff catching his foot between switch rails at a point where the block between them was worn away by use, evidence of subsequently occurring events, like the substitution of a new for the old block, was held inadmissible. *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188.

In *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 71, the cases of *Hipsley v. Kansas City, St. J. & C. B.*

R. Co. 88 Mo. 348; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188, and *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34, were distinguished, as there had been a change in the construction. In this case the condition was unchanged.

In *Rajotte v. Canadian P. R. Co.* 5 Manitoba L. Rep. 365, where a switchman caught his foot in a frog, and an improved filler was used afterwards, the court said: "The happening of the accident itself is an unsafe criterion, as also is the fact of the subsequent change to other blocking. If that change were not made after such proof of the insufficiency of the former kind, this might furnish some evidence of subsequent negligence; but the making of the change would rather show a desire to remedy defects as they became apparent, than that the defects were before apparent."

That new ties were put in a track after a railroad accident was held to be inadmissible in evidence. *Mahaney v. St. Louis & H. R. Co.* 108 Mo. 200, 18 S. W. 895.

Also evidence that a switch block was repaired after an accident. *Soeder v. St. Louis, I. M. & S. R. Co.* 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714.

And in an action for the killing of mules, where a railroad fence was defective, evidence as to the condition of the fence after repairs had been made was held inadmissible, where there was no evidence that the location of the posts and wires had not been changed. *Colyer v. Missouri P. R. Co.* 93 Mo. App. 147.

In an action for injuries caused by a defective railroad crossing, evidence of repairs made after the accident was held incompetent to show its unsafe condition at the time of the accident. See *v. Wabash R. Co.* 123 Iowa, 443, 99 N. W. 106; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L.R.A. 588, 18 Am. St. Rep. 303, 23 N. E. 965; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Payne v. Troy & B. R. Co.* 9 Hun, 526.

In the *Clem Case*, the court said: "The fact that the happening of an accident may convey information producing a conviction or belief that, had extraordinary precaution been taken, the injury would have been prevented, does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care required, and yet a person, satisfied by experience that a higher degree of care may insure absolute safety, may employ extraordinary means to prevent accidents in the future. In doing this, he does what is commendable; and certainly he ought not to be restrained or checked by the fear that, if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrongdoer when the accident occurred."

In *Menard v. Boston & M. R. Co.* 150 Mass. 386, 23 N. E. 214, the court refused to allow the attorney to comment on the fact that, after an accident, the defendant stationed a flagman at this crossing, which 32 L.R.A. (N.S.)

came to the knowledge of the jury, at the time of the view. It was said that it was not competent to be proved in any form. The court said: "Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence, any more than its use of a more dangerous system would indicate that it considered that reasonably safe."

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And in an action against a railroad for injuries sustained by a passenger, caused by an embankment being undermined by a storm of unusual violence, evidence that, after the accident, the embankment had been so altered as to provide against a recurrence of such result was held inadmissible to prove negligence on the part of the defendants. *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34.

In an action for destruction of crops by reason of a flood caused by a railroad embankment, evidence of subsequent repairs was held inadmissible. *Pribbeno v. Chicago, B. & Q. R. Co.* 81 Neb. 657, 116 N. W. 494.

And that a change was made in a railroad gangway after an accident was held to be inadmissible in evidence. *Aiken v. Rhodhiss Mfg. Co.* 146 N. C. 324, 59 S. E. 696.

And in an action for killing a passenger by reason of operating a freight train with a caboose in front of the same, it was held that evidence of change of operation after the accident was inadmissible. *Prescott & N. R. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865.

In *Hart v. Lancashire & Y. R. Co.* 21 L. T. N. S. 261, Channell, B., said: "With regard to the branch siding and its alteration since the accident, it is not because the defendants have become wiser and done something subsequently to the accident that their doing so is to be evidence of any antecedent negligence on their part in that respect."

And in an action for the death of child by a trolley car, evidence that afterwards big fenders were used on the cars was held inadmissible. *Zimmerman v. Denver Consol. Tramway Co.* 18 Colo. App. 480, 72 Pac. 607.

In an action for damages caused by a fire, evidence of subsequent repairs on an engine was held not competent to show its condition at the time of the fire. *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33.

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Evidence that, for a few days after the accident, trains were run more slowly over the trestle where a pedestrian was killed,

R. Co. 88 Mo. 348; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188, and *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34, were distinguished, as there had been a change in the construction. In this case the condition was unchanged.

In *Rajotte v. Canadian P. R. Co.* 5 Manitoba L. Rep. 365, where a switchman caught his foot in a frog, and an improved filler was used afterwards, the court said: "The happening of the accident itself is an unsafe criterion, as also is the fact of the subsequent change to other blocking. If that change were not made after such proof of the insufficiency of the former kind, this might furnish some evidence of subsequent negligence; but the making of the change would rather show a desire to remedy defects as they became apparent, than that the defects were before apparent."

That new ties were put in a track after a railroad accident was held to be inadmissible in evidence. *Mahaney v. St. Louis & H. R. Co.* 108 Mo. 200, 18 S. W. 895.

Also evidence that a switch block was repaired after an accident. *Soeder v. St. Louis, I. M. & S. R. Co.* 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714.

And in an action for the killing of mules, where a railroad fence was defective, evidence as to the condition of the fence after repairs had been made was held inadmissible, where there was no evidence that the location of the posts and wires had not been changed. *Colyer v. Missouri P. R. Co.* 93 Mo. App. 147.

In an action for injuries caused by a defective railroad crossing, evidence of repairs made after the accident was held incompetent to show its unsafe condition at the time of the accident. See *v. Wabash R. Co.* 123 Iowa, 443, 99 N. W. 106; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L.R.A. 588, 18 Am. St. Rep. 303, 23 N. E. 965; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Payne v. Troy & B. R. Co.* 9 Hun, 526.

In the *Clem Case*, the court said: "The fact that the happening of an accident may convey information producing a conviction or belief that, had extraordinary precaution been taken, the injury would have been prevented, does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care required, and yet a person, satisfied by experience that a higher degree of care may insure absolute safety, may employ extraordinary means to prevent accidents in the future. In doing this, he does what is commendable; and certainly he ought not to be restrained or checked by the fear that, if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrongdoer when the accident occurred."

In *Menard v. Boston & M. R. Co.* 150 Mass. 386, 23 N. E. 214, the court refused to allow the attorney to comment on the fact that, after an accident, the defendant stationed a flagman at this crossing, which 32 L.R.A. (N.S.)

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was held not admissible to show negligence on the part of defendant in running the train at a dangerous rate of speed at the time of the accident. *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L.R.A. 203, 58 N. W. 79.

And evidence that a bridge was changed from wood to iron, giving more room between the car and the bridge where a passenger had his arm crushed by a truss, was held incompetent. *Dale v. Delaware, L. & W. R. Co.* 73 N. Y. 468. The court said: "It was a mere incident of the change of material. Furthermore, the increased space was of no importance as bearing upon the safety of passengers when resting their arms upon the window sills, for, in the new bridge, the trusses were not as high as the sills. The case is not analogous to those in which evidence has been admitted of the repairing of a road immediately after an accident. In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair. But this was not a case of repairs. It was a change in the material and construction of the bridge, made long after the accident; and an improvement which may have been induced by considerations having no reference whatever to the safety of the arms of passengers."

In an action against a railroad company for injuries received in a railroad accident evidence that the bridge in controversy had been reconstructed with longitudinal braces after the accident, which braces were not in at the time of the accident, was held inadmissible. *Isaacs v. Southern P. Co.* 49 Fed. 797. This was on the ground that the use of the braces in the reconstruction might have been out of abundance of caution, in the light of the experience of the wreck.

And evidence of the condition of the hand car, and of repairs made on it before and after the accident by derailment, was held inadmissible. *Landers v. Quincy, O. & K. C. R. Co.* 134 Mo. App. 80, 114 S. W. 543.

In an action for killing a section hand by the hand car jumping the track, it was held that evidence of the placing or replacing wheels on the hand car about a month after the time of the accident was incompetent. *St. Louis South Western R. Co. v. Plumlee*, 78 Ark. 147, 95 S. W. 442.

Evidence of repairs and the use of a safer appliance than a straight pin for fastening the singletree to a horse car was held inadmissible to show that the prior attachment was dangerous. *Sappenfield v. Main Street & Agri. Park R. Co.* 91 Cal. 48, 27 Pac. 590.

And in an action for injuries caused by a log falling on plaintiff, while loading them onto a car, evidence in regard to another method used in loading after the accident was held incompetent to show negligence in the manner of loading at the time of the accident. *Louisville & N. R. Co. v. Morton*, 121 Ky. 398, 89 S. W. 243. 32 L.R.A.(N.S.)

In an action for injuries caused by an explosion of naphtha in a freight car, evidence that, after the accident, the railroad changed the manner of branding and labeling the cars, was offered to show negligence on the part of the defendant. This was held inadmissible. *Standard Oil Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025. The court said there was some conflict: that some cases hold that such evidence would hold out an inducement for negligence, some cases hold that it would be erroneous to show that the defects were repaired after the accident, and some cases hold that it raises distinct and independent issues.

That repairs were made on the sidewalk subsequent to the accident was held inadmissible. But it was held immaterial error not to exclude such evidence in this case, as a proper objection was not in the record. *Sylvester v. Casey*, 110 Iowa, 256, 81 N. W. 455.

Evidence of repairs made to a sidewalk after an accident was held inadmissible to show the defective condition. *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545. The court said: "This was error. Such evidence was not within the issues. The neglect of the defendant prior to the accident was the important question. If the defendant was guilty of negligence by permitting the sidewalk to remain in a dangerous condition, its liability for such negligence is neither aggravated nor mitigated by its promptness or tardiness in repairing a sidewalk after the accident."

Evidence as to sidewalk repairs was held immaterial error, where no proper objection was made. *Witt v. Latimer*, 139 Iowa, 273, 117 N. W. 680.

The admission of evidence showing a barricade after a sidewalk accident was held error. *Cramer v. Burlington*, 45 Iowa, 627. If the record had shown all the evidence, it would have shown that the condition had not been changed, and would have saved a reversal. It was too late, on petition for rehearing, to correct the record.

And that a walk was repaired six months after an accident was held inadmissible in evidence. *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853. The court said: "But, in our opinion, this whole subject of repairs in 1880 was foreign to the case. Making repairs at that time could have no significance except as an admission."

Measurements made ten months after a sidewalk accident were held inadmissible in evidence, where a material change had been made in the condition. *George v. Haverhill*, 110 Mass. 506.

That repairs were made to a sidewalk subsequent to an accident was held to be inadmissible in evidence. *Zibbell v. Grand Rapids*, 129 Mich. 659, 89 N. W. 563; *Dallas v. Meyers*, — Tex. Civ. App. —, 55 S. W. 742.

Where there was no question as to the jurisdiction of the city over the same. *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182.

Evidence of subsequent changes in a sidewalk was held inadmissible to show location of defect. *Tetrick v. Kansas City*, 128 Mo. App. 355, 107 S. W. 418. The court said this could have been shown in other ways.

Where a depression in a street was filled in shortly after an accident, evidence in regard to the same was held inadmissible. *Mackey v. New York*, 121 App. Div. 473, 106 N. Y. Supp. 114.

Evidence that barricades were placed around an excavation on the day after an accident was held to be properly excluded. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

And evidence of guards protecting an area way after an accident was held inadmissible. *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309. The court said: "Such evidence has sometimes been received by courts in cases where the party sued for an accident has, soon thereafter, made repairs or improvements for the purpose of making the machine or structure which caused the accident more secure, convenient, or safe, and its admissibility has been defended on the ground that the act of making the repairs or improvements was an admission that the machine or structure was therefore imperfect, out of repair, or unsafe. We think, however, that such evidence does not tend to prove that the party sued knew, or was bound to know, that the machine or structure was imperfect, unsafe, or out of repair."

And evidence that, after an accident from a cave-in on the highway, a new abutment and retaining wall were built in a bridge, was held incompetent. *Getty v. Hamlin*, 127 N. Y. 636, 27 N. E. 399.

And where a town would be liable for a defective highway, evidence of repairs subsequent to an accident was held to be inadmissible, although it was claimed to be for the purpose of proving duty to keep in repair. *Clapper v. Waterford*, 131 N. Y. 382, 30 N. E. 240. The court held that there was no question of control, and said: "Upon whatever pretense such evidence is put into the case, it is generally used to mislead the jury."

That repairs were made after an accident on a highway was held incompetent evidence, where it was not limited to rebuttal, or to show that witness was mistaken as to condition. *Jennings v. Albion*, 90 Wis. 22, 62 N. W. 926. In this case defendant's witness testified that the depression was very slight. A question as to whether or not repairs had been made after the accident was held error.

And that a ditch for water pipes was braced after a cave-in accident was held to be inadmissible in evidence. *Schermer v. McMahon*, 108 Mo. App. 30, 82 S. W. 535.

And that precautions were taken to strengthen a bridge, after an accident, was held to be inadmissible in evidence. *Fulton Iron & Engine Works v. Kimball Twp.* 52 Mich. 146, 17 N. W. 733; *Woodbury v. Owosso*, 64 Mich. 239, 31 N. W. 130.

Evidence of the construction of a new

bridge differing from the old one, which caused an accident, was held inadmissible to show that the old one was improperly built. *Kansas P. R. Co. v. Miller*, 2 Colo. 442.

In an action for damages for the injury caused by an obstruction in a creek by building a bridge, it was held incompetent to show that, after the injury, defendant put a culvert in the dump in front of plaintiff's place. *Ft. Smith Light & Traction Co. v. Board*, 79 Ark. 388, 96 S. W. 121.

Evidence of subsequent repairs was held inadmissible to establish negligence, where plaintiff was injured by operating a windlass without sufficient help. *Lake v. She-nango Furnace Co.* 88 C. C. A. 69, 160 Fed. 887. The court said: "But evidence that, after the accident, a master repaired his machinery, adopted a different method of operation, or employed a larger number of men in conducting his business, is incompetent because it has no legitimate tendency to prove that the number of men employed, the method pursued, or the machinery used before the accident, was not reasonably safe and sufficient, and because the reception of such evidence would deter the master from improving his methods and machinery."

And where it was claimed that an accident was caused by the ratchet dog which controlled the throttle being badly out of order, and the plaintiff was thrown from his berth by a collision, evidence that repairs were subsequently made was held inadmissible. *Atchison, T. & S. F. R. Co. v. Parker*, 5 C. C. A. 220, 12 U. S. App. 132, 55 Fed. 595. The court said: "The ground upon which the exclusion of such testimony rests is twofold: First, that the making of repairs to a piece of machinery after an accident has occurred has no legitimate tendency to show that such piece of machinery was not in an ordinarily safe and fit condition for use before such repairs were made; and second, that the admission of such evidence for the purpose of showing that a defendant has been negligent has a strong tendency to discourage employers in making alterations or repairs which would otherwise be made, and which would render machinery more safe and accidents less frequent."

In an action for injury caused by defective shears, evidence by defendant that the shears worked all right after the injury, and evidence in rebuttal that, after the accident, a bolt in the shears had been tightened, was held to have been properly excluded. *Republic Iron & Steel Works v. Gregg*, 24 Ky. L. Rep. 1627, 71 S. W. 900.

And in an action for injuries caused by the knives of a planing machine being dull and the driving belt being loose, it was held that evidence of the fact that immediately after the accident the knives were sharpened and the belt was tightened was inadmissible. *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710. The court said: "It is now well settled in this state, in accord with the rule prevailing generally else-

where, that evidence of precautions taken and repairs made after the happening of the accident is not admissible to show a negligent condition at the time of the accident."

In an action for injuries caused by the vibration of the floor of a defective building, making a ramp jump from plaintiff's hand, and forcing his right hand into the knives, it was held that evidence of subsequent repairs was inadmissible. *Huber v. Jackson & S. Co.* 1 Marv. (Del.) 374, 41 Atl. 92.

In an action for injuries, evidence of subsequent repairs to machinery was held inadmissible to show the condition before or after the accident. *Pennsylvania Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

And where a pulley fell and injured plaintiff, evidence as to subsequent repairs was held inadmissible. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591. The court said: "But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

In an action for injuries caused by a loose belt engaging a pulley, evidence of the use of an appliance after the accident, to prevent the belt making connection, was held inadmissible, where no witness had testified that the flat stick used was sufficient. *Going v. Alabama Steel & Wire Co.* 141 Ala. 537, 37 So. 784. The court said: "Had he testified in chief that this piece of wood was, in his opinion, a safe and proper appliance, he might have been asked on cross-examination, for the purpose of abating the probative force and value of his opinion, whether he had not substituted another appliance after plaintiff's injury; but the evidence is not offered in any such connection, or for any such purpose."

And in an action for injuries caused by falling studs from a broken belt, evidence that subsequently protecting boards were erected was held incompetent. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789.

In an action for injuries, evidence of a change made in the machinery after the accident was held inadmissible to show defects at the time of the accident. *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654.

And in an action for injuries caused by having a hand caught in a book-binding press, evidence that the press was repaired after the accident was held incompetent. *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854.

And evidence as to precautions taken for changing the working of a machine after 32 L.R.A. (N.S.)

an accident was held inadmissible. *Low v. Elliott*, 109 N. C. 581, 14 S. E. 51.

And evidence of subsequent repairs on a machine that had caused an accident was held inadmissible. *Morancy v. Hennessey*, 24 R. I. 205, 52 Atl. 1021; *McGarr v. National & P. Worsted Mills*, 24 R. I. 447, 60 L.R.A. 122, 96 Am. St. Rep. 749, 53 Atl. 320.

And in an action for injuries caused by a paper winder, evidence that, subsequent to the injury, the defendant caused the set screw to be countersunk, was held inadmissible. *Kreider v. Wisconsin River Paper & Pulp Co.* 110 Wis. 645, 82 N. W. 662.

Evidence that, at the time of the trial, a machine worked smoothly was held inadmissible, where the condition had changed. *Odegard v. North Wisconsin Lumber Co.* 130 Wis. 659, 110 N. W. 809. The court said: "The evident effect of the evidence that the carriage ran 'nice and smooth now' would be that it could be claimed therefrom that the changes made had been in the way of repairs to the supposed defects after the accident."

And in an action for injuries caused by the breaking of a stop valve on a steamer, it was held that evidence that a brass valve was put on after the accident, instead of a cast-iron one, was inadmissible. *Wyman v. The Duart Castle*, 6 Can. Exch. 387.

Evidence of repairs made on an edging machine subsequent to an accident was held incompetent. *Bodcaw Lumber Co. v. Ford*, 82 Ark. 555, 102 S. W. 896.

In *Wren v. Kennedy Valve Mfg. Co.* 122 App. Div. 289, 106 N. Y. Supp. 710, the court said: "The defendant, in cross-examining plaintiff's witnesses, proved that, after the accident, this bail was taken to defendant's blacksmith shop, and that both hooks were straightened,—a fact which the plaintiff would not have been permitted to prove."

And that additional safeguards were put on a machine after an accident was held inadmissible in evidence. *Worthy v. Jonesville Oil Mill*, 77 S. C. 69, 11 L.R.A. (N.S.) 690, 57 S. E. 634, 12 A. & E. Ann. Cas. 688.

A witness testified that, the day after an accident, the burr on the end of a shaft that had caught plaintiff was ground off, and after a few days' use, the shaft was thrown away. This was held to be error. *Plunkett v. Clearwater Bleachery & Mfg. Co.* 80 S. C. 310, 61 S. E. 431.

In an action by a passenger against a street railroad company for injuries received in a collision with a hook and ladder truck, evidence for the defendant, that, after this collision, the city had brakes put upon the trucks, was held immaterial and inadmissible. *Heucke v. Milwaukee City R. Co.* 69 Wis. 401, 34 N. W. 243.

Evidence of subsequent repairs to an elevator after an accident was held inadmissible. *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

And evidence that, two years after an

accident caused by an elevator, the cable was fastened with two clamps, and, at the time of the accident, it was fastened with only one clamp, was held incompetent. *Young v. Mason Stable Co.* 96 App. Div. 305, 89 N. Y. Supp. 349.

And in an action for injuries caused by a defective hoisting machine, evidence showing how the brake bar worked a year after the accident, where it appeared that it had a new catch plate, and was therefore a different appliance, was held incompetent. *Bernard v. Pittsburg Coal Co.* 137 Mich. 279, 100 N. W. 396.

Evidence of repairs made after an accident was held inadmissible, because the taking of such precautions against the future should not be construed as an admission of responsibility for the past. This was an action for personal injuries, caused by falling down an elevator, in the absence of a guard rail. *Cleveland Provision Co. v. Limmermaier*, 8 Ohio C. C. 701, 4 Ohio C. D. 240.

Evidence of repairs made on a hoist bucket after an accident was held inadmissible. *Schultz v. Barber Asphalt Paving Co.* 127 App. Div. 305, 111 N. Y. Supp. 281.

And evidence of a change in the form of the planking of the shaft upon which the bucket caught, so that it would not catch, was held incompetent to show defendant's negligence. *Camp Bird v. Larson*, 81 C. C. A. 412, 152 Fed. 160, 11 A. & E. Ann. Cas. 500.

In an action for injuries caused by coming in contact with a live wire, it was held that evidence that, subsequent to the accident, the defendant put up handbills warning employees engaged at work on its lines or circuits to quit such work at 4 o'clock was inadmissible. *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 7 Am. St. Rep. 255, 19 Pac. 479. The court said: "What it did afterwards, in the way of precaution, to avoid future accidents, should not be construed into an admission by it of a previous neglect of duty."

And evidence of repairs in covering signal wires after an accident was held inadmissible, in an action for the death of an employee, who had tripped on the wires. *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543.

In an action for injuries caused by falling while descending an electric light pole, on account of wires not being properly placed, evidence to show that, after the accident, the location of the wires was changed, was held inadmissible. *Ziehm v. United Electric Light & P. Co.* 104 Md. 48, 64 Atl. 61.

In an action for causing death in a mine by suffocation, evidence that, immediately afterwards, the defendant placed water pipes in the mine, was held incompetent. *Alabama Consol. Coal & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686.

And evidence that, shortly after the accident, repairs were made on a door piece to a mining bucket, was held incompetent. 32 L.R.A. (N.S.)

to show the defective condition of the door piece. *Harvey v. Alturas Gold Min. Co.* 3 Idaho, 510, 31 Pac. 819.

Evidence that, after an accident, the ring with which a bucket was attached to a rope was changed by hammering its overlapping ends together, was held competent in rebuttal, in an action for injuries while working in a mining shaft, caused by the defective construction of a ring. *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882.

And that repairs were made to mining-car brakes the afternoon of the accident was held to be inadmissible in evidence. *Hairston v. United States Coal & Coke Co.* 66 W. Va. 324, 66 S. E. 473.

Evidence of repairs by a new covering on a stairway after an accident was held inadmissible to show knowledge of dangerous condition. *Henkel v. Murr*, 31 Hun, 28.

Where an injury was claimed to have been caused by not having safeguards at the door of a room where the floor had been removed, it was held that evidence showing that, immediately after the accident, safeguards were put up, was inadmissible to show prior negligence. *Nalley v. Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47.

A photograph showing bars on the side of a cellar way, which had been put there after an accident, was held incompetent evidence. *Davenport v. Matthews*, 130 App. Div. 257, 114 N. Y. Supp. 715.

Evidence that, after the accident, scaffold ropes in use at the time it occurred were abandoned and new ropes substituted, was held inadmissible in an action for personal injuries, caused by the breaking of ropes. *Anson v. Evans*, 19 Colo. 274, 35 Pac. 47.

And evidence of precautions taken immediately after an accident caused by falling through an open scaffold was held inadmissible. *Burns v. Crow*, 123 App. Div. 251, 107 N. Y. Supp. 944.

Where a bridge tender was killed by a boat colliding with a bridge, and causing a part to fall, it was held that evidence of subsequent repairs by driving piles to protect the bridge was inadmissible. *Castello v. Landwehr*, 28 Wis. 522.

And evidence that, after an accident resulting in death, defendant boarded up the gang space on the boat, was held to have been properly excluded. *Dougan v. Chainplain Transp. Co.* 56 N. Y. 1.

In an action by the government against the owner of a vessel, for damaging, at night, a breakwater, which had a white light at the extreme end, evidence that, three months after the collision, the government issued a circular to mariners, calling attention to the kinds of lights used, was held inadmissible. *Davidson S. S. Co. v. United States*, 73 C. C. A. 425, 142 Fed. 315. This was on the ground that precautions taken after the occurrence of an accident should not be held evidence of want of care.

In an action for swamping a scow containing cattle, evidence that the rate of speed at which the scow was towed was decreased subsequent to the accident was held to be inadmissible. *Baird v. Daly*, 68 N. Y. 547.

In *Rudd v. Bell*, 13 Ont. Rep. 47, it was said: "Where accidents have happened, it may be the duty of the employer to make use of additional safeguards; but it does not follow that the mere fact of the adoption of increased precautions after an accident of itself proves negligence in the nonadoption of these precautions before. *Hart v. Lancashire & Y. R. Co.* 21 L. T. N. S. 261. It may constitute some evidence of a want of due care; but, as I have been unable to find any want of due care, this does not, of itself, prove it."

Evidence that a clothes pole which injured plaintiff was afterwards set in a more secure manner was held incompetent. *Schuhle v. Cunningham*, 14 Daly, 404. The court said: "Ordinarily negligence cannot be shown by proof of what occurred subsequently to the happening of an accident (*Dougan v. Champlain Transp. Co.* 56 N. Y. 1). There are cases in which an injury is caused through the disrepair of an article; and in such cases the fact that repairs have been made directly after the accident is regarded as proof that the article was out of repair when the injury occurred (*Dale v. Delaware, L. & W. R. Co.* 73 N. Y. 472). . . . That the pole was negligently set at the time of the accident was not to be proved by testimony that the defendant displayed excessive caution in resetting it"

Evidence as to repairs made after an accident is inadmissible. *Wilkes v. Gallagher*, 51 Misc. 654, 99 N. Y. Supp. 866.

But it may be immaterial error when the plaintiff was entitled to recover on other evidence. *Harvey v. Alturas Gold Min. Co.* 3 Idaho, 510, 31 Pac. 819.

In an action for injuries while unloading poles, evidence that, after the accident, the method of unloading was changed, was held incompetent to support a charge of negligence predicated upon the condition existing at the time of the accident. *Fitter v. Iowa Teleph. Co.* 129 Iowa, 610, 106 N. W. 7.

In an action for injuries caused by a marble slab falling on plaintiff from being improperly loaded, evidence of precautions taken after the accident was held incompetent to show that improper machinery was used at the time of the accident. *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 159.

In an action for injuries caused by a portion of a bank of earth falling upon plaintiff's intestate, while engaged in digging a trench, evidence of subsequent precautions to prevent the recurrence of accidents was held inadmissible, but it was held that such evidence might have been offered in rebuttal. *Shinners v. Locks & 32 L.R.A. (N.S.)*

Canals, 154 Mass. 168, 12 L.R.A. 554, 28 Am. St. Rep. 226, 28 N. E. 10.

And in an action for injuries caused by a failure to shore up a trench near a railway track, evidence that, after the accident, the track was shored up, was held inadmissible. *Schermer v. McMahon*, 108 Mo. App. 36, 82 S. W. 535.

Evidence that a defective seat on a lumber wagon and short lines for driving were remedied after the accident was held inadmissible to show negligence at the time of an accident to the driver of the wagon. *Limberg v. Glenwood Lumber Co.* 127 Cal. 598, 49 L.R.A. 33, 60 Pac. 176.

And in an action for injuries caused by being thrown out of defendant's hack, evidence that there was no door on the hack at the time of the accident, but one was put on about six months after, was held incompetent and immaterial. *Beard v. Guild*, 107 Iowa, 476, 78 N. W. 201.

And evidence that the well which caused the death was filled up subsequent to the accident was held incompetent. *Holt v. Spokane & P. R. Co.* 3 Idaho, 703, 35 Pac. 39. The court said: "Precautionary measures for the future, such as making machinery more safe where an accident has happened, or placing safeguards about a place where a person has been injured, cannot be considered as showing negligence in the past, and it is error to admit evidence showing such facts."

In an action for damages by fire from defendant's mill, argument by counsel that, after this fire, changes were made in the spark arrester, was held error. *Wager v. Lamont*, 135 Mich. 521, 98 N. W. 1. In this case defendant's witness testified that a short time after the fire, they found the spark arresters in good order, but made some changes, whereby it was unnecessary to raise the cap to shake down the soot and clean the stack.

b. Pennsylvania cases.

The rule now in this state is that evidence of repairs or precautions taken after an accident will not be admissible.

In *Baran v. Reading Iron Co.* 202 Pa. 274, 51 Atl. 979, evidence of precautions taken and repairs made after the accident was held inadmissible, as tending to prove prior negligence, in an action for personal injuries resulting in death, caused by the explosion of a boiler. This case overrules the prior decisions that seem to hold the contrary, saying: "The time has come when we should distinctly say that we do not approve the rule, and that the cases which may be considered as announcing and sustaining it are, to that extent, overruled. The admission of such testimony cannot be defended on principle."

In *Elias v. Lancaster City*, 203 Pa. 638, 53 Atl. 507, in an action for injuries caused by slipping on a plate or bridge over a gutter on a highway, evidence of subsequent precautions was held inadmissible to show prior negligence. The court said: "The

refusal of this point raises the question whether evidence of precaution taken after an accident is admissible as tending in itself to prove prior negligence. The ruling of the court on this question was warranted by our decisions as they then stood. Since the trial we have decided in *Baran v. Reading Iron Co.* supra, that such testimony is not admissible."

Evidence that a railroad employed a night watchman at a crossing after an accident was held inadmissible, where the deceased was killed in the daytime. *Derk v. Northern C. R. Co.* 164 Pa. 243, 30 Atl. 231.

And where there was no evidence of a railroad failing in its duty to a passenger who fell in a culvert after alighting, evidence of subsequent repairs was held to be inadmissible. *Fisher v. Paxson*, 182 Pa. 457, 38 Atl. 407.

And evidence that after an accident by falling down a stairway, a gate had been placed there, was held inadmissible, where it was not shown to have been immediately afterwards. *Sweeny v. Barrett*, 151 Pa. 600, 25 Atl. 148.

But in *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315, where a passenger waiting on the platform was struck by a train and killed, evidence as to the placing of the platform and its removal having been admitted, evidence that the agent of the defendants, immediately after the accident, telegraphed to the superintendent, telling him about the situation of the platform, and that it ought to be removed, and that it was removed the next day, was held competent.

In *Baran v. Reading Iron Co.* supra, the case of *Pennsylvania R. Co. v. Henderson*, supra, was criticized and distinguished, saying: "The statement, however, in the opinion, that the testimony was 'clearly proper,' gave rise to what has been considered a rule on the subject in this state. A like statement was made in the opinion in *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311, another case in which negligence of the defendant was so manifest that proof of subsequent alterations could not make it more apparent. In *McKee v. Bidwell*, 74 Pa. 218, attention was called to the cases of *Pennsylvania R. Co. v. Henderson* and *West Chester & P. R. Co. v. McElwee*, but the reversal was on the ground that the question of the plaintiff's negligence should have been submitted to the jury. *Pennsylvania Teleph. Co. v. Varnau*, 2 Monaghan (Pa.) 645, 15 Atl. 624, may be classed with these cases, and *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Sweeney v. Barrett*, 151 Pa. 600, 25 Atl. 148; *Derk v. Northern C. R. Co.* 164 Pa. 243, 30 Atl. 231, and *Card v. Columbia Twp.* 191 Pa. 254, 43 Atl. 217, merely recognize the existence of the rule, but predicate nothing of it. In *Lederman v. Pennsylvania R. Co.* 165 Pa. 118, 44 Am. St. Rep. 644, 30 Atl. 725, there was a special reason for the admission of the testimony to show that safety gates had been erected after

the accident. The jury had been on the ground and had seen them, and it was proper in rebuttal to show that they were not there when the accident happened. In *Gavigan v. Atlantic Ref. Co.* 186 Pa. 604, 40 Atl. 834, care was taken not to sanction the rule, and in *Hager v. Wharton Twp.* 200 Pa. 281, 49 Atl. 757, doubt as to its correctness was expressed."

Where a person was injured at a railroad crossing, and the warning bell could not be heard more than 15 feet away, it was held admissible to prove that the bell was repaired a day or two after the accident, in connection with the proof that it was out of order at the time of the accident. *Link v. Philadelphia & R. R. Co.* 165 Pa. 75, 30 Atl. 820, 822.

Evidence that after an accident caused by cars striking scales, the track had been removed, was held competent. *West Chester & P. R. Co. v. McElwee*, supra. In this case the court said: "If it tended to show, as suggested, that the track was originally too near the office and shanty to permit the cars to be run on it without danger, then it was evidence of a fact proper for the consideration of the jury in determining whether due and reasonable care had been used by the company to avoid the accident. If the proximity of the track to the buildings did not increase the danger, why was it moved? And if it did, then a higher degree of care was necessary in order to avoid accident; and in this aspect the evidence was properly received."

Evidence that, shortly after the accident caused by a low telephone wire, the wire was raised, and evidence as to the height of the wire on the Sunday before the accident, was held admissible, in an action for damages for the death of a driver by throwing him from his wagon. *Pennsylvania Teleph. Co. v. Varnau*, supra.

Evidence that the defendant lighted up a dangerous place in a building after an accident was held admissible, where a person was injured by falling through an elevator opening. *McKee v. Bidwell*, 74 Pa. 218.

c. Minnesota cases.

In this state the earlier cases allowing evidence of repairs and changes made after an accident have been overruled.

Evidence of repairs to a switch, made a year after an accident, was held inadmissible. *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358. The court said: "The court held, in *O'Leary v. Mankato*, 21 Minn. 65, that such evidence was, under certain circumstances, competent. This case was followed in *Phelps v. Mankato*, 23 Minn. 276, and *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588, and this position is not without support in the decisions of other courts. But, if competent, such evidence is only so as an admission of the previous unsafe condition of the thing repaired or removed; and, to render it admissible as such, the act must

have been done so soon after the accident, and under such circumstances, as to indicate that it was suggested by the accident, and was done to remedy the defect which caused it. All courts who admit the evidence at all so hold. In the present case, the change in this switch was made over a year after the accident, and after it had been removed to another place."

And that subsequent repairs were made to a sidewalk after an accident was held to be inadmissible in evidence. *Hammargren v. St. Paul*, 87 Minn. 6, 69 N. W. 470. The court said: "The evidence that the defendant had subsequently repaired this defective hole would not be admissible, under the rulings of this court in *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358; *Day v. H. C. Akeley Lumber Co.* 54 Minn. 522, 23 L.R.A. 513, 56 N. W. 243."

And in an action for damages by fire from defendant's defective sawdust burner, evidence as to repairs made after the accident was held inadmissible. *Day v. H. C. Akeley Lumber Co.* 54 Minn. 522, 23 L.R.A. 513, 56 N. W. 243. The court said: "In the case of *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358, this court, after twice holding to the contrary, concluded that evidence of this character was inadmissible, and its previous rulings wrong on principle. Several cases were cited in support of the changed position, and we are satisfied that the rule last adopted is the correct one, without regard to the time when the repairs are made."

And in an action for injuries caused by a defective machine, evidence of a change in the guard, two weeks after the accident, was held inadmissible. *Lally v. Crookston Lumber Co.* 82 Minn. 407, 85 N. W. 157. The court said: "The master should be at liberty to adopt new and safe appliances after an accident has exposed the weakness of those in use, without being subjected to the charge that he was negligent in having used the old appliance."

These cases above overrule the prior decisions, which were as follows: In *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588, evidence of subsequent repairs to a railroad crossing was held to be admissible. The court said: "It is further urged that the court erred in permitting plaintiff to show that, after the accident, defendant repaired the crossing by replacing the missing plank. Such evidence has been repeatedly held competent. *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311; *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276."

In *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, the court said: "A different rule was announced in the case of *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588. But it appears in that case that the testimony objected to showed that the accident to which it related 'was produced by a different cause, and at a point in the crossing about the condition of which there 32 L.R.A. (N.S.)

was no complaint,' and the court held that the defendant, if it deemed the evidence prejudicial, should have moved to have it stricken out. The rule as stated in the opinion in that case is not discussed, and no authority is given in its support."

In an action for death at a railroad crossing, evidence showing that the company immediately after the accident, adopted precautions to prevent similar accidents, was held admissible. *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 103, 9 N. W. 575. The court said: "The evidence of the precautions taken by defendant after the accident, to guard against similar accidents at this crossing, was admissible, under the decisions of this court in *O'Leary v. Mankato* and *Phelps v. Mankato*, supra."

And where a bridge had been changed as to its location, and the old approach left unguarded, causing a driver to go over the bank into the ditch, evidence that, after the accident, the defendant widened the bridge so as to cover the exposed portion of the ditch, was held to be admissible. *O'Leary v. Mankato*, supra. The court said: "The evidence was, however, competent, as having some, though not a very strong, tendency to show that the condition of the street was such that it was at least proper that the ditch should be covered at this point. *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311."

d. Georgia cases.

The earlier cases allowing evidence of repairs or alterations made after an accident have been overruled.

Evidence of the removal, after an accident, of ties used by the public as a foot way, was held inadmissible. *Western & A. R. Co. v. Rogers*, 104 Ga. 224, 30 S. E. 804. The court said: "This court has decided in several cases that where injury was inflicted by means of a defect in the track or machinery of a railroad company, and such defect was subsequently removed or repaired by the company, this fact could be considered as in the nature of an admission of negligence by the company. I have always regarded this as a harsh rule; for it may frequently happen that the servants of the corporation may not know of the defect until after it has injured someone."

In *Georgia S. & F. R. Co. v. Cartledge*, 116 Ga. 164, 59 L.R.A. 118, 42 S. E. 405, it was held that evidence of subsequent precautions to prevent a recurrence of injury where plaintiff was injured by reason of a post striking a mail bag was inadmissible.

In *Georgia S. & F. R. Co. v. Cartledge*, supra, on the question of evidence showing repairs subsequent to an accident, the prior decisions of this state, admitting such evidence, were overruled: this includes: *Augusta & S. R. Co. v. Renz*, 55 Ga. 126; *Central R. & Bkg. Co. v. Gleason*, 69 Ga. 201; *Savannah, F. & W. R. Co. v. Flannagan*, 82 Ga. 580, 14 Am. St. Rep. 183, 9 S. E. 471.

In an action for damages resulting from the killing of a mule by reason of defective plank way, it was held that evidence of subsequent repairs was admissible. *Central R. & Bkg. Co. v. Gleason*, 69 Ga. 200. The court said: "We do not see that the court erred in allowing the plaintiffs to prove the repairs done to the place where the injury was sustained, because such repairs were made after it happened. Whether it shows that they ought to have been made before, or that they were made necessary by the accident, was proper matter for the jury to consider."

And in an action for injuries to a passenger, caused by carelessly driving a street car over a sharp curve, it was held competent to show that the defendant had altered the curve since the accident. *Augusta & S. R. Co. v. Renz*, 55 Ga. 126. The court said: "There was no error in allowing the witnesses to testify that, since the injury to the plaintiff, the defendant had altered the curve in its road. The alteration was a fact which it was competent for the plaintiff to prove for the consideration of the jury, subject to be explained by the defendant why the alteration was made."

And evidence as to similar defective conditions of the machine shortly after the accident, and injuring other persons, was held admissible, in an action for injuries caused by this machine. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S. E. 873.

e. Kansas cases.

The rule in this state is, that evidence of repairs or changes made shortly after an accident will be admissible. This state seems to follow Pennsylvania and Minnesota overruled cases. A case in the appellate court held the other way, but this was not in accord with the rule in that state.

In an action for injuries caused by coming in contact with a coal chute near a railroad switch, claimed to be within 6 inches of where cars passed on the track, evidence as to the removal of the track after the injury was held competent. *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 245. The court said: "The jury could consider it for what it was worth; and with proper instructions it might have aided, in some degree, the jury in determining whether the railroad company changed the track on account of it being in too close proximity to the coal chute for the safety of its employees, or for other reasons. The circumstance was a slight one in the case, but was not wholly immaterial."

And in an action for injuries caused by a boiler plate falling upon plaintiff, evidence that immediately thereafter an iron post guard was driven in to prevent the trap from catching some other person was held admissible, as that was the rule in this state. *Consolidated Kansas City Smelting & Ref. Co. v. Tinchert*, 5 Kan. App. 130, 48 Pac. 889.

And in an action for injuries caused by a defective saw, evidence that repairs were

made on it subsequent to the accident was held competent. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484. The court said: "We shall not here discuss the question of whether evidence showing that repairs have been made upon a machine at which an accident has happened, shortly after it occurred, is competent to show that such machine was unsafe at the time of the accident. This court has examined and discussed this matter, and it appears to be the settled law of the state to admit such evidence."

In *Harter v. Atchison, T. & S. F. R. Co.* 55 Kan. 250, 38 Pac. 778, where plaintiff's intestate lost his life by reason of a defective joint in a switch, and it was proved that the joint was out of repair, and was repaired immediately after the accident, the court said: "The evidence showing that repairs were made immediately after the accident tended to show that a defect existed in the fastenings of the switch chair to the head block, and the driving of new spikes through the chair tended to prove that it was loose. Under the cases decided by this court, cited by the plaintiff in error, *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 248; *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 603, 15 Pac. 484, this evidence was admissible for the purpose of showing that the defect existed at the time the repairs were made; but it did not show, nor tend to show, that the defendant had knowledge of the defect prior to the accident."

But in an action for the death of the intestate, caused by a large rock falling on him from roof of a mine, evidence that, a few days after the accident, repairs were made in the mine, by putting braces and timbers at the place where the slate or rock fell, was held inadmissible. *Cherokee & P. Coal & Min. Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100. The court said: "It was manifestly to go to the jury for the purpose of establishing the fact that the place where the rock fell was in an unsafe and dangerous condition at the time of the accident; and the fact that repairs were made after the accident was an admission on the part of the company that the roof there was unsafe before the alleged occurrence. We do not think that this evidence should have been admitted."

f. Illinois cases.

There appears some conflict in this state on the subject of allowing evidence of repairs after an accident; one of the early cases allowing such evidence followed Minnesota and Pennsylvania cases that have been overruled. The latest decisions in Illinois deny the admissibility of such evidence. The question does not seem to have been authoritatively discussed so as to determine what the rule will be, but the

weight of authority in that state is against the admissibility of such evidence.

Evidence that a floor was changed after an accident to a workman on a shaping machine was held inadmissible. *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714. But the error in admitting it in this case was held immaterial, as it was only that a new employee had changed it to suit himself.

And evidence of subsequent repairs to a paper-cutting machine was held inadmissible. *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724. The court said: "The purpose of this evidence was doubtless to show an implied admission of negligence on the part of the defendants. The rule in such cases is that the question of negligence should be determined only by what occurred before and at the time of the accident; and evidence of repairs made after the accident is not admissible."

The admission of evidence that, after an elevator accident, an air cushion was put in the shaft, was held erroneous. *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423. The court said: "Persons to whose negligence accidents may be attributed will hesitate about adopting such changes as will prevent the recurrence of similar accidents, if they are thereby to be charged with an admission of their responsibility for the past. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not necessarily to be regarded as tantamount to a confession of past neglect."

And evidence that, three days after an accident, new cables were put in, and an elevator was tested to see whether the dogs worked properly, was held incompetent, in an action for injuries caused by the falling of an elevator. *Woelfel Leather Co. v. Thomas*, 68 Ill. App. 394.

And where evidence of repairs to machinery, made three weeks after an accident, was offered to show its previous condition, at the time of the accident, it was held inadmissible in an action for injuries resulting from a fall into an air shaft containing water. *Stonington Coal Co. v. Young*, 137 Ill. App. 462.

And evidence of orders given to repair a gangway shortly after an accident was held incompetent, and not part of the *res geste*. *Alabaster Co. v. Lonergan*, 90 Ill. App. 353.

And evidence of repairs to a stairway by adding a railing, more than four years after the accident, was held incompetent, in an action for injuries caused by falling from a stairway in a large flat. *Merchants' Loan & T. Co. v. Boucher*, 115 Ill. App. 101.

Evidence that repairs were made on a fence after the accident was held incompetent to show that the fence was insufficient, in an action for the killing of a colt by an engine. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

Evidence that a fence was removed shortly after the accident to a horse was held

incompetent, in an action for killing the horse. *Leggett v. Illinois C. R. Co.* 72 Ill. App. 577.

Evidence that a fence was placed around a defective sidewalk, the morning after an accident, was held to be immaterial error, as there was similar evidence to which objection was not made. *Streator v. O'Brien*, 103 Ill. App. 85.

And where plaintiff persisted in trying to prove subsequent repairs to a sidewalk, it was held not reversible error, where the court properly instructed the jury to disregard the same. *Normal v. Bright*, 125 Ill. App. 478, affirmed on another point in 223 Ill. 99, 79 N. E. 90.

And evidence of rebuilding a sidewalk in a different manner after it fell was held inadmissible. *Warren v. Wright*, 103 Ill. 298. The court said: "This testimony could only have been relevant as founding an inference that the sidewalk was defectively constructed originally, and that there was a want of ordinary care in that respect. We think it was inadmissible for that purpose."

And proof that, after an accident from a defective street, a bridge was built, was held incompetent. But evidence that stone had been prepared to construct the bridge before the accident was held admissible. *Mt. Morris v. Kanode*, 98 Ill. App. 373.

But in *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578, it was held not error to receive evidence of repairs shortly after the accident. The court said: "On the trial, the court permitted, against the objection of counsel for the defendant, several witnesses to testify that the sidewalk was repaired three or four days after the accident, and also allowed certain witnesses called for the defendant to be asked, on cross-examination, as to the repairing of the sidewalk after the accident, and this ruling is relied upon as error. It is plain that the liability of the city is to be determined by the condition of the sidewalk at the time the injury was received. If the sidewalk was then in a good and safe condition for persons to travel over, the city would not be liable; but if, on the other hand, the sidewalk was then out of repair and dangerous to travel upon, the city might be liable. But, in passing upon the relevancy of the evidence, it is not required that it should, of itself, absolutely prove a case, but the question is whether it tends to prove the fact or facts for which it is offered. If it does, then the evidence may be competent for the consideration of the jury. Here, the question at issue was the condition of the sidewalk when the plaintiff was injured; and the best evidence would be proof of its condition immediately preceding the accident; but, at the same time, it was competent to prove the condition of the sidewalk a few days before and a few days after the accident, as tending to establish its condition at the time of the accident. We think the evidence was prop-

erly admitted, the alleged defect in question which caused the injury being a loose plank in the sidewalk."

In *Marder v. Leary*, 35 Ill. App. 420, where they allowed evidence of a protecting guard after an accident, the court reviews the conflict of cases, saying: "The latest decision in Minnesota denies its admissibility (*Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358). The same view is held in New York and Iowa (*Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Simpson v. Manhattan R. Co.* 17 N. Y. S. R. 68, 1 N. Y. Supp. 673; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735). The contrary is the rule in Pennsylvania (*West Chester & P. R. Co. v. McElwee*, 67 Pa. 311; *McKee v. Bidwell*, 74 Pa. 218). Similar evidence was admitted in Chicago, *B. & Q. R. Co. v. Gregory*, 58 Ill. 272; and although the question does not appear to have been raised, the court comments on the evidence as strengthening the theory that the instrument which caused the injury then in question was in a dangerous situation when the plaintiff was hurt. The *Warren v. Wright*, 103 Ill. 298, denies the competency of the evidence, but since the decision in *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578, it must be conceded that the law for this court requires its admission."

In *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 273, where two men had been killed previous to this accident, by the same mail crane, the evidence showed that after this accident the crane was moved away from the track. The court did not discuss the admissibility of this evidence, but treated it as competent. The court said: "It appears that immediately after the happening of the casualty, the mail catcher at Cliola was moved back a distance of from 4 to 6 inches, and there is no evidence that any injury has since occurred. The officers of the company were notified of the injuries to their employees, at the date of their occurrence, and it is not an illogical conclusion that the company were guilty of gross negligence in not removing it to a safe distance at an earlier period. It was entirely practicable to do so, for there is no pretense that it has not performed its proper functions since its removal. The slightest precaution on the part of the officers of the company, after their attention had been called to its dangerous tendencies, would have prevented the occurrence of the fatal accident."

In *Vandalia v. Ropp*, 39 Ill. App. 344, it was held: "The admission of testimony on behalf of the plaintiff concerning repairs at the crossing after the accident, under the decision of our supreme court, was not error." This was a street crossing, and no cases are cited.

g. Washington cases.

An early territory case held that evidence of subsequent repairs would be ad-

missible. But the cases in the courts since becoming a state refuse to allow the admissibility of evidence of repairs.

Evidence of precautions taken subsequent to an accident was held inadmissible. *Bell v. Washington Cedar Shingle Co.* 8 Wash. 27, 35 Pac. 405.

Where evidence that a hole in the sidewalk had been filled after an accident was received without objection, an instruction that the jury might consider this on the question of negligence was held to be error. *Carter v. Seattle*, 21 Wash. 585, 59 Pac. 500. The court said this evidence was inadmissible.

Where plaintiff was injured by a pulley wheel falling from its shaft, evidence that, after the accident, a plank guard was put underneath the pulley, was held admissible. *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. Terr. 353, 19 Pac. 25. The court said: "Appellant made objections to the admission of evidence that, after the accident, the appellant put a plank under the pulley, so as to arrest its fall if it should come off in the future. Acts and words of a party which expressly or impliedly are admissions against interest are admissible. The putting up of a plank to stop the falling pulley is a declaration that the pulley is liable to fall, for the plank is useless for any other purpose. If the change of the situation by appellant might have been made for an entirely different purpose, the rule might be different."

h. As evidence in rebuttal.

It is generally held that evidence of precautions in the nature of changes and repairs is admissible in rebuttal of defendant's witnesses, when it would not be admissible as original evidence.

So, in an action for injuries caused by projecting ties of unusual and dangerous length, evidence that the ties were sawed off after the accident was held competent to show that the defect complained of existed at the time of the injury, where defendant's witnesses testified that the ties were cut off prior to the accident. *Louisville & N. R. Co. v. Woodward*, 15 Ky. L. Rep. 445.

In an action for injuries caused by falling into an opening on a dark wharf, evidence for defendant that, shortly after the accident, there was a light at that place, was held admissible in corroboration of witnesses, but it was held to be immaterial, if erroneous. *Bacon v. Casco Bay S. B. Co.* 90 Me. 46, 37 Atl. 328.

And where defendant proved that a trolley pole causing a collision was at a certain distance from the track, and the measurement was made two months after the accident, evidence that the pole had been moved farther away from the track was held admissible. *Kath v. East St. Louis & Suburban R. Co.* 232 Ill. 126, 15 L.R.A. (N.S.) 1109, 83 N. E. 533.

And evidence that, after an accident at a railroad crossing, the defendant repaired its

gates at that crossing, was held admissible. *Lederman v. Pennsylvania R. Co.* 165 Pa. 118, 44 Am. St. Rep. 644, 30 Atl. 725. The court said: "The evidence was particularly pertinent in this case, because the jury had been upon the ground, and had seen the gates there. To rebut an inference that the gates were there at the time of the accident it was proper to inform them when they were erected."

In an action for injuries to a passenger, received in a wreck on a railroad train, where defendants' witnesses had testified to the good condition of the track, and that it was used after the accident without being repaired, evidence in rebuttal was held properly admitted. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

In an action for the death of plaintiff's intestate, by a railroad wreck, evidence of the defective condition of the track generally in the immediate vicinity, subsequent to the accident, was held competent, where the railroad company had first shown that the entire track near the place of injury was good. *Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 19 L.R.A. 310, 40 Am. St. Rep. 211, 21 S. W. 244.

And where defendant showed that new brakes were on a trolley car at the time of an accident, evidence that the car was afterward dismantled and the brakes sold for old iron was held to be admissible. *Frankfort & V. Traction Co. v. Hulette*, 32 Ky. L. Rep. 732, 106 S. W. 1193.

And the condition of a stamping press two months after an accident from repeating was held admissible in evidence, where the witness had then made repairs, and the machine was in court, and the defendant claimed that there had been no change in the machine. *Clemens v. Gem Fibre Package Co.* 153 Mich. 495, 117 N. W. 187.

Where a switchman had his foot caught in a guard rail, and brought suit, and the defendant showed that a block which would have prevented the injury would have been inconsistent with the safe running of the trains, and contended that the statute had not required such an impossible precaution, it was held that evidence showing that, after the accident, there was a block sufficient to have prevented this accident, put into the guard rails, which had not interfered with the running of trains, was admissible. *Cincinnati, H. & D. R. Co. v. Van Horne*, 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139. Ohio law, March 23d, 1888, provided that every railroad shall fill or block the frogs, switches, and guard rails so as to prevent the feet of the employees from being caught therein. The court said: "So here this evidence was competent to show that a block could be used which would not interfere with the running of trains, and yet which would have prevented the accident which here occurred."

And where a brakeman was injured by an overhanging water spout, and the defendant showed by measurements that the water spout was not dangerous, evidence in

rebuttal, showing that changes had been made since the accident, was held admissible. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24. The court said: "The jury were told that nothing could be inferred against the defendant company by reason of the fact that, after the accident, such reconstruction of the spout was made, and that such change had no other bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence."

And evidence that, after an accident, defendant installed a guard rail on a ferryboat, was held incompetent to prove negligence, but was competent on the cross-examination of defendant, after he had testified there was no necessity for such rail. *Frierson v. Frazier*, 142 Ala. 232, 37 So. 825.

And where evidence of plaintiff showed that there was no brass handle hold on a car at the time of an accident, but there was an iron handle, evidence for defendant that there was a brass handle on the car, but that it was broken eighteen days after the accident, when the iron handle was put on, was held competent. *Chicago General R. Co. v. Capek*, 82 Ill. App. 168.

Evidence of repairs of defect in a bridge, made after an accident, was held competent in rebuttal to prove negligence as to the condition of the bridge at a given time, in an action for damages to crops by overflow of water. *Chicago & E. R. Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428.

And where a man's hand was caught in a metal stamping press, by reason of its repeating, evidence of a machinist, that, two months after the accident, repairs were made, was held admissible in rebuttal, where the defendant's witness testified that no repairs in regard to the operating of the machinery were made after the accident, and the machinery was in court, and was shown to the jury. *Clemens v. Gem Fibre Package Co.* 153 Mich. 495, 117 N. W. 187.

In an action for death, caused by falling off of a wagon while driving over railroad tracks across a public highway, evidence as to the condition of the tracks, and subsequent repairs, was held admissible, on re-examination, where the witness had said on cross-examination that there had been no other accidents at that place. *Tetherow v. St. Joseph & D. M. R. Co.* 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310.

Evidence in rebuttal, that defendant, after the accident, had repaired the track, was held admissible, where the defendant testified that there had been no repairs. *Schloemer v. St. Louis Transit Co.* 204 Mo. 99, 102 S. W. 565.

And evidence that, after an accident caused by working in an excavation without sufficient light, other lights were added, was held admissible in rebuttal, and to contradict witnesses as to the time when the lights were in use. *Devaney v. Degnon-McLean Constr. Co.* 79 App. Div. 62, 79 N. Y. Supp. 1050.

Evidence of repairs subsequent to an accident was held admissible in rebuttal, where the jury had viewed the machine after the repairs, and defendant's witnesses testified that the condition had not changed. *Barbour v. Miles*, 14 Ohio C. C. 628, 7 Ohio C. D. 682.

In an action for injuries caused by a coal gate giving way, evidence that, a short time after the accident, the gate fell, and the bolt holding it was then replaced and secured, was held admissible in rebuttal, where the defendant showed that the bolt was in its proper place immediately after the accident. *Gulf, C. & S. F. R. Co. v. Brooks*, — Tex. Civ. App. —, 73 S. W. 571.

Where an employee on a railroad was injured by a projecting roof belonging to defendant, and the defendant showed that such projection was necessary, it was held that the plaintiff could cross-examine these witnesses as to whether or not some changes had been made since the accident. *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446.

And where an injury was caused by a defective socket wrench, evidence as to how long the wrench was used after the accident before getting a new one was held admissible, where a witness had testified that the wrench was sound, and had been used after the injury. *Galveston, H. & N. R. Co. v. Newport*, 26 Tex. Civ. App. 583, 65 S. W. 657.

And where the defendant offered evidence to show that a sidewalk was in good condition after an accident, the plaintiff could show in rebuttal that repairs had been made after the accident. *Parker v. Otumwa*, 113 Iowa, 649, 85 N. W. 805.

And evidence that, before and after the injury caused by a defective sidewalk, repairs were made, was held competent in rebuttal, where plaintiff showed the plank was rotten, and defendant showed that at both times of repairs the plank was solid. *Abbott v. Mobile*, 119 Ala. 595, 24 So. 565.

And where defendant proved by measurement that the condition of the walk was not as bad as plaintiff proved, evidence that changes had been made was held admissible in rebuttal. *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624.

The admission of testimony in regard to placing a light at the ditch by the city marshal after an accident was held not to be error, where it was in rebuttal. Besides, it was unimportant and immaterial. *Olathe v. Mizee*, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754.

And where a stamping-press machine was exhibited in court, and defendant's counsel claimed that it had not been repaired since the accident, evidence of repairs and condition two months after the accident was held to be admissible. *Clemens v. Gem Fibre Package Co.* 153 Mich. 495, 117 N. W. 187.

And where the defendant offered proof that no accident had happened since the one in controversy, and that the mining shaft had been in continuous use and in 32 L.R.A. (N.S.)

the same condition, evidence that repairs had been made in the meanwhile was held to be admissible in rebuttal. *Overby v. Mears Min. Co.* 144 Mo. App. 363, 128 S. W. 813.

And where defendant proved that a hole in a street had been filled the day before an accident, evidence that such repairs were made after the accident was held to be admissible. *Tise v. Thomasville*, 151 N. C. 281, 65 S. E. 1007.

And where plaintiff's witness testified that the sidewalk in question was in good condition immediately after the accident, evidence on cross-examination as to whether or not this witness repaired this walk should have been allowed, as it was legitimate for the purpose of discrediting the witness. *Bond Hill v. Atkinson*, 16 Ohio C. C. 470, 9 Ohio C. D. 185.

Where plaintiff proved the condition of a water bar on a highway by a witness who claimed to have measured it some four days after the accident, and to have removed some dirt that had been placed thereon, defendant offered a plan showing less depression, and proved that its condition was the same. Plaintiff then proved that it had been filled before this plan was made. It was held that defendant should have been allowed to rebut this evidence. *Kent v. Lincoln*, 32 Vt. 591.

And where the fact that there was a passageway in a sawmill was denied, it was held that plaintiff could show that, after an accident, the passageway had been widened. *Gustafson v. A. J. West Lumber Co.* 51 Wash. 25, 97 Pac. 1094.

And evidence of repairs subsequent to an accident was held admissible in rebuttal, where the defendant proved good condition after the accident. *Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

In *Lang v. Sanger*, 76 Wis. 71, 44 N. W. 1095, in an action for injuries received by the dangerous condition of a gangway in defendant's sawmill, the evidence for plaintiff showed that the gangway was not guarded at the time of the accident. The evidence for defendant showed that guards were there at the time of the accident. On cross-examination of defendant's witnesses, plaintiff showed that the repairs were made after the accident. This might have been proper in rebuttal, but the argument of plaintiff's attorney, in which he was sustained by the trial court, was such as to give the inference that the rule of evidence so approved is that, if there had been no direct evidence whatever that the gangway and saw guard were out of repair at the time of the accident, the fact that the defendant repaired them afterwards was sufficient evidence that they were. This was held so erroneous as to require a reversal.

Where a photograph taken after a change was made in a block on a mining incline, and after an accident, was used on the trial, evidence that repairs were made was held to be error. *Lay v. Elk Ridge Coal & Coke Co.* 64 W. Va. 288, 61 S. E. 156. The court said: "It would have been easy to

say the drawing did not represent the block in use when the injury occurred, and point out the differences, and stop there."

i. To show control and duty.

Evidence of repairs after an accident has been held admissible, in order to show that the control of the premises was in defendants, or that it was their duty to protect against accidents, where this is in issue. But this is held not to allow the jury to regard the repairs as an admission that the thing or place was in improper condition at the time of the accident.

Evidence of repairs to a railing on a bridge, shortly after an accident causing death, was held admissible solely for the purpose of showing defendant's control. *Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 430, 16 L.R.A. 593, 30 Pac. 222.

And in an action against highway commissioners for want of a railing on a bridge, evidence that a railing was erected a day after the accident was held admissible to show that defendants exercised control over the bridge, but was held not admissible for the purpose of showing negligence. *Morrell v. Peck*, 88 N. Y. 398, reversing 24 Hun, 37.

To show that defendant had control, and was under the duty to keep in repair, evidence that after an accident the common council directed the removal of the bridge was held to be admissible. *Sewell v. Cohoes*, 11 Hun, 626.

And that subsequent repairs were made by a city to a sink hole where a child was drowned. *Benton v. St. Louis*, 217 Mo. 687, 129 Am. St. Rep. 561, 118 S. W. 418; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481.

And that a sidewalk was repaired by a railroad after an accident. *Bateman v. New York C. & H. R. R. Co.* 47 Hun, 429.

And that, a few hours after the accident, the old sidewalk was removed by defendant. *Rusher v. Aurora*, 71 Mo. App. 418. The controversy was whether the sidewalk was placed there by the authority of the city, or by the owner of the lots.

The same was held in *Mitchell v. Plattsburg*, 33 Mo. App. 555.

And evidence of subsequent repairs to a bridge was held admissible to show that it was defendant's duty to keep the same in repair. *Walker v. Point Pleasant*, 49 Mo. App. 244.

And that a large boulder was removed from a street after an accident. *May v. Anaconda*, 28 Mont. 140, 66 Pac. 759.

And that a defective cross walk was repaired subsequent to an accident. *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925.

And that a dangerous place in a highway was protected by a barrier after an accident. *Ashtabula v. Bartram*, 3 Ohio C. C. 640, 2 Ohio C. D. 372.

And that a fence was repaired alongside of railroad after an accident. *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405. 32 L.R.A. (N.S.)

And the same was held in an action for killing stock by reason of a defective fence. *Woods v. Missouri, K. & T. R. Co.* 51 Mo. App. 500.

And that repairs were made to a platform in front of a shop occupied by a tenant. *Readman v. Conway*, 126 Mass. 374.

In an action for injuries by a fall of a shaft, evidence that, after the accident, repairs were made to a stairway and protecting sheathing placed under a belt, to show that defendant exercised control over the shafting, was held admissible. *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046.

In an action for injuries sustained from a defective platform, evidence that, after the injury, the landlord repaired it, was held competent as an admission that it was his duty to keep the platform in repair. *Readman v. Conway*, supra. The court said: "These acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent."

Evidence of repairs to a block and tackle after an accident caused by the fall of a basket of coal was held admissible to prove that defendants exercised control over the apparatus. *O'Malley v. Twenty-Five Associates*, 170 Mass. 471, 49 N. E. 641.

In *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323, it was said: "When repairs are made on premises by those whom it is sought to charge with liability for their defective condition, evidence of this fact has been deemed competent, whether they were made before or after the accident, as being inconsistent with a denial of ownership, although such evidence is not competent as an admission of liability for the accident itself."

In *Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N. E. 183, it was said: "Evidence of subsequent repairs is not admissible to show antecedent negligence. *Wabash County v. Pearson*, 129 Ind. 456, 28 N. E. 1120; *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543, and cases there cited. But evidence of such repairs is sometimes admissible for the purpose of tending to show that the party charged had notice of the defect. *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 480, and cases cited. And evidence of subsequent repairs, when restricted by a proper instruction, is proper for the purpose of showing a city's recognition of a defective walk as one which the city was bound to repair. *Lafayette v. Weaver*, 92 Ind. 477, and cases cited."

j. For the purpose of identification and description.

Evidence comparing the condition of the place or thing causing the accident, after repairs or changes have been made, has been held admissible for the purpose of identification, or measurements, or to show discrepancies in photographs or maps. The courts seem to be in accord on this rule.

Where a witness was testifying in re-

gard to the accuracy of a map of an incline, evidence as to repairs after an accident was held to be admissible in relation to changes in the condition. *Ferrari v. Beaver Hill Coal Co.* 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016.

So, where defendant introduced in evidence photographs of the approach to a street, evidence of changes made after an accident was held not objectionable, where it was only used to fix the time and condition of the approach in witness's recollection. *Achey v. Marion*, 126 Iowa, 47, 101 N. W. 435.

In an action for injuries to a teamster thrown from a wagon by a chuck hole at a crossing, evidence that the hole had been filled up after the accident was held admissible to disprove the correctness of a photograph made by the defendant. *Sample v. Chicago, B. & Q. R. Co.* 233 Ill. 564, 84 N. E. 643.

In an action for death caused by an engine running upon a bank of sand which had washed upon the track, evidence of changes made in the road subsequent to the accident was held admissible to explain a photograph taken after the change had been made. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

And where the conditions of the place of an accident had been changed prior to the taking of a photograph of such locality, it was held competent to make use of such photograph at the trial, where the change in the conditions was proved. *Beardslee v. Columbia Twp.* 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617.

Evidence of changes made in the premises after an accident in an elevator was held competent for the purpose of showing that photographs and diagrams of the premises, presented by the defendants, had not correctly represented the premises as they were at the time in question. *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153.

Where sharp metal on stairs caused the plaintiff to be thrown and injured, it was held that evidence as to changes made after the accident was admissible to identify the condition. *Brennan v. Lachat*, 5 N. Y. S. R. 882. The court said: "The question objected to in the case at bar was plainly asked for the purpose of ascertaining whether anything had been done by defendant or anyone to remove the broken or worn-out covering of the stairs so that it could not readily be ascertained what had caused the accident, and the answer clearly shows that the witness so understood the question; that upon the steps where plaintiff had fallen there were small pieces of tin, and they had been taken off,—they removed the pieces and smoothed the place." The defendant and his witnesses were afterwards allowed without objection to testify as to exactly what was done the next day. The evidence was clearly competent as tending to show that defendant had removed the cause of the accident." It was said that the general rule is that 32 L.R.A. (N.S.)

evidence of precautions taken after an accident is inadmissible.

And in an action for killing an engineer, evidence as to repairs made after the accident was held admissible for the purpose of showing that these rotten timbers were taken from the place of injury, and for the purpose of identifying the timbers. *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 So. 445.

And evidence of repairs to a maintop-mast-stay was held admissible, in order to show what part had been broken, causing personal injuries. *Norris v. Atlas S. S. Co.* 37 Fed. 426. The court said: "If this evidence had been admitted for the purpose of having negligence in not making repairs and alterations before inferred from the fact that they were made then, its admission or use for that purpose might have been erroneous. The making of repairs and alterations, in itself, shows care rather than neglect. But this evidence showed what was broken, and how, and what was wanting; and was admitted for, and limited to, the purpose of showing the actual condition of the stay and winch at the time of the injury. The question of negligence was made to turn upon the state of things then, and not upon what happened afterwards. This does not appear to have been erroneous."

And where a pole was removed from a trolley track after an accident to the conductor, it was held admissible to prove measurements made afterwards to show its original location. *Kath v. East St. Louis & Suburban R. Co.* 232 Ill. 126, 15 L.R.A. (N.S.) 1109, 83 N. E. 533.

And in an action for death caused by a train wreck, evidence that since the accident the grade of defendant's road had been changed was held admissible, but only to show what the grade was at the time of the accident. *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990.

And evidence as to the soundness of the ties and the condition of the roadbed at the place of the accident, where it was repaired six months later, was held competent, as tending to show the condition at the time of the accident. *Stewart v. Everts*, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092.

And evidence that a hand hold had been recently placed on a car was held admissible solely for the purpose of identifying the car on which a brakeman had received injuries by reason of a defective hand hold. *Missouri, K. & T. R. Co. v. Rose*, 19 Tex. Civ. App. 470, 49 S. W. 134. In this case the wood under the hand hold was decayed and rotten.

Where a passenger stepped into a sunken box near the platform of a car and was injured, an instruction that the jury were not to consider an alteration or removal of the box after the accident was held to be properly refused, where the evidence on this point was brought out by the defendant in examining its own witnesses, and no motion was made to strike it out.

Southern P. Co. v. Hall, 41 C. C. A. 50, 100 Fed. 760.

Where a defective plank was removed after the accident, and was brought into court by plaintiff, evidence to identify the plank, showing it had been removed while repairing the sidewalk, was held to be admissible, when properly limited in the instructions. *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

That a walk was taken up after an accident was held admissible evidence, where it was limited to showing how the witness knew the condition of the stringers. *Frohs v. Dubuque*, 109 Iowa, 219, 80 N. W. 341. In this case it was said: "The admission of this evidence it is thought is contrary to the rule announced in *Cramer v. Burlington*, 45 Iowa, 627, and *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, but we cannot coincide in this view. In the first of these cases we held that the fact of a subsequent change made in the walk by defendant could not be received and considered as evidence of an admission of a previous defect. In the other case the decision was that evidence of subsequent repairs could not be received as tending to establish prior negligence."

Where the jury viewed the sidewalk in question, evidence that changes had been made before the jury saw it was held to be admissible. *Morton v. Smith*, 48 Wis. 265, 33 Am. Rep. 311, 4 N. W. 330.

And where the jury had viewed the road in controversy, evidence that changes had been made by repairs after the accident, and before the view, was held to be admissible. *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696.

Where the condition of a paper-cutting machine was shown to be bad a few days after an accident, the fact that it was shown that this witness then made repairs was held not error, as the evidence of repairs was incidental only. Besides, after this evidence, the jury viewed the machine. *Brunger v. Pioneer Roll Paper Co.* 6 Cal. App. 691, 92 Pac. 1043. The court said: "While it is established law that mere repairs made after the accident cannot be shown to establish a negligent condition at the time of the accident (*Helling v. Schindler*, 145 Cal. 312, 78 Pac. 710), the incidental showing of such repairs shortly thereafter, made to remedy actual defects then shown to exist in the machine's mechanism or operation, which, under the evidence, presumably existed at the time of the accident, presents an entirely different question (*Dyas v. Southern P. Co.* 140 Cal. 307, 73 Pac. 972)."

And where a sidewalk was torn up shortly after an accident, evidence as to its unsoundness was held admissible, although the general rule was that evidence of subsequent repairs would not be admissible. *Patton v. Sanborn*, 133 Iowa, 650, 110 N. W. 1032.

In *Osborne v. Detroit*, 32 Fed. 36, the witness, for the purpose of fixing the time

when he heard of the accident, said he went with the plaintiff's husband to the spot where the accident occurred about a week afterwards, and found that the walk had been repaired. The court said: "We think that the testimony that the walk had been repaired was some evidence tending to show that the walk was out of repair at the time of the accident, and was in the nature of an admission which was competent to go to the jury. If not, the testimony was merely immaterial, and worked no injury to the defendant."

k. To show ability, possibility.

Some cases allow evidence of repairs or changes after an accident to show that it was possible to have made a different condition, while they deny its admissibility to show negligence. This might possibly come within the class of cases allowing evidence of repairs in order to show that a duty was imposed. This is very close ground, and it is hard to distinguish the facts in these cases from those holding that evidence of repairs is inadmissible.

In an action for injuries caused by an ice tank falling upon plaintiff by reason of an unsecure bolt, evidence showing that, after the injury, the bolt was tightened by battering down, was held admissible to show that was the proper manner of making it secure. *Champion Ice Mfg. & Cold Storage Co. v. Carter*, 21 Ky. L. Rep. 210, 51 S. W. 16.

In an action for injuries caused by being pushed off of a platform, evidence of subsequent extension was held admissible for the purpose of showing that it was possible to extend the platform, but not to show negligence. *Beverley v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507.

And where there was a dispute as to whether or not better guards could have been used to protect persons from a saw, evidence that improved guards were used after an accident was held admissible, the jury having been cautioned that it was to be considered only on this question. *Thompson v. Issaquah Shingle Co.* 43 Wash. 253, 86 Pac. 588; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3.

Evidence that a vat of hot water was securely covered after an employee had fallen into the same was held competent, when limited to showing that covering was practical. *Lind v. Uniform Stave & Package Co.* 140 Wis. 183, 120 N. W. 839. The court said that, if requested, the court should have told the jury that this was no proof of negligence.

And where a stockman was compelled to change caboose in the night, at an improper place, and was thrown from the top of the car, down onto the bumper, it was held that evidence showing the manner of changing cabooses at this place after the injury was admissible to show the wrongfulness of defendant's conduct at the time of the accident. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898. The court

said: "The evidence was competent, as tending to prove, if such proof were necessary, that the change could as well have been made where the second caboose was, and that making it when and where it was made was a matter of choice, and in no wise of necessity."

In *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, where a laborer was killed while building a fire cistern, evidence that it was rebuilt with braces was objected to as immaterial. The court said: "The witness went on to explain how the walls were supported. The court remarked, in overruling the objection, that it might be material if it fell without buttresses and stood with them. The court was unquestionable correct, for the evidence had a tendency to show how such a wall should be constructed. But we think the evidence was quite immaterial in this case, as it was obvious to the most unskilled mechanic, and to any intelligent observer, that those walls should have had support in some way to prevent them falling. But the question was again asked, and answered without objection, whether the wall was rebuilt with braces, props, or abutments or buttresses, and the witness answered that it was."

In *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548, which was an action against a city for allowing a railroad company to obstruct a crossing with benches, where plaintiff's horse ran away and struck them, it was held that evidence that the benches had since been removed was incompetent to prove the character of the obstruction, but was admissible to show that the obstruction was unnecessary.

1. Exceptional cases.

In some cases evidence of repairs or changes immediately after the accident has been admitted, on the ground of closeness of time approximating the accident. These cases do not seem clearly to distinguish those holding a different rule, but on the ground of allowing evidence showing the necessity of other conditions. But it seems that if proof of a betterment by repairs, changes, or precautions is allowed on the ground of the fact that the accident showed the necessity of a change in the condition, this would open the door in nearly every case, and substantially change the rule held by the weight of authority. In the cases following, which held that evidence of repairs was admissible, it seems that they are not in line with the weight of authority in their own states, and do not seem to have been expressly overruled. Therefore it leaves the question somewhat in doubt as to the value of these cases.

Evidence that more track men were employed after the fire which injured plaintiff's property than were employed before was held competent. *Westfall v. Erie R. Co.* 5 Hun, 75. The court said: "Such evidence is not admissible in a case like that of *Dougan v. Champlain Transp. Co.* 56 N. Y. 1. In that case it was held not to be negli-

gence in the defendant to permit the gangway, through which plaintiff's intestate slipped into the lake and was drowned, to be open. The defendant's boat was constructed like other boats on the lake, in reference to protection to passengers at the gangway, and no such accident previously occurred. There was, therefore, no negligence to admit, and it would have been grossly unjust to permit negligence to be inferred from the precaution taken by defendant to guard its passengers in the future from a like misfortune. Closing up the gangway was undoubtedly an admission that it was no longer safe to leave it as it had been left, but that knowledge had been acquired only when the accident occurred. There is no similarity between that case and the one before us. In this case the necessity of having men walk the track had long been known. One man only had been employed; fires along the track were frequent, and the employment of more men after the fire was a fact competent to go to the jury upon the question whether too few men had not been previously employed."

Evidence that the defendant's company, immediately after the accident, employed an additional switchman at this station, was held admissible, to show the insufficiency of the working force prior thereto. *Harvey v. New York C. & H. R. R. Co.* 19 Hun, 556. In this case the court said: "This was so immediately after the accident that, within the cases on the subject, it was proper to be submitted to the jury as a kind of admission on the part of the company that the service had been theretofore insufficiently supplied."

In *Dale v. Delaware, L. & W. R. Co.* 73 N. Y. 468, the court said: "The case is not analogous to those in which evidence has been admitted of the repairing of a road immediately after an accident. In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair. But this was not a case of repairs."

In *Shinners v. Locks & Canals*, 154 Mass. 168, 12 L.R.A. 554, 26 Am. St. Rep. 226, 28 N. E. 10, the court said: "And in *Dale v. Delaware, L. & W. R. Co.* supra, it is said by Judge Rapallo, speaking of repairs made by a railroad corporation immediately after an accident, 'In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair.' This remark was, however, obiter; and although in accord with some decisions of the supreme court of the state of New York, which we need not farther refer to, is contrary to what is not the well-established doctrine of the court of appeals of that state, as will presently appear."

In an action for injuries to a lineman, caused by an electric shock, evidence that, some months afterwards, a change was made in the stringing of wires, was held admissible, where this witness showed that they had been defectively strung, and continued so for a month or so after the accident.

Krantz v. Brush Electric Light Co. 82 Mich. 457, 46 N. W. 787. The court said: "We can see no harm, however, in showing that the wires were strung as they were on the day of the injury, on April 1, 1886, and continued until some months later than the accident, in view of the fact that this method of stringing the wires was claimed to be the cause of the accident. If it was a defect, it was not incompetent to show how long it had existed before the injury, and what was the natural result of its existence."

In an action for injuries caused by sparks from a burner of a mill, evidence was held admissible to show that, after a change in the spark arrester had been made, immediately after the fire, the emission of sparks ceased. *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. 549. The court said: "It was in proof that the spark catcher was bent in at the top, as a consequence of the heat; and though there was no direct evidence that any wires were broken, or the openings in it increased, the very manner in which the sparks poured out of it, and started fires at a distance, would suggest, if it did not fully justify, an inference that, in some way, it was defective; and such an inference might have been fully warranted if the plaintiff had shown, as she offered to do, and as she should have been permitted to do, that after a change was made in the spark catcher, immediately following the fire, the dangerous emission of sparks through it ceased altogether."

But in an action for damages by fire, evidence that afterwards, defendant erected a high board fence around the fire pit, since which no fire was spread from the pit, was held inadmissible. *Polzen v. Morse*, 91 Mich. 208, 51 N. W. 940. This case does not refer to *Alpern v. Churchill*, supra, which held the contrary; the court said: "The only evidence from which the jury could infer negligence in this respect was the fact that, after the fire, the defendant erected a fence, and that since its erection no fire had spread from the pit. This evidence was admitted under objection. It was clearly incompetent under the frequent rulings of this court. Its sole purpose was to influence the jury; and there was no other evidence from which they could find that common prudence required the maintenance of a fence."

The case of *Polzen v. Morse*, supra, was approved in *Noble v. St. Joseph & B. H. R. Co.* 98 Mich. 249, 57 N. W. 126, where it was held that plaintiff could not introduce evidence that, after an accident on a horse car, the defendant had separated the horses.

Evidence that, shortly after a fire, repairs were made to an engine, was held competent to show the condition of the engine. *Butcher v. Vaca Valley & C. L. R. Co.* 67 Cal. 518, 8 Pac. 174. At the time of the fire, the trapdoor opening into the smokestack had nettings 1 inch apart; one of these was moved to the top of the smokestack. The court said: "It might fairly be argued that more sparks would issue from the smokestack before the change. The valve being

opened, and the draft increased, live cinders lying between the two nettings (1 inch apart) might be forced beyond the upper netting. In such case it might be argued that more sparks would escape from the stack than if there was a larger space between the two nettings, in which the cinders or sparks might die out."

In *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977, it was held proper to show that the defect in the sidewalk was afterwards repaired. No cases are cited on this proposition.

In *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L.R.A. 588, 18 Am. St. Rep. 303, 23 N. E. 965, the court said: "The incidental remark made in the case of *Goshen v. England*, supra, cannot be considered as an authoritative affirmation of the right to adduce evidence of subsequent repairs to prove precedent negligence."

In *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, evidence of changes in a passageway for water after an accident was held admissible only as tending to prove that the waterway was originally too small; but did not prove negligence, or notice, or lack of diligence. In this case the defendant also proved the same fact, and had no cause to complain.

The fact that a defective sidewalk was removed and a better one substituted was held admissible as a circumstance that the walk was out of repair, but not to show notice of defect prior to the accident. *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893. That the walk was replaced came out incidentally.

That a third party repaired holes from a sidewalk leading to a cellar, after an accident, was held admissible. *Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N. E. 183.

V. Fires.

The general rule and weight of authority is that where an engine causing a fire was not identified, evidence that the engines of defendant before and after this fire throw out sparks causing fires is admissible, if not too remote in point of time. And where the engine is identified, evidence as to other fires caused by it about that time is admissible. But where the engine causing the fire is known, evidence as to the other engines is generally held inadmissible.

Federal cases.

Where an engine setting out fire was not designated, evidence of fire at other times, before and after this fire, by the engines of the company, was held admissible. *Northwestern P. R. Co. v. Lewis*, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658; *Chicago, St. P. M. & O. R. Co. v. Gilbert*, 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711; *Texas & P. R. Co. v. Watson*, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681.

And evidence that other fires had been caused within some weeks prior to the fire in controversy was held admissible, where it was not admitted that the fire was caused by sparks from a particular en-

gine. Chicago, St. P. M. & O. R. Co. v. Gilbert, 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711.

And where the defendants claimed that if the fire was set by any of its engines, it was engine number 53, and the plaintiff had not admitted that it was the engine which caused the fire, and this was a question for the jury, evidence that engines shortly before and soon after this fire had set out other fires was held admissible. Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474.

And evidence that some of the defendant's engines during the same season scattered fire was held to be within the discretion of the court, where the particular engine was not identified. Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356.

In an action against a telegraph company for starting a house on fire while soldering wire connections, where defendant's witness had testified that his soldering iron did not scorch the woodwork, and that he immediately went to another house, and used the same care, evidence in rebuttal, showing that he scorched the woodwork on the second house, was held admissible. Watts v. Southern Bell Teleph. & Teleg. Co. 66 Fed. 453, affirmed in 13 C. C. A. 579, 25 U. S. App. 214, 66 Fed. 460.

But where the engine that started the fire was identified, and its spark arrester, in the same condition as when the fire was set, was in evidence, it was held incompetent to show that other engines threw sparks at other times. Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 133.

Alabama.

Evidence that the engines of defendant threw sparks prior and after the fire in controversy was held admissible, where the engine causing the fire was not identified. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 So. 250, 12 A. & E. Ann. Cas. 210; Alabama G. S. R. Co. v. Johnston, 128 Ala. 283, 29 So. 771. In the latter case it was said that whether such evidence would have been competent if the plaintiff had identified the engine that caused the fire would not be decided.

In an action for fire from a locomotive, it was held admissible to prove that thirty minutes before the fire, this engine causing the fire was throwing out sparks more than any of the other engines of defendants. Louisville & N. R. Co. v. Sherrill, 152 Ala. 213, 44 So. 631.

Evidence as to subsequent fires caused by this particular engine at the same place, shortly after the fire for which suit was brought, was held competent, where defendant's witness testified that the spark arresters were in perfect condition. Alabama G. S. R. Co. v. Clark, 136 Ala. 450, 34 So. 917.

In an action for damages by fire caused by a locomotive, where defendant's witness had testified that a spark arrester had been in use for more than a year, and that it was impossible to have a fire from that cause, evidence that other fires were caused by sparks within a year was held competent. 32 L.R.A. (N.S.)

Louisville & N. R. Co. v. Malone, 109 Ala. 509, 20 So. 33.

But evidence as to other fires caused by a railroad was held inadmissible where they occurred ten or twelve years prior, and not at this place, and it was not shown that they came from defendant's engine, and the conditions of the engine at that time were not shown to be the same as those complained of. Louisville & N. R. Co. v. Miller, 109 Ala. 500, 19 So. 989.

Arkansas.

In an action for damages caused by sparks from defendant's engine igniting the dry grass and inflammable material, it was held that evidence of other fires occurring a few days prior, without proof that they were caused by engines of the railroad, was admissible. St. Louis & S. F. R. Co. v. Jones, 59 Ark. 105, 28 S. W. 595.

But the refusal to allow evidence of other fires was held proper, where the fire in question could not have been caused by a locomotive. Martin v. St. Louis, I. M. & S. R. Co. 55 Ark. 510, 19 S. W. 314.

California.

In an action for injuries caused by fire kindled by defendant's engine, evidence that prior and subsequent to the fire which produced the injury, other fires were kindled by the same engine, in the same vicinity, and about the same time, was held admissible. Henry v. Southern P. R. Co. 50 Cal. 176. The court said: "We think the evidence objected to tended to prove that the fire in question was caused by sparks from the engine, and also that there was something wrong in the management, or defective in the construction, of the engine."

And the same was held as to subsequent fires. Butcher v. Vaca Valley & C. L. R. Co. 67 Cal. 518, 8 Pac. 174.

Evidence as to other fires, subsequent to that complained of, was held immaterial error, where objection was not made that the time was not limited to some recent period. Steele v. Pacific Coast R. Co. 74 Cal. 323, 15 Pac. 851. In this case, where the question was as to other fires caused by a locomotive, the court said: "Had the answer shown a knowledge of other fires within a day or two of the one in question, manifestly, under our decisions, and upon the weight of authority, it would have been proper."

Evidence as to the emission of sparks by engines, about the time of the fire, or a little before, was held admissible, where the engine was not identified. McMahon v. Hetch-Hetchy & Y. Valley R. Co. 2 Cal. App. 400, 84 Pac. 350.

In Liverpool & L. & G. Ins. Co. v. Southern P. Co. 125 Cal. 434, 58 Pac. 55, after an ice house near a railroad caught on fire, the engine was sent to the roundhouse, and the spark arrester was found to have a hole in it about 2 by 6 inches, which would allow the escape of live cinders. This engine had been said to have caused previous fires, and the superintendent of the ice house had required an employee to follow this engine, so as to extinguish any fires. No ruling was made on this evidence.

Colorado.

Evidence that after a fire, railroad men

tried to extinguish the same, was held inadmissible, in an action against the railroad. *Denver & R. G. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345.

Florida.

In *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, it was said: "Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management, and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive."

Georgia.

Evidence showing the defective condition of the spark arrester of the same engine just preceding and a short while subsequent to the fire, and also that other fires were caused prior thereto by the same engine, was held admissible in an action for damages by fire caused by a defective engine. *Brown v. Benson*, 101 Ga. 753, 29 S. E. 215.

Where the company attempted to show its diligence as to the condition of the particular locomotive by evidence tending to prove that all its locomotives run over its road were kept in substantially the same condition, and that such condition was good, this evidence might be rebutted by evidence that, on previous occasions, and at different places, the company's locomotives had emitted sparks which caused, or were capable of causing, similar fires. *East Tennessee, V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828.

But where the engine causing the fire was claimed to have been identified, evidence that other engines caused fires was held to be inadmissible. *Inman v. Elberton Air Line R. Co.* 90 Ga. 663, 35 Am. St. Rep. 232, 16 S. E. 958. The court said: "Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but when the engine is identified, the same reason does not operate, and evidence as to the condition of other engines and of their causing fires is clearly irrelevant."

And evidence implying other fires made by a particular engine shortly after the day upon which this particular fire occurred was held inadmissible, where there was no evidence that this locomotive was run on the day in question. *Akins v. Georgia R. & Bkg. Co.* 111 Ga. 815, 35 S. E. 671.

Idaho.

Evidence that defendant's engines threw out sparks several times previously was held admissible, where defendant claimed to identify the engine in controversy, and proved that all of the engines were equipped exactly alike. *Osburn v. Oregon R. & Nav. Co.* 15 Idaho, 478, 19 L.R.A. (N.S.) 742, 98 Pac. 627, 16 A. & E. Ann. Cas. 870.

Illinois.

Evidence of smoke arising along the line 32 L.R.A. (N.S.)

of the railroad some time after the engine alleged to have caused the fire had passed was held competent, in an action for damages by fire. *Lake Erie & W. R. Co. v. Hielmerick*, 29 Ill. App. 270. The court said: "It is admitted that it would have been competent to prove that there was fire after it had passed, but that the proof of smoke presupposed better evidence as to its origin and cause. It cannot be supposed that there was necessarily anyone who knew more than these witnesses; what they knew was competent."

And evidence that within ten days after the fire, the same engine was seen throwing cinders from its smokestack, was held admissible, in an action for fire caused by a railroad locomotive. *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833.

And evidence showing the finding of cinders at different places on the farm after the fire occurred, and that the same engine caused other fires the same day, and also to show frequent danger from the use of engines equipped with the spark arrester in use on the road, was held admissible in an action for damages caused by fire from a locomotive. *Lake Erie & W. R. Co. v. Kirta*, 29 Ill. App. 175.

To rebut evidence of defendants' witnesses that the defendants had in use improved spark arresters, evidence that engines of defendants the same year after the fire threw sparks over 100 feet was held competent. *Illinois C. R. Co. v. McClelland*, 42 Ill. 355.

In *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 36, 50 N. E. 1023, the case of *Illinois C. R. Co. v. McClelland*, supra, was distinguished, as there the defendant proved in the first place that an engine with a spark arrester would not throw sparks 100 feet. This was properly allowed to be rebutted.

Evidence that other fires were caused the same day, by the same engine, prior to the fire in question, was held admissible in rebuttal, where the defendant's witnesses had testified that the spark arrester was in good order, in an action for damages caused by fire from sparks from an engine. *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660.

Evidence of several fires occurring during the same season from defendant's engines was held competent, in an action for damages by fire. *Lake Erie & W. R. Co. v. Cruzen*, 29 Ill. App. 212. The court said: "The appellant denied liability on all grounds, and especially rested its defense upon the proposition that it had done its duty in providing sufficient spark arresters, which were in use on all its engines. To meet this it was competent to show the frequent escape of fire, from which it might be inferred that there was a general want of safety, and that, if in good order and skilfully managed, as was claimed, there was some radical defect in the contrivance."

But where evidence of defendant showed that spark arresters were of the most approved kind, and were in good repair, and that the engines were carefully and skilfully handled by a competent engineer at

the time of fire, it was held inadmissible to show the condition of the engines the winter before. *Toledo, St. L. & W. R. Co. v. Needham*, 105 Ill. App. 25.

Evidence as to other fires caused by defendant's engines in the immediate vicinity of this particular one, both before and after, was held inadmissible, in an action for damages caused by a defective spark arrester on engines, where it was offered in rebuttal, and not as original evidence. *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 36, 50 N. E. 1023. The exclusion of such evidence in rebuttal was held discretionary with the court.

And evidence that, at another time, plaintiff had seen sparks coming out of some other engine owned by defendant, and had seen a hole in a man's hat, and a cinder on top of it which looked like a coal cinder, was held inadmissible, and was properly excluded from the consideration of the jury. *Illinois C. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833.

Indiana.

Evidence that all the engines threw sparks was held admissible to prove that the engine in question was out of repair, in an action for damages by sparks, where the engine causing the fire could not be identified. *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *Louisville, N. A. & C. R. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609.

And evidence of smoke, sparks, and flames from a chimney at other times than the one causing a particular fire was held competent in an action for damages caused by fire from the flues and chimney of a brewery. *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322.

And evidence that previous fires were set by defendant's engine on the right of way, near the time of the fire in question, and near the same place, on an upgrade, was held admissible, in an action for damages for fire from defendant's engine. *Pittsburgh, C. C. & St. L. R. Co. v. Indiana Horseshoe Co.* 154 Ind. 322, 56 N. E. 766. The court said: "The evidence was sufficient to authorize the jury to find facts showing that appellant was guilty of negligence in permitting said combustible rubbish to accumulate and remain upon its right of way adjoining appellee's factory, and that it was guilty of negligence in permitting the fire to escape from its right of way to appellee's factory."

And evidence that other fires occurred from dry grass on the right of way in the same locality, but at other times and places, recently before and after the one in question, was held admissible, in an action for damages by fire from defendant's engine. *Wabash R. Co. v. Miller*, 158 Ind. 174, 61 N. E. 1005.

And evidence of other fires on the same day, by the same engine, was held admissible to show faulty construction of the engine, in an action for damages caused by fire from defendant's locomotive. *Lake* 32 L.R.A. (N.S.)

Erie & W. R. Co. v. Gould, 18 Ind. App. 275, 47 N. E. 941; *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033.

Where defendants' witnesses testified that the engines were carefully kept in repair, evidence that another fire was caused by a train soon after that for which the action was brought was held competent in rebuttal. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110. The court said: "This evidence was fairly calculated to show, either in the first instance or in rebuttal, that the engines of the defendant, as made, repaired, and operated, at and near the time and place of the accident, did emit sparks such as kindled into fires."

But evidence of other fires by engines other than that causing the fire in question, on the same road, was held inadmissible, in an action for damages by fire from a particular locomotive. *Chicago, I. & L. R. Co. v. Gilmore*, 22 Ind. App. 466, 53 N. E. 1078.

In an action for damages by fire caused by a passing locomotive, it was held that evidence that the engine, at other times, threw sparks causing fires, was incompetent; but the error was immaterial, as there was enough evidence to sustain the judgment. *Lake Erie & W. R. Co. v. Miller*, 24 Ind. App. 662, 57 N. E. 596. This was because the negligence complained of was in allowing the fire on the right of way to escape onto plaintiff's premises. The court said: "Appellant had a right to set fire to the combustible matter on its right of way, but it was bound at its peril to keep such fire within the limits of its right of way. *Indiana, B. & W. R. Co. v. Overman*, 110 Ind. 538, 10 N. E. 575. Its negligence consisted in permitting the fire to escape to the adjoining premises of appellee; and for injury resulting from such negligence it is answerable in damages."

Iowa.

Evidence that the engine in controversy set out several successive fires on the same trip, on the same day, was held competent to show that its appliances were not properly constructed, or were out of repair. *Slossen v. Burlington, C. R. & N. R. Co.* 60 Iowa, 215, 14 N. W. 244.

And where plaintiff proved that the engine that set out the fire in question also set out another fire, within 20 rods of this place, and that sparks went about 7 rods from the track, it was held that this was sufficient to take the case to the jury. *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575. The court said: "The number of fires set out by the particular engine is, of course, material, but the circumstances and conditions under which they were set out also have an important bearing."

In *Lanning v. Chicago, B. & Q. R. Co.* 68 Iowa, 502, 27 N. W. 478, the jury were instructed that if the engine that set out the fire on plaintiff's property set out several successive fires on the same day and

on the same trip, this should be regarded as evidence that the engine was not properly constructed or in good repair.

But in an action for damages by fire from defendant's engine, it was held incompetent to permit plaintiff to show that other fires occurred along the right of way, in that vicinity, shortly after the engines passed over the road, and before the fire in question. *Bell v. Chicago, B. & Q. R. Co.* 64 Iowa, 321, 20 N. W. 456.

In *Gandy v. Chicago & N. W. R. Co.* 30 Iowa, 420, 6 Am. Rep. 682, the court held that the verdict for plaintiff was contrary to evidence. In this case, after all the defendant's witnesses testified that the engines were all equipped with the best appliances and spark arresters in October, the month of the fire, plaintiff's witness testified that a spark arrester was out of repair on one engine in December. This evidence was not discussed.

Kansas.

In an action for damages for fire from defendant's engine, evidence showing that the engine in question had set out several fires upon the same day as this one occurred was held admissible to show the defective condition of the engine. *Missouri P. R. Co. v. Chamberlain*, 4 Kan. App. 232, 45 Pac. 967.

And evidence that a locomotive caused two or more fires on the same day, and that other engines of defendant did not cause fires all that fall prior to this fire, in an action for damages by fire, was held admissible. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362.

And in an action for fire caused by sparks from defendant's locomotives, evidence that fires had been made along the road for some weeks before and after the fire complained of was held admissible to show the defective condition of the spark arrester, and that wood had been used in coal engines. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

But in an action for damages by sparks from defendant's engine, which was identified, evidence that other engines of defendant, similarly constructed, and under similar circumstances, before and after the fire, had thrown sparks that distance, was held inadmissible. *Sprague v. Atchison, T. & S. F. R. Co.* 70 Kan. 359, 78 Pac. 828; *Atchison, T. & S. F. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286.

Kentucky.

In an action for damages by fire, evidence that frequently prior to this fire, and continuing down to the day of said fire, the engine in question sent out cinders and sparks about 300 feet, was held competent. *Taylor v. Louisville & N. R. Co.* 19 Ky. L. Rep. 717, 41 S. W. 551.

And evidence of previous fires caused by defendant's engines emitting sparks was held competent, as it gave notice to defendant of the defective condition of the spark arresters, in an action for damages by fire. *Cincinnati, N. O. & T. P. R. Co. v. Barker*, 94 Ky. 71, 21 S. W. 347. In this case the engine causing the fire was identified. The depot was admittedly fired by the 32 L.R.A. (N.S.)

engine, and fire from the depot reached plaintiff's property.

And that previous fires were set by defendant's stationary engine was held to be admissible in evidence. *Carpenter v. Laswell*, 23 Ky. L. Rep. 686, 63 S. W. 609.

In an action for damages by fire, evidence was held admissible to show that a fire had been caused the day before, and that cinders were thrown out by other locomotives, where they were all constructed in a similar manner. *Chesapeake & O. R. Co. v. Richardson*, 30 Ky. L. Rep. 786, 99 S. W. 642.

Matne.

In an action for damages by fire from defendant's locomotives, evidence tending to show other fires communicated by the locomotives used on the defendant's road, at different times about the same time as this fire, was admissible, where there was no proof as to the particular engine. *Thatcher v. Maine C. R. Co.* 85 Me. 502, 27 Atl. 519.

In an action for damages by fire from a passing locomotive, evidence that other fires were caused by the defendant's locomotives, at about the same time, and in the same vicinity, was held admissible. *Dunning v. Maine C. R. Co.* 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352. The court said: "We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives, at about the same time, and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals."

But in an action to recover for damages by fire from a steam mill, burnt on the same day, evidence showing that the mill caught fire the year before was held inadmissible, it appearing that that fire was not communicated to the mill by the use of the engine. *Burbank v. Bethel Steam Mill Co.* 75 Me. 373, 46 Am. Rep. 400. The court said: "The evidence did not properly tend to show the capacity of the furnace flues or chimney, to communicate fire to the mill by their use. It was not admissible on the authority of the cases that hold that, where the issue is whether the fire was set by a railroad locomotive, the same locomotive, under similar circumstances, at other times, had emitted sparks and coals, and set fire. If it appeared that the fire was communicated to the mill in 1875, by the use of the engine, we think it would be admissible."

Maryland.

Evidence that, on the morning of a fire, and on previous mornings, the engines of defendant were seen to throw sparks, and some of them had started fires, was held admissible. *Sims v. American Ice Co.* 109 Md. 68, 71 Atl. 522.

And in an action for damages by fire from defendant's engine, evidence that the fire started some 20 feet from the track, about three hours after the engine had passed, and that within a month previous, said engine had been seen to start two other fires, was held admissible, to show that the fire

in question was occasioned by the locomotive. *Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 54 Am. Rep. 755, 20 Atl. 1024.

And evidence of a witness who saw the spark arrester shortly after the fire, but not on that day, that it was "full of big holes" and "worn out," was held competent, but not conclusive. *Ryan v. Gross*, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

And in an action for damages by fire from defendant's locomotive, evidence of the good condition of the engine one day prior to this fire was held admissible to show its condition at the time of the fire. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251.

In an action for damages by fire from a passing locomotive, evidence that a week previous to this fire, large sparks had been seen coming from defendant's engines, was held admissible to show that fire was occasioned by the locomotive, where the engine was not identified. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.

But in an action for damages from fire from a locomotive, evidence that prior thereto this engine had caused other fires was held incompetent, as bringing in collateral issues; besides, the date was indefinite. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 59 Am. Dec. 72.

In *Annapolis & E. R. Co. v. Gantt*, supra, the case of *Baltimore & S. R. Co. v. Woodruff*, supra, was distinguished, the court saying: "The question here presented in a very different one, and it seems to us that the ruling in *Woodruff's Case* has no application to this. There the evidence offered was that, before the occurrence of the fire in question, other property had been set on fire by the locomotives of the defendant; no time was specified; it might have been, as the court said, 'six months before, or five years.'" *Massachusetts*.

In an action for damages by fire from a locomotive, evidence that the engine, on the return trip, emitted sparks which set fire to property in the same neighborhood, was held competent in rebuttal, where defendant showed the spark arrester was in good repair. *Loring v. Worcester & N. R. Co.* 131 Mass. 469.

In an action for damages by fire caused by sparks from defendant's engine, evidence in rebuttal was held competent to show that prior to this fire, the same engine, using similar fuel, had emitted sparks which had fallen at a great distance, and that other similar engines had emitted sparks setting fires. *Ross v. Boston & W. R. Co.* 6 Allen, 87.

In an action for damages by fire caused by sparks from locomotives, evidence showing the emission of sparks at other times, and that other fires had been caused thereby, was held admissible as tending to show the possibility, and, in the absence of any other apparent cause, the consequent probability, that some engine caused the fire. *McGinn v. Platt*, 177 Mass. 125, 58 N. E. 175.

Michigan.

Where a mill engine caused a fire, evidence that a mill engine caused a fire, evi-

dence of previous fires, and throwing sparks under similar conditions, was held to be admissible. *Hoyt v. Jeffers*, 30 Mich. 181; *Ireland v. Cincinnati, W. & M. R. Co.* 79 Mich. 163, 44 N. W. 426.

In *Webster v. Symes*, 109 Mich. 1, 66 N. W. 580, which was an action for a fire caused by a mill, "the plaintiff offered testimony tending to show that, on a previous occasion of a high wind, in a dry time, defendants had been requested to shut down the mill by the village marshal, and had recognized the propriety of the request, and had done so; that, on the day in question, a live spark had, during the noon hour, been blown into the barn where the fire afterwards originated from (it is claimed) a similar cause; that, during the forenoon of the same day, a stump in the street a little north and east of the barn, but in the same general direction from the mill, caught fire; that, previous to this, a live spark had fallen on the person of one of defendant's employees in the mill yard, about 150 feet from the smokestack, and on other occasions the smokestack had been seen to emit sparks. . . . And there was other testimony tending to show that the drafts were open some of the time. Moreover, the very fact that the cinders were emitted, and that this, according to the defendants' testimony, could not have occurred with the drafts closed, might be considered by the jury in determining whether the drafts were closed at the time or not. *Cheboygan Lumber Co. v. Delta Transp. Co.* 100 Mich. 24, 58 N. W. 630; *Alpern v. Churchill*, 53 Mich. 613, 19 N. W. 549."

But in *Marquette, H. & O. R. Co. v. Spear*, 44 Mich. 169, 38 Am. Rep. 242, 6 N. W. 202, the evidence showed that this particular engine was noted for throwing sparks, and two or three times before had set on fire loose hay on the dock, and that the plaintiff knew of the condition of this engine when he asked for it. It was held that he could not recover.

Minnesota.

Evidence that the engine alleged to have caused the injury set out other fires on other days, previous to that in question, was held competent to give notice of the defective condition to defendant in an action for damages by fire. *Nelson v. Chicago, M. & St. P. R. Co.* 35 Minn. 170, 28 N. W. 215.

And where evidence was offered to show frequent occurrences of fire along the line of defendant's road, it was held that it should be confined to a time at or about the date in question. *Davidson v. St. Paul, M. & M. R. Co.* 34 Minn. 51, 24 N. W. 324.

Mississippi.

In an action for damages by fire from defendant's engine, evidence that the day prior to this fire, in daylight, at a distance of 100 yards, a locomotive was seen emitting sparks which set fire to grass 50 feet from the track, was held competent, as showing the defective condition of the locomotives. *Tribette v. Illinois C. R. Co.* 71 Miss. 212, 13 So. 899.

Missouri.

In an action for burning plaintiff's mill by sparks, evidence that, on several occasions, from three to six months prior to this fire, other fires were caused by defendant's locomotives, was held admissible; it was also held that it would be immaterial, as the engine causing this fire had been located. *Hoover v. Missouri P. R. Co.* — Mo. —, 16 S. W. 480. In this case it was said: "The last point for consideration is whether the testimony of J. M. Muse was properly admitted in evidence, to the effect that, on several occasions, from three to six months before, he, living some half mile from the mill, had put out fires caused by defendant's locomotives on his land along the line of its road, and some 300 yards from the mill. The general current of authority undoubtedly, as shown by plaintiff's counsel, is in favor of the admissibility of such testimony, not only as to prior, but as to subsequent, occurrences of such a nature; the theory being that such accidents have a tendency to show negligent management of the defendant company's locomotives. There are a few authorities to the contrary; but it is believed that the theory first mentioned is better supported by reason, as it certainly is by authority. There are two cases cited from our own Reports which seem to hold contrary to the views here announced (*Coale v. Hannibal & St. J. R. Co.* 60 Mo. 227, and *Lester v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 265), but we overrule them."

And evidence that other fires before and after the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's locomotives, was held admissible, in an action for damages by fire, where the engine was not identified. *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936. This was under Missouri Rev. Stat. 1889, § 2615, providing that every corporation shall be responsible for damages to property injured by fire communicated directly or indirectly by locomotives used on their railroad. This was held to be constitutional.

In an action for damages by fire caused by sparks from a locomotive, where there was no dispute as to the identity of the locomotive from which the fire escaped, it was held competent to show that the same locomotive, on the same trip, and about the same time and place, set out other fires in its passage, as showing the defective condition or the unsuitable management of the locomotive. *Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 56 Am. Rep. 446.

Under Missouri Rev. Stat. 1889, § 2615, providing that a railroad shall be responsible for damages to every person whose property may be injured by fire communicated directly or indirectly by engines used on such railroad, evidence that, subsequent to the fire, sparks from an engine struck a tent pole near the barn, was held admissible. *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802.

The court said that in *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936, "it was held that the evidence was competent as tending to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property by sparks from one of defendant's engines."

In *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936, the case of *Coale v. Hannibal & St. J. R. Co.* 60 Mo. 227, was distinguished, as in the case at bar the statute controls.

And where an engine causing a fire was not ascertained, evidence of other previous fires from the engines of the defendant was held to be admissible. *Big River Lead Co. v. St. Louis, I. M. & S. R. Co.* 123 Mo. App. 394, 101 S. W. 636.

And evidence that other of defendant's engines had thrown out fire was held to be admissible in an action for damages by fire, where the engine was not identified. *Tapley v. St. Louis & H. R. Co.* 129 Mo. App. 88, 107 S. W. 470. The court said: "The only evidence to militate against this inference is that of the engineer, who testified that when he pulled into the depot the steam was shut off and no sparks could have escaped. He must have forgotten that sparks are as prone to fly upward as man is to sin."

But in *Kenney v. Hannibal & St. J. R. Co.* 70 Mo. 244, the plaintiff was allowed to show in evidence a worn-out spark arrester found on the defendant's road some weeks before the fire. There was no evidence that it had been on the engine that caused the fire, but the evidence showed that it could not have been on that engine. The admission of this evidence was held error.

In *Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 56 Am. Rep. 446, the court said: "In my opinion, all of this evidence was competent, though the fire to the east was not located with entire accuracy; and I do not regard *Kenney v. Hannibal & St. J. R. Co.* supra, as opposed to this conclusion."

In *Coale v. Hannibal & St. J. R. Co.* 60 Mo. 227, and *Lester v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 265, in an action for damages by fire caused by sparks from a certain locomotive, evidence in rebuttal, that other fires had occurred along the railroad, caused by locomotives, was held incompetent, as it was collateral and immaterial. But these cases were overruled in *Hoover v. Missouri P. R. Co.* — Mo. —, 16 S. W. 480.

Montana.

In an action for damages by fire, evidence that fires were made within a few weeks prior to this time, from sparks emitted from defendant's locomotives, was held admissible. *Diamond v. Northern P. R. Co.* 6 Mont. 580, 13 Pac. 367.

Nevada.

Evidence that for some months prior to, and about the time of, the fire, defendant's engines threw out sparks, was held admis-

sible, where the particular engine was not identified. *Abbott v. Chicago, B. & Q. R. Co.* — Neb. —, 130 N. W. 438.

In *Union P. R. Co. v. Keller*, 36 Neb. 189, 54 N. W. 420, the evidence showed that engine No. 805 passed this place shortly before the fire, going west of Kearney, and set out fires at five different places along the railroad a short distance east of Kearney. The question of the admissibility of this evidence was not passed upon.

Evidence that another engine had caused a fire four weeks after the fire in controversy was held competent. *Longabaugh v. Virginia City & Truckee R. Co.* 9 Nev. 271. The court said: "This fire occurred from coals dropping from the locomotive 'Reno.' Under the reasoning of the authorities cited, as applied to the facts of this case, I think the testimony was admissible. Certainly such testimony would have been admissible if directed against the 'I. E. James,' the offending engine, but there is no pretense that the 'I. E. James' is differently constructed from the 'Reno' or any other locomotive on defendant's road; or that any different appliances are used to prevent the emission of sparks from the smokestack or the dropping of coals from the ash pan. It was within the power of defendant, which must necessarily have intimate relations with all its engineers, conductors, and employees, to prove these facts, if they existed. The *onus probandi* is upon the defendant."

Evidence that, a few weeks prior to the fire in controversy, defendant's locomotive had been dropping coals at the same places, causing fire, was held admissible. *Ibid.* *New Hampshire.*

Evidence of other fires caused about the same time by the same engine, or by similar engines having the same kind of spark arresters, was held competent. But evidence that engines generally, that were not shown to be of the same construction, caused other fires about this time, was held inadmissible in rebuttal, where the fire was caused by one of two known engines.

Evidence of other fires near the line of the railroad, at other places, soon after the passing of locomotives which had the same kind of spark arresters as those used at the time of the fire in question, was held competent. *Smith v. Boston & M. R. Co.* 63 N. H. 25.

And evidence that other fires were made by the same engine a week after the fire in question was held competent. *Haseltine v. Concord R. Co.* 64 N. H. 545, 15 Atl. 143.

But where defendants showed that the two engines that ran over the road the night of the fire were properly equipped, and that no engines at or about the time of the fire were used with bonnets out of order, evidence that sparks were emitted at other times, from other engines, was held inadmissible. *Boyce v. Cheshire R. Co.* 42 N. H. 97. The court said: "To have rendered the evidence competent, it

should have been confined to the same engines, operated in the same manner, and in the same state of repair, or to other engines, conceded to have been of the same construction, to have been used in the same manner, and in the same state of repairs; which was not the fact with the engines as to which testimony was introduced against the defendants' objection."

New York.

Evidence that coals of fire had been frequently dropped from defendant's engine in passing plaintiff's farm on previous occasions than that of the fire was held competent. *Field v. New York C. R. Co.* 32 N. Y. 339. In this case, the engine that caused the fire was not identified.

And evidence of prior and subsequent emission of sparks by the defendant's engines, or some of them, was held admissible, in an action by an insurance company, subrogated to the rights of a policy holder, where the engine causing the fire was not identified. *Home Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182.

Where a steam dredge set out a fire near a canal, evidence that the dredge at other times, previous to this, emitted sparks that kindled fires at a greater distance, was held admissible. *Hinds v. Barton*, 25 N. Y. 544.

In *Hinds v. Barton*, supra, the court said: "But if no such positive testimony was given, or, if given, it became necessary to sustain it by other testimony, then it was most pertinent and important to show that, on previous occasions, the engine had emitted sparks which passed over a greater space than between it and the buildings consumed on the present occasion, and caused the ignition of other buildings or materials."

Admission of evidence to the effect that cinders had been seen falling from defendant's engine, but not so much since the accident caused by a cinder getting into plaintiff's eye, was held not prejudicial error. *Searles v. Manhattan Elev. R. Co.* 17 Jones & S. 425. The court said: "It was not followed up by any other testimony tending to give it weight and direction, and its effect, if any, must have been too slight to produce any influence on the jury."

And evidence that defendant's engine for a month or two before the fire had dropped live coals in the locality of the fire, and that there were live coals upon the track at these places at the time of the fire, and that coals at other times had dropped from the engine in question, was held competent. *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 389.

In an action for causing fire from an engine, evidence of prior fires and dropping of live coals by the engines of defendant was held pertinent. The evidence for the defendant was that all the engines were fitted with the best appliances to prevent fire. But most of the witnesses conceded that if coals of such size were dropped, there would be something wrong with the engine. *Ibid.*

Evidence that engines of defendant upon other occasions emitted sparks and coals which fell further from the track than the barn which was burned was held admissible. *Christ v. Erie R. Co.* 58 N. Y. 638.

In *Sheldon v. Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155, where the theory on the trial was that a fire was caused by the "Oneida," and there was no pretense that there was any difference between this engine and the others used on the road, it was held, first, that evidence of sparks from the "Oneida" at other times would be admissible to show its condition, and second, that evidence of sparks generally from other engines would be admissible. This case is quoted in many cases in other states on the proposition that evidence of sparks from other engines is admissible, where the engine is not identified. If it had been certain that the "Oneida" caused this fire, the evidence, under the weight of authority, would have had to be confined to sparks from that engine. The court treated the question on the assumption that, as all the engines were alike, the proof of defective construction would apply to any engine, and said: "There is no pretense in this case that the construction of the Oneida, as it respects the emission of sparks or cinders, differed from that of every other engine used by the defendants on their road. It must follow, therefore, that, under the same circumstances, the same amount of sparks and coals of fire would issue from every other engine as from the Oneida. The proof offered was therefore practically the same as though it had been proposed to show that the Oneida frequently or generally made emissions when running at the usual speed. The competency of this evidence has been directly decided in the English court of common pleas (*Piggot v. Eastern Counties R. Co.* 10 Jur. 571, 3 C. B. 229, 15 L. J. C. P. N. S. 235; *Aldridge v. Great Western R. Co.* 3 Mann. & G. 515, 4 Scott, N. R. 156, 1 Dowl. N. S. 247)."

But where the engine was identified, evidence that other engines threw large sparks more than 93 feet was held inadmissible. *Chandler v. Rutland R. Co.* 140 App. Div. 68, 12 N. Y. Supp. 1046. In this case the experts for defendant showed that this spark arrester was in perfect condition. The court treated this as conclusive in this case on the evidence above, and said: "It will be seen at a glance that this presents an entirely different question than was presented in the case of *Sheldon v. Hudson River R. Co.* In the first place, there can be no presumption of similarity as to the extent of the defect. Because one engine is so defective as to emit a spark the size of a chestnut, it cannot for a moment be urged that another engine is presumed to be equally defective, so as to emit a spark equally large. The presumption of similarity which arises when the question is simply one of construction entirely vanishes when the question is not one of construction, but of want of repair. It was clearly 32 L.R.A. (N.S.)

competent to show that this particular engine, within a reasonable time before or after this fire, emitted sparks which could not have passed if the spark arrester had been in good repair."

In *White v. New York C. & H. R. R. Co.* 90 App. Div. 356, 85 N. Y. Supp. 497, it was said: "While the rule laid down in *Sheldon v. Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155, that, for the purpose of establishing negligent construction of a specified engine, evidence may be given generally that engines belonging to the same railroad at other times had discharged an unjustifiable quantity or size of sparks, seems to be established, there does not appear to be any tendency in the latter cases to enlarge the operations or application of such rule."

In *O'Reilly v. Erie R. Co.* 72 App. Div. 228, 76 N. Y. Supp. 171, refusing evidence of fires in other places, referring to the *Sheldon* Case, the court said: "That case was not one where comparison was sought to be made between an engine conceded to be in perfect repair and others shown to have thrown fire. It was an offer to show that some of the defendant's engines did throw sparks as far as the building shown to have been burned, and that hence it might be inferred that its engines had fired the building in question. The judge writing seems to have placed the decision upon 'the peculiar circumstances' of that case; and I do not consider that it goes to the length which the plaintiffs claim for it."

And evidence that an engine emitted large sparks several months after the fire was held incompetent, where there was no proof in relation to the construction of the engine. *Collins v. New York C. & H. R. R. Co.* 109 N. Y. 243, 16 N. E. 50. The court said: "In order to permit evidence such as this, of what happened six months after the fire, it would be necessary to show either that, through the fault of its construction, sparks of that size could be emitted, or else that the engine was in the same condition of repairs that it was when the fire in question occurred."

And where the engine that caused the fire was identified, it was held that evidence of cinders being found on plaintiff's premises about the time of the fire, which was not shown to have come from this engine, was inadmissible, where it was not shown that the engine was of similar construction, condition of repairs, or management as those which were shown to have emitted such sparks. *Wheeler v. New York C. & H. R. R. Co.* 67 Hun, 639, 51 N. Y. S. R. 471, 22 N. Y. Supp. 561. The court said: "In cases where it is probable that some engine of a railroad company has started a fire, and several are shown to have passed at or about the time, evidence that engines on that road have frequently dropped sparks or cinders may be competent. *Sheldon v. Hudson River R. Co.* supra. But such evidence is not competent where the engine that caused the fire is identified, unless it is also shown that such

machine is of similar construction, state of repair, or management to those which are shown to have emitted such sparks or cinders."

In *Peck v. New York C. & H. R. R. Co.* 37 App. Div. 110, 55 N. Y. Supp. 1121, evidence that, twenty-seven days before the fire, this engine had thrown out small sparks, setting grass on fire, was held insufficient, where there was no proof that on the occasion of the fire in controversy, the engine was out of repair, or that the fire was caused by any fault on the part of the defendant. The court said: "The plaintiff did give evidence that, on the 23d of March, the same engine, in passing over the road, emitted sparks or cinders causing a fire to some grass in the town of Manchester, and the witness who speaks of the size of the sparks thrown out on that occasion says they were about the size of an ordinary pea. There is no proof in the case that on that occasion the engine was out of repair, or that the fire ensued by reason of any fault on the part of the defendant. It was incumbent upon the plaintiff to show that engine 1,073 was not equipped with a proper spark arrester, or that, being so equipped, it had become out of repair, and in such a bad condition as to emit unusual sparks or cinders, and that the defective condition was due to the neglect of the defendant's servants, and that such defect had existed a sufficient length of time to indicate that there had not been a proper inspection on the part of the defendant or its employees. No such evidence was produced."

North Carolina.

Evidence that the same engine, the day after a fire, threw sparks, was held admissible, in an action for damages caused by fire from defendant's engine. *Johnson v. Atlantic Coast Line R. Co.* 140 N. C. 581, 53 S. E. 365.

But evidence that the same engine one year after the fire in question set fire to timber some miles distant was held inadmissible. *Cheek v. Oak Grove Lumber Co.* 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

North Dakota.

Evidence that the same engine, on the same day, had set three different fires, within a distance of 8 to 10 miles, was held admissible. *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443; *Young v. Great Northern R. Co.* 8 N. D. 345, 79 N. W. 448.

Ohio.

Where the fire in question could not be traced to a particular locomotive, evidence that the engines of defendants generally threw out sparks was held competent. *Lake Side & M. R. Co. v. Kelly*, 10 Ohio C. C. 322, 6 Ohio C. D. 555, affirmed in 56 Ohio St. 785, 49 N. E. 1115; *Martz v. Cincinnati, H. & D. R. Co.* 12 Ohio C. C. 144, 5 Ohio C. D. 451.

But evidence as to wire netting procured from defendant some two or three years after the fire was held inadmissible, where the netting was not shown to be the kind used on the engines of defendant. *Cleveland L.R.A. (N.S.)*

land, C. & St. L. R. Co. v. McKelvey, 12 Ohio C. C. 426, 5 Ohio C. D. 561.

In an action for damages by fire alleged to have been caused by sparks from an engine, evidence that engines passing near that place, on other occasions shortly before, emitted sparks and coals, was held incompetent, where the time was not specified. *Pennsylvania R. Co. v. Rossman*, 13 Ohio C. C. 111, 7 Ohio C. D. 119. In this case the court said: "All the questions propounded on that subject, and the answers made, were of this character,—vague, indefinite, and very general. Time and place not specified; not limited to a time shortly before the fire, during the season or summer before the fire, or within the last decade, or to a place near the scene of the burning, or on the defendant's road, even; but taking in, in their purview, all times, all localities, and all railroads. This testimony, if testimony it is, is believed to be too attenuated and far away to possess any appreciable value or weight."

Oregon.

Where the engine causing a fire was not identified, evidence that engines in passing this place about the time of the fire, before and after the fire, threw sparks, was held admissible. *Koontz v. Oregon R. & Nav. Co.* 20 Or. 3, 23 Pac. 820.

Pennsylvania.

Where the particular engine which caused the fire was not identified, evidence that the engines on this road, shortly before and shortly after this fire, threw sparks, was held admissible. *Gowen v. Glaser*, 2 Sadler (Pa.) 250, 10 Atl. 417; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405.

Where the engine causing the fire was not identified, it was held competent to prove that the defendant's locomotives generally, at about the time of the occurrence, kindled numerous fires; but proof that many of the engines during the period of six months threw sparks was inadmissible. *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 16 L.R.A. 299, 27 Am. St. Rep. 652, 22 Atl. 851. The court said: "The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable."

In *Huyett v. Philadelphia & R. R. Co.* 23 Pa. 373, it was said: "When we find fires started by a locomotive, at distances of 80 to 150 feet from the road, how can we say that that is no evidence of carelessness? It is a question of fact whether the small sparks that escape through a good spark catcher will ignite wood at such a distance. We see wooden houses and lumber and firewood and shingles standing all along the very edge of railroads without being burnt; how can we say that the happening of several fires, all about the same time, along the line of the road, is no evidence of carelessness?"

In *Albert v. Northern C. R. Co.* 98 Pa. 316, the case of *Huyett v. Philadelphia &*

R. R. Co. *supra*, was distinguished, as there the evidence was that plaintiff's house was set on fire by sparks by some one or more of several engines passing by on that day, about the same hour.

And where the engine was identified that caused a fire, evidence that on previous occasions the same engine had been throwing fire was held competent. *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L.R.A. 577, 35 Atl. 992; *Thomas v. New York, C. & St. L. R. Co.* 182 Pa. 538, 38 Atl. 413.

And where the locomotive causing a fire was identified, evidence in rebuttal, that this engine, for two weeks before this fire, had fired property along the line of the railroad, and that immediately after this fire the engine ceased to throw out sparks, was held admissible. *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 341.

Evidence that sparks were seen coming from a train just prior to a fire was held to raise a question for the jury. *Pennsylvania Co. v. Watson*, 81 Pa. 293.

But where the engine causing a fire was identified as either one of two, evidence that a month previous to this fire other locomotives threw out large sparks was held inadmissible. *Albert v. Northern C. R. Co.* 98 Pa. 316.

In *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 16 L.R.A. 299, 27 Am. St. Rep. 652, 22 Atl. 851, it was said that where the engine was identified that caused the fire, evidence of the defects in other engines causing fires at other times would be inadmissible.

Evidence that an engine, on several previous nights within two weeks of the fire, and on the night after, threw out coals of an unusual size, was held incompetent, where this engine was not identified as the one that caused the fire. *Shelly v. Philadelphia & R. R. Co.* 211 Pa. 160, 60 Atl. 581.

Where defendant's witnesses on cross-examination testified that he had sometimes found broken grates on the engine that caused the fire, but that none were found broken within three years, it was held that plaintiff was precluded by that statement, and he could not show the contrary. *Erie R. Co. v. Decker*, 78 Pa. 293.

Rhode Island.

Evidence as to other fires caused by defendant's engines prior and up to the fire in question was held admissible, in an action for causing a fire. *MacDonald v. New York N. H. & H. R. Co.* 25 R. I. 40, 54 Atl. 795. In this case the engine causing the fire was not identified.

And evidence that the engines of defendants had caused fires previous to the one in question was held admissible. *Smith v. Old Colony & N. R. Co.* 10 R. I. 24. The court said that, in order to show negligence in the operation of trains, and to require watchfulness on the part of the defendant, evidence of previous fires would be admissible, but not evidence of subsequent fires. That to show the possibility of fires, if this was questioned, evidence of previous and subsequent fires would be admissible.

South Dakota.

An instruction that evidence of two other

fires made by the engine in controversy, about the time of the fire complained of, was to be considered by the jury as competent evidence, tending to prove that the engine was in a bad condition, was held to be within the discretion of the court. *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717.

Tennessee.

Evidence that, for some weeks prior and after a fire, the engines of defendants threw sparks, was held admissible, where the engine causing the fire was not identified. *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618.

And evidence was held competent to prove that two weeks after the fire in controversy, the defendant's engine was seen to emit such sparks at the point where this fire occurred as would have been sufficient to occasion it, in an action against the railroad company to recover for damages by fire. *Nashville & C. R. Co. v. Tyne*. — Tenn. —, 7 Am. & Eng. R. Cas. 515. The case does not show whether the engine causing the fire was identified or not.

But evidence that a year prior to this fire, engines of defendant caused other fires, was held inadmissible where it was not shown that these engines were of the same construction. *Louisville & N. R. Co. v. Short*, 110 Tenn. 713, 77 S. W. 936.

Texas.

Evidence as to other fires before and after the fire in controversy, caused by defendant's engines, was held admissible, where the particular engine that caused the fire was not identified. *Galveston, H. & S. A. R. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294.

In an action against a railroad company for setting out a fire, evidence that a week or two before this fire there was another fire about 15 or 20 feet east of this one was held admissible, or at least not reversible error, as there was sufficient competent evidence to support the judgment. *Texas & P. R. Co. v. Rutherford*, 28 Tex. Civ. App. 590, 68 S. W. 825.

Evidence that at other times and places there were fires on defendant's railway was held admissible to prove negligence on its part in setting out the fire in question. *Texas & P. R. Co. v. Land*, 3 Tex. App. Civ. Cas. (Willson) 74.

Evidence that defendant's engines at other times, before and after the fire in controversy, threw sparks as far from the track as the place where the fire began, and that they set other fires, was held admissible to give defendant notice, in an action for damages by fire. *Gulf, C. & S. F. R. Co. v. Holt*, 1 Tex. App. Civ. Cas. (White & W.) 477.

In an action for fire caused by a railroad train, evidence that a few weeks prior thereto, other fires were caused by local freight trains of the same character as the one which it was charged set out this fire, was held admissible. *Texas & P. R. Co. v. Woodriddle*, — Tex. Civ. App. —, 63 S. W. 905. The court said: "It tended

to prove that the local freight engines were not always in good order, or were not skillfully and prudently managed, or that the appliances for arresting sparks were not good, as appellant's witnesses had testified they were, and the same on all the engines; or, at all events, that it was dangerously negligent to permit the dry rubbish to accumulate and be and remain on the right of way where it was, while operating the engines along the road at that place, and that the company had notice of such danger."

And where the defendant showed that all of its engines were equipped with the best appliances, and the right of way was clean, evidence was held admissible showing occurrences of fire before and after the fire in question from defendant's engines. *International & G. N. R. Co. v. Newman*, — Tex. Civ. App. —, 40 S. W. 854.

Evidence that the engine alleged to have caused the fire had been seen to throw sparks on other occasions was held admissible to show the condition of the engine in reference to the emission of sparks. *Fleming v. Pullen*, — Tex. Civ. App. —, 97 S. W. 109.

That other fires were caused by the same engine within ten days prior to this one was held to be admissible, where defendant's evidence showed that the spark arrester was in good order. *St. Louis Southwestern R. Co. v. Alexander Eccles & Co.* — Tex. Civ. App. —, 115 S. W. 648.

And evidence of other fires was held to be admissible in rebuttal, where the evidence of defendant showed that all the appliances usual to prevent the escape of fires were used on the engines of defendant. *Missouri P. R. Co. v. Donaldson*, 73 Tex. 126, 11 S. W. 163. This evidence, however, was held to be admissible only as to such fires as were shown to have arisen soon after defendant's engines had passed.

And evidence that about five or six months before the fire caused by a train, a witness saw the fire start up on the right of way, was held admissible in rebuttal, where defendant's evidence showed that the engines and spark arresters had been in good order from six to twelve months before the fire. *Wilson v. Pecos & N. T. R. Co.* 23 Tex. Civ. App. 706, 58 S. W. 183.

But where an engine setting out a fire was identified, evidence that engines emitted sparks ten months prior to the fire was held inadmissible. *San Antonio & A. P. R. Co. v. Home Ins. Co.* — Tex. Civ. App. —, 70 S. W. 999.

Evidence that fires had occurred five years before the injury was held inadmissible, where no connection was shown with this fire. *Dillingham v. Whitaker*, — Tex. Civ. App. —, 25 S. W. 723.

Vermont.

Evidence that defendant's engines threw sparks causing fires, prior to the one in controversy, was held admissible, where the particular engine was not identified. *Hoskinson v. Central Vermont R. Co.* 66 Vt. 32 L.R.A. (N.S.)

618, 30 Atl. 24; *Smith v. Central Vermont R. Co.* 80 Vt. 208, 67 Atl. 535.

Evidence that defendant's engines caused fires about the time of the fire in controversy was held admissible in rebuttal, where the evidence of defendant showed that all the engines were inspected every trip, and that all were in proper order. *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449.

Virginia.

In *New York, P. & N. R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264, where evidence that other fires, prior and subsequent to the one in question, were caused by defendant's engines, was not objected to, it was held that the court properly instructed the jury to consider this in determining whether or not the engines were defective.

And in an action for causing a fire, evidence that the engines of defendants emitted sparks about the time of this one was held admissible. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207. In this case, after the engine causing the fire was identified, objection was not made to evidence as to fires made by other engines.

Evidence that the engine in question on other occasions caused fires was held competent in an action for causing fire by sparks from the locomotive. *Brighthope R. Co. v. Rogers*, 76 Va. 443.

In *Norfolk & W. R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614, about ten minutes after a freight train drawn by three engines had passed, plaintiff's house was on fire. One of these engines for several weeks had been throwing large cinders, some of them an inch in diameter. The court did not discuss the admissibility of the evidence, but treated the case as on a demurrer to evidence, and sustained a verdict for plaintiff.

In *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521, it was said: "Nor does the case of *Norfolk & W. R. Co. v. Perrow*, supra, have any bearing upon the question here, as all of the evidence in that case was as to sparks emitted and fires caused by the same train which caused the fire in question."

After the engine causing a fire was identified, it was held that evidence of other fires by other engines was inadmissible. *Norfolk & W. R. Co. v. Briggs*, supra.

In *White v. New York, P. & N. R. Co.* 99 Va. 358, 38 S. E. 180, the question was as to the sufficiency of evidence; the court said: "Notwithstanding these conditions, so inviting to fire from the sparks of a passing engine, it is an established fact in the case that no fire occurred at any point along the entire route, other than that alleged in this case, as the result of sparks emitted by the engine in question, after it came from the repair shops." Referring to this quotation, the court, in *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521, said: "Whether or not this is to be considered as an implied recognition that the only evidence as to other fires which would have been competent would have been as to fires caused

by sparks emitted by the engine in question, it is not authority for the proposition that evidence is admissible as to other fires not shown to have been set out from the engine in question."

In *Patteson v. Chesapeake & O. R. Co.* 94 Va. 16, 26 S. E. 393, the court did not rule on the admissibility of evidence, but said: "It is well settled that testimony is admissible on the part of the plaintiff tending to show that the defendant's locomotive, on occasions other than that for which the action is brought, had emitted sparks and communicated fire to the property along its track and right of way, for the purpose of showing negligence on the part of the defendant's employees, or defects in the construction of the machinery in question."

In *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521, it was said: "In *Patteson v. Chesapeake & O. R. Co.* supra, the evidence admitted was as to other fires caused by the same engine."

Wisconsin.

In *Brusberg v. Milwaukee, L. S. & W. R. Co.* 55 Wis. 106, 12 N. W. 416, which was an action for causing a fire, evidence that shortly after the train passed, coals were seen on the track as big as witness's thumb, and stumps were on fire near the track, was held admissible as bearing upon the question whether the fire from the engine set the plaintiff's building on fire, and also upon negligence in running the train.

In *Gibbons v. Wisconsin Valley R. Co.* 58 Wis. 335, 17 N. W. 132, it was said: "The case of *Brusberg v. Milwaukee, L. S. & W. R. Co.* supra, does not militate against this principle, but rather strengthens it. Other fires in the vicinity were allowed to be shown as tending to prove that the particular train in question caused them, which involved the question whether that engine was properly constructed or managed to prevent sparks from being emitted along the track."

But where a fire was caused by one of two locomotives, it was held that evidence as to fires caused by other locomotives was inadmissible. *Gibbons v. Wisconsin Valley R. Co.* supra.

In *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 447, 65 N. W. 176, fire occurred in a lumber yard after a switch engine passed on September 30th. The plaintiff's evidence showed that fires were caused by this engine near that place in March, April, May, and June, previously. The defendant showed that this engine was in the repair shop from July 5th to Aug. 2d, and then was equipped with the best devices for preventing sparks. This was not rebutted by any evidence. The court held that the evidence for plaintiff was sufficient to go to the jury, but that as such evidence was rebutted by the defendant, judgment should have gone for defendant. It was further held that the evidence of fires in April, May, and June, previous, was not proper for the consideration of the jury.

In an action for damages by fire, where 32 L.R.A. (N.S.)

the defendant showed that the screen on the engine was the same as on the other engines, it was held that evidence in rebuttal, showing that the other engines had set out fire on other occasions, was inadmissible. *Allard v. Chicago & N. W. R. Co.* 73 Wis. 165, 40 N. W. 685. The court said: "The mere proof that the screen or netting in the smokestack of the engine in question was the same as on other engines did not open the door for the admission of evidence tending to prove that other engines, on other occasions and under other circumstances, set such other fires. Especially is this so, since the defendant did not prove or attempt to prove that such screens or netting on such other locomotives did not emit sparks sufficient in size and quantity to set such fires."

English cases.

Evidence that other engines used on defendant's line, of the same description as the one in controversy, had on various other occasions been seen to throw sparks as great a distance as the spot in question, was held admissible. *Piggot v. Eastern Counties R. Co.* 3 C. B. 229, 10 Jur. 571, 15 L. J. C. P. N. S. 235. The court said: "The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine; and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could; and for that purpose it was clearly material and admissible."

In *Aldridge v. Great Western R. Co.* 3 Mann. & G. 519, Tindal, Ch. J., said: "If the case had gone to trial, and the plaintiff had proved that the engines had frequently set fire to stacks, that would have shown negligence; but it does not appear that such an accident had ever happened before."

In *Dimmock v. North Staffordshire R. Co.* 4 Fost. & F. 1058, the evidence showed that the engine in controversy threw sparks as large as walnuts the night before the fire. The defense contended that a spark arrester would interfere with the working of the engine. Verdict for defendants.

Canadian cases.

Evidence was held admissible that the same engine as caused the fire in question threw out sparks on other previous occasions, where the condition of the engine had not changed. *Canada C. R. Co. v. McLaren*, 8 Ont. App. Rep. 564.

And evidence that fires frequently occurred along the railroad, after the passing of defendant's trains, was held admissible. *Robinson v. New Brunswick R. Co.* 23 N. B. 323.

In an action against a steamboat company for causing a fire at a wharf, evidence of the escape of cinders after the boat left the wharf at another time was held admissible in rebuttal, where defendant's witnesses swore that they never failed to close the screens when near the wharf. *Edwards v. Ottawa River Nav. Co.* 39 U. C. Q. B. 264.

VI. Animals.

a. *Frightening other horses, previously.*

The general rule is that evidence that other horses had been frightened previously by the same object will be admissible, where the conditions were the same. *Bemis v. Temple*, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970; *Brown v. Eastern & M. R. Co. L. R. 22 Q. B. Div. 391*, 58 L. J. Q. B. N. S. 212 (horse was frightened by a pile of dirt); *Crocker v. McGregor*, 78 Me. 282, 49 Am. Rep. 611; *Gordon v. Boston & M. R. Co.* 58 N. H. 396 (escaping steam); *Powell v. Nevada, C. & Q. R. Co.* 28 Nev. 40, 305, 78 Pac. 978, 82 Pac. 96; *Winona v. Botzet*, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321 (steam whistle); *House v. Metcalf*, 27 Conn. 631 (mill wheel); *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55 (lumber pile); *Cunningham v. Clay Twp.* 69 Kan. 373, 76 Pac. 907 (stone in the road); *Nye v. Dibley*, 88 Minn. 465, 93 N. W. 524 (pile of stones).

So, in *Champlin v. Penn Yan*, 34 Hun, 33, evidence that a similar flag frightened other horses was held admissible.

And where a horse was frightened by a steam roller. *Elgin v. Thompson*, 98 Ill. App. 358.

And where a corn shredder was left in the road. *Galt v. Woliver*, 103 Ill. App. 71.

Where a railroad dumped a heap of refuse at the intersection of roads, and plaintiff's horse was frightened, it was held that evidence that other horses were frightened thereby was competent. *Brown v. Eastern & M. R. Co. supra*.

That other gentle horses had been frightened previous to this accident, on account of a defective bridge, was held admissible in evidence, to show the existence of the defect for some time, and that it was calculated to frighten horses. *Smith v. Sherwood Twp.* 62 Mich. 159, 28 N. W. 806.

Where plaintiff proved that other horses had been frightened previously at a barrel of whitewash left in the road, it was held admissible for the defendant to show that they were skittish horses. *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496.

But evidence that other horses had been frightened previous to this accident, by cars left near a crossing, was held inadmissible, where the disposition of such horses was not shown. *Cleveland, C. C. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118. The court said: "It does not follow, because one or more may have taken fright at a given object in a highway, that the object was necessarily frightful to all gentle horses; nor does proof that a number of horses took fright at an object raise a legal presumption that another horse, on a different occasion, became frightened at the same object."

And where the action was for frightening plaintiff's horse by "steam," evidence that other gentle horses had been frightened previously by locomotives and cars at 32 L.R.A. (N.S.)

the same place was held to be inadmissible. *Lewis v. Eastern R. Co.* 60 N. H. 187.

And in an action for injuries from being thrown from a buggy by the horse being frightened by a steam shovel, evidence of prior accidents at the same place, to other gentle horses, was held admissible for the purpose of proving that the machine was calculated to frighten horses. *Heinmiller v. Winston Bros.* 131 Iowa, 32, 6 L.R.A. (N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102.

Conversely, where plaintiff claimed that his horse had been frightened by cakes of ice in a highway, evidence that other gentle horses were not frightened by them was held competent upon the question whether or not they were calculated to frighten horses of ordinary gentleness. *Gould v. Hutchins*, 73 N. H. 69, 58 Atl. 1046.

But where it was uncertain what had frightened plaintiff's horse, evidence that another horse had been frightened at the same place, the day before, by meat piled on a station platform, and which was there at the time of this accident, was held to be inadmissible. *Wilkie v. Chehalis County Logging & Timber Co.* 55 Wash. 324, 104 Pac. 616.

b. *Disposition of this animal previously.*

The disposition of the animal for gentleness or viciousness prior to the accident, as a general rule, is held to be admissible in evidence.

Evidence to contradict a witness, that different halters were used from those testified to by the coachman, and also that he had left these horses standing on the barn floor, after they had been unharnessed, without halters on, at different times during two year prior to the accident, and that they had run out of the barn several times before, was held admissible to show negligence on part of the coachman, in an action for injuries caused by a runaway horse, running over a little girl. *Maxwell v. Durkin*, 185 Ill. 546, 57 N. E. 433.

And where a horse was frightened at a pile of stones in the highway, evidence showing that the horse, on previous occasions, had been driven near a steam car and a road roller, was held admissible to show its gentle character. *Clinton v. Howard*, 42 Conn. 294.

In an action for frightening a horse, evidence as to the conduct of the horse before the accident was held admissible but evidence as to his disposition after the accident was held inadmissible. *Stone v. Langworthy*, 20 R. I. 602, 40 Atl. 832.

And evidence of the vicious habits of a horse prior and since an accident was held admissible where, in an action for frightening a horse, the defense was that the horse was unsafe. *Lebanon & S. Turnp. Co. v. Hearn*, 87 Tenn. 291, 10 S. W. 510. The court said: "We are of opinion that the evidence rejected was admissible. The objection that, being afterward, the vicious

or unmanageable or timid conduct of the horse may have been occasioned by this fright, and that therefore the evidence must be rejected, is not sound. It assumes that the fright was the necessary, provoking cause, which it may or may not have been. This affects the weight, not the admissibility, of the evidence."

And where the horse that injured plaintiff had run away a month prior to this accident, evidence to that effect was held to be admissible. *Nisbet v. Wells*, 25 Ky. L. Rep. 511, 76 S. W. 120.

In an action to recover damages for injuries received in a stage, evidence of vicious acts of the horses, both before and after the accident, was held admissible to show the vicious disposition of the animals at the time of this accident. *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847.

And where plaintiff, injured by defendant's horses running away, proved that one of the horses had run away a year prior thereto, the defendant could prove that this would not affect the horse at this time. *Donnelly v. Fitch*, 136 Mass. 558.

Where plaintiff was kicked by defendant's horse, and defendant proved that plaintiff rode behind the horse two years prior, while going to a fair, evidence that this was four years prior was held to be admissible in rebuttal. *Morgan v. Hendrick*, 80 Vt. 284, 67 Atl. 702.

In an action for injuries caused by a kick from a mule in a team, evidence that one of the mules, prior thereto, had kicked another driver, was held incompetent, where the time was not shown or the mule identified. *Weigand v. Atlantic Ref. Co.* 189 Pa. 248, 42 Atl. 132. The court said: "That it had kicked some months or years before, or when untrained, would not be reason for the inference of continued viciousness. The fact that one of the pair had kicked, which one not being shown, would not justify the conclusion that both were vicious, or that the injury had been inflicted by the one which had kicked a driver before."

c. Subsequent disposition.

The weight of authority seems to be that the subsequent disposition of the animal may be shown in evidence, if not too remote in point of time.

In an action against a railroad for frightening horses, evidence that, after the accident, the horses were again frightened by the same object, was held admissible. *Valley v. Concord & M. R. Co.* 68 N. H. 546, 38 Atl. 383.

And where a horse had been frightened by a pile of lumber near a highway, evidence of the conduct of the horse on the same day, subsequent thereto, on being driven by the same, was held to be admissible. *Ibid.*

And evidence of subsequent misbehavior of a horse after an accident was held admissible, as tending to prove a vicious disposition. *L.R.A. (N.S.)*

position. Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696.

And evidence for defendant of the vicious character of a mare, two days after an accident, was held admissible. *Brown v. Green*, 1 Penn. (Del.) 535, 42 Atl. 991.

In an action for damages caused by a defective highway, where the defense was that the accident was caused by the viciousness of the horse, evidence showing the bad habits of the horse from the time he began to be used, down to the time of the accident, and afterwards, down to the time of the trial, was held competent. *Chamberlain v. Enfield*, 43 N. H. 356; *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185.

But in an action for the kick of a horse, evidence showing his docility after the accident, to rebut the claim that he was vicious, was held inadmissible. *Knickerbocker Ice Co. v. De Haas*, 37 Ill. App. 195. The court said: "The conduct of the horse after the accident was not material in any view of the case."

Cases in regard to vicious cattle and dogs are not included in this note.

VII. Subsequent accidents.

The general rule and weight of authority is that evidence of subsequent accidents will not be admissible. The exceptional cases were accidents on highways, and these were immediately after, where the condition had not changed.

In an action for death caused by a derailment of a train, evidence as to other derailments occurring afterwards, from other causes, was held inadmissible; but as to another accident, where there was a conflict of evidence as to its having been caused by the same condition, it was held that this should go to the jury, with proper instructions. *Galveston, H. & S. A. R. Co. v. Ford*, — Tex. Civ. App. —, 46 S. W. 77.

Evidence tending to show negligent construction or condition, to the effect that another accident had happened at the same engine pit about a month later, when the pit was in the same condition, was held incompetent, in an action for the death of a servant while in a cinder pit, under an engine. *Atchison, T. & S. F. R. Co. v. Dickens*, 7 Ind. Terr. 16, 103 S. W. 750.

And evidence in regard to a subsequent accident, at the same place in the street, was held erroneous. *Davis v. Alexander City*, 137 Ala. 206, 33 So. 863.

And that there were subsequent accidents at the same place in a defective sidewalk was held to be inadmissible in evidence, as this would raise collateral issues. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

But where an omnibus was upset on account of the condition of the road, evidence that the next morning, while the road was in the same condition, an ox wagon was also upset, was held admissible. *Bailey v. Trumbull*, 31 Conn. 585. The objection was that it was not the same place. It

was ruled, however, that it was sufficiently near. The court said: "We do not intend to be understood as sanctioning the idea that, had the objection been general, it would have been admissible, since it may certainly be very questionable, to say the least, whether it is not liable to the objection of raising new issues, and thus tending to render trials interminable, to admit evidence of this description."

And that another person slipped on an icy sidewalk immediately after plaintiff was hurt was held to be admissible in evidence. *Smid v. New York*, 17 Jones & S. 126.

VIII. Negative evidence.

In regard to evidence that no previous accident had ever happened, there is a conflict of authority. In Massachusetts it is held that evidence that there was no previous accident will be inadmissible. Maine also follows Massachusetts. The rule in this latter state began by excluding evidence of previous accidents, and then excluding negative evidence that there had never been any accident. In some of the cases rejecting this evidence the conditions were not shown to be similar. The general rule for the exclusion of this evidence is that it brings in collateral issues. But some cases allow such evidence on the ground that it raises the presumption that the machine was properly constructed, where it has answered the purpose without accident, for many years.

In an action against a city for injuries from a defective sidewalk, evidence that no prior accident had ever occurred at that place was held to be inadmissible, as that would raise a collateral issue. *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605. The court said that plaintiff could not have proved prior accidents, and the converse of that rule would apply.

And that other persons had previously passed over the place in the highway in question without accident was held to be inadmissible in evidence. *Kidder v. Dunstable*, 11 Gray, 342.

And that no accident had happened to other drivers at this place was held to be inadmissible in evidence. *Crocker v. Springfield*, 110 Mass. 135.

In an action to recover damages for drowning mules on a ferry, through the failure of the ferryman to perform his ordinary undertaking of transportation, evidence for defendant was held inadmissible to show that a similar boat had been used daily for thirty years, and no accident had ever occurred before. *Lewis v. Smith*, 107 Mass. 334.

And evidence that no previous accident had ever happened on a ferryboat by the removal of guards was held to be inadmissible. *Peverly v. Boston*, 136 Mass. 366. 49 Am. Rep. 37.

In *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 87 N. E. 567, the defendant's superintendent testified that in

an experience of many years he had never known an explosion of this sort, and did not know that it was likely to occur. The court said: "This evidence, however, the jury were not bound to believe, and if believed, it was not conclusive upon the issues before them."

And that other persons safely drove over the street crossing shortly after this accident was held to be inadmissible in evidence. *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810, 5 Atl. 71. The court said that evidence of other accidents would not be admissible: "Such evidence is not competent either for the purpose of proving that the way was defective, or in suitable condition at the time and place of the alleged injury, or as a test of the degree of care exercised by the plaintiff."

Evidence that no other persons were injured by electricity in defendant's car was held inadmissible. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269.

And proof that there had been no previous accident from collision with a post near a railroad track was held incompetent. *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416. The court said: "Where the question of notice of a dangerous defect is involved, evidence of prior similar accidents has been deemed competent on that question (*Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418); and perhaps it has been intimated that such evidence tends to show that a place is dangerous, on the ground that the danger or safety of a construction is proved by experience in the use of it. If that were true, it would be too plain for argument that the rule would work both ways; and if evidence of previous accidents is admissible to show the dangerous character of a place, evidence that no accident had occurred must be admissible on the other side, to show that it is not dangerous. In either case, the fact that an injury had or had not occurred would involve an inquiry into all the circumstances, and the investigation of collateral questions. The legitimate purpose of such evidence is to show notice; and in *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613, it was held not competent to prove that no accident had happened in the use of an elevator during the four and one-half years it had been in use, because such evidence would only tend to distract the attention of the jury by a multitude of collateral issues. There was no error in excluding the offered evidence."

And negative evidence that large crowds had been handled at a railroad station, and that no previous accidents from a greasy platform had ever happened, was held to be inadmissible, as bringing in collateral issues. *Newcomb v. New York C. & H. R. R. Co.* 182 Mo. 687, 81 S. W. 1069.

And negative evidence that no other horses had escaped previously from defendant's pasture was held to be properly rejected, where plaintiff's horse escaped on account of a defective fence, and was killed

by a railroad. *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695.

And negative evidence that other horses had been driven previously past a mortar box without being frightened was held to be inadmissible. *Bloor v. Delafield*, 69 Wis. 273, 34 N. W. 115. The court said: "To hold such testimony admissible would be to open the door to numerous and perplexing side issues, which is always to be avoided. For example, should the testimony be received, it would be competent for the plaintiff to show that each of those horses was blind, or was driven past the box with extraordinary care; should the plaintiff be able to prove that other horses were frightened by the box, the defendant might show that each of such horses was skittish, or carelessly driven."

Evidence by the defendants that no previous accidents had ever occurred at this place was held inadmissible, on the ground that the conditions were not shown to be similar. *Taylor v. Monroe*, 43 Conn. 42. This case distinguished *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194, as there the evidence was that others had walked over this icy pavement at this place without accident.

That no previous accident had happened from electric wires was held to be inadmissible in evidence, where it was not shown that the same conditions existed. *Harroun v. Brush Electric Light Co.* 12 App. Div. 126, 42 N. Y. Supp. 716.

And that a freight incline had been used for thirty years without others stumbling over it at a station was held to be inadmissible, where the offer of evidence did not cover light or darkness. *Sullivan v. Delaware & H. Canal Co.* 72 Vt. 353, 47 Atl. 1084.

And where a horse backed off a highway, killing the driver, evidence that no previous accident had ever happened was held to be inadmissible. *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589. This was because the conditions were not shown to be exactly similar.

The exclusion of evidence that witness had not seen any other horse frighten at a stump was held proper, especially where the party complaining had excluded evidence of previous accidents. He could not complain. *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402.

And evidence for defendant that witness had never heard of any prior accident from a log in the highway was held to be inadmissible. *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130.

And negative evidence that the highway was used for twenty years without any previous accident was held to be inadmissible. *Anderson v. Taft*, 20 R. I. 362, 39 Atl. 191. The court said: "If the defendant had been permitted to put in the testimony, the plaintiff would have been entitled to rebut it by testimony that accidents had happened within the twenty years. The defendant might then have shown that the accidents were caused not 32 L.R.A.(N.S.)

by the defective condition of the highway. but because of the want of due care on the part of the traveler."

And negative evidence that other persons drove safely over the place in question was held to be inadmissible. *Garste v. Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 A. & E. Ann. Cas. 747.

That ten thousand persons annually passed an area way previous to this accident, without falling into it, was held not to be admissible in evidence. *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260. The court said: "If the offer had been to show that others stepped into the area, as the plaintiff did, when it was in the same condition as on the night of this occurrence, and passed over the cavity safely, without being precipitated to the bottom, the proposition would have presented that coincidence of circumstances which, by the Connecticut cases, is the condition on which the reception of such evidence is permitted."

And negative evidence that others passed over the sidewalk previously, without injury, was held inadmissible. *Bauer v. Indianapolis*, 99 Ind. 56. In this case it was said that the rule was stated in *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205: "The ruling question was whether the place was in truth dangerous; and if it was shown to be so, then the fact that others had used it in safety would not change its character, nor deprive the appellee of his right to redress. A place proved to be unsafe may have been used without harm; but because this has been done does not alter its actual condition."

And that others had passed over a gutter crossing safely was held not to override the showing that this crossing was dangerous. *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128.

And negative evidence that no previous accident in eighteen years had happened, to witness's knowledge, in the use of the planer was held inadmissible. *Kirchoff v. Hohnsbehn Creamery Supply Co.* — Iowa. —, 123 N. W. 210. In this case, *Heinmiller v. Winston Bros.* 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102, was distinguished, the court saying: "Evidence that other gentle horses had been frightened by a steam shovel located near a bridge was held admissible as tending to show that a horse, because of its nature, was likely to be frightened by such an instrumentality so located. The distinction undertaken to be drawn between that case and those cited was that, in the latter, 'the ultimate questions were whether the defects existed. If they did, it was immaterial whether others had been injured thereby; while here it must be proven that the shovel was calculated to produce a certain effect on a class of animals. The testimony is not admissible for the purpose of proving that plaintiff's horse was frightened by the shovel, but for the purpose of showing how it affected a certain kind of animals.'"

Evidence that no accident had happened

prior to this one, at this elevator, was held inadmissible. *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613. The court said: "Such evidence would only tend to distract the attention of the jury by raising a multitude of collateral issues, having no material bearing upon the questions to be decided."

In *Ward v. Troy*, 55 App. Div. 192, 66 N. Y. Supp. 925, it was said: "The court refused to allow the defendant to show that no other accident of the kind had happened. There are cases which seem to give importance to the fact that no other accident had happened similar to the one in suit. Those cases, however, are mostly cases where the negligence claimed is one of construction, and the construction claimed to be negligent has stood the test of frequent use without injury. We will not say that this evidence is only competent in cases of defective construction. In the case at bar, however, considering the situation of this opening, the nature of the defect claimed, and the period of its existence, the fact sought to be proved would have given little assistance to the jury in reaching their conclusion."

And negative evidence that other persons were not injured previously in alighting from the street cars under similar conditions, at other places, was held to be inadmissible, as bringing in collateral matters. *Mobile Light & R. Co. v. Walsh*, 146 Ala. 295, 40 So. 560.

In *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, where an elevator was alleged to be unsafe for the use of children, evidence was held to be inadmissible that it had been in use a long time by large numbers of persons without injury, because the offer was not limited to use by children; but the court said: "Where the proper construction or safe condition of machinery is in issue, evidence that it has always satisfactorily answered the purpose for which it was intended is competent, as raising a strong presumption that it was properly constructed, and could be used with safety. It would also tend to repel any implication of negligence on the part of the owner in using improper machinery, because its continued operation for a long time, with uniformly good results, would be evidence of its freedom from danger, as convincing as any he could have."

But in an action for the death of a brakeman who was knocked from the top of a freight car by a supply pipe, the complaint alleged that the pipe overhung the roadbed in such a dangerous position that a brakeman standing on top of a train could not pass it without being struck. In view of this allegation, evidence that no person had been hit, although the pipe had been in the same place for years, was held admissible. *East Tennessee, V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280. The court said: "If the supply pipe to the tank had been for a number of years in the same relative position in which it was at the

time plaintiff's intestate was killed, and freight trains had passed the pipe each day and night during that period, and no brakeman or other person had been previously injured, these are facts proper to be considered by the jury on the inquiry of negligence on the part of defendant, or of contributory negligence on the part of deceased. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A.(N.S.) 710, 13 Am. St. Rep. 84, 6 So. 277; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359. It is the duty of the jury to consider the evidence tending to show such facts, as it is their duty to consider all evidence admitted before them."

And where plaintiff alleged a condition of sidewalk which, if true, must have rendered the walk impassable without accidents, evidence of absence of accidents was held admissible. *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194.

Where plaintiff was injured by his team backing a partly unloaded wagon against the railing of an incline leading to a grain elevator, breaking it and precipitating the rig to the ground, he brought an action to hold the owner of the elevator liable because of the insufficiency of the barrier. The court held that evidence that for five years prior to this accident fifty or sixty wagons loads were at this elevator approach daily, and that a similar accident had never occurred before, was admissible upon the question whether or not the arrangement was such as a reasonably prudent person would consider safe. The absence of accidents would seem practically to prove that it was reasonably so. *Field v. Davis*, 27 Kan. 400. The court said: "If an accident had ever before occurred at that elevator, it would have been an easy matter for the plaintiff to have ascertained the fact, and to have shown it to the jury."

Upon the question of the sufficiency of appliances, evidence that they have worked without injury may be admitted.

Thus, evidence that a swamp hook and lead line used in logging worked perfectly for two or three days in the same work, while in the same condition, after the accident, was held to be admissible. *Hoseth v. Preston Mill Co.* 49 Wash. 682, 96 Pac. 423.

In *Havlin v. Krulish*, 26 Misc. 381, 56 N. Y. Supp. 275, it seems to have been ruled that evidence that no prior injury had been caused by cogwheels exposed near an entrance to a factory during a period of fifteen years was admissible as bearing upon the question of care necessary to prevent injury.

The court in some cases acts on this class of negative evidence in ruling upon the question of negligence without passing upon its admissibility. In *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858, it was said: "The very fact that for ten years or more, this embankment had been in the same condition, and that, so far as appears, no similar accident had occurred, is most cogent evidence of the

lack of any negligence on the part of the city in failing to guard this spot."

In *Fulton Iron & Engine Works v. Kimball Twp.* 52 Mich. 146, 17 N. W. 733, the court said: "It also was shown that up to this time the bridge had been safely crossed for several years; and up to the day of the accident, by the heaviest loads drawn over the road, exceeding in some recent instances any ordinary burdens. It was not improper for the jury to consider all these things in determining how far the town was at fault in not planning a heavier structure."

In *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712, it was said: "There not only was no evidence that anybody else had ever stumbled at this point, but, upon the other hand, there was evidence of the use of this walk by a large number of people at about the same time when plaintiff fell, and also of general use by the public at other times without any resulting accident."

In *Maxim v. Champion*, 50 Hun, 88, 4 N. Y. Supp. 515, affirmed in 119 N. Y. 626, 23 N. E. 1144, the court said: "It was insisted by the defendant that, because no injury had resulted from the roads being substantially in the same condition for sixty-eight years, that the 'commissioners and the defendant are exonerated from any negligence in continuing the highway in its then condition.'" This was held to have been properly a question for the jury.

I. T.

WISCONSIN SUPREME COURT.

JOHN DALEY, Respt.,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appt.

(— Wis. —, 129 N. W. 1062.)

Carrier — expulsion of trespasser — authority of baggage man.

A baggage man with express authority to notify the conductor of trespassers upon the train, and, upon request, to aid him in expelling them, may be found to be acting within the scope of his authority in expelling one without reporting him to the conductor, so as to render the railroad company liable in case he causes injury by the use of excessive and unusual violence in so doing.

(February 21, 1911.)

A PPEAL by defendant from a judgment of the Circuit Court for Dane County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the wrongful expulsion of plaintiff from defendant's train by its servant. Affirmed.

The facts are stated in the opinion.
32 L.R.A.(N.S.)

Messrs. William G. Wheeler and Ralph W. Jackman, for appellant:

The plaintiff was admittedly a trespasser on defendant's train, stealing a ride. The defendant owed him no duty except not to wilfully injure him.

3 Elliott, Railroads, § 1255; *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446; *Wood, Railroads*, § 316.

Note.—Express authority to certain train employees to eject trespassers as negating implied authority of other employees.

As to the liability of railway company for negligence in ejecting trespassers from moving trains, as affected by the authority of the employee generally to eject trespassers, see *Doggett v. Chicago, B. & Q. R. Co.* 13 L.R.A.(N.S.) 364, and the note appended thereto.

The only case found, aside from *DALEY v. CHICAGO & N. W. R. Co.*, in which is raised the distinct question as to whether the express authorization of a particular employee to eject trespassers rebuts any presumption of implied power to do so on the part of other employees, is *West Jersey & S. R. Co. v. Welsh*, 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736. In that case it was contended that a brakeman in ejecting a trespasser was acting outside the scope of his employment, for the reason that that duty was expressly delegated to the conductor; but *Magie, Ch. J.*, speaking for a majority of the court, said: "I find myself unable to concede that the authority to remove trespassers from freight trains, which, as we have seen, is implied to have been conferred on those put in charge of such trains, has been either abrogated or annulled by the instructions which gave express authority to that effect to the freight conductor. If he had acted under that authority, the liability of the company would not have been in any respect diminished by its conditioning its grant of authority upon its being properly exercised. So, when the company committed to the conductor and his crew of brakemen the custody and care of its freight train, and thereby gave implied power to exclude and expel therefrom any unauthorized persons intruding thereon, in contravention of the design and purpose of the company in running such a train, I think that the implication is not rebutted by proof that it had selected one of its servants and given him express authority in respect to such trespassers. The express grant is not inconsistent with the implied authority."

In *Farber v. Missouri P. R. Co.* 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, the court says that it is not to be presumed that the brakeman would be invested with authority to eject trespassers, when he had a superior present in the person of the conductor, upon whom such duties usually devolve.

R. L. S.

Plaintiff cannot recover without proving by competent evidence that when the baggage man pushed him off the car, he was acting within the scope of his authority.

Randall v. Chicago & G. T. R. Co. 113 Mich. 115, 38 L.R.A. 666, 71 N. W. 450; Corcoran v. Concord & M. R. Co. 6 C. C. A. 231, 5 U. S. App. 453, 56 Fed. 1015.

Authority to eject trespassers is not to be implied from the baggage man's duties. Only such acts are implied as are reasonably necessary and proper to carry into effect the main power conferred, and which are not forbidden.

Mechem, Agency, §§ 280-282; 31 Cyc. Law & Proc. p. 1344; 2 Wood, Railroads, 1386; Robards v. P. Bannon Sewer Pipe Co. 130 Ky. 380, 18 L.R.A.(N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429; McKeon v. New York, N. H. & H. R. Co. 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329; Illinois C. R. Co. v. King, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552; Farber v. Missouri P. R. Co. 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631; Corcoran v. Concord & M. R. Co. 6 C. C. A. 231, 5 U. S. App. 453, 56 Fed. 1014; 3 Elliott, Railroads, § 1255; Walker v. Hannibal & St. J. R. Co. 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360.

Messrs. Aylward, Davies, Olbrich, & Hill, for respondent:

Baggage masters have power to expel intruders from their baggage cars, where they are required to prevent persons from riding in such cars.

20 Am. & Eng. Enc. Law, p. 173; Cook v. Southern R. Co. 128 N. C. 333, 38 S. E. 925.

Baggage men have authority, as the result of custom and practice, to eject trespassers.

Chesapeake & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947; Marion v. Chicago, R. I. & P. Co. 64 Iowa, 568, 21 N. W. 86; Dorsey v. Kansas City, P. & G. R. Co. 104 La. 478, 52 L.R.A. 92, 29 So. 177; Texas & N. O. R. Co. v. Buch, — Tex. Civ. App. —, 102 S. W. 124; Illinois C. R. Co. v. West, 22 Ky. L. Rep. 1387, 60 S. W. 290; Marcum v. Missouri, K. & T. R. Co. 139 Mo. App. 219, 122 S. W. 1148; West Jersey & S. R. Co. v. Welsh, 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736; Barrett v. Minneapolis St. P. & S. Ste. M. R. Co. 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; St. Louis, I. M. & S. R. Co. v. Pell, 89 Ark. 87, 115 S. W. 957; Houston & T. C. R. Co. v. Rutherford, 94 Tex. 518, 62 S. W. 1056.

Timlin, J., delivered the opinion of the court:

In this case the defendant appeals from 32 L.R.A.(N.S.)

a judgment for \$1,600 and costs, rendered upon a special verdict finding that defendant's baggage man caused the injury by pushing the plaintiff from a baggage car while the train was moving; that the baggage man was guilty of reckless or wanton conduct in so doing, and that the act was within the scope of his employment. It appeared without dispute that the plaintiff was injured while attempting to "steal a ride" on the front platform of defendant's baggage car.

It is claimed that there is no evidence to support the finding that the baggage man was within the scope of his employment in ejecting the plaintiff from the baggage car. No written rule or by-law of the corporation is produced relating expressly to trespassers on defendant's cars. Written rules are in evidence to the effect that baggage men will be held responsible for any damage to, loss or miscarriage of, baggage resulting from carelessness. That they must remain in the baggage car while on duty, unless otherwise instructed by the conductor, and not leave the car at the end of their run until all baggage is delivered to the station agent or station baggage man. Baggage car doors must be securely locked at all times, and no persons except those in the performance of duty may enter the baggage car. Another rule relates exclusively to disorderly passengers, and still another to the ejection of passengers. This last contains the following: "In all cases, on the refusal of any passenger to produce a proper ticket or pass, or to pay the fare, the conductor shall cause the train to be brought to a full stop at a regular open station, require such person to leave the train, and, on refusal, shall remove him or her therefrom. . . . A sufficient force must be brought into requisition to overcome resistance, and to place the person on the ground without inflicting injury, the law being that conductors may command employees or any of the passengers to assist in such removal."

Authority to eject a passenger who refuses to produce a proper ticket or pass, or pay the fare, would certainly include authority to eject a trespasser who made like refusal. One who attempts to ride without ticket, pass, or payment would ordinarily be a trespasser. The plaintiff, as an expert having a long and varied experience in stealing rides, was permitted to testify to the custom and practice of baggage men when they find a trespasser on the front end of the baggage car. It is not necessary to pass upon the correctness of this ruling, because the defendant does not desire a new trial of the case. We shall

eliminate this item of evidence in our investigation.

One McCoy, who had been in the employment of the defendant as locomotive fireman up to 1895, testified that it was the practice and custom in the operation of that road for baggage men to put tramps off the platform of the baggage car. Hyland, an expressman who worked on the same road up to about ten years before the trial, gave like evidence; and on the part of the defendant, Cannon, the conductor of the train in question, testified that it was not the practice or custom of baggage men to eject trespassers from the baggage car, and Whitney, another conductor, and other employees of the defendant, testified that it was not the custom for baggage men on the Northwestern Road to eject a trespasser found on the head end of the baggage car, but the baggage man notifies the conductor by word or signal. The trespasser is invited into the baggage car by the baggage man, and sent back to the smoker, and reported to the conductor.

The question is not free from difficulty and was ably presented. The verdict must be supported, if at all, under the following precedents: In *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304, a servant was employed as bartender, and engaged in such duties. An intoxicated person entered, made two or three purchases of liquor, and refused to pay. The barkeeper assaulted and injured him, and he brought an action for damages against the employer. It was ruled that, if this assault was committed with the purpose and in the line of enforcing payment for this liquor, the employer would be liable "It was his [the employee's] method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform." In that case authority to collect for drinks sold to guests or customers was a permissible inference by the jury, from the fact that the employee was charged with the duty of making sales, and in charge of the saloon. In *Johnston v. Chicago, St. P. M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, a servant employed as night watchman was charged with the duty to prevent property from being stolen, and see that cars were not damaged. A general agent of the corporation defendant instructed this night watchman to investigate and report concerning the throwing of sticks by boys at the passenger coaches of the railway com-

pany. In carrying out these orders, the night watchman assaulted and imprisoned the plaintiff, with a view of endeavoring to ascertain who committed the offense. The court said: "It is contended that authority to investigate does not imply authority to do unlawful acts in the execution of such duty, and that when Gallagher unlawfully assaulted and imprisoned the plaintiff, he was not within the scope of his duty. But since he had authority to investigate and was thus engaged, his acts, though unlawful, were binding upon his master. A master is liable for the tortious act of the servant done in the scope of his employment, though the master did not sanction it, or even though he forbade it." In *Wilson v. Noonan*, 27 Wis. 598, it was held that the employer was responsible for libel by an agent, where the latter was employed to translate written productions from one language to another, and publish the same as translated, although the translation was incorrect, and the particular libelous words in the foreign language were unauthorized by the master. In *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, the employer was held liable for an assault and battery by its servant, upon evidence from which the jury was authorized to infer that the servant was in charge of a car belonging to the master, and that the assault was for the purpose of protecting the master's property from trespass. Here the jury was permitted to infer that one in charge of a vehicle is or may be authorized to exclude from such vehicle trespassers or intruders, and the inference of fact is in accord with common sense and the experience of mankind. It would be most strange and unusual if one were to send his servant to the station with a carriage or automobile, or to the gravel pit for a load of gravel, and yet the servant have, from his charge of the vehicle, no authority to eject intruders who might insist upon climbing on the vehicle and riding free. In *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400, a farm hand was employed to do general farm work. While engaged in cultivating corn, a cow broke into the cornfield from an adjoining farm. Without any direction to that effect, the farm hand undertook to drive out the cow, and in so doing struck her with a stone and killed her in the field. It was held to be a question of fact for the jury whether the act of driving out the cow was within the scope of the servant's employment, under such circumstances. It was considered that if the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act,

though wrongful or negligent, should be treated as the act of the master, although there was no express command. The court said: "What is embraced, as commonly understood, in general farm work? In the very nature of the employment, there must be some implied authority, and duties belonging to it; and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel of fence down, through which a herd of cattle might or would likely enter and destroy his master's grain, we suppose all would say that it would be the positive duty of the servant to close the gate or put up the fence, to prevent the destruction of the grain; and if he should pass by and wilfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If that be so, how much more imperative the duty, where, as in this case, in the absence of the master, the servant being in the field at work, and seeing a herd of cattle break into the field, and in the act of destroying the corn, to drive out the cattle, and thus to save the corn from destruction?"

From the foregoing precedents it is easy to derive a rule that, where one is in charge of his master's vehicle with the right to use it for certain purposes, the jury may infer that it is within the scope of his employment to expel intruders or trespassers who attempt to use the vehicle for other unlawful or unauthorized purposes. But where there are several servants, the master may select which of these he will put in charge, or upon which of these servants he will confer the authority to protect the property against trespassers. This will rebut such authority on the part of other servants, if nothing else appear. This appears to have been done in the instant case, but still leaving with the baggage man a duty relating to trespassers who attempt to steal a ride on the baggage car. This duty did not include the ejection of the trespasser, but it did call on the baggage man, when he observed the act of trespass, to give information to the conductor, and thus call into action the forces provided by the master for the humane and careful ejection of the trespasser, as in case of the passenger without a ticket or pass, who refused to pay fare. By the written rule the baggage man had the further duty to aid the conductor in ejecting a trespasser, when called upon by the former. In the instant case, instead of discharging this duty in the manner prescribed, the baggage man undertook, in his master's interest, to discharge it by the short cut of himself expelling the trespasser without calling

ing the conductor or waiting for his orders. Had the baggage man not used excessive force, his act would have been legal. But, from these regulations of his employment, the jury might infer that his act, while outside the express authority conferred upon him, was yet within the scope of his employment. They might say of the baggage man, as was said by Justice Dodge in *Bergman v. Hendrickson*, supra: "It was his method of performing the duty delegated to him." Having observed the trespasser, he should have called the conductor and left the latter to deal with him, except that, if required by the conductor, he must assist in expulsion. He did not call the conductor, nor wait for his orders, but undertook to expel the trespasser without this detail of procedure, and, in so doing, as found by the jury, used excessive and unnecessary violence. There was therefore evidence to support the verdict.

Subordinate questions are also presented by the appeal, but we have not considered it necessary to discuss them at length.

Judgment of the Circuit Court affirmed.

CALIFORNIA SUPREME COURT.

RE ESTATE OF JOHN R. HITE, Deceased.

MERCANTILE TRUST COMPANY OF
SAN FRANCISCO, Admr., etc., of John
R. Hite, Deceased, et al., Appts.,
v.

JOHN E. McDOUGALD, Resp't.

(— Cal. —, 113 Pac. 1072.)

**Inheritance tax — amount of estate —
loss by executor.**

Money lost to the estate through misappropriation by the executor must be included in computing the inheritance tax on residuary legatees, where they are claiming under the will and some property is left to go into their possession.

(February 14, 1911.)

APPEAL by the administrator et al. from an order of the Superior Court for the City and County of San Francisco fixing the amount of inheritance tax due from the

Note. — Inheritance or succession tax on money or property of estate, which has been lost or misappropriated since decedent's death.

Little or no real authority has been found upon the precise and distinctive question indicated by the foregoing title. It does not seem that any light is thrown upon the question by cases like *Re Manning*, 169 N. Y. 449, 82 N. E. 565, holding that it is proper to exclude a worthless account

various beneficiaries under the will of John R. Hite, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. E. W. McGraw and Titus & Creed, for appellants:

The tax on money which the residuary legatees never have received and never will receive is unjust, and is warranted neither by the letter nor the spirit of the inheritance tax law.

27 Am. & Eng. Enc. Law, p. 340; People v. Koenig, 37 Colo. 283, 85 Pac. 1129, 11 A. & E. Ann. Cas. 140; Re Harbeck, 161 N. Y. 211, 55 N. E. 850; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361.

The tax is to be levied not on an abstract title or right of succession to property, but upon the actual succession in possession and enjoyment; the tax is payable on what an heir gets, and not on what he does not get.

Dos Passos, Collateral Inheritance Tax Law, § 49, p. 201; Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361; Re Westurn, 152 N. Y. 100, 46 N. E. 315; Re Gihon, 169 N. Y. 443, 62 N. E. 561; Re Liss, 39 Misc. 123, 78 N. Y. Supp. 909; Re Gihon, 33 Misc. 206, 68 N. Y. Supp. 381; Callahan v. Woodbridge, 171 Mass. 599, 51 N. E. 176; Re Roosevelt, 143 N. Y. 120, 25 L.R.A. 695, 38 N. E. 281; State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 579, 30 Atl. 76; State v. Dalrymple, 70 Md. 298, 3 L.R.A. 372, 17 Atl. 82; State v. Hamlin, 41 Am. St. Rep. 581, note; Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 373; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 794, 63 N. E. 789; Fatjo v. Pfister, 117 Cal. 85, 48 Pac. 1012; Re Wilmerding, 117 Cal. 284, 49 Pac. 181; Re Stanford, 126 Cal. 116, 45 L.R.A. 788, 53 Pac. 462; Kerr's Estate, 159 Pa. 512, 28 Atl. 354; Re Wolfe, 89 App. Div. 349, 85 N. Y. Supp. 950, affirmed in 179 N. Y. 599, 72 N. E. 1152; Morrow v. Durant, 140 Iowa, 437, 23 L.R.A. (N.S.) 474, 118 N. W. 781, 17 A. & E. Ann. Cas. 850; Re Stone, 132 Iowa, 136, 109 N. W. 450, 10 A. & E. Ann. Cas. 1033; English v. Crenshaw, 120 Tenn. 531, 17 L.R.A. (N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; Re Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439; Re Gihon, 169 N. Y. 443, 62 N. E. 561; Brown v. Lawrence Park Realty Co. 133 App. Div. 753, 118 N. Y. Supp. 132;

Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

Mr. U. S. Webb, Attorney General, with Mr. Hartley F. Peart, for respondent:

The tax is levied upon the privilege of succeeding to the property, and not upon the property itself.

Re Wilmerding, 117 Cal. 281, 49 Pac. 181; Re Gihon, 169 N. Y. 443, 62 N. E. 561; Re Fox, 154 Mich. 5, 117 N. W. 558; Nunnemacher v. State, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711.

The state cannot be divested of its interest in the assets of a deceased person, computed in accordance with the provisions of the inheritance tax act, by any subsequent event.

Re Lander, 6 Cal. App. 744, 93 Pac. 202; Re Kennedy, 157 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280.

Per Curiam:

This is an appeal from an order fixing the amount of inheritance tax due under the inheritance tax act (Stat. 1905, p. 341) from the various beneficiaries under the will of deceased. The appeal is by residuary legatees and by the administrator with the will annexed. The lower court, in fixing the amount of tax, included in the valuation of the estate upon which the tax should be computed the sum of \$98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which, according to the showing made by the record, had been appropriated to his own use within a year of his appointment by the executor of the will of deceased. By reason of such misappropriation, the executor having been without bonds or other security, and being impecunious and insolvent, the whole of said sum was lost to said estate, as was found by the lower court. By the order of the lower court, the tax on this amount was imposed wholly on the residuary legatees. The correctness of the court's action in so including the \$98,991.10 in computing the tax, and in assessing the same against the residuary legatees, is practically the only question presented by this appeal.

The exact question thus presented has apparently never before arisen in this or any other state. It was held by this court in *Re Kennedy*, 157 Cal. 517, 29 L.R.A. (N.S.) 428,

in estimating the value of an estate for the purpose of imposing a transfer tax, since it cannot be deemed property transferred or disposed of by will within the contemplation of statute. Possibly if, in a case of this kind, it could be established that, at the time of the death of the testator, the debt was absolutely good and enforceable, 32 L.R.A. (N.S.)

and became worthless only through circumstances occurring after his death, it would present substantially the question discussed in *RE HITE*. However, no cases of this kind have been found. Indeed, no case other than *RE HITE*, in which there was a loss or misappropriation after the death of the testator, has been found.

L. A. W.

108 Pac. 280, that property lawfully diverted in due course of administration, from the beneficiaries under the will of a deceased or the law of succession, for the payment of expenses of administration, and the debts of decedent, and in making such provision as is authorized by law for the support of the family of decedent, including property exempt from execution set apart to the family, and also a homestead so set apart, does not pass by will or by the intestate laws of the state, within the meaning of our inheritance tax law, and is therefore not to be included in fixing the tax to be paid by the beneficiaries. The basis of this conclusion was that the property given by will or devolving under the law of succession passes to the devisee, legatee, or heir at the death of the deceased subject to these burdens, and that so much thereof as is lawfully diverted from the beneficiary under the will or the law of succession in due course of administration never does actually pass to him. It was held, in accord with the general current of authority in states having a substantially similar statute to ours, that "the provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir." The rule applied was that stated in *Re Gihon*, 169 N. Y. 443, 62 N. E. 561, as follows: The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net successions to the beneficiaries. While the tax imposed by the act is not a tax on property as such, but a tax upon one for the privilege of succeeding to property, the amount of the tax as to any beneficiary is to be determined according to the value of the "net succession;" that is, the value of such property as remains for him after the satisfaction of such charges and burdens as may lawfully be satisfied in due course of administration. It is only such property that can be properly said to actually pass to the beneficiary.

This is the full extent of the ruling in the Kennedy Case. It appears to us to be the full extent of the rule in the various cases cited in the opinion in that case, and also in the cases relied on by learned counsel for appellants here. No decision has been cited or found by us that appears to authorize the conclusion that property illegally diverted by an executor or administrator, and thus lost to the beneficiary, has not passed to the beneficiary within the meaning of the act, 32 L.R.A. (N.S.)

or that the value of such property so diverted may be deducted in fixing the amount of the tax. The distinction between such a condition and the condition existing in the Kennedy Case and analogous cases is very clear, and to our minds it requires the inclusion of the value of the property so illegally diverted in the determination of the amount of tax. In the cases referred to we have, as it were, a taking upon condition, the condition being that if any of the property is necessary for debts of deceased, expenses of administration, etc., the same shall be used for such purposes and shall not go to the beneficiary, and the property so lawfully diverted therefor never passes to the beneficiary. But the condition covers only such property as is lawfully diverted in due course of administration, and, subject only to this condition, the property passes to the beneficiary at the moment of death of the testator or intestate. While the extent of the residuary estate cannot be definitely ascertained until the final accounting of the executor or administrator, it vests in the beneficiaries at the instant of death. See *Re Graves*, 242 Ill. 212, 89 N. E. 978; *Pierce v. Stevens*, 205 Mass. 219, 91 N. E. 319; Civil Code, § 1341. And the question whether property is subject to the tax is to be determined on the conditions existing at the time of death. *Pierce v. Stevens*, supra.

It is thoroughly settled that the tax is to be assessed on the value of the property at the time of the death of the testator or intestate, and that subsequent appreciation or depreciation in value is immaterial. See *Hooper v. Bradford*, 178 Mass. 95, 59 N. E. 678; *Re Van Pelt*, 63 Misc. 616, 118 N. Y. Supp. 655; *Re Vivanti*, 138 App. Div. 281, 122 N. Y. Supp. 954; *Re Sanford*, 66 Misc. 395, 123 N. Y. Supp. 284. The right of the state to the tax accrues at the moment of death, and is measured as to any beneficiary by the value at that time of such property as then actually passes to him. We can perceive no warrant in the inheritance tax act for holding that the destruction or loss of a part of the property before actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than would a material depreciation in its value affect it. The state is in no way legally responsible for any act of an executor or administrator causing such loss or destruction, and the beneficiary's loss in such a case is simply the character of loss that accrues to any owner of property that is lost or destroyed. In the case of the ordinary tax on property, it would not be claimed that the loss or destruction of the property after the tax had accrued, but before its collection, would affect the taxpayer's liability. There is no

material difference between such a case and the case at bar. The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will, the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time.

So far as we can see, there is nothing in the authorities opposed to the conclusion that the \$98,991.10 should be included for the purpose of determining the tax. In the Kennedy Case the language used in the opinion impliedly limited the noninclusion of property diverted in course of administration, to such property as was lawfully diverted, and this is apparently true of all the other cases involving a similar question. In a few of the cases we find the term "distributable assets" or "what remains for distribution," but when such terms are used, the connection clearly implies that the surplus over lawful diversion is meant. Property not lawfully diverted does actually pass at the death. In *Re Liss*, 39 Misc. 123, 78 N. Y. Supp. 909, where the question of deducting reasonable funeral expenses was presented and decided in favor of the deduction, the court said: "Of course, if the funeral expenses are manifestly improper, so that on the accounting of an executor or administrator the executor or administrator would not be permitted to charge for the same, the mere fact that the executor [or administrator] has expended that amount is not sufficient to justify this deduction; but, if it is a reasonable expense, then it should be deducted." In the same case, considering the question of the deduction of certain taxes on the property of the estate, it was said: "If the executors were bound to pay and did pay these taxes, then the personal estate was depreciated by this amount, and therefore did not pass to the next of kin, and consequently is not subject to the tax." These statements are in line with our conclusion. What was said in *Re Roosevelt*, 143 N. Y. 120, 25 L.R.A. 695, 38 N. E. 281, about it not being assumed that the legislature intended the citizen to pay a tax upon an interest he may never receive, was said with reference to a purely contingent estate, one that might never vest. The claim sustained in *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, was simply that the Federal inheritance tax act did not

make subject to taxation a gift which, even if technically vested in title, was yet subject to be defeated in possession or enjoyment by the happening of a contingency stated in the will, and that, as to such a gift, no tax could be imposed until the time when, by the happening of the contingency stated, the right to possess or enjoy had accrued. Whenever property actually vests in the beneficiary under the terms of a will, he receives it within the meaning of those decisions which declare that the amount of the tax is measured by the sum or property received by the legatee.

We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the \$98,991.10 is concerned from the other property in its hands, which constitutes part of the residuum of the estate, and belongs, under the provisions of the will, to the residuary legatees. The residuary legatees are bound to pay, as a condition to receiving possession of the residue of the estate, a succession tax determined on the basis hereinbefore stated, and the administrator with the will annexed is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will.

The case is doubtless a hard one on its facts so far as the residuary legatees are concerned. The amounts that will actually come into their hands, already heavily depleted by the large shortage of the executor, are still further depleted by the deduction from the remainder of the amount, of the tax on the portion unlawfully diverted. But our conclusion appears to us to be the only logical one under the provisions of our inheritance tax law.

The order appealed from is affirmed.

Beatty, Ch. J., not participating.

IOWA SUPREME COURT.

JOSIAH DUDLEY

v.

LUELLA M. DUDLEY, Appt.

(— Iowa, —, 130 N. W. 785.)

Marriage — divorced person — evasion of statute — effect.

1. That a divorced person, to avoid the

Note. — As to law governing validity of marriage, see notes in 57 L.R.A. 155: 11 L.R.A. (N.S.) 1082; 17 L.R.A. (N.S.) 800; 26 L.R.A. (N.S.) 179; 28 L.R.A. (N.S.) 753; and the later case of *Lando v. Lando*, 30 L.R.A. (N.S.) 941.

effect of a local statute prohibiting his remarriage, went into another state and contracted a marriage, and immediately returned and took up his residence in the state where the divorce was granted, does not render the marriage void; and it is immaterial that a similar statute exists in the state where the marriage contract is entered into.

Same — custody of child— unfitness — evasion of law.

2. A divorced mother does not show her unfitness, because of breach of good morals or violation of public policy, to have the custody of her child, by going into another state to avoid the operation of a statute forbidding her remarriage, contracting such marriage, and immediately returning to the state of her domicile.

(April 8, 1911.)

APPEAL by defendant from a decree of the District Court for Green County modifying a decree of divorce regarding the custody of a minor child of the parties. Reversed.

The facts are stated in the opinion.

Messrs. Faville & Whitney and Wilson & Albert, for appellant:

The original decree can be modified only by reason of matters that have arisen since the entry of the original decree.

Crockett v. Crockett, 132 Iowa, 388, 106 N. W. 944; Youde v. Youde, 136 Iowa, 719, 114 N. W. 190.

Where the child was awarded to the father, and the mother remarried, and then made application to have the minor child awarded to her, it was held, under the circumstances, that she should have the minor child.

Flory v. Ostrom, 92 Mich. 622 52 N. W. 1038.

Where the child is of tender years, the mother is to be preferred in awarding the custody of the child.

Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; Aitchison v. Aitchison, 99 Iowa, 93, 68 N. W. 573.

The remarriage of the defendant in the state of Nebraska is not a violation of the laws of Iowa; the act involves no moral turpitude; such marriage is perfectly legal and valid; and such fact is material in this action only as affecting the welfare of the child.

State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 930, 38 Atl. 81; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; Phillips v. Madrid, 83 Me. 205, 12 L.R.A. 862, 23 Am. St. Rep. 770, 22 Atl. 114.

Messrs. Howard & Howard, for appellee:

This court has held that not very material 32 L.R.A.(N.S.)

changes in the condition and situation of the parties would justify a modification of the decree, and accordingly transfer the custody of the minor children.

Lindquist v. Lindquist, — Iowa, —, 126 N. W. 1109.

While, to modify a decree in divorce proceedings for the custody of children or for alimony, there must be a change of conditions, still inability of the mother to care for the children, because of sickness, is held sufficient to warrant change in the order.

Slattery v. Slattery, 139 Iowa, 419, 116 N. W. 608; Peitzman v. Peitzman, 147 Iowa, 704, 125 N. W. 218.

Where a divorced person, immediately before and after the entry of the decree, resides in the state where the decree is granted, and leaves the state, is married, and immediately returns thereto, such marriage is absolutely void.

Marshall v. Marshall, 48 How. Pr. 57, 4 Thomp. & C. 449; Kerrison v. Kerrison, 60 How. Pr. 51; Williams v. Oates, 27 N. C. (5 Ired. L.) 535; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; State use of Newman v. Kimbrough, — Tenn. —, 52 L.R.A. 668, 59 S. W. 1061; Tyler v. Tyler, 170 Mass. 150, 48 N. E. 1075; Gabisso's Succession, 119 La. 704, 11 L.R.A.(N.S.) 1082, 121 Am. St. Rep. 529, 44 So. 438, 12 A. & E. Ann. Cas. 574; State v. Sartwell, 81 Vt. 22, 130 Am. St. Rep. 1017, 69 Atl. 151.

Deemer, J., delivered the opinion of the court:

By a decree entered January 1, 1909, the parties to this action were divorced. By that decree the following order was made as to the custody of their minor child, a boy six years of age: "That the said child shall remain in the care, custody, and control of the defendant, the mother, until the 1st day of June, A. D. 1909; that the child then may be taken by the plaintiff, the father, into his care, custody, and control for a period of six months from the date; and then that the defendant, the mother, may take him into her care, custody, and control for the succeeding six months; and this order and judgment and finding shall then apply as to the custody of said child, the plaintiff and defendant, the father and the mother of said child, alternating in each six months, the plaintiff's six months commencing on the 1st day of June of each year, and the defendant's on the 1st day of December of each year, and to continue until the child is fourteen years of age, when as under the law he will have the right to select his own guardian." On August 23, 1909, plaintiff, the father, filed an application for the modification of this part of the decree, ask-

ing that the court give him the absolute care and custody of the child. This was answered by the defendant, and on the issues joined the original decree was modified as prayed. Defendant appeals.

The only allegations showing change of conditions and reasons for the modification asked were in this language: "That during the larger portion of the time said child was subjected to the control of the defendant prior to June 1, 1909, said child was not with the defendant, but that the defendant left said child with her mother, the grandmother of said child, and the defendant removed some considerable distance from the place where said child was kept. That, by the terms of said decree, there was no provision made authorizing the plaintiff or defendant, or either of them, to again remarry within one year, and that therefore, by the provisions of the statute in such cases made and provided, the plaintiff and defendant were each enjoined and prohibited from marrying within one year from the date of the entry of said decree. That, contrary to and in violation of the terms of said decree and the provisions of the statutes of Iowa, and for the purpose of evading the criminal statutes of the state of Iowa, the defendant temporarily left the state of Iowa, and went to the state of Nebraska, as plaintiff is informed and believes and alleges the fact to be, and was there married to one Roy Mullen on or about the 18th day of May, 1909. That said defendant and the said Mullen returned immediately to the state of Iowa, and took up their residence and cohabited together as husband and wife on a farm in Buena Vista county, Iowa, and are now residing within said Buena Vista county, Iowa, and cohabiting together as husband and wife. That, for the purpose of concealing from this court and the plaintiff the fact as to said marriage, the said defendant has enjoined and cautioned the said minor child not to divulge to this plaintiff the fact as to said marriage, and that plaintiff would have been ignorant of such fact had he not been advised of said fact by parties in Buena Vista county, Iowa, having knowledge thereof. . . . That plaintiff is earning good wages, and amply able and willing to support and well provide for said minor. That the defendant has no property or means of support except such support as she will receive from her said husband, who, as plaintiff is informed, possesses little or no property, and that said child will therefore be cast upon his said stepfather for his support, even if he should reside with his said mother, the defendant."

Plaintiff further pleaded a statute of Nebraska with reference to the remarriage of

divorced parties, reading as follows: "It shall be unlawful for any person who shall obtain a decree of divorce to marry again during the time allowed by law for commencing proceedings in error or by appeal for the reversal of said decree. And in case such proceedings shall be instituted, it shall be unlawful for defendant in error or appellee to marry again during the pendency of such proceedings; and a violation of this act shall subject the party violating it to the penalties as in other cases of bigamy."

Violation of the terms of this statute are also relied upon. Something is said in argument about the court reserving power of modification of the decree as to the custody of the child in the original decree itself, and claim is also made that defendant has used profane language in the presence of the child, and is an unfit person to have its custody. But there is nothing in either of these contentions. The original decree made no reservation save as the statute itself provides for a modification, and there is no pleading to support the charge that the defendant is an unfit person to have the custody of the infant. Even if there had been such a charge, there is no testimony that defendant's habits have changed in any respect since the original decree was entered. The sole ground for the modification of the decree is the claim that the defendant violated both the law of this state and that of Nebraska in marrying one Mullen in the state of Nebraska on the 18th day of May, 1909, and in living with him as her husband in this state since that time. If such violation of law is shown, it might be ground for modifying the original decree. Such statutes as the one existing in this state, or the one copied from the Nebraska statutes, have no extraterritorial effect. The original decree was passed in this state where the parties were domiciled. Defendant, on the advice of an attorney, went to Nebraska and there married Mullen, and soon returned to this state, where she has since lived with him as his wife. This act was not in violation of our law, as it took place in Nebraska. It was not in violation of the Nebraska statute for the reason that no decree was entered in that state forbidding the marriage. The marriage was good in Nebraska, where consummated, and, being valid there, was valid when the parties returned to this state. These are familiar doctrines sustained by the great weight of authority. See *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255. 31 N. E. 706; *Thorp v. Thorp*, 90 N. Y. 602. 43 Am. Rep. 189; *Re Chace*, 26 R. I. 357. 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050; *Norman v. Norman*, 121 Cal. 620. 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac.

143; Canale v. People, 177 Ill. 219, 52 N. E. 310; Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; Gibson v. Gibson, 24 Neb. 394, 39 N. W. 450. The exceptions to this rule are pointed out in Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; but none of these exceptions apply to this case. See also Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505. So that defendant was not guilty of any violation of law. There is nothing in the record to show that Mullen is an improper person to have such custody and care of the child as he acquired by virtue of his marriage to the defendant. And defendant's remarriage, under the circumstances shown, does not constitute such a breach of good morals or of public policy as to brand her with unfitness for the custody of her child.

No valid reason is shown for modifying the decree, and the order of the trial court upon the application must be, and it is, reversed.

ALABAMA SUPREME COURT.

COSMOS COTTON COMPANY, Appt.,
v.

FIRST NATIONAL BANK OF BIRMINGHAM.

(— Ala. —, 54 So. 621.)

Bill of lading — indorsee — liability on contract.

A bank which cashes a draft in its favor, with bill of lading attached, is not liable to the consignee who pays the draft upon presentation, for shortage or inferiority of quality in the shipment.

(February 2, 1911.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in de-

fendant's favor in an action brought to recover for shortage of certain cotton described in a bill of lading attached to a draft drawn on plaintiff by the shipper, and paid by the plaintiff to the defendant bank. Affirmed.

The facts are stated in the opinion.

Mr. John W. Tomlinson, for appellant:

A bank must refund money paid it on account of a draft with a bill of lading attached, each describing 100 whole bales of cotton, when in fact they represented only 100 half or split bales.

Haas v. Citizens' Bank, 144 Ala. 562, 1 L.R.A. (N.S.) 242, 113 Am. St. Rep. 61, 39 So. 129; Searles Bros. v. Smith Grain Co. 80 Miss. 688, 32 So. 290; Mason v. Nelson Cotton Co. 148 N. C. 492, 18 L.R.A. (N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625; Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Columbian Nat. Bank v. White, 65 Mo. App. 679; Miller v. American Nat. Bank, 76 Miss. 84, 23 So. 439; American Nat. Bank v. Henderson, 123 Ala. 612, 82 Am. St. Rep. 147, 26 So. 498; Commercial Bank v. Hurt, 99 Ala. 130, 19 L.R.A. 701, 42 Am. St. Rep. 38, 12 So. 568; Jasper Trust Co. v. Kansas City, M. & B. R. Co. 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546; 4 Am. & Eng. Enc. Law, 2d ed. p. 549.

"Money paid by mistake on raised check can be recovered."

Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 49 Am. St. Rep. 17, 15 So. 440, 108 Ala. 205, 19 So. 791, 116 Ala. 142, 23 So. 53.

Assignments of bills of lading are not governed by the commercial law.

Commercial Bank v. Hurt, 99 Ala. 130, 19 L.R.A. 701, 42 Am. St. Rep. 38, 12 So. 568; Jasper Trust Co. v. Kansas City, M. & B. R. Co. 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546; 4 Am. & Eng. Enc. Law, 2d ed. p. 549.

Note. — Rights and liabilities of assignee of bill of lading with draft attached, as against consignee who does not get the goods or finds them defective.

The earlier cases on this subject are considered in the notes to Finch v. Gregg, 49 L.R.A. 679; Haas v. Citizens' Bank, 1 L.R.A. (N.S.) 242; and Mason v. Nelson, 18 L.R.A. (N.S.) 1221.

The decision in COSMOS COTTON Co. v. FIRST NAT. BANK, overruling, or at least distinguishing, the Haas Case, removes about the last support of the doctrine which at the time of the note in 49 L.R.A. 679, had received the approval of a number of courts, that one who purchases and collects a draft with a bill of lading attached assumes the obligation of the seller toward the

purchaser, and is liable to the latter for any deficiency or defects in the goods. As shown in the earlier notes this doctrine has now been expressly repudiated by most of the courts that previously favored it.

In First Nat. Bank v. Wilkesbarre Lace Mfg. Co. 162 Ala. 309, 50 So. 153, the court, without entirely repudiating the doctrine, held that it did not apply where the purchasers, at their own instance, were named as shippers, and the cashier of the defendant bank as consignee, the bill of lading being thus in fact their own bill, made payable to the cashier of the bank by their own procurement and with their full knowledge as to who the real shipper was. In view of the decision in COSMOS COTTON Co. v. FIRST NAT. BANK, the distinction thus suggested is no longer of practical importance in Alabama.

Messrs. Campbell & Johnston, for appellee:

The bill of lading cannot be regarded in any more favorable light for the plaintiff "than as collateral security accompanying the bill of exchange."

Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366.

There could have been no sale, either by Smith & Coughlan to the bank, or by the bank to the plaintiff, because the transaction lacks an essential element of a sale.

1 Benjamin, Sales, 2; Jenkyns v. Brown, 14 Q. B. 496, 19 L. J. Q. B. N. S. 286, 14 Jur. 505; American Nat. Bank v. Henderson, 123 Ala. 613, 82 Am. St. Rep. 147, 26 Sp. 498; Young v. Lehman, 63 Ala. 519; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; S. Blaisdell, Jr. Co. v. Citizens' Nat. Bank, 96 Tex. 626, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 292.

The drawee of a bill of exchange having paid it, though in ignorance of the want or failure of consideration, cannot reclaim the money.

Young v. Lehman, 63 Ala. 519; First Nat. Bank v. Burkham, 32 Mich. 328; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; 7 Cyc. Law & Proc. pp. 779-781; 14 Am. & Eng. Enc. Law, 2d ed. p. 198; Dan. Neg. Inst. § 1734a; Robinson v. Reynolds, 2 Q. B. 196, 1 Gale & D. 626, 3 Perry & D. 611, 9 L. J. Q. B. N. S.

The case of Hall v. Keller, 64 Kan. 211, 62 L.R.A. 758, 91 Am. St. Rep. 209, 67 Pac. 518 (cited in the note to 1 L.R.A.(N.S.) 242), is followed in the later case of Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, — L.R.A.(N.S.) —, 112 Pac. 114, expressly holding that where the seller of goods ships them, and draws a draft upon the purchaser with bill of lading attached, one who buys the draft, and receives payment therefor from the drawee, is not liable for the return of any portion of the proceeds on account of any defect in quality of the goods.

And S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 Tex. 629, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 292 (also cited in the note to 1 L.R.A.(N.S.) 242), overruling Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48, is followed by First Nat. Bank v. Mineral Wells & L. P. Street R. Co. — Tex. Civ. App. —, 133 S. W. 1099, holding specifically that a bank which purchases a draft with a bill of lading attached, without notice of any noncompliance with the terms of the contract between the seller and purchaser of the goods, does not become a warrantor of the quality and quantity of the goods.

The case of First Nat. Bank v. Felker, 185 Fed. 678, is not in point, although the question was suggested in the opinion. That was an action of trover by a bank which

249; Sewell v. Burdick, L. R. 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 753; Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 299; Marine Bank v. Wright, 48 N. Y. 3; S. Blaisdell, Jr. Co. v. Citizens' Nat. Bank, 96 Tex. 626, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 292; Tolerton & S. Co. v. Anglo-California Bank, 112 Iowa, 706, 50 L.R.A. 777, 84 N. W. 930; Hall v. Keller, 64 Kan. 211, 62 L.R.A. 758, 91 Am. St. Rep. 209, 67 Pac. 518; Lewis v. Small, 117 Tenn. 153, 6 L.R.A.(N.S.) 887, 119 Am. St. Rep. 994, 96 S. W. 1051; Mason v. Nelson Cotton Co. 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625; Arpin v. Owens, 140 Mass. 144, 3 N. E. 25; Inge v. Branch Bank, 8 Port. (Ala.) 115; Desha v. Stewart, 6 Ala. 852; Sands v. Hammell, 108 Ala. 624, 18 So. 489; Hall v. Pegram, 85 Ala. 523, 5 So. 209, 6 So. 612.

Anderson, J., delivered the opinion of the court:

This suit proceeds upon the theory that notwithstanding the defendant bank, the payee of the draft, cashed the same, or placed the proceeds thereof to the credit of the drawers, Smith & Coughlan, it became liable to the plaintiff, upon a subsequent payment by it of said draft, as for the

had purchased a draft with a bill of lading attached, against an agent employed by it to collect the same, who, contrary to his instructions, had delivered the bill of lading to the purchaser without receiving the amount of the draft from it. In defense, he sought to charge the bank with liability as for a breach of warranty as to the quality of the goods. The decision against the defendant was on the ground that the purchaser acquired the goods by a tort, so that, under the circumstances, the defense of breach of warranty would not have been available even as against the seller of the goods, and *a fortiori* was not available against the bank. The court remarked that if the bank had waived the tort of its agent, and had sued the purchaser for the purchase price of the goods wrongfully delivered to it, thereby ratifying the delivery, the sale being complete, a defense of that character could with some degree of reason, and perhaps with some show of authority, be urged (referring in this connection to Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48; and Finch v. Gregg, 126 N. C. 176, 49 L.R.A. 679, 35 S. E. 251). As pointed out, however, the court was not called upon, and did not undertake to pass on, that question; and it will be observed that both of the cases cited in that connection have been expressly overruled by later cases in the same jurisdictions.

G. H. P.

breach of the contract of sale between it, the plaintiff, and the consignor of the cotton and drawers of the draft, Smith & Coughlan, and which said draft, when paid by the plaintiff, had the bill of lading for the cotton attached thereto, and which said bill of lading, when delivered to the defendant, was indorsed in blank. The question therefore arises: Did the defendant bank, who cashed the draft, or placed the proceeds thereof to the credit of the drawers, Smith & Coughlan, and who forwarded the same for collection with bill of lading attached, become liable to the plaintiff, upon payment of said draft, for a breach of the contract of sale between the plaintiff and the vendors of the cotton, Smith & Coughlan, growing out of a shortage in the weight of the cotton or a deterioration in the quality? We think not. The defendant, by purchasing or cashing the draft, did not undertake thereby to carry out the contract of sale. Nor did the assignment of the bill of lading put the defendant in the shoes of the vendors, and entail upon it the duty of standing sponsor for their warranties and obligations connected with or growing out of the contract of the sale of the cotton. Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of the transferor to the goods described in them. *Commercial Bank v. Hurt*, 99 Ala. 130, 19 L.R.A. 701, 42 Am. St. Rep. 38, 12 So. 568; *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546; 4 Am. & Eng. Enc. Law, p. 549; 6 Cyc. Law & Proc. p. 426. The transferee of the bill of lading gets only the title to the thing shipped or included in the bill of lading, and does not get a title to what should have been shipped, or to something which the vendor agreed to ship, and which is not embraced in the bill of lading. It would therefore seem that one who gets a bill of lading as assignee does not assume to carry out the contract of the assignor with the consignee or drawee to the draft of which it is attached. He merely gets such title as the transferor has in the goods covered by the bill of lading, and he does not assume to warrant the obligations of the shipper as to quality or quantity. The foregoing rule seems to apply to unconditional transfers or assignments of bills of lading; but when the shipment is made with bill of lading attached to a draft for the purchase money, only a special property in the goods passes to the transferee, subject to be divested by the acceptance and payment of the draft. 4 Am. & Eng. Enc. Law, p. 548; *American Nat. Bank v. Henderson*, 123 Ala. 612, 82 Am. St. Rep. 147, 26 So. 498. The defendant in the case at bar ac-

quired the draft for a valuable consideration, and, when accepted and paid by the plaintiff, the defendant, as the owner or payee of same, did not, in receiving the money thereon, become responsible for the breach of the contract between the drawer and drawee. It was under no obligations to perform the contract of Smith & Coughlan, and had the right to assume that the draft it received and forwarded, and which was accepted and paid by the plaintiff, was a legitimate and regular transaction between the drawer and drawee, and that it was right and proper that the latter should pay, as the principal party, and the presumption of law that such is the case is its complete protection, if it received the draft in the ordinary course of business. *Young v. Lehman*, 63 Ala. 526.

The appellants contend, however, that the bill of lading, duly indorsed, was attached to the draft, and that they had the right to rely upon it as a security protecting them in the payment of the draft. As heretofore set out, the defendant, by being the transferee of the bill of lading, was under no legal obligation to carry out the contract for Smith & Coughlan. They did not become a party to the contract of sale, and the only representations or warranties that can be attributed to them was that the bill of lading was in the same condition as when they got it from Smith & Coughlan. We doubt if the status would be changed, if the transfer of the bill of lading had been unconditional, as it would only operate to transfer the title to the property, and not the contract of sale, so as to put the defendant in the shoes of Smith & Coughlan; but the transfer was conditional, and was only a security for the draft, as the draft to which it was attached shows upon its face that the bill of lading was attached. The plaintiffs had knowledge, or notice of facts to put them on notice, that the payment of the draft would divest the defendant of any title or claim to the cotton under the bill of lading, and that the bill of lading was simply held as collateral security for the draft, and which was sufficient to negative all idea that the defendant, in acquiring the bill of lading, had become the vendor of the cotton, or had undertaken to perform the contract of Smith & Coughlan. This conclusion is supported by the great weight of authority, English and American and some of which are directly in point, in law and fact, and is opposed by a very few cases, which will be hereafter considered and discussed. *Robinson v. Reynolds*, 2 Q. B. 196, 1 Gale & D. 526, 3 Perry & D. 611, 9 L. J. Q. B. N. S. 240; *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 306; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed.

515, 7 Sup. Ct. Rep. 318; S. Blaisdell, Jr. Co. v. Citizens' Nat. Bank, 96 Tex. 626, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 292; Arpin v. Owens, 140 Mass. 144, 3 N. E. 25; Tolerton & S. Co. v. Anglo-California Bank, 112 Iowa, 706, 50 L.R.A. 777, 84 N. W. 930; Lewis v. Small, 117 Tenn. 153, 6 L.R.A. (N.S.) 887, 119 Am. St. Rep. 994, 96 S. W. 1051; Hall v. Keller, 64 Kan. 211, 62 L.R.A. 758, 91 Am. St. Rep. 209, 67 Pac. 518. The cases opposed are, Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48; Finch v. Gregg, 126 N. C. 176, 49 L.R.A. 679, 35 S. E. 251; Searles Bros. v. Smith Grain Co. 80 Miss. 688, 32 So. 287; and perhaps the Eufaula Grocery Co.'s Case, 118 Ala. 408, 24 So. 389, and which said last case will be hereafter fully discussed and explained. The case of Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48, was expressly overruled by the supreme court of Texas in the case of S. Blaisdell, Jr. Co. v. Citizens' Nat. Bank, 96 Tex. 626, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 292. And Finch v. Gregg, 126 N. C. 176, 49 L.R.A. 679, 35 S. E. 251, was expressly overruled by the North Carolina court in the case of Mason v. Nelson Cotton Co. 148 N. C. 492, 18 L.R.A. (N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625.

The opinion in the case of Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389, contains expressions contrary to the present holding, and which would indicate that defendant bank, as payee of the draft, was a guarantor of Burbaker's contract with the Eufaula Grocery Company. We need not, and do not, question the soundness of the conclusion in said case; but the opinion seems to proceed upon a misconception of the record, and is not responsive to the appellant's style of action or complaint, or the argument and contention of counsel upon the appeal, as will appear from the reading of the brief on pages 410 and 411 of 118 Ala. We have before us the original record in the case. It seems that the plaintiff rescinded the contract of sale and sued the Missouri Bank for money paid under a mistake of fact, upon the theory that it *ex æquo et bono* belonged to the plaintiff, as the Missouri Bank had not paid it over to Burbaker and did not claim to hold it as a bona fide owner, and the Eufaula Bank was garnished while holding the money as agent for the Missouri Bank, and which the plaintiff contended was its money, having been paid under a mistake of fact. An examination of appellant's brief will demonstrate that the right to recover the money was not insisted upon or sought upon the idea that the Missouri Bank was liable, as the result of its ownership of the draft, for a breach

of the contract of sale between the plaintiff and Burbaker; but upon the theory that it collected the money for Burbaker, or, whether it had title to same or not, it was in duty bound to restore it to the plaintiff, "there being no question of a bona fide purchase by it." The Missouri Bank did not attempt to show that it was the bona fide owner of the draft or the fund, and the undisputed evidence showed that it held the money as a mere collecting agent for Burbaker, the drawer of the draft and consignor of the lading. The appellant's brief (the plaintiff) made the point that the undisputed evidence (evidence introduced by appellee) showed that the Missouri Bank held it merely as collecting agent for Burbaker; yet the court held that there was error in admitting this evidence, although the appellant assigned no error as to rulings upon evidence, and predicated its right to recover upon the defendant's own evidence. The liability of the Missouri Bank as a guarantor of Burbaker's contract, because payee or holder of the draft with bill of lading attached, was not made or insisted upon, and was absolutely foreign to plaintiff's theory as indicated by its complaint and argument upon appeal. Nor do we understand the opinion as holding that the Missouri Bank was liable as a guarantor of the contract of sale, or that it could not have been a bona fide purchaser or holder of the draft. There was no attempt to show that it was a bona fide owner, and the opinion does not hold that this would not be a good defense, and appellant conceded, in brief, that it had the right to recover only because there was no question of a bona fide purchase. The opinion merely held that, as to the plaintiff, the Missouri Bank was estopped from denying the title to the fund, but does not hold that the fund would have been subject to plaintiff's demand, had the Missouri Bank held it as a bona fide purchaser, or that it could not have been a bona fide purchaser under the circumstances,—a fact not attempted to be shown or set up.

The case of Haas v. Citizens' Bank, 144 Ala. 562, 1 L.R.A. (N.S.) 242, 113 Am. St. Rep. 61, 39 So. 129, reaffirmed in 157 Ala. 607, 46 So. 1036, whether sound or not, can be differentiated from the present case, and, in fact, from all the cases cited for and against the present holding. In this Haas Case, the complaint averred not only that the bank acquired the draft and bill of lading, but purchased the account also, and on page 571 of 144 Ala. the court, speaking through Tyson, J., stresses the point that the bank purchased the account, and does not fasten its liability upon the draft and bill of lading alone. In response to

the contention by the bank, that it held the draft as a bona fide purchaser, and was not therefore liable, the court says: "To so hold would be to give effect to only a part of the transaction,—to ignore its ownership of the goods and the account transferred to it by Klyce." (Italics supplied.) It will be noted that the purchase of the account or invoice was an important factor in the mind of the court, in reaching the conclusion in said case, and is one not to be considered in the case at bar against this defendant. There was no proof that this defendant purchased the account or invoice, or that it had any notice of the contents of the invoice or of the details of the transaction between the plaintiff and Smith & Coughlan, and it appears that said invoice was mailed by said Smith & Coughlan direct to the plaintiff. The defendant never saw the invoice, and had no notice of Smith & Coughlan's representations to the plaintiff, made therein or otherwise, as to the quality or quantity of the cotton, and, if the plaintiff relied upon same in paying the draft, it cannot hold this defendant to account for the representations of the vendor of the cotton. It held the draft as a bona fide owner, and the bill of lading as a security for said draft, and which the plaintiff knew from an inspection of the papers when presented, and the only representations which could be attributed to the defendants are that the papers were in the same condition when presented as when gotten from Smith & Coughlan. *Young v. Lehman*, 63 Ala. 526, and other cases cited. See also the case of *First Nat. Bank v. Wilkesbarre Lace Mfg. Co.* 162 Ala. 309, 50 So. 153.

The judgment of the City Court is affirmed.

All of the Justices concur.

Simpson, McClellan, and Mayfield, JJ., concur in the opinion, *Dowdell, Ch. J.*, and *Sayre, J.*, concur in the conclusion and the opinion, except in so far as it differentiates the case at bar from the *Haas Case*. They think the *Haas Case* is in conflict and should be overruled. *Simpson, J.*, thinks the *Haas Case* unsound, but properly differentiated, and that it is not necessary to overrule same.

ARKANSAS SUPREME COURT.

R. L. MILLSAPS, Appt.,

v.

W. L. BROGDON.

(— Ark. —, 134 S. W. 632.)

Highway — attempt to cross — duty to look and listen.

1. The rule requiring travelers to look 32 L.R.A. (N.S.)

out for trains at railroad crossings does not fix the measure of care which a pedestrian attempting to cross a street must use in looking out for automobiles.

Automobile — injury to pedestrian — presumption of negligence.

2. No presumption of negligence on the part of the driver of an automobile arises from the mere fact that he runs down and injures a pedestrian on a public street.

(February 6, 1911.)

Note. — Applicability of res ipsa loquitur to injury by automobile or other vehicle on highway.

This note does not cover the question of whether the doctrine of *res ipsa loquitur* is applicable in cases of runaways, but deals only with its applicability to cases where the only evidence is that an injury on the highway has resulted from collisions with automobiles or other vehicles.

The decision in *MILLSAPS v. BROGDON*, to the effect that no presumption of negligence arises from the mere fact that the driver of an automobile runs down and injures a pedestrian on a public street, is in accord with the general rule that the mere happening of an injury, with nothing else shown, does not raise a presumption of negligence.

Thus, the law does not draw an inference of negligence from the mere showing that there was a collision between a boy and a man on a bicycle on a public street, and that the boy was injured; but negligence must be proved. *Lee v. Jones*, 181 Mo. 291, 103 Am. St. Rep. 596, 79 S. W. 927.

And in *Bierbach v. Goodyear Rubber Co.* 14 Fed. 826, in charging the jury in an action for injury resulting from a collision of teams, the court said that negligence was not to be imputed to the defendant from the mere fact of the collision, but that it was to be proved as any other fact in the case.

So, where one working on a highway was struck by a horse and wagon, and the only witness for the plaintiff who was able to make any statement testified that he heard the driver cry "Look out," and saw the plaintiff struck to the ground, the doctrine of *res ipsa loquitur* does not apply, and negligence will not be presumed against the defendant. *Stone v. Forest City Exp. Co.* 105 Me. 237, 74 Atl. 223.

And it was held in this case that the doctrine of *res ipsa loquitur* does not apply to collisions of passers in highways; and negligence is not presumed, but must be proved. *Ibid.*

And in the absence of proof of negligence on the part of the driver, evidence that a child was run over and killed by a wagon in charge of such driver will not warrant a recovery. *Parsons v. Yeager Mill. Co.* 7 Mo. App. 594.

And a verdict for the plaintiff will be reversed where, from the evidence, it appears that an ox team and cart were going

APPEAL by defendant from a judgment of the Circuit Court for Garland County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Greaves & Martin, for appellant:

Plaintiff was guilty of negligence.

Burns v. St. Louis Southwestern R. Co. 76 Ark. 12, 88 S. W. 824; St. Louis, I. M. & S. R. Co. v. Martin, 61 Ark. 549, 33 S. W. 1070; Little Rock & Ft. S. R. Co. v. Blewitt, 65 Ark. 235, 45 S. W. 548; St. Louis & S. F. R. Co. v. Crabtree, 69 Ark. 134, 62 S. W. 64; St. Louis, I. M. & S. R. Co. v. Forbes, 63 Ark. 427, 39 S. W. 63; Hot Springs Street R. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245.

A pedestrian and operator of an automobile have reciprocal rights and duties, and neither must so exercise this right as to injure the other.

Thies v. Thomas, 77 N. Y. Supp. 276; Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234; Simeone v. Lindsay, 6 Penn. (Del.) 224, 65 Atl. 778; McCormick v. Hesser, 77 N. J. L. 173, 71 Atl. 55.

Mr. James E. Hogue for appellee.

Kirby, J., delivered the opinion of the court:

Appellee brought suit for damages for personal injuries alleged to have been caused by appellant's negligence in running him down with an automobile on the streets of the city of Hot Springs. Appellant denied that he was injured, or that he was struck by appellant's automobile, or caused any suffering and damages, and al-

down a steep grade moving somewhat rapidly, and a child not three years old ran under their feet and the wheels, and was injured. Chester v. Porter, 47 Ill. 66.

But it was held in Salminen v. Ross, 185 Fed. 997, that uncontradicted testimony that plaintiff, while driving on the right-hand side of a wide road, was overtaken by an automobile which struck the hind wheel of her wagon, established a clear case of negligence.

And a bicyclist has the burden of disproving his negligence, when he rides up behind another who is walking where he has a right to walk, and without giving any warning strikes him with his vehicle. Myers v. Hinds, 110 Mich. 300, 33 L.R.A. 350, 64 Am. St. Rep. 345, 68 N. W. 156.

And a verdict for the plaintiff was held to be supported by sufficient evidence in Spina v. New York Transp. Co. 96 N. Y. Supp. 270, where the injured person testified that he was going north on the left side of a street, that he looked east, but did not observe any wagons, that he had

leged contributory negligence on the part of appellee. The testimony tended to show that appellee, a beggar upon his crutches, was walking "quartering," or diagonally, across Central avenue in Hot Springs on the day of the injury, and, after crossing the street car track in front of a car, which stopped to take on passengers, he stopped within about 6 feet of the curb on the west side for about a minute, trying to decide whether he should go up or down the street for dinner, it being about 1 o'clock; that he was looking down the street, and heard an automobile horn in his rear, and was immediately struck and knocked down; that everything seemed to be clear when he crossed the street; that he did not see the automobile, and heard nothing to indicate its approach until the horn sounded, and he was struck before he could move; that appellant was going down Central avenue, and was seen 50 or 60 feet away from the place of the injury, in his car going about 20 miles an hour; that he apparently made no effort to stop; that there was not room between the place appellee was standing and the standing car for the automobile to pass without striking one or the other; that appellant had to run in ahead of the car there, the track running so close to the curb at that point. Appellant testified that he was going south on the avenue to his place of business, the street car to his left going down, and he slowed up before he got to the crossing, saw appellee turn off, having crossed just in front of the car, and was running slowly to give him a chance to get out of the way; that appellee was walking across the street and stopped when he got within 8 or 10 feet of him, too close to stop the automobile, and he turned it aside and

taken three steps into the street in order to cross when he was struck by an automobile, and that he did not see the automobile until it struck him, and his witnesses testified that the automobile came along the right side of the avenue and swung in a westerly direction into the street upon which the injured person was standing.

And in Heath v. Cook, — R. I. —, 68 Atl. 427, it was held that the jury properly found the defendant guilty of negligence where there was evidence that he was driving his automobile, and came up behind the plaintiff who was proceeding in the same direction on a bicycle, and, according to the preponderance of the evidence, ran into the plaintiff's wheel, upset, and injured him.

And in Harlow v. Standard Improv. Co. 145 Cal. 477, 78 Pac. 1045, where a steam roller was run over plaintiff's sidewalk, which was broken up, and into his fence and house, which were permanently injured, it was held that the maxim *res ipsa loquitur* was peculiarly applicable. J. T. W.

tried to pass between him and the car; that he could not have gone further to the left without running into the car; that the injury occurred in a narrow part of the street, on a curve; that there was not room to go between appellee and the street car at the time appellee stopped, and the collision with him or the street car could not be avoided. Appellee was injured by the collision, his hand and head cut and bruised; and he testified that since the injury he has suffered from headache, which he never had before, and that he was unable to lie on his right side; that he worried a great deal over his condition, and was about hopeless as to ever recovering since the injury. There was other testimony as to the extent of his injury, which the doctor to whom appellant sent him for treatment testified was slight, and not serious, and for the treatment of which he only charged appellant \$4.90. The evidence showed that appellee had been a cripple for five years, that he was farming when he became ill, and that he had no means of support, and could do no work except to sell shoe strings and pick up bottles and junk for a living. The court gave several instructions at the request of appellee, including No. 11, as follows: "The court instructs the jury that if you find that the defendant ran against the plaintiff with his automobile, upon the public street, and injured him, a prima facie case of negligence against the defendant is thereby established, and in that case the law presumes that the defendant was negligent, and it devolves upon the defendant to prove that he was not negligent, and, unless he does so, your verdict should be for the plaintiff, unless you find that the plaintiff was guilty of negligence which contributed to his injury." The court refused appellant's requested instruction No. 6, as follows: "The burden of proof is upon the plaintiff in this case, to show by a preponderance of the evidence, not only that he was injured by the defendant, but that the defendant was guilty of negligence which caused the injury. Negligence is a fact and must be proved, and unless the plaintiff has shown by a preponderance of the evidence that the defendant omitted some duty he owed the plaintiff, and that the plaintiff was thereby injured, your verdict should be for the defendant." The jury returned a verdict against appellant for \$150 damages, and he appealed.

The beggar on his crutches has the same right to the use of the streets of the city as has the man in his automobile. Each is bound to the exercise of ordinary care for his own safety, and the prevention of injury to others, in the use thereof. *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 573, 82 S. W. 245; *Hannigan v. Wright*, 5 Penn. 32 L.R.A. (N.S.)

(Del.) 537, 63 Atl. 234; *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778.

Negligence and contributory negligence are matters to be proved, and the burden is on the one alleging injury from negligence to establish it, and upon the other alleging immunity because of contributory negligence to establish it, unless it is shown by the plaintiff's testimony. *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 573, 82 S. W. 245.

This case seems to have been tried upon a wrong theory of the law, that a pedestrian, in crossing the street, would be held to the same care in looking and listening for approaching automobiles as would a traveler on a highway crossing a railroad, to look out for the approach of trains. There was no presumption of negligence arising from the fact that appellant ran against appellee with his automobile on a public street, and injured him, and proof of such fact alone did not create a prima facie case of negligence, as the jury were told in said instruction No. 11, given on appellee's part, which was erroneous and prejudicial.

Appellant's requested instruction No. 6, refused, was a correct statement of the law, and should have been given.

Since the case must be reversed for these errors, we have not found it necessary to examine the other instructions with a view to approving or disapproving them. We deem it unnecessary also to discuss the conduct of appellee's attorney in making the statements objected to in the closing argument, for the reason that such statements will probably not be repeated on the trial anew.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE F. MANNING et al., Exrs., etc.,
of Charles H. Hayden,
v.

EDGAR W. ANTHONY.

(— Mass. —, 94 N. E. 466.)

Statute of frauds — promise to pay mortgage debt — validity.

1. A parol promise of an assignee of the equity of redemption, to the mortgagee, to pay the mortgage debt in consideration of forbearance of foreclosure, is not invalid under the statute of frauds, as one to pay

Note. — The general question whether an agreement by a vendee to pay an encumbrance is within the statute of frauds, as a promise to answer for the debt of another,

the debt of another, since it is supported by a sufficient consideration to the promisor.

Appeal — refusal to submit questions — immaterial error.

2. Refusal to submit a special question to the jury is not error, if, by findings on the issues submitted to them, the jury answer the question against the contention of the one taking the exception.

(March 9, 1911.)

EXCEPTIONS by defendant to rulings of the Superior Court for Norfolk County made during the trial of an action on an alleged agreement for the payment of a certain promissory note, which resulted in a verdict in plaintiff's favor. Overruled.

Defendant made an agreement with plaintiff to pay a note of \$5,000, which was signed by Warren D. Vinal and made payable to Albert L. Jewell. It was secured by a second mortgage on certain real estate. The equity in the premises was conveyed by Vinal to defendant, whose name was not upon the note. Title to the note and mortgage was acquired by testator by assignment from Jewell, and came into plaintiff's possession as executor of his estate, and plaintiff testified that defendant promised to pay the note in consideration of an agreement not to foreclose the mortgage.

Messrs. Whipple, Sears, & Ogden, for defendant:

The contract was within the statute of frauds.

Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343; Carleton v. Floyd, R. & Co. 192 Mass. 204, 78 N. E. 126; Dows v. Swett, 134 Mass. 140, 45 Am. Rep. 310; O'Connell v. Mt. Holyoke College, 174 Mass. 511, 55 N. E. 460; Nelson v. Boynton, 3 Met. 399, 37 Am. Dec. 148.

The letter does not state the promise upon which defendant is sued with sufficient certainty to constitute a memorandum such as the statute requires; and it is also insufficient because it contains none of the other terms of the alleged contract, which, so far as is shown by any writing in the case, was purely gratuitous.

Riley v. Farnsworth, 116 Mass. 226; May v. Ward, 134 Mass. 127; Ashcraft v. Butterworth, 136 Mass. 511; Williams v. Smith, 161 Mass. 248, 37 N. E. 455; John Fowkes Mfg. Co. v. Metcalf, 169 Mass. 599, 48 N. E. 848; Morton v. Dean, 13 Met. 385; Waterman v. Meigs, 4 Cush. 497; White v. Bigelow, 154 Mass. 595, 28 N. E. 904; Howe v. Watson, 179 Mass. 37, 60 N. E. 415; Leath-

erbee v. Bernier, 182 Mass. 507, 65 N. E. 842; Kemensky v. Chapin, 193 Mass. 500, 79 N. E. 781, 9 A. & E. Ann. Cas. 1168; Nickerson v. Weld, 204 Mass. 354, 90 N. E. 589; Williams v. Smith, 161 Mass. 248, 37 N. E. 455.

Messrs. James W. Spring, John Wells Farley, and Arthur G. Mitton, for plaintiff:

A promise to forbear the enforcement of a legal right against the defendant or against a third person is good consideration for a promise by the defendant.

Fish v. Thomas, 5 Gray, 45, 66 Am. Dec. 348; Boyd v. Freize, 5 Gray, 553; Howe v. Taggart, 133 Mass. 284; Mackin v. Dwyer, 205 Mass. 472, 91 N. E. 893; Drury v. Fay, 14 Pick. 326; Vinal v. Richardson, 13 Allen, 521; Fears v. Story, 131 Mass. 47; Page v. Cook, 164 Mass. 116, 28 L.R.A. 759, 49 Am. St. Rep. 449, 41 N. E. 115.

Braley, J., delivered the opinion of the court:

The evidence warranted the special findings of the jury that the defendant agreed to pay the overdue mortgage note if the plaintiff would not foreclose, and that, in reliance upon the promise, foreclosure proceedings were not instituted. The title to the equity of redemption stood in the defendant's name, but the note and mortgage having been given by his grantor, the principal defense is that, if the promise was collateral, no sufficient memorandum in writing was ever given, or, if original, the agreement was not to be performed within one year from its date, and the action, therefore, is barred by Rev. Laws, chap. 74, § 1, cls. 2 and 5. The last contention, if it were not disposed of by the very terms of the agreement, is settled by the third special finding of the jury, that the period of performance was understood to be less than the statutory time. Roberts v. Rockbottom Co. 7 Met. 46. If a special promise to answer for the debt of another must be evidenced by a memorandum or note in writing, signed by the party to be charged, even if the consideration expressed therein may be shown by extrinsic evidence, the testimony is plenary that the defendant's controlling motive was to prevent a foreclosure for his own benefit, or, as he testified, to protect the interests of the corporation with which he was connected, although neither could have been compelled by suit to pay the note of the mortgagor. Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343; Carleton v. Floyd, R. & Co. 192 Mass.

is considered in the note to Enos v. Anderson, 15 L.R.A. (N.S.) 1087.

And the question whether an oral promise to pay another's pre-existing debt, made in order to secure a benefit to the promisor, 32 L.R.A. (N.S.)

without releasing the original debtor, is within the statute of frauds, is considered in the note to Howell v. Harvey, 22 L.R.A. (N.S.) 1077.

204, 78 N. E. 126; Rev. Laws, chap. 74, § 2; *Bogigian v. Booklovers' Library*, 193 Mass. 444, 79 N. E. 769. The defendant's promise, as the jury specially found, was to pay a debt for which the property could have been held, and, the plaintiffs' forbearance to press the right of foreclosure having been a sufficient consideration to support the promise, the ruling that the contract was independent of the statute was right. *Mackin v. Dwyer*, 205 Mass. 472, 475, 91 N. E. 893, and cases cited; *Fish v. Thomas*, 5 Gray, 45, 66 Am. Dec. 348; *Fears v. Story*, 131 Mass. 47; *Stratton v. Hill*, 134 Mass. 27, 30; *Paul v. Wilbur*, 189 Mass. 48, 52, 75 N. E. 63.

The defendant's evidence having tended to prove that he acted or intended to act in a representative capacity, he contends this question should have been submitted to the jury, and that the judge erred in directing a general verdict for the plaintiffs upon the special findings. It is clear from the record that the request was not made until after the return of the special findings under the first two questions. But the defendant not having called to his attention the question of agency, the judge evidently understood when the testimony closed, and so stated to the jury, that the only matter of law the defendant intended to raise was that which we have discussed. If the defendant desired to present this question, he should have asked for a ruling before the judge instructed the jury. It came too late as of right after the special findings had been submitted and answered. *Re Keohane*, 179 Mass. 69, 60 N. E. 406. But the general verdict, simultaneously returned, was at once set aside by the judge on his own motion, without any objection being made by the parties, as no instructions had been given in reference to the amount the plaintiffs were entitled to recover. A general verdict, however, was necessary at some stage of the proceedings, and the defendant then for the first time asked the judge to rule that, upon all the evidence in the case, there is nothing for the jury, and a verdict should be ordered for the defendant, and that, if the defendant promised as the jury had found, a verdict for the plaintiffs could not be ordered. The judge properly could have refused, as we have said, to entertain this request. Yet he did not take this course. His final reply, after a long colloquy with counsel for the defendant, that his requests were refused, and "your exceptions noted," saved the point now pressed. The jury were then further instructed to find the time when performance was due from the defendant, and also as to the amount of their verdict, which the court ordered for the plaintiffs.

32 L.R.A. (N.S.)

But the exceptions, although open, cannot be sustained. The ruling that the agreement, if either entirely verbal or evidenced by the letters which passed between the parties, was an original, and not a collateral, contract, left the question of fact to be determined whether the defendant's promise was unconditional and absolute, as the plaintiffs contended, or whether, as the defendant testified, it was conditional upon a sale of the property which he was trying to arrange, but did not complete, because, as he notified the plaintiffs, his efforts to sell had not been successful. The request that a verdict be ordered for the defendant was rightly refused, and under instructions to which no exception were taken to the omission to refer to any question of agency, the jury were correctly instructed: "That an agreement of some sort was made, there is no question. What the agreement was is the issue here." By their special findings the jury decided that the defendant's promise was his own unqualified undertaking to pay the debt, as the plaintiffs alleged. It followed that no further question of fact as to the defendant's liability remained to be proved, and, the amount not having been in dispute, the court properly ordered a verdict for the plaintiffs. *Raymond v. Crown & E. Mills*, 2 Met. 319; *Winsor v. Griggs*, 5 Cush. 210; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Doucette v. Baldwin*, 194 Mass. 131, 135, 80 N. E. 444.

Exceptions overruled.

MICHIGAN SUPREME COURT.

WALTER DINGMAN, Plff. in Err.,
v.

DULUTH, SOUTH SHORE, & ATLANTIC
RAILWAY COMPANY.

(— Mich. —, 130 N. W. 24.)

Carrier — special privilege to transfer agent.

1. A railroad company is not prevented from granting to a particular person engaged in transferring passengers and baggage the exclusive right to a representative

Note. — *Right of carrier to grant exclusive train privilege to baggage or passenger transfer companies.*

The decisions are in accord in holding that common carriers have the right to grant the exclusive train privilege to baggage or passenger transfer companies.

Thus, it was held in *Lewis v. Weatherford*, M. W. & N. W. R. Co. 36 Tex. Civ. App. 48, 81 S. W. 111, that a carrier might grant an individual the exclusive right to solicit on its trains the transfer business of its passengers. The court said: "There

on its trains to solicit patronage, by a statute requiring such corporation to grant equal facilities for transportation of freight and passengers without discrimination.

Evidence—judicial notice.

2. The court may take judicial notice that a particular railroad company is engaged in interstate commerce.

(February 1, 1911.)

ERROR to the Circuit Court for Chippewa County to review a judgment for defendant in a suit to recover damages for alleged discrimination by defendant against plaintiff in the business of soliciting passengers and baggage. Affirmed.

The facts are stated in the opinion.

are many cases which deny the right of a railroad company to enter into an arrangement whereby the right of its passengers to choose their own transfer agents after leaving the railway company's premises is controlled. But this may be, and is, we think, a different question from the one presented in this case, and the authorities referred to need not be discussed. Ordinarily, all hackmen alike have the common right of soliciting the patronage of railroad passengers, but this common right may be defeated by the railroad company by the establishment of a reasonable rule or regulation with respect to its passengers while they are in such company's charge. At the point where the railroad company's right to maintain its rule or regulation ends, this common right of the transfer companies begins. It is not contended in this case, neither indeed can it be, that appellee did not have the right to exclude all hackmen from its trains. Our statutes have never declared railroad companies common carriers of transfer companies. But the contention mainly is that since appellee has not seen fit to exclude all, but has permitted Green and his agents to canvass its passengers, it therefore lost all right to exclude others. But this contention cannot be maintained. A properly regulated transfer service on passenger trains in this day is not only a convenience, but practically a necessity. The means adopted by appellee in this case, or some similar method, is practically the only plan by which such business can be regulated at all. To admit all transfer agents would amount not only to an inconvenience to the traveling public, but would render it well nigh impossible to establish any rules or regulations in regard to the business whatever. To hold as appellant insists in this case would be nothing short of judicial legislation. If the rule or regulation adopted by a railway company is unreasonable, the court would doubtless afford relief; otherwise the question is one for the legislative, and not the judicial, branch of the government."

And it was held in *Kates v. Atlanta* 32 L.R.A. (N.S.)

Messrs. F. T. McDonald and M. M. Larmonth for plaintiff in error.

Messrs. A. B. Eldredge and A. E. Miller, for defendant in error:

The interstate commerce law does not, and never has, forbidden discrimination.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 624; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis Southwestern R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, affirming 4 Inters. Com. Rep. 537, 59 Fed. 400; *Louisville & N. R. Co. v. West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

Baggage & Cab Co. 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372, that, in its character as a common carrier, a railroad cannot grant to any person or persons rights or privileges which it refuses others, but that, in the management and control of its property, it may grant concessions to some which it denies to others, and where it acted in good faith, it was held not to violate any public duty, or deprive any citizen of any lawful right, by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, or by renting to such corporation or individual a portion of its baggage room, and conceding to it or him the privileges necessarily incident to the occupancy and use thereof, providing that in so doing it did not interfere with the exercise by any other person of any right which he might lawfully demand of the company as a common carrier.

And a carrier which has established for its own profit and the convenience of passengers on its car or vessel an agency for the delivery of baggage can exclude all other persons from entering its car or vessel to solicit orders in competition. *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 117. The court said: "The carrier, however, may make reasonable rules and regulations for the conduct of his business, and when they are made known passengers are bound to observe them. He may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and, except to the extent to which he has devoted it to public use by the business in which he has engaged, he may manage and control it for his own profit and advantage to the exclusion of all other persons. For instance, the sale of books, papers, or refreshments are common incidents to the business of a carrier by certain modes of conveyance, and the carrier may avail himself of the opportunity which his business gives him to supply the

The court may take judicial notice that the defendant railroad is an interstate road.

16 Cyc. Law & Proc. p. 861.

Brooke, J., delivered the opinion of the court:

Plaintiff, a resident of Sault Ste. Marie, in this state, commenced suit against defendant by declaration, alleging that he had been engaged for several years in the business of carrying passengers and their baggage for hire, being the owner and operating a number of buses and wagons used for that purpose, and principally in carrying passengers and baggage to and from the passenger trains of railroads having their termini in the city of Sault Ste.

special wants of travelers in these and other respects, and appropriate to himself the profits of the business, and exclude third persons from entering the car or vessel to carry on the same business, in opposition to him. He may grant or refuse the privilege at his option. In this no right of a passenger is invaded. The passenger has the right to be carried and to enjoy equal privileges with others, or, at least, to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect rights incident to his ownership of his property. So, also, a carrier may establish, for the convenience of passengers and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and exclude all other persons from entering to solicit or receive orders from passengers in competition with the agency established by him. This is in no just sense a monopoly. It is simply saving to the carrier a legitimate advantage which his position and business give him."

And in *The D. R. Martin*, 11 Blatch. 233, Fed. Cas. No. 1,030, where the carrier's duty to transport one who went on board a steamer for the purpose of carrying on the business of an express agent was under consideration, the court said: "A steamboat company or a railroad company is not bound to furnish traveling conveniences for those who wish to engage, on their vehicles, in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage; nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes."

And a steamboat company may refuse to take on board as a passenger the agent of a line of stage coaches, who seeks passage merely to solicit business, where the company has made a reasonable contract with

Marie. That defendant is a common carrier engaged in the business of carrying passengers and freight between various points in the state of Michigan and the city of Sault Ste. Marie, and it was the duty of defendant to afford equal facilities to all persons operating bus and baggage wagons, to solicit passengers on its trains and at its depots, and not to discriminate, or allow undue or unfair advantage to anyone. That defendant, intending to injure him, has discriminated in favor of one Price Eagle, engaged in a like business as plaintiff, by entering into an agreement with Eagle, August 1, 1904, whereby he and his agents are permitted to go upon defendant's passenger trains, and solicit passengers and baggage for his buses and

another line for the transportation of all its passengers who chose to go on that line. *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258.

And in *Godbout v. St. Paul Union Depot Co.* 70 Minn. 188, 47 L.R.A. 532, 81 N. W. 835, where the question involved was as to the right of a carrier to grant the exclusive right of soliciting by hackmen to one individual, the court said that it was well settled that a common carrier might grant the exclusive privilege of soliciting the patronage of passengers on its boats and trains.

And the grant to one of the exclusive right to solicit on a carrier's trains the transfer business of its passengers is not a violation of the anti-trust statute, as an unauthorized restriction in the free pursuit of any business. *Lewis v. Weatherford*, M. W. & N. W. R. Co. 36 Tex. Civ. App. 48, 81 S. W. 111. The court said: "One of appellant's assignments of error, though not the first, presented in the brief, is that the court erred in perpetuating the injunction, because the rule or regulation by the appellee whereby the exclusive privilege of soliciting the patronage of its passengers was given to Green creates a monopoly, and it is violative of the anti-trust law of this state. That portion of the anti-trust law which is germane to the point here made is as follows: 'A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or association of persons, or either two or more of them, for either, any, or all of the following purposes: 1. . . . To create or carry out restriction in the free pursuit of any business authorized or permitted by the laws of this state.' It is, we think, sufficient answer to this contention, that the rule or regulation of appellees by which Green was permitted to solicit the patronage of its passengers to the exclusion of appellant did not 'create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state,' because the only restriction imposed is with respect to the transaction of appellant's business on appellee's passenger trains,

baggage wagons, and for that purpose has been given a pass to be carried free on all trains between Soo Junction and Sault Ste. Marie, all within this state, which said Eagle has continued to do since that date, and the same privilege has been continuously denied to plaintiff. The declaration further alleges that, by reason of the exercise of this privilege by Eagle, he has suffered great damage, etc. Defendant demurred to this declaration, giving several reasons. The court sustained the demurrer.

To give to § 6266, Comp. Laws 1897, the construction contended for by plaintiff, would result in depriving the public of one of the most valuable privileges incident to public travel. That the privilege of dealing with a competent and trustworthy baggage agent is a valuable one seems too obvious for argument. The traveling stranger is often ignorant of the location of termini or his destination, and the best means of transportation to and from the same. He is entitled to receive this information, and to receive it from one whose position upon the train is a guaranty that he is responsible and may be safely intrusted with the person or property of the traveler. In large cities, scores, nay hundreds, are engaged in the same business as is the plaintiff. To compel the railroad company to transport all persons who desired to solicit the transportation of passengers or baggage would of necessity result in the refusal of the company to carry any, and, as a consequence, the denial to the traveling public of a service of the greatest possible importance.

But suppose the railroad, instead of refusing to carry all, permitted two or more baggage agents upon its trains. The conditions which would result from such a course would at once become intolerable. Rival agents would besiege the passenger for his business to his infinite annoyance, and, when he finally made a selection, he would have no means of knowing that he had chosen either a competent or responsible agency for its transaction. It may

be urged that the passenger is subjected to the same annoyance upon his arrival at his destination. If this is so, it is because he voluntarily transacts his business at the depot, rather than upon the train. But the conditions at the depot are different from those upon the train. At the depot the competition for his business is ordinarily duly regulated and under the supervision of the police, a safeguard entirely wanting upon trains.

I have said this much as bearing upon the general aspect of the question, and the result to the public if the contention of the plaintiff should prevail. While these considerations are not controlling, they certainly militate most strongly against such a construction of the statute as would result in harm or inconvenience to the general public, unless that construction is forced upon us by plain and unequivocal language or pertinent judicial determination. Neither, in my opinion, compels us to adopt plaintiff's contention.

The case at bar is not within the principle of the decision in *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 198, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667, relied upon by plaintiff. That decision itself is probably not in harmony with the weight of current authority. See, for a full discussion of the question, *Beale & Wyman on Railroad Rate Regulation*, p. 759, and authorities there cited. It is not, however, necessary to question the soundness of the principles there enunciated. In that case the railroad company had leased a portion of its depot grounds to the Hack & Bus Company, which, relying upon said lease, sought to exclude Sootsma, who also operated a hack from said leased premises. It is apparent that the contract between the railroad company and its lessee was one which resulted in profit to the company, while, in the case at bar, the record fails to show that Eagle paid anything for the privilege; indeed, the declaration charges that Eagle and his agents were given free transportation, while a like favor was refused plaintiff.

which he is nowhere authorized or permitted by the laws of this state to engage in. It is therefore not a restriction upon the free pursuit of his lawful business. In the sense that the regulation prevents appellant from securing the patronage of appellee's passengers, it may be said to be a restriction upon his business. But the least reflection will show that if this construction of the law were to be adopted a very large per cent of the everyday contracts in the business world, such as those of leasing, of agency, of service, and the like, would be reprobated, a result never dreamed of by the legislators who enacted 32 L.R.A. (N.S.)

the statute. If appellee is to be denied the relief prayed for, it must be upon other grounds than that asserted in this assignment."

For a note on right to discriminate between hackmen and other solicitors of patronage at depots, wharves, etc., see note to *Oregon Short Line R. Co. v. Davidson*, 16 L.R.A. (N.S.) 777.

For a note on the right of a railroad to give exclusive or preferential facilities to an express company for express business, see note accompanying *State v. Missouri, K. & T. R. Co.* 5 L.R.A. (N.S.) 783.

J. T. W.

So far as the averments in the declaration disclose the facts in the case, it may be presumed that the arrangement between the defendant and Eagle was one solely for the benefit and accommodation of the traveling public, and to provide it with a capable and responsible agency for the transaction of such business as the traveler desired to commit to its care. This court said in *Kalamazoo Hack & Bus Co. v. Sootsma*, supra: "But independently of the statute, upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or the passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure."

In considering this identical question here involved, it was said in *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372: "It cannot successfully be maintained that the grant of these privileges to the cab company is in violation of law, nor do the concessions of themselves create a monopoly, nor are they in any sense an interference with the right of the traveling public. On the contrary, it will be recognized that the exercise of the facilities named tends to the public convenience and the prompt and safe handling of the baggage of the passenger. Under no view of the case would the petitioner be entitled to the aid of the courts in restricting these conveniences, and lessening the facilities for the safe and convenient handling of the effects of a passenger. . . . It is not the right of the plaintiff in error, by injunction or otherwise, to take away or disturb any reasonable means tending to promote the convenience and comfort of the public. The merit of his complaint, if any exists, must be found in the fact of the refusal of the defendants to grant to him the opportunities so to serve the public and thereby better his business. Whether the refusal so to do is proper or unlawful does not depend upon the favor or inclination of the railroad company, but upon the plaintiff's right. If it should depend upon favor, then the plaintiff in error has no cause of complaint, because favor is essentially free and voluntary, and may not be demanded; and it is in this view that we come to 32 L.R.A. (N.S.)

measure by the legal standard what are the rights of the petitioner under the allegations he makes, as against the rights of the defendants to control property to which they have title and consequently the right of use; and the plaintiff in error, to succeed, must establish the proposition that the defendants, as common carriers, are in law bound to afford to him the same conveniences and facilities for carrying on his business which they afford to others engaged in the same calling. . . . Railroad companies have rights of way, stations, depots, cars, engines, etc., as their equipment to serve the public. In the use of such property as public carriers, no one of the public ought to be favored more than another, nor is it lawful to impose any restriction, or make any discrimination in such use, against any one, which does not apply to all; but this rule of impartiality applies to railroad companies in their public capacity, and it by no means follows that such reasonable rules and regulations which a carrier may make for the protection of its property, for the safety and convenience of its passengers or freights, are subject to the same unqualified condition." See also *Donovan v. Pennsylvania Co.* 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215.

It has been held in many jurisdictions that the right to sell lunches upon railroad premises is wholly dependent upon contract. See *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547.

I am of opinion that if plaintiff's position is tenable, it could be urged with equal force that anyone desiring to enter defendant's trains to sell books, candies, fruits, etc., would have a perfect right to do so. Supplying these necessities to the traveling public adds to the comfort of travel, and, of course, results in profit to the person or corporation exercising the privilege; but I think it would scarcely be claimed that the railroad was guilty of unjust discrimination because it granted this privilege to one only, thus protecting its patrons from the annoyance of a horde of insistent vendors.

We may take judicial notice of the fact that defendant is engaged in interstate commerce. 16 Cyc. Law & Proc. p. 861, and cases there cited. Section 1 of the interstate commerce law (Act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154) permits railways to furnish free transportation to baggage agents, among others. Section 3 provides that it shall be unlawful for any common carrier to give any undue or unreasonable

preference or advantage to any particular person, etc. It has been held repeatedly that all discriminations are not unlawful, but only such as are unjust, undue, or unreasonable. See *Louisville & N. R. Co. v. West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745, and cases there cited and approved. Cases may arise, as in the case under consideration, where, to preserve to the public a valuable right, a railroad company not only has the power, but it is bound, to exercise its right of selection or discrimination to the end that public convenience may be served, and its passengers' baggage handled with promptness and safety.

The judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE FRED ROQUEMORE.

(— Tex. Crim. Rep. —, 131 S. W. 1101.)

Habeas corpus — unjustified conviction — release.

1. Habeas corpus lies to secure the release of one in custody under a conviction upon a complaint which charged no offense under the laws of the state because no law existed making the acts committed by accused an offense, although he did not pursue his remedy by appeal.

Sunday amusement — baseball.

2. Baseball playing is not within a statute imposing a fine upon the proprietor of any place of public amusement who shall permit it to be opened for public amusements on Sunday, where the statute defines the term "place of public amusement" to mean circuses, theaters, variety shows, and such other amusements as are exhibited, and for which an admission fee is charged.

(November 9, 1910.)

PETITION for a writ of habeas corpus to secure the petitioner's release from custody to which he had been committed for

Note. — Playing baseball on Sunday as an offense.

Aside from *EX PARTE ROQUEMORE*, the only case directly involving Sunday baseball as an offense, decided since the date of the note to *State v. Prather*, 21 L.R.A. (N.S.) 23, to which this note is supplemental, seems to be *Southern Tier Baseball Assn. v. Day*, 69 Misc. 53, 125 N. Y. Supp. 733, an action to enjoin a sheriff from interfering with Sunday baseball games, wherein the court, in denying a motion for an injunction *pendente lite*, held that Sunday baseball games between paid professional teams, one of which is owned and operated as a business enterprise by a corporation controlling and operating a baseball park in which the games are played, which games

alleged unlawfully keeping open a baseball park on Sunday. Writ granted.

The facts are stated in the opinion.

Messrs. King & King for petitioner.

Messrs. C. A. Hodges and John A. Mobley for the State.

Ramsey, J., delivered the opinion of the court:

It is shown by the record in this case that relator was charged by complaint filed in the corporation court of the city of Nacogdoches with being the manager and proprietor of a place of public amusement, to wit, a baseball park, in the city of Nacogdoches, and that on the 10th day of July, A. D. 1910, said day being Sunday, he did then and there unlawfully and wilfully open and permit said baseball park and ground to be open for public amusement, and did then and there on said Sunday, and date above alleged, permit a baseball game to be exhibited and played on said baseball park and ground for public amusement, and for the admission to which a fee was charged.

The prosecution is based upon article 199 of the Penal Code of 1895. Relator, it appears, was tried and convicted in said corporation court, and gave notice of appeal from said judgment to the county court of Nacogdoches county, but omitted or failed to perfect his appeal as by law provided. Soon thereafter application was made for writ of habeas corpus to the county judge of said county, which was presented on the 18th day of August of this year. This was refused by the county judge, and there was indorsed on the application submitted to him the following: "The foregoing petition for habeas corpus being this day presented to me, and, after considering the same, I am of the opinion that the same should be refused and the matter referred to the court of criminal appeals, inasmuch as there is some doubt in the mind of the county judge as to whether or not article 199 of the

are a part of a series of games regularly scheduled to be played by such team as a member of a state league of baseball clubs, constitute a violation of statutes prohibiting on Sunday all labor, except works of necessity and charity, and all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows, and all noise disturbing the peace of the day, although such Sunday games are not advertised, the public not invited, and no admission fee charged.

As to exemption of professional ball players from operation of Sunday laws, see *Carr v. State*, post, 1190. As to validity of classification in Sunday law generally, see note to *State v. Dolan*, 14 L.R.A. (N.S.) 1259.

A. C. W.

Penal Code includes such character of offense." Thereupon this application was presented to the presiding judge of this court, and a writ of habeas corpus was by him directed to issue, and was made returnable before us on October 5, 1910; relator, pending the appeal, being admitted to bail in the sum of \$300.

We are met at the threshold of the case with the suggestion by our able assistant attorney general that the writ of habeas corpus cannot apply in this character of proceeding; that it is sought merely as a method of appeal or supersedeas, and under the authority of the cases of *Ex parte Schwartz*, 2 Tex. App. 74; *Perry v. State*, 41 Tex. 488; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; and the still later case of *Ex parte Cox*, 53 Tex. Crim. Rep. 240, 109 S. W. 369, cannot be entertained; and that the judgment of inferior courts can only be attacked by writ of habeas corpus for such illegalities as render them void (*Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546); and that the erroneous judgments of inferior courts having jurisdiction of the subject-matter and of the person cannot be successfully attacked upon habeas corpus, unless they are so far erroneous as to be absolutely void (9 Am. & Eng. Enc. Law, p. 222); and that it is only when the proceeding is void that the writ of habeas corpus may be resorted to (*Ex parte Slaren*, 3 Tex. App. 662, and *Ex parte Boland*, 11 Tex. App. 160).

That these general rules obtain there can be no sort of question, but, as we believe, they have no application to the case here. The sole matter in controversy in this case is, as stated in the agreed statement of facts: "Whether or not the complaint hereinbefore mentioned charged an offense under the facts herein agreed upon, in view of article 199 of the Penal Code of 1895 of this state, or whether the facts heretofore agreed upon make an offense denounced by article 199." So that we are confronted with the question as to whether in this state it is unlawful for one, the proprietor of a baseball park, to permit a game to be played therein on Sunday, or to cause a game to be played on Sunday therein, where an admission fee is charged. If there is no such law in this state, then manifestly no offense is charged, and none could be charged upon any state of case made by this record, or that could be predicated upon any state of facts reasonably applied to the condition of relator. Counsel for relator who prosecuted the case in the corporation court, among other things, says: "It is obvious that articles 196 to 200 are based upon the commandment, 'Remember the Sabbath day to keep it holy, six days shalt thou labor and do all thy work, but the seventh day is the

Sabbath of the Lord thy God, in it thou shalt not do any work, thou nor thy son, nor thy daughter, thy manservant nor thy maidservant nor thy cattle, nor thy stranger that is within thy gates, for in six days, the Lord made heaven and earth, the sea and all that in them is and rested the seventh day, wherefore the Lord blessed the Sabbath day and hallowed it.'" Exodus 20: 8-11.

That it would be competent for the legislature to prohibit a baseball game on Sunday may be true. As was said in *Bloom v. Richards*, 2 Ohio St. 387: "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require this cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected." We are not therefore concerned here with the issue or question as to whether the legislature could enact a law prohibiting baseball on Sunday, but rather with the question as to whether they have so enacted. To determine this correctly, recourse must be had to article 199 of the Penal Code of 1895, on which reliance is had by the state to hold relator. This article is as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term 'place of public amusement' shall be construed to mean circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives, and places of like character with or without fees for admission." It will be noted that this article undertakes to name and designate the place of public amusement, and it is said that it shall be so construed as to mean circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged, and shall also include dances at disorderly houses, low dives, and places of like character with or without fees for admission. That baseball is not specifically named, of course is clear. What are we to understand by the

general term, "and such other amusements as are exhibited and for which an admission fee is charged?" Clearly we think amusements of a like or similar character. This seems to have been the construction given to a similar statute by many courts. It has been said that baseball is not prohibited by a statute which provides for the punishment of any one convicted of horse racing, cockfighting, or playing at cards or game of any kind on Sunday. *State v. Prather*, 79 Kan. 513, 21 L.R.A.(N.S.) 23, 131 Am. St. Rep. 339, 100 Pac. 57. To the same effect, see *Ex parte Neet*, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025; *St. Louis Agri. & Mechanical Assn. v. Delano*, 108 Mo. 217, 18 S. W. 1101. In discussing this matter in the case of *State v. Prather*, supra, the court, referring to the meaning of the word "game" in the statute under consideration, said: "In the broad sense in which the word is often used it includes baseball. Giving to the language this interpretation. The statute necessarily applies to every contrivance or institution which falls within the general term. This construction would make the statute apply to every game,—to authors, whist, chess, checkers, backgammon, and cribbage, even when played within the privacy of one's home, and to croquet, basket-ball, tennis, and golf, whether played in public or on private grounds. It hardly seems probable that it could have been the intention of the legislature to enact a provision so drastic in its terms as to make the playing of all games on Sunday misdemeanors without regard to their character, and with no limitations or reservations with respect to the place where or the circumstances under which they might be indulged in. The doctrine of *ejusdem generis* is applied in all cases where there is doubt as to the intention of the legislature, and, as a rule of statutory construction is stated to be that where general words follow particular ones in a statute, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified. . . . The particular words of the statute create a class or species of games, which in the popular mind are associated with gambling. Baseball, on the other hand, is looked upon as entirely devoid of this and like objectionable features. . . . It is within the power of the legislature to make the playing of baseball on Sunday a misdemeanor, but, if such be the purpose, apt words can readily be employed which will express that intention and leave no room for doubt."

In the case of *Ex parte Muckenfuss*, 52 Tex. Crim. Rep. 467, 107 S. W. 1131, we had occasion to review and consider at 32 L.R.A.(N.S.)

length the rule of construction applicable to a statute such as this. We there said: "It is a familiar rule that, where general words follow particular and specific words, the former must be confined to things of the same kind. It has been held, also, that this rule is especially applicable in the interpretation of statutes defining crimes and regulating their punishment. See *McDade v. People*, 29 Mich. 50, 1 Am. Crim. Rep. 81, citing *American Transp. Co. v. Moore*, 5 Mich. 368; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Re Ticknor*, 13 Mich. 44; *Phillips v. Poland*, L. R. 1 C. P. 204; *Hall v. State*, 20 Ohio, 7; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *Chegaray v. New York*, 13 N. Y. 220; 1 Bishop, *Crim. Law*, ¶ 149; *Dwarris*, 621. The doctrine itself is thus well expressed in *Lewis's Sutherland, Statutory Construction*: When there are general words following particular and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of *ejusdem generis*. Some judicial statements of this doctrine are here given. 'When general words follow an enumeration of particular things, such words must be held to include only such matters or objects as are of the same kind as those specifically enumerated.' 'The rule is that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases of like kind to those designated by the particular words.' 'It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear, if standing alone, but as related to the words of more definite and particular meaning with which they are associated.' The rule is supported by numerous cases. *Hurd v. McClellan*, 14 Colo. 215, 23 Pac. 792; *Washington Electric Vehicle Transp. Co. v. District of Columbia*, 19 App. D. C. 462; *Balkcom v. Empire Lumber Co.* 91 Ga. 651, 44 Am. St. Rep. 58, 17 S. E. 1020; *Grier v. State*, 103 Ga. 428, 30 S. E. 255; *Davis v. Dougherty County*, 116 Ga. 491, 42 S. E. 764; *Misch v. Russell*, 136 Ill. 22, 12 L.R.A.

125, 26 N. E. 528; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841; *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70; *Cecil v. Green*, 161 Ill. 265, 32 L.R.A. 566, 43 N. E. 1105; *Elgin Hydraulic Co. v. Elgin*, 194 Ill. 476, 62 N. E. 929; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Marquis v. Chicago*, 27 Ill. App. 251; *Cairo v. Coleman*, 53 Ill. App. 680; *McKeon v. Wolf*, 77 Ill. App. 325; *Phillips v. Christian County*, 87 Ill. App. 481; *Stites v. Wiggins Ferry Co.* 97 Ill. App. 157; *Roberts v. Detroit*, 102 Mich. 64, 27 L.R.A. 572, 60 N. W. 450; *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31; *State v. Barge*, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 911; *Leinkauf v. Barnes*, 66 Miss. 207, 5 So. 402; *State ex rel. Cannon v. May*, 106 Mo. 488, 17 S. W. 660; *Greenville Ice & Coal Co. v. Greenville*, 69 Miss. 86, 10 So. 574; *State v. Dinnisse*, 109 Mo. 434, 19 S. W. 92; *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *State v. South*, 136 Mo. 673, 38 S. W. 716; *Ruckert v. Grand Ave. R. Co.* 163 Mo. 260, 63 S. W. 814; *Bachman v. Brown*, 57 Mo. App. 68; *McCutcheon v. Pacific R. Co.* 72 Mo. App. 271; *State ex rel. Catron v. Ennis*, 79 Mo. App. 12; *Kime v. Crider*, 6 Pa. Dist. R. 688; *Re Barre Water Co.* 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 109; *American Manganese Co. v. Virginia Manganese Co.* 91 Va. 272, 21 S. E. 466; *People v. Dolan*, 5 Wyo. 245, 39 Pac. 752; *Baker v. Cook County*, 9 Wyo. 51, 59 Pac. 797; *United States v. Wilson (D. C.)* 58 Fed. 768; *Bruen v. People*, 206 Ill. 417, 69 N. E. 24; *Lassen v. Karrer*, 117 Mich. 512, 76 N. W. 73; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533. This precise rule has received indorsement in our own courts. *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 623, 2 S. W. 757. In that case Judge White says: "The leading and controlling rule in the construction of statutes, in fact the primary and fundamental one, is to interpret them according to their true meaning and intent. To ascertain this intent it is the duty of the court to find, by other established rules, what was the fair, natural, and probable intent of the legislature. For this purpose the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly, clearly, and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere. *People v. Schoonmaker*, 63 Barb. 47, citing *McCluskey v. Cromwell*, 11 N. Y. 601. Another good rule of construction is that, "when a particular class is spoken of, and general words follow, the class first

mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class." *Hernance v. Ulster County*, 71 N. Y. 487, citing *Canterbury's Case*, 2 Coke, 46a; *Lyndon v. Standbridge*, 2 Hurlst. & N. 51, 26 L. J. Exch. N. S. 386, 5 Week. Rep. 590; *Reg. v. Edmundson*, 2 El. & El. 83, 28 L. J. Mag. Cas. N. S. 213, 5 Jur. N. S. 1351, 7 Week. Rep. 565, 8 Cox, C. C. 212; *Gibbs v. Lawrence*, 30 L. J. Ch. N. S. 170, 7 Jur. N. S. 137, 3 L. T. N. S. 367, 9 Week. Rep. 93; *Broom, Legal Maxims*, 625."

Following this construction, it occurs to us that baseball is not in fairness included in this statute. It is elementary, before a citizen can be punished as a criminal, that the offense must be clearly defined by statute, and an appropriate penalty affixed thereto. Further, it is a rule of construction well known that, in undertaking to fix and place meaning upon statutes, we should do so in the light of contemporaneous history, and in reference to the habits and activities of our people. It is known, of course, that baseball is the most generally practised, patronized, and approved of all the games of exercise, and that it is the cleanest and fairest of all manly sports, and excites rivalry in the youths of our land, and that every village and hamlet has its favorite nine, and that in every village and hamlet many ambitious youths dream of the day when they shall equal if not excel Matthewson, Speaker, Cobb, Napoleon La Joie, and Honus Wagner. It is also well known that for many years, in many of our larger cities, baseball on Sunday has been not only frequently, but continuously played where an admission fee was charged. Now it would have seemed, in the light of these facts, that, if it had been the legislative intent to condemn this form of amusement and include it within the statute under consideration, it would have been an easy matter to have done so in express words, and not left the matter at least clouded in doubt. Again, it is worthy to be remembered, as a part of the political history of the times, that many efforts have been made within the last few years in the legislature to make the playing of baseball on Sunday an offense without success. It would seem that, if it were already an offense, these efforts would not have been put forth. We have not felt it necessary, and indeed it would be out of place, to express any view as to whether baseball should be prohibited on Sunday, but have contented ourselves with deciding that under the statute as it now stands it has not been prohibited.

Believing that the law under which re-

lator is sought to be held does not make the act set forth an offense, it is ordered that he be, and is hereby, discharged.

INDIANA SUPREME COURT.

CHARLES C. CARR, Appt.,

v.

STATE OF INDIANA.

(— Ind. —, 93 N. E. 1071.)

Appeal — rulings not in record — effect.

1. Error in giving and refusing instructions cannot be considered on appeal, if those given and refused are not brought into the record by bill of exceptions, as required by law.

Sunday — allowing ball games — illegal privilege.

2. Exempting professional baseball players from the operation of the Sunday laws, while leaving them applicable to persons engaged in other occupations, does not grant them an unconstitutional privilege or immunity, since the possibility of benefit to the populace which may witness the games

Note. — Validity of classification in Sunday law.

For the earlier cases on this subject, see note to *State v. Dolan*, 14 L.R.A. (N.S.) 1259, to which this note is supplementary.

As shown in the former note and as illustrated in *CARR v. STATE*, the classification which legislatures have made in Sunday laws has generally been upheld whenever there is any possible reason for such classification, so that it does not appear to be the result of purely arbitrary action.

Thus, in *Re Caldwell*, 82 Neb. 544, 118 N. W. 133, holding that a statute prohibiting "common labor" on Sunday was not violative of the 14th Amendment of the Federal Constitution, and not unconstitutional as class legislation, the court said: "If, from our knowledge of conditions existing at the time that the legislation was adopted, we can say that there was such a sensible distinction between the occupations properly grouped under the head of common labor, and those without that term, as to form a basis for judgment, then the act cannot be said to be void because of the constitutional inhibitions above referred to."

In *Stanfeal v. State*, 78 Ohio St. 24, 84 N. E. 419, 14 A. & E. Ann. Cas. 138, it was held that where there is a general law penalizing common labor on Sunday, except works of necessity and charity, a statute making it a misdemeanor to engage in the business of barbering on Sunday, and providing special penalties on conviction thereof, is not unconstitutional as class legislation.

And a proviso "that keeping open a barber shop on Sunday for the purpose of cut-

ting hair and shaving beards shall not be deemed a work of necessity or charity," added by amendment to a statute providing that "any person who shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity," on Sunday, shall be punished, does not render it invalid, as denying to a barber the equal protection of the law, or depriving him of liberty or property without due process of law. *Stark v. Backus*, 140 Wis. 557, 123 N. W. 98.

(Myers, Ch. J., and Monks, J., dissent.)

(February 23, 1911.)

APPEAL by defendant from a judgment of the Criminal Court for Marion County convicting him of playing baseball on Sunday in violation of the Sunday observance law. Reversed.

The facts are stated in the opinion.

Messrs. Roemler & Chamberlin, Ayers & Jones, Ralph K. Kane, and F. Winter, for appellant:

Legislative discretion cannot be controlled by judicial decisions, and is not subject to judicial surveillance.

State v. Barrett, 172 Ind. 169, 87 N. E. 7; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Townsend v. State*, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *State ex rel. Duensing v. Roby*, 142 Ind. 168, 33 L.R.A. 213, 51 Am.

ting hair and shaving beards shall not be deemed a work of necessity or charity," added by amendment to a statute providing that "any person who shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity," on Sunday, shall be punished, does not render it invalid, as denying to a barber the equal protection of the law, or depriving him of liberty or property without due process of law. *Stark v. Backus*, 140 Wis. 557, 123 N. W. 98.

In *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177, 6 A. & E. Ann. Cas. 979, it was held that a statute prohibiting the business of barbering on Sunday is not an unconstitutional denial of equal privileges and immunities, or of equal protection of the law, or a deprivation of liberty or property without due process of law, even as to one who conscientiously observes the seventh day of the week.

Nor is a statute penalizing the keeping open of any playhouse or theater violative of any of the same constitutional provisions. *State v. Herald*, 47 Wash. 538, 20 L.R.A. (N.S.) 433, 92 Pac. 376.

But it is a valid exercise of the police power, and not objectionable as class legislation. *Re Donnellan*, 49 Wash. 460, 95 Pac. 1085.

And a statute providing for the punishment of any dramshop keeper convicted of keeping open his dramshop, or disposing of any intoxicating liquor, on Sunday, is not unconstitutional and void as class legislation. *State v. Grossman*, 214 Mo. 233, 113 S. W. 1074.

A. C. W.

St. Rep. 174, 41 N. E. 145; Neuendorff v. Duryea, 69 N. Y. 563, 25 Am. Rep. 235; Lindenmuller v. People, 33 Barb. 575.

Of the propriety and policy of the laws, the legislature must judge.

Cooley, Const. Lim. 7th ed. 555, 556; State v. Barrett, 172 Ind. 169, 87 N. E. 7; Chandler Coal Co. v. Sams, 170 Ind. 623, 85 N. E. 341; Fry v. State, 63 Ind. 560, 30 Am. Rep. 238; Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178; State ex rel. Smith v. McClelland, 138 Ind. 395, 37 N. E. 799; Dozier v. State, 154 Ala. 83, 129 Am. St. Rep. 51, 46 So. 9; Re Donnellan, 49 Wash. 460, 95 Pac. 1085; Johnson County v. Johnson, 173 Ind. 76, 89 N. E. 590; Smith v. Stephens, 173 Ind. 564, 30 L.R.A.(N.S.) 704, 91 N. E. 167.

The question of determining what classes of business shall be exempt from a Sunday closing law is a matter of policy.

State v. Dolan, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419; State v. Sopher, 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482; State v. Nichols, 28 Wash. 628, 69 Pac. 372; State ex rel. Hoffman v. Justus, 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, 1 A. & E. Ann. Cas. 91; Lindenmuller v. People, 33 Barb. 548; Ex parte Andrews, 18 Cal. 678; State v. Hogreiver, 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921; State v. Barrett, 172 Ind. 169, 87 N. E. 7; Chandler Coal Co. v. Sams, 170 Ind. 623, 85 N. E. 341; Vogle-song v. State, 9 Ind. 112; Johns v. State, 78 Ind. 332, 41 Am. Rep. 577; Foltz v. State, 33 Ind. 215; Shaw v. Williams, 87 Ind. 158, 44 Am. Rep. 756.

It is legitimate to put baseball players in a class by themselves.

State v. Hogreiver, 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921; Johns v. State, 78 Ind. 332, 41 Am. Rep. 577.

Messrs. Charles W. Smith, John S. Duncan, Henry H. Hornbrook, Albert P. Smith, Alexander G. Cavins, Edward M. White, and William H. Thompson, with Mr. James Bingham, Attorney General, for the State:

So much of the act approved March 8, 1909, as exempts professional baseball players from following their usual vocations is in violation of § 23 of article 1 of the Constitution of the state of Indiana.

Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; 22 Am. & Eng. Enc. Law, 2d ed. p. 397; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Ex parte Newman, 9 Cal. 32 L.R.A.(N.S.)

502; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Hogreiver, 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921; Rushville v. Hayes, 162 Ind. 193, 70 N. E. 134; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; Ruhs-trat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Re Keymer, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667; Brown v. Russell, 166 Mass. 14, 32 L.R.A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; Graffy v. Rushville, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; Henderson v. London & L. Ins. Co. 135 Ind. 23, 20 L.R.A. 827, 41 Am. St. Rep. 410, 34 N. E. 565; State ex rel. Tieman v. Indianapolis, 69 Ind. 375, 35 Am. Rep. 223; Murray v. Ramsey County, 81 Minn. 359, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 16 L.R.A.(N.S.) 1035, 109 S. W. 293; Milton v. Bangor R. & Electric Co. 103 Me. 218, 15 L.R.A.(N.S.) 203, 125 Am. St. Rep. 293, 68 Atl. 826; Toledo, St. L. & W. R. Co. v. Long, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757; State v. Schmuck, 77 Ohio St. 438, 14 L.R.A.(N.S.) 1128, 122 Am. St. Rep. 527, 83 N. E. 797; State v. Holland, 37 Mont. 393, 96 Pac. 719; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986.

Cox, J., delivered the opinion of the court:

On May 24, 1909, appellant, who followed baseball playing for hire as a vocation, was charged by affidavit in the criminal court of Marion county with a violation of the Sunday observance law by playing baseball on Sunday, the 23d day of May, 1900. No question was raised as to the sufficiency of the affidavit, and appellant was tried on it and convicted by a jury. A motion for a new trial and a motion in arrest of judgment were successively overruled, and

then judgment was rendered, from which this appeal is taken.

The instructions given and refused by the trial court have not been brought into the record by bill of exceptions, as required in criminal cases, and errors urged by appellant based on the action of the court in giving and refusing to give instructions cannot be considered. *Donovan v. State* (1907) 170 Ind. 123-132, 83 N. E. 744.

The other assignments of error center in the one question of the validity of the act of March 8, 1909, which purports to amend § 467, and to repeal a part of § 468, of the act concerning public offenses, approved March 10, 1905 (Laws 1905, chap. 169), and which, as found in Acts 1909, p. 436, reads as follows:

"Section 1. Be it enacted by the general assembly of the state of Indiana, that § 467 of the above-entitled act be and the same is hereby amended to read as follows: Section 467. Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor, or engaged in his usual avocation, works of charity and necessity only excepted, shall be fined not less than \$1 nor more than \$10; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers and those engaged in conveying them, families removing, keepers of toll bridges and toll-gates, ferrymen acting as such, and persons engaged in publication and distribution of news, or persons engaged in playing the game of baseball between the hours of 1 o'clock P. M. and 6 o'clock P. M. and not less than 1,000 feet distant from any established house of worship or permanent church structure used for religious services, or any public hospital or private hospital erected prior to the passage of this act.

"Sec. 2. So much of § 468 of said act, approved March 10, 1905, as makes it unlawful for anyone to engage in playing any game of baseball between 1 o'clock P. M. and 6 o'clock P. M. on Sunday, is hereby repealed."

The record discloses, with others, the following uncontradicted material facts, upon which appellant was found guilty below: That on and prior to May 23, 1909, appellant was a professional baseball player, and was pursuing that vocation as the manager and first base man of the Indianapolis Baseball Club, which was associated with clubs in seven other cities, and with them formed the clubs of the American Association, playing a series of games in the several cities; that on Sunday, May 23, 1909, he participated as the first base man of the

Indianapolis club in a game played with one of the other clubs of the association, on grounds maintained by the Indianapolis club in the city of Indianapolis, known as Washington park; that the game was played between the hours of 3 o'clock and 5 o'clock in the afternoon on that day; and that there was no church or hospital within 1,000 feet of the grounds or park where the game was played. Appellant was convicted on the theory that so much of the act set out above as undertakes to exempt persons whose usual vocation is playing baseball for hire, and who follow such vocation on Sunday under the restrictions named in the act, is in violation of § 23 of article 1 of the state Constitution, which provided: "The general assembly shall not grant to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." And on that theory the state is depending to sustain the conviction. Other questions raised and discussed flow from this one question, and the need of considering them or not depends on the decision of the question of the validity of the exemption of baseball playing from the general effect of the act.

In the very able brief of the counsel for the state, it is conceded that it is for the legislative department of the state government to declare the public policy of the state, and that, as to all offenses against the state,—that is, all questions of crime—what shall be the policy of the state is within the exclusive power of the legislature. In other words, that the legislature alone can create or define offenses against the state, for which individuals may be punished, and that none exist except such as have been so created and defined; that therefore courts cannot inflict any penalty for an act which the legislature has not declared to be a crime, however immoral the members of the court may conceive the act to be. Counsel in further concession say: "Unquestionably the state, in the exercise of its police power, may determine, on the grounds of morality or from sociological consideration, that there should be a cessation from all the usual labors of life on one day in each week. And therefore, unquestionably, the legislature was acting in its province when it enacted the body of the section forbidding all persons, save those excepted, from following their usual avocations. And unquestionably it would be within the power of the legislature as a mere abstract proposition to repeal this and all other similar enactments altogether, and leave no enactment whatever in force forbidding labor of any kind or pursuits of any kind on Sunday. We are not

disputing this question at all. And, further than this, we admit that the legislature may pass a general law forbidding men generally from following their usual vocations on Sunday, and that then they may except or exempt certain vocations from the operation of the law." All this is manifestly true and well conceded. Counsel for the state also well say: "We are also mindful that when any party to a cause, whether it is the state itself or the humblest citizen, challenges the validity or constitutionality of any act of the general assembly of the state, it must stand ready to point out and put its finger on the provision of the Constitution which it is claimed is violated." While this states correctly the obligation resting on one assailing the validity of a law, it does not fully measure the duty resting on a court in considering and determining the question presented. The power given to courts to overthrow an act of the legislature is the highest and most solemn function with which they are vested, and it is to be exercised only under the compulsion of the clearest and most positive conviction that some constitutional provision has been violated by the lawmaking body in the enactment of the law assailed. Section 1 of article 4 of our Constitution vests in the general assembly the lawmaking power of the state, and that body is supreme and sovereign in the exercise of the power, subject only to such limitations as are imposed, expressly or by clear implication, by the state Constitution, and the restraints of the Federal Constitution and the laws and treaties passed and made pursuant to it. Apart from these curtailments of power, the legislature is without fetter or clog, especially when exercising its police power. *State ex rel. Harrison v. Menaugh* (1898) 151 Ind. 260-266, 43 L.R.A. 408, 418, 51 N. E. 117, 357, and cases there cited; *State ex rel. Geake v. Fox* (1901) 168 Ind. 126-129, 56 L.R.A. 893, 63 N. E. 19; *Cain v. Allen* (1906) 168 Ind. 8-24, 79 N. E. 201, 896. The duty of this court in considering a question as to the validity of a legislative enactment was well defined in part in the following language in the opinion in *State ex rel. Harrison v. Menaugh*, supra: "Being therefore required to give the benefit of all reasonable doubts in favor of the validity of the act of the lawmaking power, it is consequently incumbent upon him who assails its validity, to establish affirmatively and clearly his charge to the exclusion of all such doubts. Especially must this rule prevail in view of the fact that the legislature is invested with plenary power for all purposes of civil government. Therefore an inhibition to exercise a particular power is an exception, and the 32 L.R.A. (N.S.)

burden must rest upon the party who questions the validity of a statute, to show that it is forbidden. *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76, and cases cited; *State ex rel. Smith v. McClelland*, 138 Ind. 395, 37 N. E. 799; *Cooley*, Const. Lim. 105." "To doubt the constitutionality of a law is to resolve in favor of its validity. An act of the legislature is not to be declared unconstitutional unless it is clearly, palpably, and plainly in conflict with the Constitution." *Henderson v. State* (1893) 137 Ind. 552-556, 24 L.R.A. 469, 36 N. E. 257; *State ex rel. Smith v. McClelland*, 138 Ind. 395, 37 N. E. 799; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Townsend v. State*, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19.

The following statement of the duties and responsibilities of the courts in relation to enactments by the legislature, by *Frazer, J.*, in *Brown v. Buzan*, 24 Ind. 196, 197, is as wise and pertinent now as then: "The Constitution is paramount to any statute, and whenever the two are in conflict, the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends toward the destruction of popular liberty by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can therefore be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court may err in denying the rightful authority of the lawmaking department, we would chain that authority for a long period at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life should soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute unless its con-

sist with the Constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the Constitution, and also a high capacity to judge of its meaning. Hence its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon the legislative action as rare a thing as it ought to be, and secure that harmonious co-operation of the two departments, and that independence of both, which are essential to good government."

With a full realization of the limitations upon the power of the court, and the grave duties resting upon it, as well as a serious appreciation of the importance of this case, which involves a modification of the Sunday law of our state, as it has heretofore existed, which is unique, we approach the consideration of questions presented for decision. There have been Sunday laws in our state throughout its history. Such an act was passed at the first session of the first general assembly and was approved January 3, 1817. Acts 1816-17, p. 165. This act contained numerous exceptions to the general application of the penalty provided, and it continued in force without substantial change until 1905, when the legislature added to the exceptions by the provision that it should not apply to "persons engaged in the publication and distribution of news." As has been seen, the act of 1909 merely added the further exception of baseball playing under certain conditions, which is assailed as invalid in this case. Many times the law has been upheld by this court, together with all the exceptions contained in it, except the two just mentioned. *Vogelsong v. State*, 9 Ind. 112; *Foltz v. State*, 33 Ind. 215; *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577. There has probably never been enacted a law for Sunday observance which was wholly general and without exception. Some prohibit generally all vocations of life, and except generally from the operation of the law, and save from its penalty, work in any vocation which may be determined as a matter of fact to be done in response to a present necessity or to charity. Others go farther, and except some one or more designated business or vocation, the continuous exercise of which may be deemed necessary, either on account of the inherent nature of the business or the welfare of the public. Others again place the ban of the prohibitive statute on some one or more business or vocation of a noisy character, or

otherwise offensive and disturbing to the full and peaceful enjoyment of the day as a period of rest or recuperation or of devotion, as each individual may please to keep it, leaving all other employments to be pursued or dropped according to the individual choice. The exception from the operation of such laws, of those who observe another day as their Sabbath, from religious conviction, is common. Many Sunday laws, with varying exemptions from their general effect, within the range stated, have been uniformly held to be within the constitutional powers of lawmaking bodies.

In *Liberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419, a city ordinance which made it unlawful for any business house, bank, store, saloon, or any office, to keep open on Sunday for general business, but which excepted telegraph, railroad, telephone, and express offices, photograph galleries, hotels, restaurants, cigar stores, ice cream parlors, fruit stands, meat markets, bathrooms, the printing and distribution of newspapers, and other business and vocations, was held valid, and that the classification was permissible. In *People ex rel. Woodin v. Hagan*, 36 Misc. 349, 73 N. Y. Supp. 564, it was held that a Sunday observance law permitting the sale of articles of food generally before 10 o'clock in the morning, but excepting from the permission and prohibiting the sale of "uncooked flesh foods or meats, fresh or salt," at any time during the day, was well within the police power of the legislature. In *People ex rel. Moffatt v. Zimmerman*, 48 Misc. 203, 95 N. Y. Supp. 136, it appears that there was in force in the state of New York a general Sunday law and also a law prohibiting "all manner of public selling or offering for sale of any property on Sunday," and providing, "except that articles of food may be sold and supplied at any time before 10 o'clock in the morning, and except . . . prepared tobacco, milk, ice, and soda water, . . . fruit, flowers, confectionery, newspapers, . . . may be sold," and also prohibiting the "sale or delivery of uncooked flesh foods or meats, fresh or salt, at any hour or time of the day." The law was upheld. The case of *State v. Nichols*, 28 Wash. 628, 69 Pac. 372, involved the validity of a Sunday law which made it unlawful to "open on Sunday, for the purpose of trade or sale of goods, wares, and merchandise, any shop, store, or building, or place of business whatever," but exempted drug stores, livery stables, and undertakers. The law was held valid, and that the exceptions were ones which were clearly within the legislative discretion to make. In the case of *State ex rel. Walker v. Judge of Section "A,"* 39 La.

Ann. 139, 1 So. 437, a Sunday law was assailed on the ground that it sought to compel the observance of Sunday as a religious institution, and also on the ground that it was class legislation, because of certain exemptions from its general effect. Its provisions required, under penalty, that "all stores, shops, saloons, and all places of public business, . . . and all plantation stores," should close at 12 o'clock Saturday night, and remain closed twenty four hours. It was provided that the act should not apply to newsdealers, keepers of soda fountains, places of resort for recreation and health, watering places, and public parks, the sale of ice, newspaper offices, printing offices, book stores, drug stores, bakeries, and other named businesses. The court held, and such holding is in accordance with what is almost the unanimous opinions of courts in decided cases and of eminent jurists in text-books, that if the object of the act were to compel the observance of Sunday as a religious institution, because it is the Christian Sabbath, to be kept holy under the ordinances of the Christian religion, they would be compelled to declare it violative of the Constitution. It was declared that the statute was to be judged precisely as if it had selected any other day of the seven as a day of rest, and that its validity was not to be questioned because, in the exercise of a wise discretion, that day had been chosen which a majority of the people, under the sanction of their religious faith, already voluntarily observed as their day of rest. On the question of the effect of the exceptions on the validity of the act, the court said: "It only remains to consider the objection urged against the law on the ground of inequality because of the numerous exceptions contained in the act. The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the state is permitted to pursue any of the prohibited callings on Sunday. Every person is at liberty to pursue those which are excepted. The same discretion which authorizes the legislature to determine that the public health, welfare, and convenience required the adoption of the general rule equally authorized it to exempt from its operation certain specified callings, on the ground that the public welfare and convenience would be more hindered than advanced by the suspensions of such callings. It is not for us to control the lawmaking power in such a case, or to require it to fit its laws to a procrustean bed of our own construction."

The constitutionality of a Sunday law with numerous exceptions was involved in the case of *State v. Dolan*, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995. The 32 L.R.A.(N.S.)

act in its general provisions made it unlawful for any person to keep open on Sunday any shop, store, building, or place of business whatever, for the purpose of any business, trade, or sale of goods, wares, or merchandise. It was further provided that the law should not apply to news stands for the sale of daily papers and magazines, nor to the sale of nonintoxicating refreshments, candies, and cigars, nor to the carrying on of certain other named businesses and vocations. As against a contention that the law was in conflict with the constitutional provisions against unreasonable discriminatory classification, the court said: "An examination of the authorities, however, supports the contention that the legislature is the sole judge of the exemptions that may be made from the operation of such a statute; that the question of determining what classes of business shall be exempt from a Sunday closing law is a matter of policy, and entirely within the power of the legislature, and that the judicial department will not call in question the motive of the legislative department in enacting a statute." A statute of the state of Utah prohibited in general the keeping open on Sunday of any place of business for the purpose of transacting business therein, but also excepted from the general operation of the law, baths, livery stables, retail drug stores, etc., and such manufacturing establishments as are usually kept in constant operation. In dealing with the contention urged on behalf of a barber who was being prosecuted under the general provisions of the act, that the exceptions made the act unjustly discriminating and rendered it invalid, the court said: "The exception permitting baths to be kept open on Sunday approaches nearest to the act here complained of; but the court is unable to say that there is such a similarity between keeping open a bath house and a barber shop that it was not within the province of the legislature to make a distinction between the two. Upon reflection, many points of difference in the manner in which each is conducted . . . are readily suggested. The court may not rightly assert a wisdom it would deny to the co-ordinate branch of government (the legislature), and interfere with the discretion of that department of government. All presumptions are in favor of the validity of a statute, and, unless the courts can clearly say that the legislature has erred, the act should stand. . . . Courts may interpret, construe, declare, and apply the law, but may not usurp the functions of the lawmaking power by assuming to interfere with or control the legislative discretion." *State v. Sopher* (1902) 25 Utah,

318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482.

A statute of the state of Minnesota placed a general prohibition on all manner of selling or offering for sale on Sunday of any property, and then excepted from its general provisions prepared tobacco, fruits, confectionery, newspapers, and other articles, and then followed this exemption with a proviso "that nothing in this section shall be construed to allow or permit the public sale . . . of uncooked meats, fresh or salt, or groceries, dry goods, clothing, wearing apparel of any kind, or boots or shoes." It was contended that the statute involved and authorized a discrimination for favored classes in the exemption of fruit, confectionery, and newspaper selling, and against meat dealers especially, so palpably unreasonable as to convict the legislature of gross and arbitrary partiality in its adoption; but the court held that the selection of the classes for the ban of the law, and the exemption therefrom, was for the legislature, saying: "Whether the discrimination be justified by wise legislative policy, we are not required to determine. That is the province of the lawmaking power, not ours. It is our duty to ascertain, if possible, whether, from our knowledge of existing conditions, there is such a sensible distinction between these occupations as would furnish a basis of judgment in making the same." Upon such consideration, the court concluded that there were differences upon which the legislature might have acted in the exercising of a reasonable judgment. *State ex rel. Hoffman v. Justus* (1904) 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, 1 A. & E. Ann. Cas. 91.

In the case of *Ex parte Koser*, 60 Cal. 177, in holding good a Sunday statute prohibiting generally the conducting of business on Sunday, and excluding some from the general provisions, it was said that the questions of exemption or not, and what should be excluded, were for the legislature. "Certainly the legislature is intrusted with an enlarged discretion to determine what shall be punished criminally and what shall not be, to fix upon what shall be put in the class of *mala prohibita* and what shall not be included. . . . Declaring the provisions of the sections referred to invalid as violative of the Constitution would be to strike at the foundation of the legislative power to determine what acts of those not *mala in se* shall be punished criminally, and what shall not be punished. In most cases acts not *mala in se* are by statute declared penal offenses, while acts apparently of a like nature are not declared to be penal. What other power than the legislature

can or should draw the line on one side of which is liability to punishment, and on the other side no such liability is incurred."

In *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, a law prohibiting barbers generally carrying on their business on Sunday throughout the state, but providing that barbers in the city of New York and the village of Saratoga Springs might conduct such business until 1 o'clock of the afternoon of that day, was held to be a valid exercise of the police power by the legislature, and that the exception was not so obviously arbitrary as to nullify the provision.

In the case of *Petit v. Minnesota* (1899) 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, a Sunday law of the state of Minnesota excepted from its general operation works of charity and necessity, and then specially provided that the keeping of a barber shop open on Sunday for work should not be deemed a work of necessity. It was contended both in the supreme court of Minnesota and the Supreme Court of the United States that, by reason of the proviso, the act must be held unconstitutional, because thereby it was restricted in its operation on the particular class of craftsmen to which *Petit*, the defendant, belonged, as contradistinguished from other classes of labor. The Supreme Court of the United States, following that of the state, held that the classification was not purely arbitrary, and said in conclusion: "We recognize the force of the distinction suggested, and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the states in these matters, by holding that the classification was so palpably arbitrary as to bring the law into conflict with the Federal Constitution."

This review of the cases involving the right of the lawmaking department of states to make classification of what should or should not be prohibited on Sunday, and made criminal if done on that day, might be largely extended, but to no good purpose. These cases are reviewed at this length, not in admission that this court in every instance approves the conclusion reached, or the reasoning by which it was reached, nor that they are precedents of such strength and manifest correctness as to coerce this court in the decision of the question before it. But they are all illustrative of the fact that legislatures have, undoubtedly, constitutional power to make selection at least of those things not inherently wrong, and not involving mortal turpitude, and place or not the ban of the law upon them. The exercise of the power of the legislature to

make exceptions from the general effect of a penal statute is seen in many of the provisions of our Criminal Code affecting various things, persons, and conditions. The act for the protection of fish, approved March 9, 1867, was a general law for the protection of fish for a certain number of years and at certain seasons thereafter throughout the state, but it provided that the penalties prescribed should not be enforced against persons taking fish out of the Ohio and St. Joseph rivers. This court held that both the act and the exception were valid. *Gentile v. State*, 29 Ind. 409. A later case than that of *Gentile v. State*, *supra*, which involved the validity of our fish law, is the case of *Long v. State*, — Ind. —, 92 N. E. 653. Long was convicted of taking fish from the Wabash river with a seine, in violation of § 2541, Burns's Anno. Stat. 1908, and on appeal urged that the section in question was unconstitutional because in violation of § 22 of article 4, which prohibits the passage of local laws for the punishment of crime, and of § 23 of article 1, against the granting of privileges and immunities. The section makes it generally unlawful to take fish from any of the waters of the state by means of any gig, spear, seine, net, or trap, etc., under a heavy penalty, but contains a proviso that its provisions shall not apply to the waters of Lake Michigan, private ponds, the Ohio river, or the Wabash river, but making only a partial exemption of these two rivers. The court by Montgomery, J., in passing on these questions, said: "If it be conceded that the act provides for the punishment of crimes and misdemeanors within the meaning of the constitutional provision cited, it does not follow that it is local and invalid. Section 22, art. 4, Const., does not preclude proper classification in legislation relating to the subjects therein enumerated, but does prohibit legislation which rests upon such arbitrary selection as renders the act local or special. Many of our penal statutes have exclusive application to special localities or objects, and are nevertheless general and unquestionably valid, because they rest upon an inherent and substantial basis of classification. . . . The line defining the precise limits of classes must in most cases be in a sense arbitrary. The legislature had full power over the subject-matter of this legislation, and in making the exceptions contained in the act, there is no evidence of bad faith or purely arbitrary action. . . . It is our conclusion, therefore, that the statute does not contravene § 22, art. 4, Const. . . . The only reason advanced in support of the other constitutional objection raised is that the act confers privileges on citizens residing 32 L.R.A.(N.S.)

near the Wabash river where it forms a state boundary, which are not allowed citizens residing near the same stream where it is wholly within the state. This scarcely requires discussion, since it is manifest that a few persons necessarily share more largely than others the benefits of every general law, by reason of their special situation. This act does not confer privileges or immunities upon any citizens, but such fishing privileges as are not prohibited are available to all citizens on the same terms." Section 440 of the public offense act of 1905 (Burns's Anno. Stat. 1908, § 2345) makes it generally unlawful to wear or to carry any dirk, pistol, bowie knife, dagger, sword in cane, or any other dangerous or deadly weapon, but excepts travelers. One would have to consider earnestly to evolve any especially good reason in our day and condition of society that would make it needful for a traveler to carry a weapon contrary to the general inhibition, that would not apply with equal force to many persons not travelers; but the law in its entirety has long been upheld, and as lately as within two years. *McIntyre v. State* (1908) 170 Ind. 163, 83 N. E. 1005.

In *Johns v. State* (1881) 78 Ind. 332-335, 41 Am. Rep. 577, this court sustained the validity of our Sunday law, and especially the exception from the general operation of the law of those who conscientiously observe the seventh day of the week as the Sabbath. In the opinion of the court, given by Elliott, Ch. J., it was said: "The opinion in *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238, vindicates the constitutionality of the statute we are discussing. It was there held that it is competent for the legislature to restrict the sale of railway tickets to persons who have complied with certain prescribed terms, and to punish persons selling tickets who had not complied with the requirements of the law. As was there said, by Howk, Ch. J., as the organ of the court: 'It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation.'" Our statute relating to the practice of medicine, which provides for licenses, and declares penalties for violations, makes certain exemptions from the general application of the penal provisions. Burns's Anno. Stat. 1908, §§ 8400 et seq. This court in *Parks v. State* (1902) 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862, held it to be not unconstitutional, and not in conflict with the "privileges and immunities" clause of the Federal or of our Constitution. It was there said that, "as the power to enact laws has been confided to the legislative department, a very large measure of authority is vested in that department, to de-

termine what is reasonable and wholesome in the enactment of statutes under the police power. . . . In the exercise of the police power, there must needs be a considerable discretion vested in the legislature, whereby some people have rights or suffer burdens that others do not." And again it was there said: "The power of reasonable classification, however, exists (*Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 31, 25 L. ed. 989, 992; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350), and, in cases where there is room for the presumption that a substantial and just reason furnished the basis for legislation enacted in the carrying out of a public purpose, the exercise of the legislative discretion in the establishing of a classification must be respected by the courts. *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383." The late case of *Chandler Coal Co. v. Sams* (1908) 170 Ind. 623, 85 N. E. 341, settled affirmatively the validity of an act of this state for the protection of miners, which was general in its scope, but contained exceptions which removed certain mines from its requirements. The court held the classification permissible, approving this statement: "Of course, the legislature must have the power to classify, when necessary, subjects for legislation, and make provisions for subjects within one class without making them applicable to subjects in another; and the proper exercise of that power is not liable to the objection that it is class legislation." It follows, and we so conclude, that neither of the exceptions in controversy violates any principle of constitutional law, either state or Federal." Another late case decided by this court which involved a contention that a penal law which was enacted for the protection of miners, but which excepted certain mines from the general operation of the law was invalid, is the case of *State v. Barrett* (1909) 172 Ind. 169, 179, 87 N. E. 7, 10. In holding both the act and the exception constitutional and a just exercise of the police power, this court said: "The legislature had the right, and we must presume exercised it, of learning for itself the reasons which impelled it to act, and we cannot say that it did not find substantial reasons for its conclusions. Unless we can say that the act is unreasonable, we would not be authorized to overthrow it, for a very large measure of authority is vested in the legislature upon that subject." In a case decided by the Supreme Court of the United States on December 12, 1910, *Griffith v. Connecticut*, 218 U. S. 572, 54 L. ed. 1155, 31 Sup. Ct. 32 L.R.A. (N.S.)

Rep. 132,—it is disclosed that a statute of Connecticut made it unlawful, with severe penalty, for any person, firm, or corporation to exact more than 15 per cent interest for money loaned. National banks and banks and trust companies of that state and pawnbrokers were excepted from the general effect of the law, and this was made the ground for the contention that it was invalid. It was held, sustaining the superior court of the state, that the general assembly, in respect to the matter of usury, had the right to deal with different classes of money lenders and money borrowers in a different way, provided that there was nothing apparently unreasonable in creating such distinctions, and all members of each class were treated alike.

It cannot be otherwise than that the law-making department has the power, in legislating for the general welfare, to make reasonable exceptions to the general operation and effect of penal laws in certain instances, without conflicting with the constitutional limitations placed upon their action. It is a high power, a governmental power of the very highest nature. Within what limits must that department keep. To avoid the power of the judicial department to nullify their action? This court has decided many times, times almost innumerable. That courts have nothing to do with the wisdom, justice, policy, or expediency of a law; that these questions are for the legislature. The legislature is unfettered, save by the constitutional restraints. The police power is not a fixed known quantity, but the expression of social, economic, and political conditions. As these conditions vary, the police power must continue to be elastic and capable of development to meet these changes. *Freund, Pol. Power, § 3* That it might have been proper, and perhaps necessary, in the early history of our state, for a traveler to carry with him on his journey a deadly weapon, seems evident, but changed conditions in the increase of population, means of travel, and otherwise would seem to make it much less clear that the traveler should be exempted from the law against carrying weapons. In the early days, when life was lived more in the open, when employments were less confining, less monotonous, and when the stress of life and spur of competition did not so drive to continuous toil, when the pleasures and amusements of life were few and simple, we can well see that the Sunday law might reasonably be different in its restraints than now. The police power may be said to be that inherent and plenary power residing within constitutional limitations in the legislature, to pass wholesome and reasonable laws for the good and welfare of the people

of the state. Sunday laws which are an invasion of natural private right are enacted under this power. They are upheld as sanitary measures, on the ground of necessity for periodical relaxation and rest from mental and physical toil, for the general good. The influence of the Christian religion we know has been potent in establishing our civil Sunday, and it is probably true that the desire to give free opportunity for religious devotion and observance of the day as a Christian institution was not absent from the mind and intent of the lawmaking power in providing for and requiring fulfillment of the day as a day of pause in the activities of life. And we know, also, that without the influence of the Christian religion and its followers and believers, the enforcement of observance of the day as a civil day of rest and recuperation would be difficult indeed, and its integrity hardly preserved. But eminent jurists and courts, with practical unanimity, agree that Sunday laws can only be upheld as a civil regulation of a sanitary nature. Freund, Pol. Power, § 185; Tiedeman, Pol. Power, § 78; Cooley, Const. Lim. 7th ed. p. 675; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086. Such laws may be said to be based on the saying of the Master: "The Sabbath was made for man, and not man for the Sabbath." Indeed, it is true, for the idea is to work a recuperative benefit primarily to the individual, that good may follow to society at large. It will appear by examination of the exceptions in Sunday laws that they are sometimes made for the benefit of the business or vocation exempted, sometimes for the benefit of those patronizing the business or vocation exempted, sometimes for the benefit of both, and, again, for the benefit of society generally.

If the act in question and the circumstances connected with it were such that, in considering the exemption of ball playing from the general provision against Sunday work, we must say that it is patent that the legislature intended solely to give baseball players an advantage over those pursuing other vocations, or that it intended to place it in the power of those employing baseball players to force them to pursue their calling seven days in the week, then we would be required to hold the action of the legislature in passing it to be purely arbitrary, and the act therefore in conflict with the constitutional restraints upon the legislature. But we cannot do this, for there are manifest conditions and reasons existing upon which the legislature might have acted, which they, in the exercise of their discretion, might have deemed full warrant for making the exemption. The 32 L.R.A. (N.S.)

purpose of the required observance of Sunday as a day of cessation of the daily vocations of the people being based on sanitary reasons, it is obvious that the purpose in all cases could not best be carried out by the inertia of absolute rest. The wearing effects of the monotony of daily toil in office, store, factory, or whatever the lot of man is cast to labor, is overcome by diversion of mind no less than by the mere respite from the physical or mental strain. That baseball has come to be the one great American outdoor game; that it is played during the summer season throughout the land by boy and youth and man, beginner, amateur, and professional, in country village, town, and city; that it is played out of doors in seasonable weather; that it engages the mind alike of the participant and the spectator in an entertaining way; that it trains the body to vigor and activity, and to a degree the mind to alertness; that the playing of a game requires but a fraction of a half day; that it cannot be successfully played at night; that those who witness it find in it for the time a relief mentally and physically from the stress of the intense life we as a people lead,—are facts known of all men, and of which the courts and legislatures cannot be wholly ignorant. And we cannot say that the legislature did not have in mind that good might flow to many who, during all the secular days of the week, might be compelled to persist in continuous toil in office, store, shop, or factory, from spending a part of the afternoon of a Sunday in the open air, their minds diverted by interest in the popular game. And, too, it is well and commonly known that the season for baseball, both on account of the nature of the game and the actual practice, is short; that the hours of each day devoted to its pursuit by the players engaged in it are few; and that weather conditions enforce frequent pauses; and it cannot be said that the legislature did not conclude, as it might, that the welfare of players therefore needed no such restriction of their natural right to pursue their work on each of the seven days of the week as might be necessary in other employments. The legislature may admittedly withdraw a class from the general anathema of the Sunday law for the purpose of a severe penalty, not for the good or relief of those constituting that class which would be involved in a cessation of their labor on that day, but for such good as might come therefrom to others of the community from added peace or quiet or other reason. *State v. Hogreiver* (1899) 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921. It would seem to follow then that it has the correlative power to withdraw a class from in-

clusion in the inhibition of Sunday labor for the good of others, if reason manifestly exists upon which the legislative action may be based. It being conceded that baseball playing in its nature is subject to classification by itself, in legislation having reference to Sunday observance, its classification becomes then a legislative question, and not a judicial one. Whether it shall be subjected to such legislation at all, or in what degree and under what circumstances and restrictions, is for the legislature to say, within the reasonable exercise of its discretion, which ends only where arbitrary action begins. A reason of such character as to indicate an absence of purely arbitrary action upon which the legislature might have been moved to act in exempting ball playing from the penalty of the act in question is manifest. As much as we as individuals may desire the integrity of the Sabbath preserved in full measure, we cannot say that the legislature acted arbitrarily in making this exemption, or that the exemption is clearly, palpably, and plainly in conflict with that provision of the constitution claimed, and we therefore hold that it is not, but that it is a valid enactment.

The judgment is therefore reversed, with instructions to the trial court to sustain the motion of appellant in arrest of judgment.

Myers, Ch. J., dissenting:

I am unable to concur in the majority opinion in this case. The amended § 467, together with the amendment to § 468, specifically singles out the game of baseball from football and other games, and exempts the former from the general interdiction. This is in direct contravention of § 23, art. 1, of the Constitution, with respect to the equal rights and privileges of the players of every other kind of game where a fee is charged, in allowing baseball to be played and a fee to be charged. This proposition is fully sustained in the following authorities: *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Longview v. Crawfordsville*, 164 Ind. 117, 68 L.R.A. 622, 73 N. E. 78, 3 A. & E. Ann. Cas. 496; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119; *Rushville v. Hayes*, 162 Ind. 193, 70 N. E. 134; *Dixon v. Poe*, 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518; *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L.R.A. 327, 41 Am. St. Rep. 410, 34 N. E. 565; *Grafty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. God-

ard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Brown v. Russell*, 166 Mass. 14, 32 L.R.A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Ruhstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *People v. Hanover*, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Re Keymer*, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Ex parte Newman*, 9 Cal. 502; *Murray v. Ramsey County*, 81 Minn. 359, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; *State ex rel. Luria v. Wagener*, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. E. 67; *Johnson v. St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *State v. Gardner*, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; *Sutton v. State* (1896) 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; *Sayre v. Phillips* (1892) 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; *State ex rel. Wyatt v. Ashbrook* (1900) 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Waters-Pierce Oil Co. v. Hot Springs* (1908) 85 Ark. 509, 16 L.R.A.(N.S.) 1035, 109 S. W. 293; *Milton v. Bangor R. & Electric Co.* (1907) 103 Me. 218, 15 L.R.A.(N.S.) 203, 125 Am. St. Rep. 293, 68 Atl. 826; *State v. Schmuck*, 77 Ohio St. 438, 14 L.R.A.(N.S.) 1128, 122 Am. St. Rep. 527, 83 N. E. 797; *State v. Holland* (1908) 37 Mont. 393, 96 Pac. 719; *Re Van Horne* (1908) 74 N. J. Eq. 600, 70 Atl. 986.

For the same reason, it is a special law, in violation of § 22, art. 4, of the Constitution, prohibiting the enactment of local or special laws for the punishment of crimes or misdemeanors. It is tantamount to saying that it shall be unlawful for any person to play any games on the forbidden day, not upon religious grounds, but upon grounds of health and recreation, except baseball. If there could be any ground of distinction between or classification of baseball players as distinct from players of other games, we would be bound to yield to the legislative discretion. If it could be said that it is allowable because it provides recreation for the worn and tired persons who cannot yield any other day from their work, to witness a game in the daytime, the same thing is true as to football, basket ball, polo, cricket, or any other out-door game, that they are interdicted and excluded from

the privilege, and the sight-seer and those who are seeking recreation are excluded from other games, and a distinction is made as to both, so that those persons who are within the related or same class—that is, all persons desiring to engage in other games, as well as those who may desire to witness them—are denied the privilege, where a fee is charged. I am unable to perceive that there can possibly be any basis for such distinction or ground upon which the classification can rest. There is just as much inequality produced by singling out baseball players and permitting them to play for compensation, while all other games for pay are prohibited, as there was in singling out barbers and punishing them. *Armstrong v. State*, 170 Ind. 188, 15 L.R.A. (N.S.) 646, 84 N. E. 3. The classification is openly and frankly made, as is shown by the repealing clause of the 2d section, leaving no doubt as to the purpose intended. A classification in which all within the class or naturally related to it are not embraced cannot be justified. *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954; *Bedford Quarries Co. v. Bough*, 168 Ind. 171, 14 L.R.A. (N.S.) 418, 80 N. E. 529; *Longview v. Crawfordville*, 164 Ind. 117, 68 L.R.A. 622, 73 N. E. 78, 3 A. & E. Ann. Cas. 490; *Dixon v. Poe*, 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518.

It is also invalid as a local law, in violation of § 22, art. 4. The last clause of the act permits the game to be played "not less than 1,000 feet from any established house of worship, or permanent church structure, or any public hospital, or private hospital erected prior to the passage of this act." The clause specifically interdicts playing within 1,000 feet of "established houses of worship, or permanent church structure, or public or private hospitals, erected prior to the passage of this act" (our italics). By its terms the game may be played within any distance of such structures erected after the passage of the act, and thus it would be unlawful to play within 1,000 feet of these structures if erected prior to the passage of the act, but lawful to play within any distance of those erected later, by reason of which conditions the law would necessarily be local, and in violation of § 22. These provisions of the Constitution were adopted by the people as restraints upon legislative power, and a correct construction should be courageously adopted by the courts, to effectuate the intent of the people as expressed in the organic law, for, by erroneous interpretations of its provisions, and by erroneous applications of the 32 L.R.A. (N.S.)

doctrine of classification, its provisions may be gradually abrogated and Constitution nullified.

No doubtful case should give rise to annulment of a statute as the deliberate act of a co-ordinate and independent branch of government, but by attempted classification and by laws of only local application, to which there is the most natural tendency, and by extension by construction in deference to class interest and special cases, the organic law may be practically nullified, until we are in danger of having all the train of evils resulting from local or special legislation and inequalities of rights, which it was a leading purpose of the Constitution of 1851 to prevent.

Monks, J., concurs in this opinion.

TEXAS SUPREME COURT.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY Plff. in Err.,

v.

J. T. BUSH.

(— Tex. —, 133 S. W. 245.)

Carrier—assault by servant—liability.

A railroad company is not liable for the act of a station porter who boards a train and makes an assault on a through passenger traveling thereon, for the purpose of satisfying a personal grudge, where its other servants are not negligent in failing to anticipate and prevent the assault.

(January 4, 1911.)

Note.—Carrier's liability for assault by servant on passenger while on train.

Cases involving liability of the carrier for the use of excessive force in ejecting a passenger are not included in this note.

For the earlier cases involving the question under annotation, see notes to *Davis v. Houghtelin*, 14 L.R.A. 738, and *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485.

As to the liability of a railroad company for the acts of employees of sleeping or Pullman car companies toward passengers, see *Campbell v. Seaboard Air Line R. Co.* 23 L.R.A. (N.S.) 1056, and note.

For cases passing upon the liability of an individual or corporation for the acts of special police officers appointed by public authority, see notes to *McKain v. Baltimore & O. R. Co.* 23 L.R.A. (N.S.) 289, and *Pennsylvania R. Co. v. Kelly*, 30 L.R.A. (N.S.) 481.

As to the liability of a carrier for injury to a passenger from the sportive act of its servant, see *Hayne v. Union Street R. Co.* 3 L.R.A. (N.S.) 605.

As to carrier's liability for assault on passenger by fellow passenger, see note to

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District affirming a judgment of the District Court for Grayson County in plaintiff's favor in an action brought to recover damages for an assault committed on plaintiff by one of defendant's servants while a passenger on its train. Reversed.

The facts are stated in the opinion.

Messrs. Baker, Botts, Parker, & Garwood, and Head, Dillard, Smith, & Head, for plaintiff in error:

The assault was not in the presence of the employees in charge of and intrusted with the running of said train, and was wholly without their knowledge or consent, and, there being no facts shown by which they could reasonably have foreseen or an-

ticipated such assault, the company was not liable.

Thweatt v. Houston, E. & W. T. R. Co. 31 Tex. Civ. App. 227, 71 S. W. 976; Prokop v. Gulf, C. & S. F. R. Co. 34 Tex. Civ. App. 520, 79 S. W. 101; Jones v. Missouri, K. & T. R. Co. 32 Tex. Civ. App. 286, 73 S. W. 1090; Segal v. St. Louis Southwestern R. Co. 35 Tex. Civ. App. 517, 80 S. W. 233; Galveston, H. & S. A. R. Co. v. Long. 13 Tex. Civ. App. 664, 36 S. W. 485; Texas Midland R. Co. v. Dean, 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Connell v. Chesapeake & O. R. Co. 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E.

Jansen v. Minneapolis & St. L. R. Co. post, —.

It is now well established that a carrier will be liable for an assault by one of its employers on a passenger. Birmingham R. Light & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701; Kelleher v. United R. Co. 147 Mo. App. 553, 126 S. W. 796; Danziger v. Interborough Rapid Transit Co. 104 N. Y. Supp. 845; Baumstein v. New York City R. Co. 56 Misc. 498, 107 N. Y. Supp. 23; Coorman v. Brooklyn Heights R. Co. 127 App. Div. 315, 111 N. Y. Supp. 531.

Thus, it has been held that the company was liable:

—for an assault by a conductor on a female passenger by grasping her by the arm and shoulder, and smiling and winking at her. Birmingham R. Light & P. Co. v. Parker, 161 Ala. 248, 50 So. 55;

—where, upon the justifiable refusal of the passenger to pay fare, the conductor seized him by the wrist and held on, causing him to fall from the car. Braly v. Fresno City R. Co. 9 Cal. App. 417, 99 Pac. 400;

—where the conductor assaulted plaintiff because he pulled the bell cord after failing to get a response to his signal to stop. Amann v. Chicago Consol. Traction Co. 243 Ill. 263, 90 N. E. 673;

—for injury to plaintiff by being struck by the conductor's elbow while he was scuffling with plaintiff's husband. McMahon v. Chicago City R. Co. 239 Ill. 334, 88 N. E. 223, affirming 143 Ill. App. 608;

—for a rape committed upon a passenger by a brakeman. Garvik v. Burlington, C. R. & N. R. Co. 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327; and, on a former appeal reported in 124 Iowa, 691, 100 N. W. 498, it was held that, though the rape charged was not established, the company might nevertheless be held liable for the assault;

—although the assault was provoked by the commission by the passenger of a misdemeanor for which the statute expressly authorized the conductor to eject the passenger, the court saying that, in committing the assault, the conductor was acting solely as agent for defendant, and not as 32 L.R.A. (N.S.)

an officer of the state by virtue of the statute. Heggen v. Ft. Dodge, D. M. & S. R. Co. — Iowa, —, 130 N. W. 148;

—for an assault committed by the conductor in forcibly removing plaintiff from a seat desired by the conductor for his own use. McLain v. St. Louis & G. R. Co. 131 Mo. App. 733, 111 S. W. 835;

—for an assault by a brakeman on a passenger who merely interfered peaceably in a fight between the brakeman and another passenger. Teel v. Coal & Coke R. Co. 66 W. Va. 315, 66 S. E. 470.

Scope of authority.

Liability is not dependent on whether or not the employee was acting within the scope of his authority or in the line of his duty, as the responsibility of the carrier in this respect is based, not on its liability as master for the acts of its servant, but on its duty as a common carrier to protect its passengers from assault. This duty, however, is affected by the relationship of master and servant, inasmuch as the carrier is, by the later cases, held practically to the liability of an insurer as to assaults by its employees, while it is liable only for failure to exercise a high degree of care to protect its passengers from assaults by fellow passengers or strangers. St. Louis, I. M. & S. R. Co. v. Dowgiallo, 82 Ark. 289, 101 S. W. 412; Baltimore & O. S. W. R. Co. v. Davis. 44 Ind. App. 375, 89 N. E. 403; Johnson v. Detroit, Y. & A. A. R. Co. 130 Mich. 453, 90 N. W. 274; Keen v. St. Louis, I. M. & S. R. Co. 129 Mo. App. 301, 108 S. W. 1125; Shelby v. Metropolitan Street R. Co. 141 Mo. App. 517, 125 S. W. 1189; Galveston, H. & S. A. R. Co. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721.

HOUSTON & T. C. R. Co. v. BUSH, the facts of which present an unusual and extreme case, limits the absolute liability of the carrier for assaults by its servants on passengers to assaults by those servants who are charged with the making or carrying out of the contract to carry safely, and, apparently, makes it liable for

468; Mullan v. Wisconsin Central Co. 46 Minn. 474, 49 N. W. 249; Felton v. Chicago, R. I. & P. R. Co. 69 Iowa, 577, 29 N. W. 618; Gasway v. Atlanta & W. P. R. Co. 58 Ga. 216; Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404; Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 43 Am. Rep. 185; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

A carrier is not liable for an assault committed upon one who is a through passenger on its train, by a person who enters the car for the purpose of making such assault on his own account.

Texas Midland R. Co. v. Dean, 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135; Lytle

assaults by other servants only in such cases as it would be liable for assaults by strangers.

That the action for assault by a carrier's employee is based on the contract duty of the carrier to carry safely is further illustrated by the case of Schwartz v. Interborough Rapid Transit Co. 53 Misc. 289, 103 N. Y. Supp. 80, in which it was contended that the action could not be maintained in the municipal court for the reason that that court has no jurisdiction of an action for damages resulting from assault and battery; but the action in that court was sustained on the ground that it was for breach of the contract to carry.

Assault continued off the car.

As to liability for assault by an employee on a passenger outside of the car or train, see Blomness v. Puget Sound Electric Car Co. 17 L.R.A.(N.S.) 764. And see also Jackson v. Old Colony Street R. Co. 30 L.R.A.(N.S.) 1046, and Berryman v. Pennsylvania R. Co. 30 L.R.A.(N.S.) 1040.

Where an assault is commenced by an employee while the passenger is on the car, and immediately continued off the car, the entire assault will be regarded as a single transaction, and the company held liable for damages sustained, when ordinarily the relation of carrier and passenger would have ceased. Alabama City, G. & A. R. Co. v. Sampley, — Ala. —, 53 So. 142; Louisville R. Co. v. Kupper, — Ky. —, 118 S. W. 266; Flynn v. St. Louis Transit Co. 113 Mo. App. 185, 87 S. W. 560.

Punitive damages.

The general rule is that punitive damages may be awarded when the assault was unwarranted, unprovoked, and vicious. Neuer v. Metropolitan Street R. Co. 143 Mo. App. 402, 127 S. W. 669; Cathey v. St. Louis & S. F. R. Co. 149 Mo. App. 134, 130 S. W. 130; Williams v. St. Louis, M. & S. E. R. Co. 119 Mo. App. 663, 96 S. W. 307.

But in Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607, it was held that the company would not be liable for punitive damages for assault by a serv-

v. Crescent News & Hotel Co. 27 Tex. Civ. App. 530, 66 S. W. 240; Galveston, H. & S. A. R. Co. v. Currie, 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073.

Mr. E. J. Smith for defendant in error.

Williams, J., delivered the opinion of the court:

This was an action by defendant in error (plaintiff below), for damages for an assault committed on him by one of the servants of plaintiff in error (defendant). The only question is whether or not the defendant is liable for the assault. Adams, the servant who committed it, was employed as porter at defendant's station at Groesbeck, and it was his duty to assist about the bag-

ant unless it authorized, participated in, or ratified his act.

Self-defense.

If the assault is precipitated by such action on the part of the passenger that the employee is compelled to act as he did in self-defense, the company will not be liable. Arnold v. Atchison, T. & S. F. R. Co. 81 Kan. 530, 106 Pac. 42.

In St. Louis, I. M. & S. R. Co. v. Harrison, 76 Ark. 430, 89 S. W. 53, where the evidence was conflicting as to whether the conductor's act was wilful or in self-defense, it was held that the question was properly submitted to the jury.

In Dallas Consol. Electric Street R. Co. v. Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42, it was held that while it is the conductor's duty to exercise that high degree of care to avoid injury to a passenger that a very cautious and prudent person would have exercised under the same circumstances, nevertheless, if he acts in self-defense or in a reasonable belief of immediate danger, the company will not be liable.

In International & G. N. R. Co. v. Washington, — Tex. Civ. App. —, 117 S. W. 992, it was held that if the passenger assaulted an employee, and the latter acts in self-defense, the company is not liable, for the doctrine of the high degree of care which applies in other cases when a passenger is injured has no application.

And in Houston Electric Co. v. Park, — Tex. Civ. App. —, 135 S. W. 229, it was held that if the passenger first commenced an assault on the conductor, and the latter acted only in repelling the assault or only upon reasonable appearance of danger, the company would not be liable provided he used no more violence than was reasonably necessary to protect himself.

But where the action of an intoxicated passenger was not sufficient to create a reasonable belief that he intended to commit a personal assault on defendant's brakeman, it was held that the company would be liable for an assault, though it was claimed the brakeman acted in self-defense. Norfolk & W. R. Co. v. Brame, 109 Va. 422, 63 S. E. 1018.

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gage and express matters in connection with passenger trains, and to receive and deliver the mail sacks carried on trains. A train on which plaintiff, when assaulted, was traveling as a passenger between two other points, had made its usual stop at Groesbeck, and that was the only reason for plaintiff's presence at that station. Adams, learning that he was on the train, and acting on a personal grudge of five months' standing, slipped into the car, purposely avoiding the notice of other servants of the defendant, and made the assault.

There is no contention that in assailing plaintiff he was rendering any service to defendant, or acting in the scope of his employment, or that the other servants of the defendant were guilty of any want of care in not anticipating and preventing the assault. The recovery is defended wholly upon the theory that Adams, himself a servant, in making the assault, committed a breach of the obligations of the contract of carriage between the carrier and the passenger. In attaching such a consequence to the act of one who did not have and could not have had anything to do with executing or carrying out that contract, the case goes beyond any which has come to our knowledge, except one. *Hayne v. Union Street R. Co.* 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219. In that case the conductor on a street car standing on one track, in sport, threw a dead chicken at the motorman on another car standing opposite on another track, and injured plaintiff, who was a passenger on the latter car. The act of the conductor was held to constitute a breach of the contract of carriage of the company, operating both cars; this holding being founded upon the broad proposition laid down in the opinion that the duty to protect passengers from assaults is not confined to those servants of the carrier immediately engaged in carrying out the contract of carriage, but is incumbent on all, at least, who are employed in the general business of transportation, and that an assault by any of these is a breach of the carrier's duty to protect. In every other case than that just referred to that we have found, in which the carrier was held liable for an assault on the passenger by a servant, when not acting in the carrier's business and in the scope of his employment, the servant was employed about the particular premises or conveyance used in performing the obligations of the carrier to the particular passenger, and charged with rendering some part of the various services the aggregate of which was to constitute the execution of the contract of carriage. In other words, there was delegated to the servant the doing of some part of the work, or

the rendering of some part of the attention, provided for the safety, comfort, or convenience of passengers using the place or conveyance. In discussing cases of that kind, judges have expressed the rule as to the liability of the carrier for the servant's mistreatment of the passenger in various language, some of it, if abstracted from the case before the court and disassociated from its context, comprehensive enough, perhaps, to impute the liability from the act of any servant in any branch of the service whatever. But we have always supposed that such expressions had reference to such servants as those whose actions were brought in question, to whom was intrusted, in part, the execution of the carrier's undertaking with the passenger, and this is the form in which the doctrine is generally expressed. If there is no such limitation, the courts have put themselves to much unnecessary trouble in trying to state the principle so as to indicate the class of servants whose misconduct is treated as a breach of the carrier's contract. It would always have been very easy to have said that the liability arose from the misconduct of any servant, or of any servant "employed in the general business of transportation," if no limitation was intended. The almost uniform modes of expression indicate to our minds the consensus that there is a limitation suggested by the nature of the carrier's undertaking and the means provided to execute it. His undertaking with each passenger, and he has no contract except with the individual passenger, is to carry him safely and to provide for his comfort and convenience, as far as can be done by the exercise of the care which the law exacts. This obligation as to a safe carriage involves the duty to exercise the requisite care to protect the passenger from assaults from all quarters, and hence the carrier himself cannot commit, nor authorize the commission of, an assault without a breach of his undertaking. Most carriers perform that undertaking by servants to whom they commit the doing of everything essential thereto. Railway companies have stations in which passengers are received and servants are there employed, each charged with the rendition of some service which enters into the discharge of the carrier's duty to those coming to that station for transportation. These servants act for the carrier in dealing with passengers at the station where they are employed, but not elsewhere. The performance of the duty of the carrier to those taking passage at other stations is not delegated to them, but to a different corps of employees. How, then, is a servant to break the contract of carriage? Since it includes the obligation to carry safely, the

carrier breaks it if he makes the carriage unsafe by assaulting the passenger. The same result follows from like acts of one who stands in the carrier's place charged with the performance of his duty, and thus, and not otherwise, servants in whose care the carrier has left the passenger may commit a breach of the contract. Certainly it will not be contended that a stranger to a contract can break it. Can it be said with greater force that a servant or agent who has no part either in the making or the carrying of it out can break it? If not, how is the conduct of an employee to constitute a breach of the obligation assumed by the employer, except upon the theory of authority delegated by the latter; and how can the delegation be sufficient, unless it charge the employee with the duty which forbids the act? There is such a delegation to all those to whom the carrier has intrusted the execution, in whole or in part, of his contract with the passenger, because either an omission or an act of theirs which is inconsistent with his obligations is a breach thereof. To illustrate, where the relation exists either at a station or in a conveyance, it is under the control of a corps of servants to whose care the passenger is committed by the carrier, and, as the duty of protection assumed by the carrier rests on them individually and collectively, while the passenger is under their care, no one of them can do anything or omit anything inconsistent with that duty, without breaking the contract. And the liability of the carrier for such acts or omissions, because it arises from the breach of his contract, is as absolute as is that of any other party to a contract for his breach thereof. Further than this, the absolute liability in our opinion does not go. It is assumed in the case above referred to that the carrier's contract insures the safe transportation and proper treatment of the passenger, against the misconduct of all his servants, but there certainly is no such express undertaking, and whether or not it is to be implied depends on the consideration already discussed. The carrier's implied obligation is that which the law raises from the nature of his business. No statement of it with which we are familiar will include any such absolute liability as that under consideration, for the conduct of servants other than those to whom he delegates his duty. Such a liability is not one of those which arises from duties imposed by law for reasons of public policy. The law does not make the carrier an insurer of the safety of the passenger, but only requires that, in order to secure it, he exercise the high degree of care and skill so often defined in the books. It does not make him liable for assaults com-

mitted by others than himself or those put by him in his stead, unless they could have been anticipated and prevented by the exercise of the requisite care. He must provide an equipment and a force of employees such as that degree of care exacts, in order properly to discharge each of his duties, and will be held liable for the consequences of any deficiencies in those respects, but, when he has done that, there is no principle of which we have knowledge that requires him to hold each servant at the service of every passenger, so that every servant must be regarded as his representative in all his conduct towards the passenger. The only good reason for making the carrier responsible for the misconduct of the servant perpetrated in his own interest, and not in that of his employer, or otherwise within the scope of his employment, is that the servant is clothed with the delegated authority, and charged with the duty by the carrier, to execute his undertaking with the passenger. And it cannot be said, we think, that there is any such delegation to the employees at a station with reference to passengers embarking at another or traveling on the train. Of course, we are speaking only of the principle which holds a carrier responsible for wrongs done to passengers by servants acting in their own interest, and not in that of the employer. That principle is not the ordinary rule, *respondet superior*, by which the employer is held responsible only for acts or omissions of the employee in the scope of his employment; but the only reason in our opinion for a broader liability arises from the fact that the servant, in mistreating the passenger wholly for some private purpose of his own, in the very act, violates the contractual obligation of the employer for the performance of which he has put the employee in his place. That reason does not exist where the employee who committed the assault was never in a position in which it became his duty to his employer to represent him in discharging any duty of the latter towards the passenger. The proposition that the carrier clothes every employee engaged in the transportation business with the comprehensive duty of protecting every passenger with whom he may in any way come in contact, and thereby makes himself liable for every assault committed by such servant, without regard to the inquiry whether or not the passenger has come within the sphere of duty of that servant as indicated by the employment, is regarded as not only not sustained by the authorities, but as being unsound and oppressive both to the employer and the employee. In the present case it may be assumed that Adams performed every duty and rendered every serv-

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the rendering of some part of the attention, provided for the safety, comfort, or convenience of passengers using the place or conveyance. In discussing cases of that kind, judges have expressed the rule as to the liability of the carrier for the servant's mistreatment of the passenger in various language, some of it, if abstracted from the case before the court and disassociated from its context, comprehensive enough, perhaps, to impute the liability from the act of any servant in any branch of the service whatever. But we have always supposed that such expressions had reference to such servants as those whose actions were brought in question, to whom was intrusted, in part, the execution of the carrier's undertaking with the passenger, and this is the form in which the doctrine is generally expressed. If there is no such limitation, the courts have put themselves to much unnecessary trouble in trying to state the principle so as to indicate the class of servants whose misconduct is treated as a breach of the carrier's contract. It would always have been very easy to have said that the liability arose from the misconduct of any servant, or of any servant "employed in the general business of transportation," if no limitation was intended. The almost uniform modes of expression indicate to our minds the consensus that there is a limitation suggested by the nature of the carrier's undertaking and the means provided to execute it. His undertaking with each passenger, and he has no contract except with the individual passenger, is to carry him safely and to provide for his comfort and convenience, as far as can be done by the exercise of the care which the law exacts. This obligation as to a safe carriage involves the duty to exercise the requisite care to protect the passenger from assaults from all quarters, and hence the carrier himself cannot commit, nor authorize the commission of, an assault without a breach of his undertaking. Most carriers perform that undertaking by servants to whom they commit the doing of everything essential thereto. Railway companies have stations in which passengers are received and servants are there employed, each charged with the rendition of some service which enters into the discharge of the carrier's duty to those coming to that station for transportation. These servants act for the carrier in dealing with passengers at the station where they are employed, but not elsewhere. The performance of the duty of the carrier to those taking passage at other stations is not delegated to them, but to a different corps of employees. How, then, is a servant to break the contract of carriage? Since it includes the obligation to carry safely, the

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mitted by others than himself or those put by him in his stead, unless they could have been anticipated and prevented by the exercise of the requisite care. He must provide an equipment and a force of employees such as that degree of care exacts, in order properly to discharge each of his duties, and will be held liable for the consequences of any deficiencies in those respects, but, when he has done that, there is no principle of which we have knowledge that requires him to hold each servant at the service of every passenger, so that every servant must be regarded as his representative in all his conduct towards the passenger. The only good reason for making the carrier responsible for the misconduct of the servant perpetrated in his own interest, and not in that of his employer, or otherwise within the scope of his employment, is that the servant is clothed with the delegated authority, and charged with the duty by the carrier, to execute his undertaking with the passenger. And it cannot be said, we think, that there is any such delegation to the employees at a station with reference to passengers embarking at another or traveling on the train. Of course, we are speaking only of the principle which holds a carrier responsible for wrongs done to passengers by servants acting in their own interest, and not in that of the employer. That principle is not the ordinary rule, *respondet superior*, by which the employer is held responsible only for acts or omissions of the employee in the scope of his employment; but the only reason in our opinion for a broader liability arises from the fact that the servant, in mistreating the passenger wholly for some private purpose of his own, in the very act, violates the contractual obligation of the employer for the performance of which he has put the employee in his place. That reason does not exist where the employee who committed the assault was never in a position in which it became his duty to his employer to represent him in discharging any duty of the latter towards the passenger. The proposition that the carrier clothes every employee engaged in the transportation business with the comprehensive duty of protecting every passenger with whom he may in any way come in contact, and thereby makes himself liable for every assault committed by such servant, without regard to the inquiry whether or not the passenger has come within the sphere of duty of that servant as indicated by the employment, is regarded as not only not sustained by the authorities, but as being unsound and oppressive both to the employer and the employee. In the present case it may be assumed that Adams performed every duty and rendered every serv-

ing the motion for judgment notwithstanding the verdict or for a new trial.

Appellant offered no evidence, and that offered in behalf of respondent was to the effect that respondent, who is an elderly Catholic priest, boarded the smoking car of appellant's train at Excelsior for the purpose of riding to Minneapolis. While he was in the act of closing the door, an intoxicated man who was one of the passengers slapped him over the head with his hat and hand. Respondent pushed him to one side, and took the only vacant seat, which was near the middle of the car. The conductor came through immediately after to collect fares, and respondent complained of what had occurred, whereupon the conductor replied, "What can you do when the party has the whisky in him?" and then went back to the baggage car, without saying anything to the intoxicated person. After a little while the attack was repeated, and again a third time, and some of the passengers seemed to consider it a joke, and laughed at the performance, until some friends of respondent in another part of the car were attracted and stopped the disorder.

Appellant claims that it owed no duty to respondent under the circumstances, and relies upon the case of *Mullan v. Wisconsin C. R. Co.* 46 Minn. 474, 49 N. W. 249. It was there said that railway carriers are

bound to exercise the highest degree of care and diligence in the conduct and management of their business to prevent accidents or injuries to passengers on their trains, and that in respect to the danger of injuries from the misconduct of fellow passengers, the obligation of the carrier is qualified or limited by the nature of its relation to the passenger; that it must exercise the greatest diligence consistent with its obligations to the public and all the passengers, and neglect no reasonable precaution to protect passengers from insult or injury from its servants or fellow passengers; but as respects passengers, there is no such privity between them and the carrier as to make the latter directly liable for their wrongful acts, and it can only interfere under an implied police power to prevent an abuse of their privileges as passengers; that the carrier is bound to exercise the utmost diligence in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances and the number and character of the persons on board. This, no doubt, is a correct statement of the principles of law applicable in such cases; but in that case the trial court was justified in dismissing it, for the reason that the plaintiff provoked the attack which resulted

road company, nor the reasonable care required of the Pullman company.

In *Twitchell v. Pecos & N. T. R. Co.* — Tex. Civ. App. —, 131 S. W. 243, it was held that whenever the carrier, through its agents or servants, knows or has opportunity to know of, or might reasonably have anticipated, an assault on a passenger by a fellow passenger, and neglects to take proper precautions to prevent it, it will be liable.

And in *Norfolk & W. R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879, where an altercation commenced by a passenger with plaintiff was in the presence of the conductor, so that he must have heard it, and was of such a character that it should have warned him of his duty to interpose, but he failed to do so, it was held that the company was liable for the ensuing assault.

See also *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 296, post, 1209, 69 S. E. 238.

But the carrier will not be liable where its employees neither knew, nor had reason to anticipate, that a passenger was about to assault a fellow passenger. *Alabama City, G. & A. R. Co. v. Sampley*, — Ala. —, 53 So. 142.

Thus, in *Snyder v. Colorado Springs & C. D. R. Co.* 36 Colo. 288, 8 L.R.A.(N.S.) 781, 118 Am. St. Rep. 110, 85 Pac. 686, it was held that the company was not liable where a passenger on a crowded car was pushed off the car by a fellow passenger

who became angered because plaintiff was crowded against him by the conductor, the company's negligence, if any, not being the proximate cause, and there being no reason to anticipate such an assault.

In *Illinois C. R. Co. v. Gunterman*, 135 Ky. 438, 122 S. W. 514, it was held that the company would not be liable if the shot injuring plaintiff was fired by a fellow passenger under circumstances which were not to be anticipated by the defendant's employees.

In *Brehoney v. Pottsville Union Traction Co.* 218 Pa. 123, 66 Atl. 1006, it was held that the fact that the conductor admitted a drunken passenger to the car was not negligence, in the absence of anything to indicate that he was dangerous, and that the company will not be liable for an injury to another passenger by him during an altercation between him and the conductor, arising over payment of fare.

And in *Widener v. Philadelphia Rapid Transit Co.* 224 Pa. 171, 73 Atl. 209, where the occurrence resulting in plaintiff's injury happened in a brief space of time, and under such conditions that it was difficult to see how the conductor could have interfered to prevent the injury, it was held that a compulsory nonsuit was properly entered.

As to carrier's liability for assault by servant on passenger, see note to *Houston & T. C. R. Co. v. Bush*, ante, 1201.

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in his being assaulted by a fellow passenger.

In the present case, respondent had a right to assume that the people whom he found riding in the smoking car would be orderly and would not interfere with him as a passenger. He was just as much entitled to take a seat and remain unmolested in that car as in any other car on the train. He not only did nothing to aggravate or provoke the assault upon him, but, on the contrary, simply tried to ward off the blows and prevent any serious injury. The man who assaulted him may have had no serious intention of doing him bodily harm. He was intoxicated, and in that condition which, no doubt, caused him to feel that he was doing something smart for the entertainment of his companions. But pulling off a man's hat and striking him on his head with his hat or hand, even for the purpose of merely creating amusement, is no less an assault than if his intention had been to do him physical harm. If, after his attention had been called to the disturbance, the conductor had taken reasonable precautions to prevent its continuance, then there would be no liability. The evidence is to the effect that he did nothing to stop the disturbance. On the contrary, he left the car with the remark that nothing could be done with a man with whisky in him, which was equivalent to saying that the passenger would have to put up with such annoyances as drunkenness. He was informed of what had been going on. He knew the condition of the man, knew that he was drunk, and gave that as an excuse for not interfering. So, in leaving the car without doing anything to prevent a renewal of the disturbance, it would be fair to assume that he did not intend to take any steps to interfere, and that he expected respondent to put up with it. We think the case comes within the rules of law laid down in the Mullan Case and in *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944. It was a question of fact for the jury to determine whether or not the company expressed that degree of care for its passengers which was reasonably practicable under the circumstances.

Granting that respondent was not permanently or seriously injured, that alone is not a prerequisite for the recovery of damages for an assault of that character. Wounded feelings or humiliation are as much grounds for damages as physical injury. Such treatment may cause acute mental anguish, and the extent of such suffering naturally differs with the disposition and condition of different persons. An elderly man of the clerical profession might

feel much more humiliated, and feel the loss of protection under such circumstances more, than one accustomed to mingle with such rough characters. It is the general rule that not only bodily pain, but mental suffering, anxiety, suspense, fright, sense of wrong from insult or injury, connected with bodily injury, may be considered, when the facts will justify it, as an element of the injury for which damages for compensation should be allowed. 3 Sutherland, Damages, p. 259; *Head v. Georgia P. R. Co.* 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1. It is unnecessary to consider whether mental anguish alone, without some personal injury, can be the basis of damages; but under the evidence there was undoubtedly some physical injury, although not of a serious or lasting character.

This is not a case which requires the return of only nominal damages. The injury cannot be said to be so trivial as to justify no compensatory damages, and the amount as fixed by the court, considering respondent's age, his profession, and the manner in which he was treated, cannot be considered as excessive.

Affirmed.

NORTH CAROLINA SUPREME COURT.

B. F. PENNY

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Appt.

(153 N. C. 296, 69 S. E. 238.)

Carrier — injury to passenger — act of employee off duty.

1. A carrier is not answerable for the act of one of its employees who is riding on its train as a passenger, when not on duty, in engaging in an altercation with a passenger to the injury of a third person.

Same — unanticipated altercation — injury to passenger.

2. A carrier is not liable for injury to a passenger through the failure of its conductor to anticipate that a passenger on

Note. — Duty of passenger to protect himself during an affray on the train.

Apparently the only case, aside from *PENNY v. ATLANTIC COAST LINE R. Co.*, involving the specific question raised by the title, is *McMahon v. Chicago City R. Co.* 143 Ill. App. 608, affirmed in 239 Ill. 334, 88 N. E. 223, where plaintiff was inadvertently struck by the conductor during a

the train who has had an altercation with another would borrow a pistol, and attempt to assault the latter after he had left the train, or that the person assaulted would use a pistol so as to cause the injury, where the conductor had searched him for a pistol and found none.

Proximate cause — injury to bystander — loan of pistol.

3. The act of a baggage master on a train in lending his pistol to a passenger, without knowledge of the use which he intends to make of it, is not the proximate cause of injury to another passenger, from a stray bullet from a pistol in the hands of a third person who was induced to fire because of an assault which the borrower attempted to make upon him after he had left the train.

Appeal — refused instruction — error.

4. It is error to refuse a requested instruction pointing out particular phases of the evidence, although an instruction has been given dealing in general terms with the point involved.

Carrier — altercation — injured passenger — contributory negligence.

5. A passenger is guilty of contributory negligence which will prevent his holding the carrier liable for injury from a stray bullet fired by another passenger, if the danger of such injury could have been apprehended by him, and he did not turn out of his way or make any effort to avoid it, although the conductor who knew of the danger failed to give him warning.

(October 26, 1910.)

APPEAL by defendant from a judgment of the Superior Court for New Hanover County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The following issues were submitted:

"(1) Was the plaintiff injured by the negligence of the defendant? Ans. Yes.

"(2) Did the plaintiff by his own negligence contribute to his injury? Ans. No.

"(3) What damage, if any, has the plaintiff sustained? Ans. Five thousand dollars (\$5,000).

scuffle between her husband and the conductor, growing out of a quarrel over transfers. It was held that the court properly refused to instruct the jury that, "if you believe from the evidence under the instructions, the plaintiff could and would on the occasion in question have avoided the alleged injury by the exercise of ordinary and reasonable care and prudence on her own part, and that she did not exercise such ordinary and reasonable care and prudence, and as an approximate result thereof received the alleged injury, she cannot recover in this case," when the only basis for the instruction was the argument of counsel 32 L.R.A. (N.S.)

"(4) Is the cause of action stated in the amendment to the complaint filed at April term, 1910, barred by the statute of limitation? Ans. No."

From the judgment rendered the defendant appealed.

The further facts are stated in the opinion.

Messrs. Junius Davis, J. D. Bellamy, and George Rountree, for appellant:

A railroad is not an insurer of passengers against assaults from outsiders or from other passengers.

Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212; Stoddard v. New York, N. H. & H. R. Co. 181 Mass. 422, 63 N. E. 927; Elliott, Railroads, §§ 1583, 1587, 1640; Britton v. Atlanta & C. Air Line R. Co. 88 N. C. 536, 43 Am. Rep. 749; Pounder v. North Eastern R. Co. [1892] 1 Q. B. 385; Royston v. Illinois C. R. Co. 67 Miss. 376, 7 So. 320; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; Brooks v. Old Colony R. Co. 168 Mass. 164, 46 N. E. 566.

There is no evidence that the baggage master gave the pistol to La Motte for the purpose of shooting Calloway, which was necessary to establish liability.

King v. Wells, 94 N. C. 344; Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 50 S. E. 562; Pell's Revisal (N. C.) 263.

To constitute liability, there must not only be a breach of duty owing by defendant to the plaintiff and injury to the latter, but the breach of duty must be the proximate cause of the injury.

Hudson v. McArthur, 152 N. C. 452, 23 L.R.A. (N.S.) 115, 67 S. E. 995; McDowall v. Great Western R. Co. [1903] 2 K. B. 331; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; Laidlaw v. Sage. 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; Leeds v. New York Teleph. Co. 178 N. Y. 118, 70 N. E. 219; Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 43; Butts v. Cleveland, C. C. & St. L.

that plaintiff should have impassively kept her seat during the struggle.

No other case has been found involving the question of contributory negligence on the part of a passenger in failing to protect himself during an affray on a train.

As to liability of a carrier for an assault by its servant on a passenger while on its train, see Houston & T. C. R. Co. v. Bush and note, ante, 1201; and for cases involving liability of a carrier for assault by a fellow passenger, see Jansen v. Minneapolis & St. L. R. Co. and note, ante, 1206.

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R. Co. 49 C. C. A. 69, 110 Fed. 329; Jarnagin v. Travelers' Protective Asso. 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; Winfree v. Jones, 104 Va. 39, 1 L.R.A.(N.S.) 201, 51 S. E. 153; Bowers v. East Tennessee & W. N. C. R. Co. 144 N. C. 684, 12 L.R.A.(N.S.) 446, 57 S. E. 453; Harton v. Forest City Teleph. Co. 141 N. C. 455, 54 S. E. 299, 146 N. C. 430, 14 L.R.A.(N.S.) 956, 59 S. E. 1022, 14 A. & E. Ann. Cas. 300; McGhee v. Norfolk & S. R. Co. 147 N. C. 142, 24 L.R.A.(N.S.) 119, 60 S. E. 912; Fanning v. White, 148 N. C. 541, 62 S. E. 734; 29 Cyc. Law & Proc. p. 502 note; 14 Harvard Law Rev. 546; 1 Street, Foundations of Legal Liability, 120.

Messrs. A. J. Marshall, E. K. Bryan, and Bellamy & Bellamy for appellee.

Brown, J., delivered the opinion of the court:

We are of opinion that the complaint presents but one cause of action, and that is the allegation that the defendant, while the plaintiff was a passenger on its train and entitled to protection, negligently failed to protect him while alighting at the end of the journey, in consequence of which the plaintiff was injured. The amended complaint sets out no cause of action and adds nothing to the original complaint. Therefore the fourth issue in regard to the statute of limitations is unnecessary.

There is evidence tending to prove that on September 18, 1898, plaintiff was a passenger on defendant's train from Wilmington to Leland, North Carolina, in the second-class car. A negro passenger, Sam Calloway, partly intoxicated, became very disorderly, and after much trouble was subdued by the conductor with the assistance of the porter, the baggage master, Van Amringe, and one La Motte, who was a passenger on this train, although in the employment of defendant, but not on duty. The conductor then undertook to search Calloway for arms, but found none. The disturbance had been entirely quieted before train reached Leland. Calloway jumped off train at Leland, and while on the ground, seeing La Motte, asked him if he meant to cut him. La Motte replied: "I will cut your heart out," and then went in baggage car, and asked Van Amringe, the baggage master for his pistol, which Van Amringe gave him. La Motte then went to the platform of the second-class car, the train being at full stop for passengers to get off. The negro Calloway was on the ground in a diagonal direction on the Leland side. La Motte snapped pistol three times at him, but it did not fire. Just about this time plaintiff passed over from the second-class car on the platform of first-class car, 32 L.R.A.(N.S.)

and down the steps of the car for the purpose of leaving the train. It was then that Calloway fired and the bullet took effect on plaintiff, injuring him.

It is contended by the plaintiff that the conductor was standing on the car platform, knew what was going on, and permitted plaintiff unwittingly, without warning, to step down on car steps in a highly dangerous position, in consequence of which he was shot. This is plaintiff's only cause of action, and it is clearly stated in the complaint. The defendant denies the alleged negligence of the conductor, Carmon, and offers evidence tending to controvert plaintiff's contention. Defendant also contends that the plaintiff must have seen the disturbance, and carelessly and negligently, without necessity, exposed himself to obvious danger.

His Honor instructed the jury that if the defendant, by the exercise of the "highest degree of care and human forethought," could have prevented La Motte from assaulting Calloway, and that this would have saved Penny from being injured, and defendant failed to do so, defendant would be liable, and to answer first issue, "Yes." This instruction is erroneous in two respects: (1) It assumes that the defendant is in any event liable for La Motte's acts. He was not on duty, but was a passenger on the train, and in the consideration of this case must be regarded as such. The conductor in charge of the train was not bound to foresee that La Motte would borrow a pistol and engage in a difficulty with Calloway after Calloway had left the train, and ceased to be a passenger. The conductor could not foresee that Calloway had a pistol with which injury might be inflicted on a passenger, since he had searched Calloway and found none. (2) While the carrier is not an insurer, its servants are required to exercise the highest degree of care in the transportation, as well as the protection, of passengers from actually impending assaults of fellow passengers and intruders. For the latter purpose, it must use all available means at hand. But the carrier is not required to foresee and guard the passenger against all assaults, but only against such, as from the circumstances, may reasonably be expected to occur. The duty of the defendant is clearly stated in Britton's Case, 88 N. C. 536, 43 Am. Rep. 749, by Ruffin, Judge, as follows: "And while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case

and the condition of the parties." This view of the law is well sustained by authorities elsewhere. *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385; *Royston v. Illinois C. R. Co.* 67 Miss. 376, 7 So. 320; *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Brooks v. Old Colony R. Co.* 168 Mass. 164, 168, 46 N. E. 560. The court further instructed the jury: "If the jury shall find by the greater weight of the evidence that a difficulty was pending between La Motte and Calloway, and Van Amringe, the baggage master on the train, with knowledge of the purpose for which La Motte wanted it, handed him a pistol with which he could shoot Calloway, and that La Motte took the pistol out on the platform, and, pointing the same towards Calloway, tried to shoot him, but could not discharge the pistol, and this caused the said Calloway to fire the shots at La Motte, which struck the plaintiff, then the jury should answer the first issue, 'Yes.'"

It is contended that his Honor neglected to give the correlative contention of the defendant, and that he should have told the jury that, if Van Amringe gave the pistol to La Motte without any knowledge of the purpose for which La Motte intended to use it, then the defendant would not be liable on this ground. In *Jarrett v. High Point Trunk & Bag Co.* 144 N. C. 299, 56 S. E. 937, it is held that, if the trial judge undertakes to apply the law to the facts and gives the contention of one side, it is his duty, without being requested, to give the correlative contention of the other side. But the instruction in our opinion is itself erroneous (1) because there is no evidence that Van Amringe knew or had reason to believe that La Motte borrowed the pistol for an unlawful purpose; (2) the act of Van Amringe in lending the pistol to La Motte was not the proximate cause of the injury to plaintiff, which was caused by a stray bullet fired from Calloway's pistol. The accidental wounding of plaintiff did not follow in direct sequence from the act of Van Amringe, assuming, for the sake of argument, that the latter was guilty of negligence in lending his pistol to La Motte. *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 39, 50 S. E. 448. In this case it is held by Mr. Justice Hoke that the proximate course of an injury is one that produces the result in continuous sequence, without which it would not occur, and which a man of ordinary prudence could reasonably be expected to foresee. There is in legal parlance no direct causal connection between the act of Van Amringe in loaning the pistol, and the unforeseen accidental injury to plaintiff by Calloway. *Harton v. Forest City Teleph. Co.* 146 N. C. 429, 14 L.R.A.(N.S.) 956, 32 L.R.A.(N.S.)

59 S. E. 1022, 14 A. & E. Ann. Cas. 390; *McGhee v. Norfolk & S. R. Co.* 147 N. C. 142, 24 L.R.A.(N.S.) 119, 60 S. E. 912; *Bowers v. East Tennessee & W. N. C. R. Co.* 144 N. C. 684, 12 L.R.A.(N.S.) 446, 57 S. E. 453; 1 Street, Foundations of Legal Liability, 120. To constitute liability, there must not only be a breach of duty owing by the defendant to the plaintiff, and injury to the latter, but the breach of duty must be the cause, and the proximate cause, of the injury. So far as the act of Van Amringe is concerned, it is a case of *post hoc*, but not *ergo propter hoc*, as was said by Manning, J., in *Hudson v. McArthur*, 152 N. C. 452, 28 L.R.A.(N.S.) 115, 67 S. E. 998.

In *McDowall v. Great Western R. Co.* [1903] 2 K. B. 331, on page 337, Vaughan Williams, L. J., says: "In those cases in which a part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible, unless it is found that that which they do, or omit to do,—the negligence to perform a particular duty,—is itself the effective cause of the accident." That case is instructive upon this point. It was there held that the servants of the defendant had been guilty of negligence in not properly placing the railway van, but that, it having been interfered with by trespassers, the negligence of the defendant's servants was not the effective cause of the accident, and the defendant was exonerated. In *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, Mr. Justice Holmes uses this language: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual." That proposition is illustrated in a great number of cases. *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; *Leeds v. New York Teleph. Co.* 178 N. Y. 118, 70 N. E. 219; *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 43; *Butts v. Cleveland, C. C. & St. L. R. Co.* 49 C. C. A. 69, 110 Fed. 329; *Jarnagin v. Travelers' Protective Asso.* 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; *Winfree v. Jones*, 104 Va. 39, 1 L.R.A.(N.S.) 201, 51 S. E. 153.

Upon the issue of contributory negligence, the court failed to give the following requested instruction, which is assigned as error: "If the jury shall find the evidence that Penny, the plaintiff, went out on the platform, and at that time the negro had the pistol aimed towards the car where Penny

was, and the danger could be as reasonably apprehended by the plaintiff as by the defendant, and the plaintiff did not turn out of his way or go back to avoid the injury, and the accident happened, he would be guilty of contributory negligence. It was the duty of the plaintiff to exercise his senses for his own protection, and if he saw the danger, or could have seen it in the exercise of the reasonable care of a prudent man, and failed to do so, he would be guilty of contributory negligence, and you should answer the second issue, 'Yes.' This is a correct proposition of law, and should have been given. This instruction points to particular phases of the evidence, and it was error to refuse it, although his Honor did tell the jury in very general terms that "it was plaintiff's duty to exercise his senses for his own protection." *Horne v. Consolidated R. Light & P. Co.* 141 N. C. 50, 53 S. E. 658.

Recurring to the allegation of negligence, the duty which defendant owed to plaintiff is to be determined by what transpired when the train stopped at Leland, and the plaintiff undertook to alight at the end of his journey. It is undoubtedly true that the conductor had no power to restrain plaintiff and prevent him from leaving the train. Nevertheless, if, as is charged by plaintiff, the conductor was standing on platform when plaintiff came out of the car for the purpose of leaving, and if the conductor could then see that it was obviously dangerous for plaintiff to go down the steps at that moment, it was his duty to warn the plaintiff, and apprise him of his danger. If the conductor, having such knowledge, failed to warn plaintiff, and permitted him to venture on the steps ignorantly and unwittingly in the presence of obvious danger, it would be an act of negligence upon the part of the conductor, and the defendant would be liable for consequent injury. *Per contra*, it is equally true that if, when plaintiff came out on the car platform, he could see for himself the "fracas" going on, it was his duty to exercise his faculties, and to act with the care of a prudent man, and not venture down the steps into the midst of obvious danger. If plaintiff could see for himself the apparent danger, then he needed no warning. If then he ventured in the face of it, the consequent injury will be attributed to plaintiff's own negligence, and he cannot recover.

New trial.

Hoke, J., concurring:

I concur in the opinion that there should be a new trial in this case, but do not assent to some of the positions stated in the principal opinion as ground for the decision. The testimony in the record, as I view it, presents two theories on which liability of

defendant may be predicated: (1) By reason of a negligent act of the conductor of the train in failing to warn plaintiff so as to keep him out of the line of fire. (2) A negligent act, the cause of the injury, on the part of Van Amringe, the baggage master, in lending La Motte the pistol with which he attempted to shoot the negro.

The first view seems to have been presented to the jury without valid exception. On the second the court charged the jury: "If the jury find from the evidence, by its greater weight, that one La Motte called for a pistol with which he assaulted Sam Calloway, and the defendant's servant. Van Amringe, the baggage master, in compliance with La Motte's request, gave to La Motte a pistol with which to assault Calloway, knowing, or having reasonable grounds to believe, that La Motte was going to use the pistol for that purpose, and that, after La Motte got the pistol, he did attempt to assault Calloway by pointing the same at him, and trying to shoot him, and this assault upon Calloway caused Calloway to draw his pistol and attempt to shoot La Motte, and in shooting at La Motte shot the plaintiff, Penny, then the jury should answer the first issue, 'Yes,' and this for the reason that it was the duty of the agents and employees of defendant company to do all in their power to prevent assaults and disturbances which were likely to bring on an assault or fight, and it does not matter that Van Amringe did not personally make the assault, if he gave the pistol to La Motte with which to make the assault, and La Motte did make the assault, both La Motte and Van Amringe would have been guilty of an assault with a deadly weapon, as there are no accessories before the fact in misdemeanors. And, if the jury further find from the evidence, by its greater weight, that the assault would not have been made by Calloway but for the wrongful act of Van Amringe and La Motte, then the jury should find that the plaintiff's injury was proximately caused by the neglect and wrongful conduct of the defendant through its servants and employees." And again: "If the jury shall find by the greater weight of the evidence that a difficulty was pending between La Motte and Calloway, and Van Amringe, the baggage master on the train with a knowledge of the purpose for which La Motte wanted it, handed him a pistol with which he should shoot Calloway, and that La Motte took the pistol out on the platform, and, pointing the same towards Calloway, tried to shoot him, but could not discharge the pistol, and this caused the said Calloway to fire the shots at La Motte, which struck the plaintiff, then the jury should answer the first issue, 'Yes.'" De-

fendant excepts to this charge, and assigns for error what is, to my mind, a perfectly valid objection. There was testimony introduced tending to show that from the attitude and conduct of the negro, either La Motte or Van Amringe, the baggage master, had the present right to use a pistol in the legitimate protection of the train and its passengers or themselves, and thus presenting and requiring the view that the act of Van Amringe may have been free from fault. Under certain conditions, the doctrine of self-defense is available in actions of negligence as in other cases. *Laidlaw v. Sage*, 158 N. Y. 90, 44 L.R.A. 216, 52 N. E. 679. Even if it is conceded that these excerpts correctly express the view tending to inculpate, the charge nowhere refers to the opposing and necessarily correlative view which tends to excuse defendant company, and to my mind the failure to present the case in this respect constitutes reversible error, under the principles declared and upheld in *Jarrett v. High Point Trunk & Bag Co.* 144 N. C. 299, 56 S. E. 937, and *Meredith v. Cranberry Coal & I. Co.* 99 N. C. 576, 5 S. E. 659. I am inclined to think that the charge as given is positively erroneous, in that it fails to say that, if Van Amringe wrongfully, and in breach of his duty to safeguard the passengers, supplied the pistol, etc. The portion of the principal opinion from which I am compelled to withhold my assent is the position maintained, as I interpret it, that there is no evidence tending to show that the act of Van Amringe in lending the pistol to La Motte was wrongful, or that, if it was, there is no evidence to show that such act was the proximate cause of the injury. On the first proposition, the negro, Calloway, examined as a witness for the plaintiff, testified in respect to himself that he was the aggrieved party throughout the occurrence; that he was wrongfully assaulted in the car by La Motte, and the conductor, without justification, shoved him down in the seat, and La Motte, with an open knife, said, "If he (the negro) breathed, he would cut his damned throat." Shortly thereafter, as the train slowed for Leland, witness asked them to let him get out, La Motte holding the knife on him. When the witness got on the ground, he asked La Motte if he wanted to cut witness, and La Motte replied, "Yes, God damn you; I will cut your heart out," and by that time La Motte called for a gun, and witness was close to the cars steps. La Motte snapped the gun in his face, and witness began to run back and was feeling in his pocket for his gun. That La Motte snapped the gun on witness three times before witness could draw his, running backward all the time, when wit-

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ness got his gun out and fired twice (the shots that caused the injury). Record, p. 45, and again p. 46.

Q. Where did La Motte go when he asked for a pistol?

A. He went back to the door of the second-class car, where I had just come out, and it seems time he got to the door somebody gave him a pistol, and he came back. The first thing he did after he got the pistol he snapped it in my face.

The testimony showed that the original difficulty occurred in one compartment of a car divided into a baggage car and coach for second-class passengers; that the coach connected with the baggage car by a door, and the evidence tended to show that Van Amringe was cognizant of all the facts.

Speaking to the question of such knowledge, Van Amringe himself testified:

My attention was called to the loud talking, and, when they pulled out from Navassa, I went through the partition to the baggage car door. I noticed a crowd,—not a crowd, either. It seems that Capt. La Motte and Capt. Carmon were talking to a negro fellow down by the stove.

Q. Who was Capt. La Motte?

A. The conductor for the Coast Line, dead-heading to Florence to bring out a train. He was not on duty at the time. They were talking to a negro. I noticed there was going to be some trouble, and thought it best to go back in the baggage car and await developments. As we were pulling up to Leland (it is not far from Navassa to Leland, it didn't take long), when we were slowing up, I went back, opened the door, and looked in, as I was going in the car. Let's see,—I want to get that straight,—I went in the car and met Mr. La Motte coming in there. That is the way, I think. I went in the second-class car, and Capt. La Motte came in at the door. I went in and got my pistol, as I expected trouble. He came in and I had my pistol in my hand. He asked for my pistol, and I gave it to him.

Q. What occurred from the time you gave the pistol to Capt. La Motte? Where did Capt. La Motte go, and where did you go, and what did you see, and what was done? A. Capt. La Motte went ahead of me out of the car, and stood on the platform of the second-class car, and on the end facing Wilmington—on the rear end of the train towards Wilmington—on the second-class car. You see, when he came out of the car, he just turned around and went to the steps. He didn't go across. He went on the second-class platform to the left, and he stood up on the top step, and was aiming his pistol at the colored man, trying to shoot

him, but the pistol wouldn't go off on account of having a little safety valve. It had a couple of triggers, and you had to pull both of them to make it fire. It wouldn't go off. He had it aimed at the colored man.

And again:

Q. Where was the colored man?

A. He had gotten off of the train as the train slowed up, and was standing at the edge of the swamp, about 40 or 50 feet from the rear end of the second-class coach; about the same distance as that door,—about 40 or 50 feet,—between 40 and 50 feet to the right of the second-class car.

And further:

Q. Were you close enough to hear what was said by Capt. Carmon and Capt. La Motte, if they had said anything?

A. Yes; I reckon so. Do you mean inside the coach?

Q. Right there on the platform at the time you and Capt. La Motte went out of the door of the car.

A. I could have heard anything said. I was on the platform.

In the presence of this testimony, tending, as it does, to show that the conductor and La Motte made an unlawful assault upon the negro, and that La Motte was in the wrong throughout, and Van Amringe must have known it, I think that the position assumed in the principal opinion, "that there is no evidence that Van Amringe knew or had reason to believe that La Motte borrowed the pistol for an unlawful purpose," cannot be upheld. The counsel for defendant company, as I understood their earnest and able argument before us, made no such claim, and it cannot to my mind be for one moment sustained. And the second position referred to, "that the act of Van Amringe in lending the pistol to La Motte was not the proximate cause of the injury to plaintiff, which was caused by a stray bullet fired from Calloway's pistol," cannot be sustained as a legal proposition, assuming, as it does to have any significance, that the act of Van Amringe was not lawful. The law of proximate cause, as affected by the intervening acts of an independent agent, was fully laid down by the court in *Harton v. Forest City Teleph. Co.* 141 N. C. 455, et seq., 54 S. E. 299, and in which it was held among other things as follows:

"(3) There may be more than one proximate cause of an injury, and, when a claimant is himself free from blame, and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained, though there may be other

proximate causes concurring and contributing to the injury.

"(4) The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition.

"(5) The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause, . . . breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.

"(6) Except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could have reasonably expected them to occur as a result of his own negligent act."

When this case was again before the court (146 N. C. 429, 14 L.R.A.(N.S.) 956, 59 S. E. 1022, 14 A. & E. Ann. Cas. 390), on a fuller statement of the testimony, the court was unanimously of the opinion that the facts showed that the original or primary negligence had been insulated by the acts and conduct of an independent, intervening agent, and recovery was therefore denied, but the general principles laid down in the first opinion were in no wise questioned or denied; and under these principles, if it is established that Van Amringe wrongfully gave La Motte a pistol, knowing, or having reason to believe, he was about to project a pistol duel in a crowd or in close proximity to a train and passengers, and one of them was injured, though with the adversary's pistol, this should, in my opinion, be considered the proximate cause of the injury. Certainly, on this evidence, there is no wrong done defendant in submitting the question of proximate cause to the jury. As I have heretofore said, there is testimony to the effect that the lending of the pistol was entirely justifiable, and I think the defendant is entitled to have this view presented to the jury under a correct charge.

Clark, Ch. J., concurs in concurring opinion.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON

v.

MARTIN STRASBURG, Appt.

(— Wash. —, 110 Pac. 1020.)

Criminal law — insanity — abolishing defense.

An attempt to deprive one accused of crime of the defense of insanity is ineffectual under constitutional provisions guarantying due process of law and trial by jury.

(Fullerton, J., dissents.)

(Morris, J., dissents in part.)

(September 10, 1910.)

PPEAL by defendant from a judgment of the Superior Court for King County convicting him of assault in the first degree. Reversed.

The facts are stated in the opinion.

Messrs. Alfred Heller and William A. Holzheimler for appellant.

Mr. George F. Vanderveer for the State.

Messrs. E. C. Hughes, Harold Preston, H. W. Craven, Milo A. Root, and George E. De Steiguer, *amici curiæ*.

Parker, J., delivered the opinion of the court:

The prosecuting attorney for King county by information charged the defendant with the crime of assault in the first degree, as follows: "He, said Martin Strasburg, in the county of King, state of Washington, on the 3d day of September, A. D. 1909, did wilfully, unlawfully, and feloniously make an assault upon one Otto Peeck, with a firearm, to wit, with a revolver pistol, then and there loaded with powder and ball, which he, said Martin Strasburg, then and there had and held, and did then and there wilfully, unlawfully and feloniously, with said revolver pistol, shoot at, toward and into the body of said Otto Peeck, with intent then and there wilfully, unlawfully and feloniously to kill said Otto Peeck." The offense charged by this information is defined by § 2413 of Remington § Ballinger's Code, as follows: "Every person who, with intent to kill a

human being, or to commit a felony upon the person or property of the one assaulted, or of another, shall assault another with a firearm or any deadly weapon, or by any force or means likely to produce death, . . . shall be guilty of assault in the first degree, and shall be punished by imprisonment in the state penitentiary for not less than five years." The trial resulted in a verdict of guilty against the defendant. His motion for a new trial being denied, judgment was rendered against him upon the verdict. From this judgment, the defendant has appealed.

The principal grounds relied upon by learned counsel for defendant to secure a reversal of the judgment is that the trial court erred in refusing to admit evidence tending to prove that the defendant, at the time charged as the commission of the crime, was insane and incapable of understanding the nature and quality of his act; and also that the court erred in instructing the jury "that, under the laws of this state, it is no defense to a criminal charge that the person charged was at the time of the commission of the offense unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong."

In support of these rulings of the learned trial court, counsel for the state rely upon the provisions of § 7 of our New Criminal Code (§ 2259, Rem. & Bal. Code; Laws 1909, p. 891, § 7), providing as follows: "It shall be no defense to a person charged with the commission of a crime, that at the time of its commission he was unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence." It is contended by learned counsel for appellant that this statute withholds from him rights guaranteed by our state Constitution, and particularly those rights guaranteed by the following provisions thereof: Article 1, § 3: "No person shall be deprived of life, liberty, or property without due process of law." Article 1, § 21: "The right of trial by jury shall remain inviolate." We are then confronted with the novel and grave question: Has the legislature the power under our Constitution to enact a law taking away from a defendant accused of crime the opportunity to show in his defense the fact that, at the time of the commission of the act charged as a crime against him, he was insane, and, by reason thereof, was unable

Note.—The court in the above opinion makes the observation that this is probably the first instance where such a law has been enacted. Had such legislation been enacted, it is almost certain that its constitutionality would have been attacked, and as an extensive search has disclosed no other cases dealing with the validity of such a statute, it must be concluded that the question is entirely novel.

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to comprehend the nature and quality of the act committed? We are not advised of any instance where the legislative power of any common-law country has ever enacted a law prohibiting all consideration by the jury of the question of the insanity of the accused at the time of the commission of the act relied upon as the offense charged against him, when such insanity is sought to be shown in his behalf in connection with the question of his guilt. We believe it reasonably safe to assert that this is the first instance of any such enactment. This fact, of course, is not within itself a reason for holding that the legislature of our state has no such power; but, in view of the source of our jurisprudence and the spirit of our institutions, this fact does furnish a reason for us to view this assumption of power with grave concern, and for a more than ordinary critical examination of its alleged source. This is, indeed, an occasion for heeding the admonition of the concluding section of our constitutional bill of rights, which reads: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." State Const. Art. 1, § 32.

At the outset, then, let us recur to some fundamental principles touching the effect of the insanity of one accused of crime, at the time of committing the act charged against him, upon the question of his guilt. It is possible we may thus discover that the mental responsibility of the accused is a fact entering into the question of his guilt, upon which he has a right of trial by jury, the same as upon any other fact inherent in that question, even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him. In the text of 4 Blackstone's Commentaries, pp. 20, 21, 24, it is stated: "All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. . . . The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, 32 L.R.A. (N.S.)

is that *furiosus furor solo punitur*. In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself." In 1 Russell on Crimes, p. 2, it is said: "Without the consent of the will, human actions cannot be considered as culpable; nor where there is no will to commit an offense is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offenses." The doctrine as understood in the United States is stated in 16 Am. & Eng. Enc. Law, 2d ed. p. 618, as follows: "From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent." This is in accord with the view of our leading American text writers. 1 Wharton, Crim. Law, 10th ed. § 33; 1 Bishop, New Crim. Law, § 375; 1 McClain, Crim. Law, § 154. Mr. Tiedeman in his work on State and Federal Control of Persons and Property (§ 47) says: "It is probably the rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is that there must be a criminal intent in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong. Insanity, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to an acquittal." In the case of Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458, Chief Justice Shaw, speaking for the supreme judicial court of Massachusetts, said: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." Mr. Freeman, the able editor of the American Decisions, in his note to State v. Marler, 36 Am. Dec. 402, says: "It was always a settled rule of the common law that a person could not be legally punished for any act committed by him while he was insane. . . . The common law never intended to inflict punishment upon one whom it believed to be insane at the time when he did the act charged as a crime; for the law holds that a criminal intent is an es-

essential element in every crime, and if, by reason of insanity, a person be incapable of forming any intent, he cannot be regarded by the law as guilty." In 12 Cyc. Law & Proc. p. 164, the doctrine is stated in the text in substantial accord with the above quotations, and there supported by a great array of cited authorities. Indeed, they are apparently unanimous. The doctrine has been recognized by our territorial supreme court as well as by this court. *McAllister v. Territory*, 1 Wash. Terr. 360; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 255, 88 Pac. 207. We have quoted from and cited authorities upon this question to this extent, in order to show not only how firmly fixed in our system of jurisprudence was this doctrine of incapacity of insane persons to commit crime, at the time of the enactment of our Criminal Code of 1909, but also to conclusively show that at the time of the adoption of our Constitution, preserving the right of trial by jury inviolate, this doctrine was in full force in the territory of Washington as a part of the common law, unimpaired by judicial decision or legislative enactment. Referring to the declaration of our Constitution that the right of trial by jury shall remain inviolate, this court in *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 384, 58 Am. St. Rep. 39, 47 Pac. 958, 959, said: "The effect of the declaration of the Constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate. *Whallon v. Bancroft*, 4 Minn. 109, Gil. 70; *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L.R.A. 510, 41 N. W. 1020; *Taliaferro v. Lee*, 97 Ala. 92, 13 So. 125." This appears to be the rule generally recognized by the authorities. 24 Cyc. Law & Proc. p. 102.

From what has been said thus far, it seems too plain for argument that one accused of crime had the right prior to and at the time of the adoption of our Constitution to show as a fact in his defense that he was insane when he committed the act charged against him, the same as he had the right to prove any other fact tending to show that he was not responsible for the act. Indeed, his right to prove his insanity at the time of committing the act was as perfect even as his right to prove that his physical person did not commit the act or set in motion a chain of events resulting in the act. This consideration suggests the application to our inquiry of the maxim. "An act done by me against my will is not my act." 1 Bishop, New Crim. Law, § 288. The question of the insanity of the accused

at the time of committing the act charged being one of fact when sought to be shown in his behalf, it needs no citation of authorities other than the foregoing to demonstrate that it is and always has been a question of fact for the jury to determine. as much so as any other question of fact bearing upon the responsibility of the accused for the occurrence of the act relied upon as constituting the offense charged. Such, beyond all question, was the right of all persons accused of crime at the time of and prior to the adoption of our Constitution.

Our problem then is reduced to the question: Can the legislature under our Constitution so circumscribe inquiry touching the question of the guilt of the accused as to exclude all consideration by the jury of his insanity at the time of committing the act? Now, this right of trial by jury which our Constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury, else the legislature could, by a process of limitation in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury. In the case of *Cummings v. Missouri*, 4 Wall. 277, 325, 18 L. ed. 356, 363, Justice Field said: "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." The correctness of this statement is too self-evident to require comment. The due process of law provision of our Constitution above quoted probably does not of itself mean right of trial by jury; but it does mean, in connection with the provision "the right of trial by jury shall remain inviolate," that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our Constitution. It is not easy to define in general terms "due process of law" with such precision that we may at once see the exact limit of legislative power fixed by these words in the Constitution; nor is it easy to define in general terms "the right of trial by jury" as guaranteed by the Constitution, so that we may readily determine, in all cases, whether or not the legislature has violated this right. But, in any event, it is clear that we must look beyond the letter, and give consideration to the spirit, of these provisions, be-

fore we can hope to discover their true meaning. Judge Cooley in commenting upon the phrases "due process of law" and "the law of the land," which he regards as meaning the same thing, in his *Constitutional Limitations*, 7th ed. 502, observes: "If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another. Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*, 4 Wheat. 519, 4 L. ed. 630: 'By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.' The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'" The concluding words of this quotation seem very comprehensive; but they do not fully answer the problem we are here confronted with. The words "proceed upon inquiry" suggest the further question, inquiry of what? May such inquiry be so limited as to exclude therefrom any fact or facts the will of the legislature may dictate? If so, then the inquiry may be narrowed by the legislative will, to the ascertainment of some insignificant fact or facts by the jury, and the state still be able to successfully contend that the right of trial by jury has been preserved. This cannot be. The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise, this provision of our Constitution, found also in varying language in all the Constitutions of the Union, state and Federal, treasured by a free people for generations as one of the principal safeguards of their liberties, would be rendered void, and utterly fail in the purpose which our people have always believed it was intended to accomplish. Mr. Black on *Constitution-*
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al Law, 2d ed. 519, says: "The Constitutions were intended not merely to secure the right of trial by jury, but also to insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now, it is evident that it would be entirely feasible for a state legislature, if so minded, to impose such onerous and oppressive restrictions or conditions upon this right as to make it practically unavailing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit and intent of the constitutional provision, and the courts would hold any such restrictions upon the right as not less unconstitutional than the total denial of it." In the case of *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228, 234, Judge Folger, speaking for the New York court of appeals, said: "Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property." This language was quoted with approval by the supreme court of Minnesota in *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 795; *Plimpton v. Somerset*, 33 Vt. 283; *King v. Hopkins*, 57 N. H. 334, 352; *Wynehamer v. People*, 13 N. Y. 378, 442.

We believe enough has been said to show that the sanity of the accused at the time of committing the act charged against him has always been regarded as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act. It seems to us the law could as well exclude proof of any other substantive fact going to show his guilt or innocence. If he was insane at the time to the extent that he could not comprehend the nature and quality of the act,—in other words, if he had no will to control the physical act of his physical body,—how can it in truth be said that the act was his act? To take from the accused the opportunity to offer evidence tending to prove this fact is, in our opinion, as much a violation of his constitutional right of trial by jury, as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act. The maxim, "An act done by me against my will is not my act," may, without losing any of its force, be paraphrased to fit our present inquiry as follows. "An act done by me without my will, or in the absence of my will, is not my act."

Learned counsel for the state contend that the legislature has the power to eliminate the element of intent from any and all crimes, and that it can provide punishment for the commission of any act it chooses to define as criminal, regardless of the intent or want of intent with which such act may be committed. In support of this contention, we are cited to instances of laws relating to the sale of liquors to minors and Indians, living off the earnings of a prostitute, and incest, under which it has been held that the want of intent on the part of the accused, and want of knowledge on his part as to the age or relationship of the person in connection with whom he commits the prohibited act, does not excuse him; as in *State v. Glindemann*, 34 Wash. 221, 101 Am. St. Rep. 1001, 75 Pac. 800; *State v. Zenner*, 35 Wash. 249, 75 Pac. 191; *State v. Constatine*, 43 Wash. 102, 117 Am. St. Rep. 1043, 86 Pac. 384. No doubt many other instances of this character might be cited, but none have been called to our attention, and we think the books do not contain any, where the constitutionality of a law has been sanctioned which conclusively imputes intent to commit crime to an insane person, or withholds from him the right to prove in his defense that he was insane at the time of committing the act. It seems too elementary to call for citation of authorities to show that the general rule is now and has been for centuries, at least in all common-law countries, that "there can be no crime without a criminal intent." *State v. Constatine*, 43 Wash. 102, 104, 117 Am. St. Rep. 1043, 86 Pac. 384; 4 Bl. Com. 20; 1 Bishop, New Crim. Law, § 287; 1 McClain, Crim. Law, § 112. In a note to *People v. Flack*, 11 L.R.A. 807, the learned editor has collated authorities illustrating the rule and its exceptions. While the general rule is subject to some exceptions, seemingly enabling the legislative power to eliminate the element of intent from certain crimes, as indicated by some of our previous holdings, it does not logically follow therefrom that an insane person can be rendered amenable to the *criminal laws* of the state as long as those laws have in them the element of punishment, which we will notice later. We italicize the words "*criminal laws*," for we desire to emphasize the fact that we have not for a moment considered or had in mind what may be done in the way of restraining and caring for the insane under those humane laws enacted for that purpose, which, if not now sufficient to protect society and the insane, can easily be made so without infringing any constitutional right by virtue of the abundant power residing in the legislature. 32 L.R.A. (N.S.)

We are now only concerned with the question of whether or not one accused of crime may be branded as a felon without any consideration whatever by the jury trying him of the question of his insanity at the time of committing the act charged against him. Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury. One so accused had this right at the time of the adoption of our Constitution, and we are of the opinion that the question is so inherently related to the guilt or innocence of all accused persons that it cannot be now taken away from them without violating these guarantees of the Constitution.

Since we conclude that the defendant has the right to have submitted to the jury the question of whether or not he was insane at the time of committing the act charged against him, in connection with and as bearing upon the question of his guilt, we need not notice the provisions of § 228 Rem. & Bal. Code, providing for the disposition of a convicted person who, in the judgment of the court trying him, was insane at the time of committing the act in which he was convicted, further than to observe that that section does not pretend to give to the accused the right to have the question of his insanity submitted to the jury in connection with and as bearing upon the question of his guilt, but leaves the question of his insanity entirely to the trial judge. This, of course, is not a jurisdiction upon that question.

Finally, we will briefly notice the valuable and ingenious argument put forward by learned counsel for the state, based upon the seeming assumption that the modern humane treatment of those convicted of crime practically removes them from the realm of punishment, and places them in a position but little different from those of our unfortunate members of society while the state is obliged to care for and restrain of their liberty, not because they have committed wrong, but because of the menace to society and themselves without fault of their own,—the insane. Learned counsel's premise may be better understood by quoting from his brief as follows: "The central idea upon which the whole fabric of criminal jurisprudence was formerly built was the idea that every criminal act was the product of a free will, possessing a full understanding of the difference between right and wrong, and full capacity

to choose a right or wrong course of action, and, as one error naturally and logically follows another, it was only natural and logical that society should have prescribed punishments as a central feature of its scheme for correction. A better understanding of crime and the science of criminology now convinces us that this theory is wholly wrong,—that a dominant percentage of all criminals are not free moral agents, but, as a result of hereditary influences or early environments, are either mentally or morally degenerate, or their crimes are committed under the degenerating influence of intoxicating liquor. An understanding of this fact has made readily apparent the folly of expecting that punishment could relieve the condition, and accordingly stocks, whipping posts, and chain gangs are giving way to workhouses, reformatories, and asylums, the purpose of which is to instruct, educate, and reform, rather than further to debase the individual; and the modern systems of criminal classification and segregation are themselves a recognition of the fact that every criminal is a concrete problem." Counsel then cites certain provisions of our laws providing in a measure for the classification and treatment of those convicted of crime, and, continuing, argues that the purpose of these laws "is to put in operation in this state a scheme of criminal jurisprudence which gives recognition to these ideas." The argument seems to be in its last analysis that, because of modern humane methods in caring for and treating those convicted of crime, there is no longer any reason for taking into consideration the element of will on the part of those who commit prohibited acts, when their guilt is being determined for the purpose of putting them in the criminal class for restraint and treatment. Learned counsel's premise suggests a noble conception, and may give promise of a condition of things towards which the humanitarian spirit of the age is tending; yet the stern and awful fact still remains, and is patent to all men, that the status and condition in the eyes of the world, and under the law, of one convicted of crime, is vastly different from that of one simply adjudged insane. We cannot shut our eyes to the fact that the element of punishment is still in our criminal laws. It is evidenced by the words "shall be punished," found in this very section defining the crime here charged against appellant. It is evidenced by these or similar words characterizing the treatment which the law imposes upon those convicted of crime in practically all parts of our Criminal Code prescribing the fate of the guilty. As long

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as this is the spirit of our laws, though it may be much mellowed in the treatment of the convicted, as compared with former times, the constitutional rights here invoked must be given full force and effect when an accused person is put upon trial to determine the question of his guilt of crime. We regret the necessity of holding that the legislature has exceeded its constitutional power; but we cannot escape the conclusion that § 2259, Rem. & Bal. Code (Laws 1909, p. 891, § 7), has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and is therefore unconstitutional.

The judgment of the learned trial court is reversed, with direction to grant appellant a new trial.

Crow and Mount, JJ., concur.

Rudkin, Ch. J., concurring:

Before discussing the validity of the legislative act under consideration, it becomes important to determine what the legislature has done or attempted to do. Section 7, Crim. Code 1909 (Rem. & Bal. Code, § 2259), declares that "it shall be no defense to a person charged with the commission of a crime, that at the time of its commission he was unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence." If the act stopped here, there could be no question as to the legislative intent. For the first time in history, so far as we are advised, the legislature of a civilized state has attempted to place the idiot, who hath no understanding from his nativity, the imbecile and the insane, who have lost their understanding through disease or mental decay, and the sane man, in the full possession of all his mental faculties, on an equal footing before the criminal law. But the legislature did not stop here. Section 31 of the act (Rem. & Bal. Code, § 2283) provides that "whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane, or an idiot or imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane, or in the insane ward of the state peniten-

tiary, until such person shall have recovered his sanity. In determining whether any person convicted of a crime was at the time of the commission thereof unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or is at the time of his conviction or sentence insane, or an idiot or imbecile, the court may take counsel with one or more experts in the diagnosis and treatment of insanity, idiocy, and imbecility, and make such personal or other examination of the defendant as in his judgment may be necessary to aid in the determination." When these two sections are construed together, we are prone to believe that the legislature did not intend to punish one for the commission of a crime, when, by reason of his insanity, idiocy, or imbecility, he was unable to comprehend the nature and quality of his act, or to understand that it was wrong, but rather that it intended to minimize the well-known evil resulting from the all too frequent interposition of the defense of insanity in homicide cases, where no other defense is available, by changing the time and mode of trial of the issue of insanity. We reach this conclusion the more readily for the reason that any other construction of the statute would bring it in conflict with the Constitution. Assuming, therefore, for the present, that the legislature simply intended to change the time and mode of trial of the issue of insanity, § 2283, *supra*, is lacking in every essential requirement of due process of law. No attempt has ever been made to give a complete and exhaustive definition of the phrase, "due process of law," or its equivalent, "the law of the land," and it has been said by the Supreme Court of the United States that it is the part of wisdom to leave their meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The exposition, however, of the term "due process of law," or "the law of the land," by Mr. Webster, in the Dartmouth College Case, has generally been accepted by both courts and law writers, *viz*: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be consid-

ered the law of the land." Measured by this definition, the deficiencies in the act under consideration become at once apparent. It provides that whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable, by reason of his insanity, idiocy, or imbecility to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane, or an idiot or an imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane, or in the insane ward of the state penitentiary, until such person shall have recovered his sanity; but how is the court to form a judgment on the question of insanity, idiocy, or imbecility? No such charge is preferred against the accused and, under the express provisions of another section of the act, no testimony or other proof of the mental condition of the accused shall be admitted in evidence. The court must therefore base its judgment on the appearance of the accused, or on other matters *dehors* the record. But, aside from this, the accused has no notice of the proceedings against him no opportunity to offer testimony, or to be heard in his defense. The court may adopt its own procedure, free from all constitutional restraints, may counsel with experts if it will, or act as its own expert if it chooses. It is almost needless to say that such a proceeding is an absolute nullity, if the question of insanity be a material one.

In *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794, the court had under consideration an act of the legislature of that state, providing for the commitment of insane persons, and, although the act was far more complete in its details than is the act now before us, it was held that it violated the due process clause of the state and Federal Constitutions. In the course of its opinion the court said: "It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the Constitution. And while the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the au-

thorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and to submit evidence. The question here is not whether the tribunal may proceed in due form of law and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the Constitution and without due process of law. . . . We are not speaking of what every honorable and humane officer would do when a case is before him, but of what the statute will permit an officer to do."

For these reasons, if the question of insanity is at all a material one under the statute, the procedure prescribed for its determination amounts to a palpable denial of due process of law. But if we must accept the view that the legislature intended to abrogate the defense of insanity in its entirety, and to place the sane and the insane, the idiot, and the imbecile on an equal footing before the criminal law, we are still of opinion that the act is unconstitutional and void. The state seeks to uphold it on two grounds. First, on the ground that it is within the police power of the state to eliminate the question of intent in all criminal cases; and, second, on the ground that under modern theories the lawbreaker is taken into custody by the state for his own amelioration and reformation, and not as a punishment for crime. In other words, that the theory of legal punishment for crime is a relic of a barbarous age. True it is that in many cases the person accused of crime does not intend to commit the particular act which constitutes the crime. Such is the case in involuntary manslaughter, the sale of adulterated food, the sale of intoxicating liquors to minors, habitual drunkards, or insane persons, adultery, incest, statutory rape, and other crimes that might be mentioned. In the case of involuntary manslaughter, the accused does not intend to commit the homicide, but does intentionally or negligently commit the wrongful act which results in the homicide. The man who sells adulterated food or intoxicating liquors may not intend to sell the particular kind of food, or to the prescribed class, but he does intend to make the sale. The man who commits adultery

may not have knowledge of the married state of his paramour. The man who commits incest may not have knowledge of his relationship to the other party to the crime, and the man who commits statutory rape may not know the age of his victim; but in all such cases the man is a free moral agent, the master of his own destiny, and has it within his power to determine whether the act he is about to commit is or is not a crime, or to refrain from its commission altogether. There is little analogy between such a man and the idiot, the imbecile, or the person who is insane to the degree defined by our statute. It will be conceded that the legislature has a broad discretion in defining and prescribing punishment for crime, but, broad and pervading as the police power is, it is not without constitutional limitations and restraints, and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid.

The argument that persons are no longer punished for their crimes is illusory and unsound. In the first place, the defense of insanity is almost invariably interposed in capital cases, where there is no other defense, and the man who is deprived of his life for crime is punished, whatever the engine of destruction may be. The man who is deprived of his liberty is also punished, and you cannot change the fact by changing the name. Liberty regulated by law is the birthright of every citizen, and liberty means freedom from arrest and restraint. It means more than this. It means freedom of action, freedom in the pursuit of any lawful business or calling, freedom in the control and use of one's property, so far as its use does not infringe upon the rights of others, and freedom in the exercise and enjoyment of all the rights, privileges, and immunities of citizenship. You cannot convince the prisoner in his cell that he is not undergoing punishment for his crime, and mankind in general will share his doubts. But why should we attempt to uphold the statute on humane grounds, when it is an apparent and palpable attempt on the part of the legislature to punish those whom it fears the tribunal created by the Constitution will acquit? All will agree that the unfortunate insane, who are dangerous to themselves or to others, should be restrained of their liberty for their own protection and the protection of society, until the danger is removed by death or complete restoration to sanity; but few will contend or agree that they should be punished or restrained beyond this. We are not

entirely without authority upon this question. In 1899 the legislature of North Carolina passed an act which provides that "when any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial upon the ground of insanity, . . . the court before which such proceedings are had shall, in its discretion, commit such person to the Hospital for the Dangerous Insane, to be kept in custody therein for treatment and care," etc. And that "no person acquitted of a capital felony on the ground of insanity, and committed to the Hospital for the Dangerous Insane, shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly." Laws 1899, chap. 1, §§ 65, 67. This act was declared unconstitutional in *Re Boyett*, 136 N. C. 415, 67 L.R.A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, 1 A. & E. Ann. Cas. 729. In 1873 the legislature of Michigan passed an act providing that any person acquitted of murder and other high crimes by reason of insanity should be sentenced to confinement in the insane hospital of the state's prison, and that such person could only be discharged therefrom by the governor upon a certificate of the medical inspector of the insane asylum, and the circuit judge of the circuit from which he was sent, that he is no longer insane. This act was also declared unconstitutional in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, on the ground that it denied to the accused the protection of the due process clause of the Constitution. There would seem to be little difference between a person found guilty of the commission of a crime while insane, and one found not guilty by reason of insanity, for in both cases the two facts coexist, viz., violation of the law and insanity. The opinion in the latter case was delivered by Judge Campbell, and concurred in by Judge Cooley and Chief Justice Graves, jurists, who were certainly not lacking in humanity, or in a knowledge of constitutional restraints on legislative power. In concluding his opinion Judge Campbell said: "It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has been allowed to go under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science, and made the name of experts unsavory in the community. No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions, and not destroying the safeguards of private liber-

ty." Like all things earthly, our jury system has its imperfections. Jurors are only human. Their passions and their prejudices follow them into the jury box, and not infrequently find expression in their verdicts. The disposition of juries to convict on inadequate testimony in prosecutions for certain crimes has become so notorious that nearly every state legislature has found it necessary to provide that in such cases the prosecuting witness must be corroborated. On the other hand, juries will sometimes acquit when the evidence of guilt seems all but conclusive. This result usually happens where there is no public sentiment behind the prosecution, either because of the nature of the crime charged, or the particular circumstances leading up to its commission. But, as well said by Mr. Justice Campbell, the remedy for acquittals through maudlin sentiment, or in response to popular clamor, must be sought by correcting false notions, and not by destroying the safeguards of private liberty.

There are other objections to the act which would render it unconstitutional in individual cases. It provides what shall or may be done with persons who are insane, idiots, or imbeciles at the time of their conviction, and the clear implication from this is that such unfortunates shall be placed on trial for their crimes. In that event, what becomes of the constitutional guaranties that the accused shall have the right to appear and defend in person, to be informed of the nature and cause of the accusation against him, to meet the witnesses, etc.? Of what possible avail are these guaranties to a man bereft of reason? But, without pursuing the inquiry further, I am of opinion that the act is unconstitutional in any aspect we may view it, and I therefore concur in the judgment of reversal.

Chadwick, J., concurs. Dunbar, J., concurs on the first ground discussed by Rudkin, Ch. J. Gose, J., concurs in the opinion of the chief justice.

Morris, J., dissenting in part:

I am not in accord with the views of my brethren as expressed in the foregoing opinions, in so far as it is sought to be shown that it is not within the power of the legislature to say that insanity shall not be a defense to crime. I can find no such inhibition in the Constitution, either expressed or implied. No man, whether sane or insane, has any constitutional right to commit crime, and, when the legislature provides that the criminality of an act shall be determined by the act itself, and not by the mental condition of the man who com-

mits it, it violates none of the constitutional rights of the man accused of crime. In so far as insanity has ever been permitted to determine the noncriminality of an act otherwise criminal, it has been by virtue of the law as given under legislative, and not constitutional, authority. The power to create is the power to destroy, and the same law-enacting body which has said that the insane man cannot be guilty of the commission of a crime may destroy that immunity, and determine the character of his act by the same rules as determine the act of the sane man. It is not our purpose to discuss the subject other than in its constitutional aspect. Otherwise, we might add, and why not, the defense of insanity is permitted not because of the inability of the insane man to do the thing complained of, but because of his mental condition there is no moral responsibility, and hence there should be no legal responsibility. It is not the duty of the state to inquire into the moral guilt or innocence of those whom it adjudges guilty of crime, as it derives its power to determine guilt or innocence only as it finds its law violated and its commandments broken by the individual for whose act there is in law no justification. No defense has been so much abused, and no feature of the administration of our criminal law has so shocked the law-loving and the law-abiding citizen, as that of insanity, put forward not only as a shield to the poor unfortunate bereft of mind or reason, but more frequently as a cloak to hide the guilty for whose act astute and clever counsel can find neither excuse, justification, nor mitigating circumstances, either in law or in fact. It is therefore not strange that there should be found a legislative body seeking to destroy this evil, and wipe out this scandal upon the administration of justice. While an innovation to us, such a law is neither unknown nor untried, as it has been the law of England since 1883; and while its constitutionality cannot be questioned, it being an act of Parliament, and not subject to such attack, its enforcement must have proved its value, and obtained the approval of the English people, or some way would have been found to bring about its repeal. I therefore am of the opinion that the legislature has every right to pass a law which destroys this much abused defense.

I cannot, however, vote to sustain the law for the reasons given by Rudkin, Ch. J., in the discussion of the second objection raised. Insanity is a question of fact, and such a fact as can only be determined as other material facts are determined, and not left to the arbitrary announcement of
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a court unaided by the only means known to our law for the ascertainment of facts in a judicial procedure. The question of insanity should, therefore, be determined by the jury as any other fact, and if, in their judgment, the person accused committed the act, but was insane at the time of its commission, they should, in my opinion, have legislative authority to so determine. Such a fact, then, having been judicially determined with the preservation of all the constitutional rights of the accused, authority should be given the court to pronounce such judgment as the legislature in its wisdom may determine. Such is the English law above referred to, and such a law would not be subject to the defects shown in the opinion of the chief justice.

For these reasons, I concur in the result.

Fullerton, J., dissenting:

I am of the opinion that the law is constitutional, and that it should be given effect by the courts.

WISCONSIN SUPREME COURT.

JULIA F. COOK, Appt.,

v.

RICE LAKE MILLING & POWER COMPANY, Resp't.

(— Wis. —, 130 N. W. 953.)

Highway — engine on abutting property — frightening horse — liability.

The owner of property who uses thereon, for legitimate purposes, a portable engine in a depression which an adjacent highway crosses on a bridge, is not liable for injury caused to a traveler by the fright of his horse at smoke issuing from the stack in the ordinary operation of the engine, although the stack rises only a short distance above the level of the bridge and is likely to frighten horses, where the engine has been in operation for a considerable

Note. — As to liability for discharge of steam near street or highway so as to frighten horses, see note to *Ft. Wayne Cooperage Co. v. Page*, 23 L.R.A.(N.S.) 946.

As to liability of railway company for frightening horses by escape of steam from engine standing on highway crossing, see note to *Weller v. Lehigh Valley R. Co.* 24 L.R.A.(N.S.) 1202.

As to duty to prevent escape of steam from engine in highway so as to frighten horses, see note to *Lane Bros. Co. v. Barnard*, 31 L.R.A.(N.S.) 1209.

As to liability for placing near a highway object calculated to frighten horses, see note to *Davis v. Pennsylvania R. Co.* 12 L.R.A.(N.S.) 1152.

time without interference with the convenient and safe use of the bridge.

(Siebecker and Kerwin, JJ., dissent.)

(April 5, 1911.)

PPEAL by plaintiff from a judgment of the Circuit Court for Sawyer County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. Affirmed.

Statement by Marshall, J.:

Action to recover for a personal injury. The issues sufficiently appear by the following, established by the evidence:

In the regular course of legitimately erecting a power plant adjacent to a public highway where it crossed the Red Cedar river at Rice Lake, Wisconsin, plaintiff placed and operated on its own land a small portable engine. The fire box was 5 to 15 feet from the side of the bridge and the smokestack further away. The machine sat on a lower level than the top of the bridge. The smokestack was 10 to 18 feet from the side of, and reached 5 to 10 feet above, the roadway. Smoke from the stack was liable to be carried toward the bridge, and, as proved to be the case, frighten horses of ordinary gentleness. The engine was a necessary appliance in constructing the power plant. It might have been located a little further from the bridge, and the smokestack carried somewhat higher, so as to have lessened, perhaps, danger of frightening horses. It was operated with due care. No unusual or unnecessary noise or emission of smoke from the smokestack occurred. The smokestack was readily observable by a person approaching the vicinity of the engine on the roadway. For some time before the occasion in question, the engine had been used during working hours, and without interfering with the convenient, safe use of the bridge. No arrangement was made to warn travelers of the presence of the engine, or to avoid frightening horses. The engine was operated in the ordinary way, leaving users of the highway to look wholly after their own safety. As plaintiff, in the daytime, with others, one of whom was the driver, was riding in a one horse drawn vehicle across the bridge, unconscious of the location of the engine, the horse became frightened from smoke suddenly escaping from the smokestack and blowing toward the roadway, ran away, threw her out of the conveyance, and seriously injured her. The particulars of the injury were sufficiently established to enable a jury to assess damages.

There was a motion for a directed verdict 32 L.R.A.(N.S.)

in defendant's favor, which was denied. There was a special verdict as follows: The engine was negligently placed and operated with reference to use of the highway for driving thereon with horses of ordinary gentleness. Defendant failed to exercise ordinary care in locating and operating the engine. Such failure was the proximate cause of the injury, without any want of ordinary care on her part or of the driver contributing thereto. She was damaged in the sum of \$4,950.

The court refused judgment on the verdict, and on motion reversed the three first findings, and rendered judgment in defendant's favor.

Messrs. W. H. Frawley and T. F. Frawley, for appellant:

Property owners must use their property without injury to persons or property.

Holman v. Mineral Point Zinc Co. 135 Wis. 132, 128 Am. St. Rep. 1016, 115 N. W. 327; Rogers v. John Week Lumber Co. 117 Wis. 5, 93 N. W. 821; McCann v. Strang. 97 Wis. 551, 72 N. W. 1117; Price v. Oakfield Highland Creamery Co. 87 Wis. 536, 24 L.R.A. 333, 58 N. W. 1039; Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629; Pennoyer v. Allen, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609; Rushmer v. Polsue [1906] 1 Ch. 234, 75 L. J. Ch. N. S. 79. 54 Week. Rep. 161, 93 L. T. N. S. 823, 22 Times L. R. 139, 4 A. & E. Ann. Cas. 373; LeBlanc v. Orleans Ice Mfg. Co. 121 La. 249, 17 L.R.A.(N.S.) 287, 46 So. 226; Wood. Nuisances, 3d ed. § 498; 21 Am. & Eng. Enc. Law, 2d ed. p. 694; McCarty v. Natural Carbonic Gas Co. 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 A. & E. Ann. Cas. 840; Wright v. Compton, 53 Ind. 337. 2 Mor. Min. Rep. 189; Snyder v. Philadelphia Co. 54 W. Va. 149, 63 L.R.A. 896, 102 Am. St. Rep. 941, 46 S. E. 366, 1 A. & E. Ann. Cas. 225; Judd v. Fargo, 107 Mass. 264; Parker v. Union Woolen Co. 42 Conn. 399; Knight v. Goodyear's India Rubber Glove Mfg. Co. 38 Conn. 438, 9 Am. Rep. 406; Wolf v. Des Moines Elevator Co. 126 Iowa, 659, 98 N. W. 301, 102 N. W. 517; Heinmiller v. Winston Bros. 131 Iowa, 32. 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Ft. Wayne Cooperage Co. v. Page, — Ind. App. —, 82 N. E. 86.

Liability is imposed where a horse has been frightened by an object controlled by defendant.

Peterson v. Adams Exp. Co. 111 Iowa, 572, 82 N. W. 963; Maiss v. Metropolitan Amusement Asso. 241 Ill. 177, 89 N. E. 268; McCann v. Consolidated Traction Co. 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888.

Liability is imposed where horses are

frightened by objects located on private property of defendant.

Wood, Nuisances, 3d ed. § 290; Wharton, Neg. §§ 107, 853, 983; Elliott, Roads & Streets, 2d ed. 104, 616; Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38; House v. Metcalf, 27 Conn. 631; Lynn v. Hooper, 93 Me. 46, 47 L.R.A. 752, 44 Atl. 127; Lobenstein v. McGraw, 11 Kan. 645; Snyder v. Philadelphia Co. 54 W. Va. 149, 63 L.R.A. 896, 102 Am. St. Rep. 941, 46 S. E. 366, 1 A. & E. Ann. Cas. 225.

Liability is imposed where horse has been frightened by smoke and steam escaping from engines located on private property of individuals.

Elliott, Roads & Streets, 2d ed. § 616; Thomp. Neg. §§ 125 et seq.; Shearm & Redf. Neg. § 355; State ex rel. Detienne v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009; Illinois C. R. Co. v. Com. 29 Ky. L. Rep. 756, 96 S. W. 467; Crocker v. McGregor, 76 Me. 283, 49 Am. Rep. 611; Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401; Mendenhall v. Philadelphia, W. & B. R. Co. 202 Pa. 427, 51 Atl. 1028; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143; Barber v. Manchester, 72 Vt. 675, 45 Atl. 1014; Vansant v. McMenamy, 41 Pa. Super. Ct. 509; Wolf v. Des Moines Elevator Co. 126 Iowa, 659, 98 N. W. 301, 102 N. W. 517; Heinmiller v. Winston Bros. 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Ft. Wayne Cooperage Co. v. Page, — Ind. App. —, 82 N. E. 83, 170 Ind. 585, 23 L.R.A.(N.S.) 946, 84 N. E. 145.

Messrs. Clarence C. Coe, Arthur E. Coe, and James Robbins, for respondent:

Steam rollers and traction engines may be operated in the street in the usual manner, without incurring liability, although they are likely to and do frighten horses.

Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 A. & E. Ann. Cas. 435; Cahoon v. Chicago & N. W. R. Co. 85 Wis. 570, 55 N. W. 900; Abbot v. Kalbus, 74 Wis. 504, 43 N. W. 367; Maanum v. Madison, 104 Wis. 272, 80 N. W. 591.

Marshall, J., delivered the opinion of the court:

The judgment must be affirmed. The case seems to have been prosecuted upon the theory that if a person use his premises in the prosecution of legitimate business without anything unusual about it, or notice by any previous occurrence that the kind and manner of use may frighten horses rightfully in the vicinity,—though the use has been enjoyed for a considerable length of time without any such difficulty,—he is nevertheless liable to one who may be injured by such use, if the occurrence be one

liable to take place under the circumstances. Neither precedent nor principle supports that.

All actions for damages on the ground of negligence depend on failure of duty of the defendant,—failure to exercise ordinary care,—a legal wrong to the defendant. There is no evidence to establish any such fault in this case,—no evidence to warrant the thought that a person of ordinary care would hesitate to locate a small engine near a highway on his own premises, as in this case, for use in the ordinary way in a legitimate industrial enterprise, and make such use, till shown by events that it was liable to be unreasonably disturbing to persons using the highway in the ordinary way. There was no evidence that any horse had been frightened by operation of the engine before the occurrence in question; no evidence but that engines were customarily operated on highways and near highways, as occasion required; nothing to take the case out of the ordinary; no evidence of unusual noise, escape of smoke, unusual use, or previous frightening of horses by operation of the engine; no evidence of any sort tending to show that respondent used his own premises in a manner inconsistent with ordinary care; no evidence to bring the case within the field of responsible fault on principle or on any well considered authority. It makes no difference because it can be seen, looking backward, that possibly, or even probably, the arrangements might have been less dangerous. These cases are not to be examined for the purpose of testing the conduct of a defendant by what might have been done, or to discover some excuse for adjudging a liability, but for the purpose of testing defendant's conduct by the standard of ordinary care and legal duty.

Notwithstanding the foregoing, there are some seventy-five, more or less, adjudications cited to our attention in the brief of counsel for appellant, as having some bearing on this case. Counsel should select authorities with more care. Parker v. Union Woolen Co. 42 Conn. 399, where the claim of negligence was not passed upon at all, does not fit this case; House v. Metcalf, 27 Conn. 631, and many cases that might be classed with it, where the object which caused the mischief was within the highway boundaries, and had notoriously been a menace to the safety of persons traveling there with horses; Forney v. Geldmacher, 75 Mo. 113, 42 Am. Rep. 388, where the defendant wilfully threw a stream of water on a horse which was lawfully in the highway; Winona v. Botzet. 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 160 Fed. 321, where the defendant unnecessarily used a

whistle, known by experience to imperil the safety of persons using the street with horses; and a multitude of like cases are cited to us. Manifestly they are wholly irrelevant. All cases cited have not been examined, but enough have to warrant suggesting that none fit this case. If there be one now and then, it is so out of harmony with fundamental principles as not to be worthy of consideration.

In this class of cases it must not be forgotten that some real, appreciable, efficient fault, tested by the standard of care exercised by the great mass of mankind, is necessary to liability. The mere fact that a person was injured by the act of another is not sufficient. Further, it must not be forgotten that a person has the right to use his own property in the usual conduct of his business, characterized with the usual incidents. A highway does not constitute a burden on lands abutting thereon, so as to deprive the owners of such use. *Davis v. Pennsylvania R. Co.* 218 Pa. 463, 12 L.R.A. (N.S.) 1152, 67 Atl. 777, is a good illustration. From that this rule was evolved: "An owner of real estate has the right to use his property for every lawful purpose 32 L.R.A.(N.S.)

for which he may desire to use it, and is only required to exercise ordinary care in that case, in order to relieve him from liability for damages on account of injuries incidentally resulting to a traveler on the highway."

Ordinary care under such rule contemplates that the owners of lands abutting on a highway may freely use the same in the regular conduct of their business, not creating unusual or unnecessary noises or appearances, known to be liable to dangerously disturb passing horses under control of persons of ordinary care and capability, and though, nevertheless, such horses may sometimes shy or even run away because of something outside the right of way being done or maintained by the owner of the land, such dangers the user of the highway accepts, in the very nature of things, else the burdens on abutting land would be unreasonable and intolerable.

The judgment is affirmed.

Siebecker and Kerwin, JJ., dissenting.

Vinje, J., took no part.

Petition for rehearing denied June 1, 1911.

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ABANDONMENT.

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Of privilege secured by *ad quod damnum* proceedings, see Eminent Domain, 3.

Sufficiency of proof of abandonment of right to flow lands, see Evidence, 34.

As question for jury, see Trial, 12.

ABATEMENT AND REVIVAL.

By dissolution of corporation, see Corporations, 14.

ACCESS.

To highway, see Estoppel, 1; Evidence, 6.

ACCIDENT.

Evidence of other accidents, see Evidence, 23, 24.

ACCORD AND SATISFACTION.

1. One receiving a check for less than the amount in dispute on an unliquidated claim, which is tendered upon express condition that it shall be in full satisfaction, must return it or be bound by the condition, unless it is waived. *Seeds Grain & Hay Co. v. Conger*, 32: 380, 93 N. E. 892, — Ohio St. —.

2. Failure of one who has tendered a check for less than is claimed on an unliquidated disputed demand, upon express condition that it shall be received in full satisfaction, to reply upon receiving notice that the check has been placed to his credit but does not close the account, does not amount to a waiver or withdrawal of the condition. *Seeds Grain & Hay Co. v. Conger*, 32: 380, 93 N. E. 892, — Ohio St. —.

ACKNOWLEDGMENT.

An acknowledged deed for land which, with the consent of the grantors, has been altered after delivery, so as to make it describe a larger boundary, to be effective as a deed of the larger tract must be reacknowledged. *Waldron v. Waller*, 32: 284, 64 S. E. 964, 65 W. Va. 605.

ACTION OR SUIT.

Abatement of, see Abatement and Revival.

Duty of stranger to, to defend, see Banks, 11.

By stockholder to recover stock sold for delinquent assessment, see Corporations, 12.

Actions to recover damages for the suffering which one undergoes before death because of another's negligence, and for the death itself, cannot be joined. *Hendricks v. American Express Co.* 32: 867, 128 S. W. 1089, 138 Ky. 704. (Annotated)

AD QUOD DAMNUM PROCEEDINGS.

See Eminent Domain.

ADVERSE POSSESSION.

Of water, see Waters, 1.

1. No title, right, or privilege other than those acquired by the *ad quod damnum* proceedings can be secured by the institution of such proceedings to acquire a right to flow land for a millpond followed by possession and use alone, no matter how long continued. *Gross v. Jones*, 32: 47, 122 N. W. 681, 85 Neb. 77.
As to tenants in common.

2. If one cotenant make an executory contract for sale to a stranger, of the entire tract, not merely his interest, and the purchaser enter into actual possession, this is an ouster of the other cotenant, and such possession for the period of the statute of limitations will bar his rights, without other notice of adverse claim. *Lloyd v. Mills*, 32: 702, 69 S. E. 1094, — W. Va. —. (Annotated)

Color of title.

3. A quitclaim deed for land is good color of title on which to base adversary possession under the statute of limitations. *Lloyd v. Mills*, 32: 702, 69 S. E. 1094, — W. Va. —.

Extent and kind of possession.

4. Actual possession in drilling and producing oil and gas by a lessee of land under the usual lease for production of oil and gas is actual possession of the land by the lessor for adversary possession. *Lloyd v. Mills*, 32: 702, 69 S. E. 1094, — W. Va. —.

ADVERTISEMENTS.

Recovery for publication of, in Sunday paper, see Sunday, 2.

ALIMONY.

See Divorce and Separation, 4-6.

ALTERATION OF INSTRUMENTS.

Necessity of reacknowledgment after alteration of delivered deed, see Acknowledgment.

Alteration of deed after delivery, see also Deeds.

Sufficiency of proof as to alterations wrongfully made, see Evidence, 35.
Reformation of altered deed, see Reformation of Instruments.

Question for jury as to whether alteration was made without consent of other party, see Trial, 6.

1. A "material alteration" of a written instrument is an intentional act done upon it, after it has been fully executed, by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect. *O. N. Bull Remedy Co. v. Clark*, 32: 519, 124 N. W. 20, 109 Minn. 396.

2. The cross marking of a material provision in a written instrument, after its execution, by one of the parties thereto, without the consent of the other, with the intention of canceling or erasing it, constitutes a material alteration of the instrument. *O. N. Bull Remedy Co. v. Clark*, 32: 519, 124 N. W. 20, 109 Minn. 396.

(Annotated)

3. The unauthorized alteration of a deed by the grantee so as to make it describe land not conveyed thereby will not entitle the grantor, by a suit in equity, to set aside his deed and be reinvested with the title conveyed. *Waldron v. Waller*, 32: 284, 64 S. E. 964, 65 W. Va. 605.

4. An alteration of the printed figures forming part of the date of a note written on a printed blank, so as to make them correspond with the figures written in ink in the body of the note, is not so material as to avoid the note. *Lombardo v. Lombardini*, 32: 515, 106 Pac. 907, 57 Wash. 352.

(Annotated)

AMBIGUITY.

In statutes, see Statutes, 3.

AMENDMENT.

Application of 6th Amendment of Federal Constitution to states, see Constitutional Law, 1.

Of pleading, see Pleading, 2.

AMUSEMENTS.

On Sunday, see Sunday, 1.

One who, for the purpose of giving an exhibition for pay, rents a new state armory which has been erected under the supervision of a competent architect, is not answerable for latent defects in the balcony railing which appears to be sufficient; nor is he bound to have the railing

inspected by competent experts, so as to be liable, in the absence of such inspection, for injury to a patron who is injured by its giving way at a time when the balcony is not overcrowded, but patrons are leaning against the railing to get a better view of the performance. *Greene v. Seattle Athletic Club*, 32: 713, 111 Pac. 157, — Wash. —.

(Annotated)

ANIMALS.

Fright of horse on highway, see Highways, 2.

Fright of horse by engine on private property, see Negligence, 1.

Injury to, by barbed wire, see Nuisances, 4.

Fright of horse at railroad crossing, see Railroads, 4, 6.

Warranty of horse on sale, see Sale, 2.

APPEAL AND ERROR.

Effect of failure to pursue remedy by, on right to habeas corpus, see Habeas Corpus.

Effect of dissolution of corporation on writ of error sued out against, see Corporations, 15.

1. An appeal from an order dismissing a bill seeking an injunction against the sale under execution of property alleged to be exempt, and directing the sheriff to proceed with the sale, after refusing to enlarge the preliminary injunction so as to extend the time of its operation, is not prevented by a statute denying an appeal from a refusal of the court to enlarge an injunction. *Neblett v. Shackleton*, 32: 577, 69 S. E. 946, 111 Va. 707.

Record on appeal.

2. Error in giving and refusing instructions cannot be considered on appeal, if those given and refused are not brought into the record by bill of exceptions, as required by law. *Carr v. State*, 32: 1190, 93 N. E. 1071, — Ind. —.

Objections and exceptions; raising questions in lower court.

3. Where only a portion of the charge is excepted to and included in the bill of exceptions, in order to permit a review by the appellate court, the bill must show that it includes the whole charge on the subject-matter covered by the exception. *Clute v. Clintonville Mut. F. Ins. Co.* 32: 240, 129 N. W. 661, 144 Wis. 638.

Hearing and determination generally.

4. Where evidence is admitted without objection to support a ground of negligence not charged in the complaint in an action to recover for wrongful death, and the cause is tried on that issue, the court on appeal will treat the pleadings as amended to conform to the proof. *Pulaski Gas Light Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

5. Whether or not a convict was given too light a sentence cannot be reviewed on his appeal, at the instance of the state. *State v. McDowell*, 32: 414, 112 Pac. 521, — Wash. —.

Presumptions.

6. The appellate court will not, to save error in refusing to admit opinion evidence, assume facts which would go merely to its weight, and might have been developed on cross-examination. *Adler v. Pruitt*, 32: 889, '53 So. 315, — Ala. —.

7. A mere statement in a motion for new trial of a prosecution for forgery, that there was a variance between the instrument set out in the indictment and that produced at the trial, is not sufficient to warrant a presumption by the appellate court that such variance existed, if there is nothing in the evidence or findings to show that it did exist. *Forcy v. State*, 32: 327, 131 S. W. 585, — Tex. Crim. Rep. —.

Discretionary matters.

8. Whether a sufficient foundation has been laid for the admission of documentary evidence is addressed to the discretion of the trial court. *O. N. Bull Remedy Co. v. Clark*, 32: 519, 124 N. W. 20, 109 Minn. 396.

9. The appellate court will not interfere with the discretion of the trial court in ruling upon the competency of experts to testify as to the mental capacity of a testator. *Auld v. Cathro*, 32: 71, 128 N. W. 1025, 20 N. D. 461.

Review of facts.

10. The court of appeals cannot consider the question of the reasonableness of a municipal ordinance as one of fact after a finding in its favor has been affirmed by the appellate division. *Rochester v. Macauley-Fien Milling Co.* 32: 554, 92 N. E. 641, 199 N. Y. 207.

Grounds for reversal.

11. Refusal of the trial court, which is hearing a case without a jury, to strike evidence which is incompetent because not responsive to the question asked, is not ground for reversal where it is apparent that such evidence was not regarded by the court as a material factor in the determination of the facts found, which are sustained by competent evidence. *Re Fallon*, 32: 486, 124 N. W. 994, 110 Minn. 213.

12. The verdict of a jury will not be reversed on account of the admission of improper testimony or the giving of an erroneous instruction, when it clearly appears that if such evidence had been excluded and such instruction refused the result could not thereby have been changed. *State v. Davis*, 32: 501, 69 S. E. 939, — W. Va. —.

13. A judgment for plaintiff in an action against a municipal corporation to recover for negligent injuries inflicted by its agent will not be reversed because the only proof of the agency put in by plaintiff were inadmissible declarations of the agent himself, where defendant supplies the missing proof of agency. *Hewitt v. Seattle*, 32: 632, 113 Pac. 1084, — Wash. —.

14. Error in defining gross negligence is not reversible in an action to hold a railroad company liable for injury to a gratuitous passenger, if, under the circumstances, defendant would be liable in case of ordinary negligence, which was amply

shown by the evidence. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

15. It is not reversible error as a comment on evidence, for the court to instruct the jury not to waste time upon a denial in the pleadings of proper presentation of claim in an action to hold a municipality liable for negligent injury, where proper presentation of the claim is not denied at the trial and a copy of the claim is in evidence before the jury. *Hewitt v. Seattle*, 32: 632, 113 Pac. 1084, — Wash. —.

16. It is error to refuse a requested instruction pointing out particular phases of the evidence, although an instruction has been given dealing in general terms with the point involved. *Penny v. Atlantic C. L. R. Co.* 32: 1209, 69 S. E. 238, 153 N. C. 296.

17. A case will not be reversed because of remarks of counsel in argument as to the effect of instructions which had been given by the court, if they are no more than correct inferences to be drawn from the record. *Pulaski Gas Light Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

18. A remark of the trial judge, in overruling an objection that the questions asked a witness were leading, that he was only thirteen years old, very young, that such questions could be asked such witnesses, is not reversible error as an unconstitutional comment on the facts, where the testimony as to his age does not conflict. *State v. McDowell*, 32: 414, 112 Pac. 521, — Wash. —.

19. Merely informing the jury, which has requested the testimony of a witness to be read to it on Sunday, that the request will be complied with the following morning, will not require a reversal of the cause if the jury do not wait for the evidence but agree on a verdict on Sunday. *Auld v. Cathro*, 32: 71, 128 N. W. 1025, 20 N. D. 461.

20. Refusal to submit a special question to the jury is not error, if, by findings on the issues submitted to them, the jury answer the question against the contention of the one taking the exception. *Manning v. Anthony*, 32: 1179, 94 N. E. 466, — Mass. —.

21. A judgment will not be reversed because the jury did not follow instructions which were so erroneous that doing so would have required reversal. *Thornton v. Dow*, 32: 968, 111 Pac. 899, — Wash. —.

22. The appellate court will not interfere with a verdict of \$25,000 for injury to a man in perfect health, thirty-nine years old, earning \$1,800 per year, where the injury partially paralyzed him, caused great pain, and rendered him a physical wreck, while the physicians state that the injuries are probably permanent and will eventually cause death. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

23. That one sued upon a note given for the purchase price of an engine was permitted to recover from plaintiff the value of certain other property delivered to plain-

tiff in exchange for the engine, upon the theory that there had been no acceptance of the engine, and therefore no consideration for the property, instead of upon breach of warranty of the engine, does not require a reversal, where the engine delivered was wholly worthless for the purposes for which it was purchased, although some parts of it might have had some value for old iron. *J. I. Case Threshing Mach. Co. v. Huber*, 32: 212, 125 N. W. 66, 160 Mich. 92. Judgment.

Remanding case for rehearing upon petition for mandamus to compel issuance of license, see *Mandamus*, 3.

24. Upon appeal in an equity case, where the facts have all been judicially ascertained, the court, in reversing the decree, may direct the entry of the judgment to which the parties are entitled. *Central New York Teleph. & Teleg. Co. v. Averill*, 32: 494, 92 N. E. 206, 199 N. Y. 128.

APPROACHES.

To cars of carrier, see *Carriers*, 21.

ARGUMENT.

Of counsel, see *Appeal and Error*, 17.

ARREST.

Of passenger, see *Carriers*, 8.

Civil liability for making, see *False Imprisonment*.

ASSAULT.

On passenger, see *Carriers*, 6, 7.

Homicide resulting from fright caused by unlawful assault on other person, see *Homicide*.

ASSENT.

Presumption of, see *Evidence*, 11a.

ASSESSMENTS.

On capital stock of corporation, see *Corporations*, 13.

ASSETS.

Insurance as, see *Insurance*, 8.

ASSIGNMENT.

Of bills of lading, see *Bills of Lading*.
Liability of transferee of corporate assets, see *Corporations*, 2-4.

Estoppel of assignee by acts of assignor, see *Estoppel*, 3.

Of mortgage, see *Mortgage*.

Right of assignee to specific performance of contract, see *Specific Performance*, 2.

The rule that a deed of trust cannot be assigned so as to vest title freed from any defenses which the mortgagor has against the original grantee does not apply to a promissory note which the deed is given to secure. *Zollman v. Jackson Trust & Sav. Bank*, 32: 858, 87 N. E. 297, 238 Ill. 290.

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ASSOCIATIONS.

Service of process on unincorporated association, see *Writ and Process*.

An injunction to restrain a boycott will not lie against an unincorporated association of workmen. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

ASSUMPSIT.

Recovery by payee of check against collecting bank as for money had and received, see *Banks*, 7.

Where no provision is made for the payment of taxes in a lease of real estate, and the lease provides that the structures or improvements put upon the lot by the lessee are removable, and the landlord is compelled to pay the entire amount of the taxes to save the property from being sold at tax sale, an action may be maintained by him against the tenant for the recovery of that portion of the tax levied upon the improvements. *La Paul v. Heywood*, 32: 368, 129 N. W. 763, — Minn. —.

ASSUMPTION OF RISK.

By passenger, see *Carriers*, 17.

ATTACHMENT.

Attaching creditor as bound by estoppel upon debtor, see *Estoppel*, 7.

Duty of sheriff to pursue property which escapes from custody, see *Levy and Seizure*.

An obligor on a statutory bond to discharge an attachment, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment. *Moffit v. Garrett*, 32: 401, 100 Pac. 533, 23 Okla. 398. (Annotated)

ATTORNEY GENERAL.

The attorney general may properly appear in a proceeding to test the right of a corporation to engage in the practice of the law. *Re Co-operative Law Co.* 32: 55, 92 N. E. 15, 198 N. Y. 479.

ATTORNEYS.

As to attorney general, see *Attorney General*.

Right of corporation to practise law, see *Attorney General*; *Corporations*, 1.

Argument of, see *Appeal and Error*, 17.

AUTOMOBILES.

Presumption of negligence of driver, see Evidence, 11.

Injury to pedestrian by automobile driven by street superintendent, see Highways, 3.

The rule requiring traveler to look out for trains at railroad crossings does not fix the measure of care which a pedestrian attempting to cross a street must use in looking out for automobiles. *Mill-saps v. Brogdon*, 32: 1177, 134 S. W. 632, — Ark. —.

AWNINGS.

Injury from fall of, see Highways, 7, 8.

BAD FAITH.

Presumption of, see Evidence, 7.

BAGGAGE.

Grant of exclusive privilege to solicit, see Carriers, 34.

BAILOTTS.

See Elections, 2-4.

BANKRUPTCY.

Right to dower after avoidance of conveyance in bankruptcy proceedings against husband, see Dower.

BANKS.

Liability of bank cashing draft attached to bill of lading, see Bills of Lading.

Denial of equal protection of laws by statute providing for depositors' guaranty fund, see Constitutional Law, 12.

Creation of depositors' guaranty fund as exercise of police power, see Constitutional Law, 22.

Creation of depositors' guaranty fund by assessment upon daily deposits as taking of property for private use, see Eminent Domain, 1.

Set-off in case of insolvency, see Set-off and Counterclaim, 2.

1. A state law permitting state banks to contribute to a fund to guarantee their deposits is not invalid because the plan will tend to attract depositors from national banks, and therefore impair their efficiency as instrumentalities of the national government. *Abilene Nat. Bank v. Dolley*, 32: 1065, 179 Fed. 461, 102 C. C. A. 607. (Annotated)

Right to do business.

Limiting transaction of banking business to corporations as deprivation of liberty and property, see Constitutional Law, 18.

Regulation of banking business in exercise of police power, see Constitutional Law, 22, 23.

2. Where the statutes for the regulation of the banking business provide for issuance of licenses only to corporations, individuals may conduct the business without a license. *Marymont v. Nevada State* 32 L.R.A. (N.S.)

Bkg. Board, 32: 477, 111 Pac. 295, — Nev.

Authority of officers; ratification.

3. A national bank cannot ratify the act of its cashier in guarantying payment of a loan made by a third person to its customer to whom it has made a loan exceeding the statutory limit, although the money was needed to pay the person's debts and keep the customer solvent. *First Nat. Bank v. Monroe*, 32: 550, 69 S. E. 1123, 135 Ga. 614.

Collections.

4. If the holder of a check indorses it, and deposits it for credit and collection in another bank, the collecting bank, if the check is not paid and it is without fault in forwarding it for payment, has the right, on its return, to charge it back to its customer, or recover the amount if he has in the meantime withdrawn the money. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —.

5. The custom of the banks at the place where the collecting bank is located, of sending checks to a drawee bank, will not justify the sending of a check directly to a drawee. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —.

6. Generally it is negligence for a collecting bank to send checks direct to the drawee bank, and the fact that the drawee bank is the only one in the place where it is located is immaterial. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —.

7. Where a collecting bank is negligent in transmitting a check for collection, and in forwarding it to the drawee bank, whereby such drawee, though in disregard of a special agreement, is enabled to debit the drawer of the check and credit the collecting bank, and control of the check is lost by the collecting bank and it is never returned to the customer, the latter may in action of assumpsit, upon the common counts as for money had and received, recover the full amount of the check. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —.

8. A collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customer of such vital condition, and fails to take vigorous measures under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care, and diligence which the nature of its undertaking calls for, with reference to the time, place, and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —.

9. The credit by the drawee of a check, to which it is forwarded by another bank for collection, under a custom authorizing it to credit the amount and remit or settle at stated periods, amounts to payment, and renders the forwarding bank liable to its principal, although the

check was an overdraft and the drawee insolvent. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va.

Other transactions.

Right of bank guarantying repayment of loan to third person to set up defense of *ultra vires*, see Corporations, 9.

Estoppel to set up invalidity of guaranty, see Estoppel, 6.

10. A national bank in negotiating its paper can bind itself for the payment thereof by its indorsement thereon; but it cannot guarantee the payment of the paper of others, or become surety thereon, solely for the benefit of the latter. *First Nat. Bank v. Monroe*, 32: 550, 69 S. E. 1123, 35 Ga. 614.

Savings banks.

11. A savings bank which has issued a check in payment of a deposit account is under no obligation to defend a suit by the drawee against one who cashed it and collected its amount from the drawee, for a return of the money on the theory that the indorsement was forged. *Gallo v. Brooklyn Sav. Bank*, 32: 66, 92 N. E. 633, 199 N. Y. 222.

12. A savings bank which, upon not being satisfied of the identity of one presenting a pass book and demanding money from the account, gives him a check for the amount, payable to the order of the depositor, is not guilty of such negligence or fraud as to be liable in tort to one who cashes the check for the one to whom it was delivered. *Gallo v. Brooklyn Sav. Bank*, 32: 66, 92 N. E. 633, 199 N. Y. 222.

13. The liability, as drawer of a savings bank which, upon not being satisfied of the identity of one presenting a pass book and demanding money from an account, gives him a check payable to the order of the depositor, is terminated by the payment of the check by the drawee, so that it cannot be held liable as such to one who cashed the check and is compelled to return the amount which he collects from the drawee, because the instrument was forged, on the theory that the one to whom the check was delivered must be regarded as the true payee. *Gallo v. Brooklyn Sav. Bank*, 32: 66, 92 N. E. 633, 199 N. Y. 222.

BARBED WIRE.

Injury to animals by, see Nuisances, 4.

BASEBALL.

Playing of, on Sunday, see Constitutional Law, 13; Sunday, 1.

BENEFITS.

Estoppel by receiving, see Estoppel, 6.

BILL OF EXCEPTIONS.

See Appeal and Error, 2.
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BILLS AND NOTES.

Alteration of, see Alteration of Instruments, 4.

Power to assign note free from defense in hands of original holder, see Assignment.

Retention of jurisdiction in suit to secure cancellation of notes, see Equity, 6.

Authority of partner after dissolution to bind co-partners by note in firm name, see Partnership, 3.

Pledge of notes, see Pledge and Collateral Security.

1. A recital in a promissory note that it is secured by deed of trust does not destroy its negotiability, so as to charge a purchaser for value, before maturity, with notice of latent defenses which the maker may have against the payee. *Zollman v. Jackson Trust & Sav. Bank*, 32: 858, 87 N. E. 297, 238 Ill. 290. (Annotated)

2. The qualification of the general two-day rule allowed for forwarding paper for presentment is that, if there would be more than one mail on the second day, it need not go by the first, but, if there be but one, it must go by it, unless it leave or close at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of the business. *Pinkney v. Kanawha Valley Bank*, 32: 987, 69 S. E. 1012, — W. Va. —

3. The substitution by a bank of promissory notes of a third person as security for the debt of its customer, in lieu of other collateral, which it releases to the customer, renders it a purchaser for value. *Zollman v. Jackson Trust & Sav. Bank*, 32: 858, 87 N. E. 297, 238 Ill. 290.

BILLS OF LADING.

A bank which cashes a draft in its favor, with bill of lading attached, is not liable to the consignee who pays the draft upon presentation, for shortage or inferiority of quality in the shipment. *Cosmos Cotton Co. v. First Nat. Bank*, 32: 1173, 54 So. 621, — Ala. — (Annotated)

BIPARTISAN BOARD.

Constitutionality of provision for, see Constitutional Law, 8.

BONA FIDE PURCHASER.

See Corporations, 3.

BONDS.

On attachment, see Attachment.

In injunction suit, see Injunction, 11.
Enforcement by bondholder of taxing district of tax lien, see Taxes, 5.

The submission to the voters of a municipal corporation, of the question of issuing bonds for a public improvement, is not invalid because the statute authorizing it does not require approval by a two-thirds majority of the voters as required by the Constitution, since the stat-

note need not repeat the requirements of that instrument. *Render v. Louisville*, 32: 530, 134 S. W. 458, — Ky. —.

BOYCOTT.

As conspiracy, see Conspiracy.
Injunction against, see Constitutional Law, 24; Injunction, 4-6, 12.

BREACH.

Of covenant, see Covenants and Conditions, 2.

BREACH OF PEACE.

Ambiguity in statute as to, see Statutes, 3.

Whooping, yelling, and uttering loud and vociferous language to the gross disturbance of the public peace is prohibited by a statute providing that "every person who wilfully and wrongfully commits any act . . . which grossly disturbs the public peace or health . . . although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor." *Stewart v. State*, 32: 505, 109 Pac. 243, — Okla. Crim. Rep. —. (Annotated)

BRIBERY.

Right of citizen who has undergone punishment for, to vote, see Elections, 1.

BRIDGES.

Running of limitations against right to recover for injury to, see Limitation of Actions, 6.
Liability of contractor for injuries resulting from defects in, see Master and Servant, 10, 11.

BUILDING CONTRACTORS.

Liability of, for negligence, see Master and Servant, 8-11.

BUILDING CONTRACTS.

Consideration for agreement to pay extra compensation, see Contracts, 1.
Construction of, see Contracts, 7.

BUILDINGS.

Liability of contractor for injuries resulting from defects in, see Master and Servant, 8, 9.

BURDEN OF PROOF.

In general, see Evidence, 5-13.

CANCELATION OF INSTRUMENTS.

Retention of jurisdiction in suit to secure cancelation of notes, see Equity, 6.
Of insurance policy, see Insurance, 1, 2, 6.

A false statement of present intention as to the use to which the lot should be put, made for the purpose of inducing the sale of a city lot, when the use to which the lot is actually to be put will greatly
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depreciate the value of the remaining property of the grantor, is such fraud as will justify cancelation of a deed made in reliance thereon. *Adams v. Gillig*, 32: 127, 92 N. E. 670, 199 N. Y. 314. (Annotated)

CARRIERS.

Bills of lading, see Bills of Lading.

Judicial notice that carrier is engaged in interstate commerce, see Evidence, 4.

Presentation to, of forged order for intoxicating liquors, see Forgery, 2.

Proximate cause of loss or injury by, see Proximate Cause, 3-5.

1. The conductor of a railroad company has no such control of the passengers in a sleeping car of another corporation, which becomes a part of his train without any compensation to the railroad company except the ordinary fares collected from its occupants and the advantage to the company of its being part of its train, that he can require a colored passenger therein who holds a sleeping car ticket when he enters the state, to leave the car and enter a compartment set apart for colored passengers, and render the railroad company liable to punishment for his failure to do so. *Com. v. Illinois C. R. Co.* 32: 801, 133 S. W. 1158, — Ky. —.

2. A railroad company is not punishable for hauling the sleeping car of another corporation, which is not provided with compartments for colored persons and does not bear any indication of the race for which it is set apart, or having no additional separate sleeping car for colored passengers, under a statute providing for the punishment of any railroad company running or operating railroad cars or coaches, which does not furnish separate coaches or cars for the transportation of white and colored passengers, and have each respective coach or compartment marked with appropriate words in plain letters indicating the race for which it is set apart, where it receives no compensation for hauling the car except the regular fare for transportation of persons occupying it and the advantage of its being a part of its train. *Com. v. Illinois C. R. Co.* 32: 801, 133 S. W. 1158, — Ky. —. (Annotated)
Who are passengers.

3. One who attempts to use a plank placed to facilitate access to a standing street car for the purpose of entering the same as a passenger is entitled to the rights of a passenger, although he has not been expressly accepted as such by an employee of the car or paid fare or purchased a ticket. *Messenger v. Valley City Street & I. R. Co.* 32: 881, 128 N. W. 1023, — N. D. —.

Abuse of passenger; insult.

4. A carrier of passengers is as much bound to protect them from humiliation and insult as from physical injury. *May v. Shreveport Traction Co.* 32: 206, 53 So. 671, 127 La. 420.

5. Applying the term "negro" to a white person, or suggesting that he belongs in the negro compartment of a street car, when done by the conductor of the car, will render the company liable in damages to such person. *May v. Shreveport Traction Co.* 32: 206, 53 So. 671, 127 La. 420. (Annotated)

Assault.

Damages for, see Damages, 3, 6.

6. A common carrier is bound to exercise the utmost diligence in maintaining order and in guarding its passengers against assaults by other passengers, which might reasonably be anticipated or naturally expected to occur. *Jansen v. Minneapolis & St. L. R. Co.* 32: 1206, 128 N. W. 826, — Minn. —. (Annotated)

7. A railroad company is not liable for the act of a station porter who boards a train and makes an assault on a through passenger traveling thereon, for the purpose of satisfying a personal grudge, where its other servants are not negligent in failing to anticipate and prevent the assault. *Houston & T. C. R. Co. v. Bush*, 32: 1201, 133 S. W. 245, — Tex. —. (Annotated)

Arrest.

8. A railroad company is not liable in damages to one arrested by a police officer while a passenger on its train, because the conductor pointed him out to the officer and did not attempt to interfere with the arrest, where the officer had apparent authority to make the arrest. *Mayfield v. St. Louis, I. M. & S. R. Co.* 32: 523, 133 S. W. 168, — Ark. —. (Annotated)
Measure of care required; negligence generally.

Presumption and burden of proof as to negligence, see Evidence, 9.

Evidence of conditions at other times, see Evidence, 25.

Sufficiency of proof of negligence, see Evidence, 33.

Relief under pleadings, see Pleading, 1.

Proximate cause of injury, see Proximate Cause, 4, 5.

Negligence as question for jury, see Trial, 7.

9. A street car company is liable in damages for a mistake of, or abuse of discretion by, its servants in complying with the provisions of a statute requiring the assignment of white and colored passengers to different compartments. *May v. Shreveport Traction Co.* 32: 206, 53 So. 671, 127 La. 420.

10. A street car company may be liable for injury to a passenger encumbered with a small child, who is prevented from leaving the car at the terminal by a boisterous crowd surging into the car, and injured by the turning of a seat against her, where the employees, although having notice of the probability of a rush to board the car, make no attempt to protect her; and it is immaterial that the terminal is in a public street rather than in its own station. 32 L.R.A. (N.S.)

Glennen v. Boston Elevated R. Co. 32: 479, 93 N. E. 700, 207 Mass. 497. (Annotated)
Injury by other passenger.

Proximate cause of injury, see Proximate Cause, 5.

11. A carrier is not liable for injury to a passenger through the failure of its conductor to anticipate that a passenger on the train who has had an altercation with another would borrow a pistol, and attempt to assault the latter after he had left the train, or that the person assaulted would use a pistol so as to cause the injury, where the conductor had searched him for a pistol and found none. *Penny v. Atlantic C. L. R. Co.* 32: 1209, 69 S. E. 238, 153 N. C. 296.

12. A carrier is not answerable for the act of one of its employees who is riding on its train as a passenger, when not on duty, in engaging in an altercation with a passenger to the injury of a third person. *Penny v. Atlantic C. L. R. Co.* 32: 1209, 69 S. E. 238, 153 N. C. 296.

Speed; jolts.

13. The employees of a railroad company must use every care commensurate with the danger to a passenger, and where a motorman of a street car fails to sufficiently slow down his car in rounding a curve, and a passenger, who has been standing on the platform with the motorman, is thrown out by the consequent jolting, and is injured, the railroad company is liable. *McMahon v. New Orleans R. & L. Co.* 32: 346, 53 So. 857, 127 La. 544.
Duty as to vehicle or place of riding.

14. Where a passenger is permitted to stand on the front platform of a motor car, he has the right to assume that if there is any danger to him, requiring the closing of the gates of the platform, that they will be closed, and the same duty of closing these gates, when it is necessary for the protection of a passenger, rests upon an interurban railroad as upon a strictly city railroad. *McMahon v. New Orleans R. & L. Co.* 32: 346, 53 So. 857, 127 La. 544. (Annotated)

Contributory negligence of passenger.

As question for jury, see Trial, 7.

15. A street car company is not liable for injury to a passenger standing in the door of a crowded car, because the tone in which the conductor tells her to make way for passengers seeking to leave the car, is such that she becomes frightened and falls from the car. *McCumber v. Boston Elevated R. Co.* 32: 475, 93 N. E. 698, 207 Mass. 559.

16. A passenger is guilty of contributory negligence which will prevent his holding the carrier liable for injury from a stray bullet fired by another passenger, if the danger of such injury could have been apprehended by him, and he did not turn out of his way or make any effort to avoid it, although the conductor who knew of the danger failed to give him warning. *Penny v. Atlantic C. L. R. Co.* 32: 1209, 69 S. E. 238, 153 N. C. 296.

(Annotated)

17. One who takes passage on a street car so crowded that he is compelled to stand in the door assumes the risk of being pushed off the car, to his injury, by passengers attempting to force a passage out of it. *McCumber v. Boston Elevated R. Co.* 32: 475, 93 N. E. 698, 207 Mass. 559. (Annotated)

18. A fireman riding free on a street car, who, contrary to known rules of the company requiring him to ride on the rear platform, and forbidding persons to ride on the running boards of cars which are next to the parallel track, takes his position on such running board, is a mere licensee, and cannot hold the company liable for injuries negligently inflicted upon him while there; and it is immaterial that the conductor assented to his remaining there, since he had no authority to waive the rules of the company. *Twiss v. Boston Elevated R. Co.* 32: 728, 94 N. E. 253, — Mass. —.

19. The fact that the rules of a railroad company provide that passengers may stand on the platform only when there are no seats in the car will not preclude a passenger from obtaining damages for the negligence of the car crew, because there were seats in the car, where the passenger was riding on the platform with the sanction of the employees of the railroad company. *McMahon v. New Orleans R. & L. Co.* 32: 346, 53 So. 857, 127 La. 544. Ejection of passenger.

20. A baggageman with express authority to notify the conductor of trespassers upon the train, and, upon request, to aid him in expelling them, may be found to be acting within the scope of his authority in expelling one without reporting him to the conductor, so as to render the railroad company liable in case he causes injury by the use of excessive and unusual violence in so doing. *Daley v. Chicago & N. W. R. Co.* 32: 1164, 129 N. W. 1062, — Wis. —. (Annotated)

Stations; approaches; platform.

21. It is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night. *Messenger v. Valley City Street & I. R. Co.* 32: 881, 128 N. W. 1023, — N. D. —. (Annotated)

22. The mere fact that a railroad company which provides a subway for passengers to pass from one side of its tracks to the other, with signs directing them to it, does not enforce its order not to let them cross over standing trains, because it is impossible to distinguish between those wishing to embark on such trains and those wishing to cross the tracks, does not amount to an invitation to them to cross the train, within the rule governing the care which is due to invitees. *Hillman v. Boston Elevated R. Co.* 32: 198, 93 N. E. 653, 207 Mass. 478. (Annotated)

Tickets; conditions; fares.

23. Where by statute a carrier is required to transport a gratuitous passenger which it has accepted, one is not prevented

from holding the carrier liable for injury to him by failure to use the care which the law requires in case of gratuitous passengers, by the fact that he was traveling on a pass which the carrier was prohibited, under penalty, from giving. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

24. Refusal to accept pennies in payment of street car fare, except on condition of taking from the conductor a 5-cent piece and depositing it in an automatic coin collector, is not a violation of the Federal legal tender law, which makes pennies a legal tender to the amount of 25 cents. *Martin v. Rhode Island Co.* 32: 695, 78 Atl. 548, — R. I. —.

25. Charter limitation of a street car company to 5 cents, and no more, for a single fare, does not prevent its requiring a passenger to place the fare in an automatic collector brought to him by the conductor. *Martin v. Rhode Island Co.* 32: 695, 78 Atl. 548, — R. I. —.

26. A street railway company may require persons to insert the coin representing their fare into an automatic collector brought to them by the conductor, where it offers to furnish them with the proper coin in exchange for the money with which they may be provided. *Martin v. Rhode Island Co.* 32: 695, 78 Atl. 548, — R. I. —.

(Annotated)

27. That an independent corporation has acquired control of two competing street railway companies, and operates both by one set of officers, having formed a physical connection between the two, and uses the cars of each upon the tracks of the other, and that it keeps the accounts in one office, and does all repairing at one shop, does not, while the accounts are kept separate, require the owner of one of the roads to issue transfers over the other, under its contract with the city to grant such transfers over any line which shall be operated or controlled by it. *State ex rel. Tacoma v. Tacoma R. & Power Co.* 32: 720, 112 Pac. 506, — Wash. —.

(Annotated)

Carriers of freight.

Conversion by, see *Trover*.

Variance between pleading and proof, see *Evidence*, 37.

Proximate cause of loss of freight, see *Proximate Cause*, 3.

28. The strict rules making the carrier an insurer of freight have no application where the relation of the parties is not that of carrier and consignee or owner, and in such cases the carrier is liable only for losses resulting from its own negligence. *Kansas City, M. & O. R. Co. v. Cox*, 32: 313, 108 Pac. 380, — Okla. —.

29. Before the liability of insurer attaches to a carrier for goods loaded on a car placed at the shipper's disposal, it must have been notified that the goods were ready for shipment, and the owner must have relinquished his control over

the car. *Kansas City, M. & O. R. Co. v. Cox*, 32: 313, 108 Pac. 380, — Okla. —

(Annotated)

30. Notifying a carrier that a car on a private switch is loaded and ready for transportation is not a delivery of the goods to it, so as to charge it with liability as carrier, where no bill of lading has been presented for signature, and its rule is not to move loaded cars from the station until a bill of lading has been signed, and the car had not been taken into its possession. *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* 32: 323, 134 S. W. 613, — Tenn. —

31. The liability of a carrier for suffering on the part of a sick person, due to its neglect promptly to transport and deliver medicine for him, is not affected by the fact that the order was given without his knowledge or approval. *Hendricks v. American Express Co.* 32: 867, 128 S. W. 1089, 138 Ky. 704.

Governmental control; discrimination.

Delegation of power to railroad commission, see *Constitutional Law*, 4-6.

Discrimination in rule of railroad commission subjecting carrier to penalty for delaying loaded cars, see *Constitutional Law*, 7.

Due process in regulations of railroad commission, see *Constitutional Law*, 19.

Regulations of railroad commissioners as denial of right to jury trial, see *Jury*, 1.

Party plaintiff in action for fine imposed by railroad commissioner, see *Parties*, 1.

Powers of railroad commissioners generally, see *Railroad Commissioners*.

Partial invalidity of statute regulating, see *Statutes*, 5.

32. Under the power given a railroad commission to require common carriers to furnish all necessary facilities for the convenient and prompt handling, transportation, and delivery of all freight offered for transportation, and to provide and prescribe the rules and regulations necessary to secure the furnishing of such facilities and transportation and delivery of all freight, to direct and control all matters pertaining to railroads that shall be for the good of the public, and to do and perform any act or thing necessary to be done effectually to carry out and enforce the provisions of a railroad commission law, the commissioners are authorized to adopt a rule making all railroads liable to a shipper in a charge of \$1 per day per car for detaining cars properly loaded, with shipping instructions given, in violation of the commission rules, as such a charge is not a penalty, but is a monetary obligation incurred for breach of duty that may be enforced by the shipper to which it is due. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

33. The liability or charge prescribed by the rule of a railroad commission making a carrier liable to a shipper in the sum of

\$1 per day per car for the unlawful detention of loaded cars is a cumulative remedy in the nature of a charge or recompense for the inconvenience or detention resulting directly to the shipper from the act or omission of the carrier, in the payment of which the public is not interested, and is therefore not a penal liability for the failure of payment of which a penal punishment can be imposed. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

34. A railroad company is not prevented from granting to a particular person engaged in transferring passengers and baggage the exclusive right to a representative on its trains to solicit patronage, by a statute requiring such corporation to grant equal facilities for transportation of freight and passengers without discrimination. *Dingman v. Duluth, S. S. & A. R. Co.* 32: 1181, 130 N. W. 24, — Mich. —

(Annotated)

35. Under constitutional and statutory provisions forbidding discrimination in rates by carriers between the same classes of passengers, free transportation or special rates may be given to employees of the issuing road and their families; doctors, nurses, and helpers being hurried to wrecks; soldiers and sailors going to or coming from institutions for their keeping; ministers of religion and persons engaged in charitable and religious work; and children and persons who, by reason of physical injuries, defects, or deformities, or other misfortune, are unable to compete with mankind in general. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

36. The giving by railroad companies of passes even to employees of other railroad companies is prohibited by constitutional and statutory provisions that all individuals shall have equal rights to have persons transported on railroads, and no discrimination in charges shall be made, and that it is unlawful for any carrier to charge any person any greater sum for a ticket than is charged another for a similar ticket of the same class. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

CAUSE.

Proximate cause, see *Proximate Cause*.

CHARITIES.

A religious or charitable corporation is not immune from liability for injuries to persons coming upon its property to perform services for it, because of the unsafe condition of the premises due to the negligence of its servants. *Hordern v. Salvation Army*, 32: 62, 92 N. E. 626, 199 N. Y. 233.

(Annotated)

CHATTEL MORTGAGE.

A mistake in the middle initial of a name signed to a chattel mortgage by one whose business signature consists of his surname and initials destroys the efficacy of its record as against subsequent bona

vide purchasers. *First Nat. Bank v. Hacoda Mercantile Co.* 32: 243, 53 So. 802, — Ala.

CHATELS.

Sale of, see Sale.

CHECKS.

As accord and satisfaction, see Accord and Satisfaction.

Rights and liabilities of bank in regard to, see Banks.

Collection of, by bank, see Banks, 4-9.

CHILDREN.

In general, see Infants.

CITIES.

See Municipal Corporations.

COLLATERAL CONTRACTS.

Statute of frauds as to, see Contracts, 3-6.

COLLATERAL SECURITY.

See Pledge and Collateral Security.

COLLECTIONS.

By bank, see Banks, 4-9.

COLOR OF TITLE.

See Adverse Possession, 3.

COMMERCE.

Judicial notice that carrier is engaged in interstate commerce, see Evidence, 4.

1. There is no unconstitutional interference with interstate commerce by requiring an interstate telegraph company, as a condition to receiving a license to place poles to carry its wires in the city streets, to permit the city to place on the poles, without compensation, wires necessary for its fire alarm and electric lighting systems, where the detriment to the telegraph company is no greater than the reasonable cost of inspecting the poles necessary to keep the streets safe for travelers. *Postal Teleg.-Cable Co. v. Chicopee*, 32: 997, 93 N. E. 927, 207 Mass. 3-1.

2. Requiring railroad companies to maintain electric headlights of a specific character on their locomotives does not interfere with interstate commerce, although in case other states required a different kind of lights there might be delay and expense at the boundary line in making the change from one to the other on interstate trains. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

(Annotated)

COMMON CARRIERS.

See Carriers.

COMPENSATION.

Of officers, generally, see Officers, 3, 4.

COMPLAINT.

Of plaintiff, see Pleading, 3, 4.

CONDITION.

Power of railroad, in purchasing right of way, to bind itself by condition to complete road, see Corporations, 5.

Distinction between covenant and condition, see Covenants and Conditions, 1.

Condition of right to cancel insurance contract, see Insurance, 6.

CONDONATION.

In divorce case, see Divorce and Separation, 3.

CONDUCT.

Estoppel by, see Estoppel, 3.

CONFESSION.

Evidence of, see Evidence, 20.

CONFIDENTIAL COMMUNICATIONS.

Evidence of, see Evidence, 21.

CONFLICT OF LAWS.

The courts of one state cannot, at the suit of one of the parties, annul a marriage which was valid by the law of the state where it was contracted, on the ground that it is void under the laws of their state, and cohabitation between the parties made a penal offense, where, at the time the marriage was contracted, they were not citizens of the state where the suit is brought, so that the marriage was not a mere evasion of its laws. *Garcia v. Garcia*, 32: 424, 127 N. W. 586, — S. D.

CONSENT.

Question for jury as to, see Trial, 6.

CONSIDERATION.

Of contract, see Contracts, 1.

CONSPIRACY.

Injunction against, see Injunction, 12.
Injunction against bearing of placard through streets announcing strike which has already ended, see Injunction, 7.

1. A boycott is a combination to harm one person by coercing others to harm him. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

2. That each member of a labor union has a right to withdraw his patronage from a given concern and those who deal with it does not make valid a combination of all the members to do the same thing by concert of action. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

3. The loss by a brickmaker of the sale of brick for a building because of a statement by a member of a labor union that union laborers would not handle them gives him no right of action against the officers of the union for the resulting loss. *Meier v. Speer*, 32: 792, 132 S. W. 988, — Ark. — (Annotated)

4. The mere refusal by members of a

labor union to lay stone for the foundation of a building in case an employer of non-union labor secures the contract for the superstructure, which causes their employer to refuse to lay the foundation in that event, so that the nonunion contractor is deprived of the opportunity to do the work, gives him no right of action for the resulting damages. *Meier v. Speer*, 32: 792, 132 S. W. 988, — Ark. —.

CONSTITUTIONAL LAW.

Right to trial by jury, see *Jury*.

Who may question constitutionality of statute, see *Statutes*, 1, 2.

Amendment.

1. The guaranty in the 6th Amendment of the Federal Constitution of an impartial jury has no application to trials in a state court for violation of state laws. *State v. McDowell*, 32: 414, 112 Pac. 521, — Wash. —.

Ex post facto and retrospective laws.

As to when laws are retrospective, see *Statutes*, 9.

2. Constitutional provisions prescribing the manner in which a municipal corporation may enter into a contract, and its duration, and prohibiting it from incurring indebtedness, do not, under the provisions of the Federal Constitution, forbidding states to impair the obligation of contracts, control a renewal in accordance with its own provisions of a contract existing at the time they were adopted. *Slade v. Lexington*, 32: 201, 132 S. W. 404, — Ky. —.

Delegation of power.

3. A board of park commissioners to be appointed by the governor is not a corporate authority of a municipal corporation, within the meaning of a constitutional provision that the legislature shall not levy taxes upon the inhabitants or property in the city or town for municipal purposes, but may vest in the corporate authorities thereof the power to assess and collect such taxes. *State ex rel. Gerry v. Edwards*, 32: 1078, 111 Pac. 734, 42 Mont. 135.

(Annotated)

4. A legislature cannot delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize a railroad commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law, and where the penalty is imposed by law it may be incurred for the penal violation of a rule prescribed by a railroad commission within their express authority. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

5. No unconstitutional delegation of legislative power is effected by conferring on an administrative commission power to carry into effect the legislative purpose to regulate intrastate transportation by common carriers by fixing reasonable freight and passenger rates, and by providing rules to effectuate their enforcement by the imposition of penalties for violation thereof. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

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(Annotated)

6. A legislature may enact a law complete in itself, designed to accomplish the regulation of common carriers, and may expressly authorize an administrative commission within definite valid limits to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose, since the complex and changing conditions that attend and affect such a service make it impracticable for the legislature to prescribe the necessary rules and regulations. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

Equal protection and privileges.

Who may raise question of unconstitutional discrimination, see *Statutes*, 1.

7. The rule of a railroad commission making a common carrier liable for unreasonably detaining loaded freight cars is not an arbitrary or unjust discrimination against freight not so loaded. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

8. A provision that a commission to have charge of a municipal hospital shall be bi-partisan, and that its members shall be chosen from the two dominant parties in the municipality by name, does not violate a constitutional provision that all men are equal and that no grant of exclusive privilege shall be made to any man, on the ground that it requires a political test for office and creates special privileges in those made eligible to appointment. *Render v. Louisville*, 32: 530, 134 S. W. 458, — Ky. —.

9. A statute requiring railroads to maintain electric headlights on their locomotives is not unconstitutional as depriving them of the equal protection of the laws, because it does not apply to receivers of railroads. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

10. Exempting tramroads, mill roads, and roads engaged principally in lumber and logging transportation in connection with mills, from the operation of a statute requiring the maintenance of electric headlights on locomotives, does not render it unconstitutional as depriving railroads of the equal protection of the laws. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

11. A statute imposing, for the benefit of the public, a tax of a certain per cent upon every judgment entered in a court of record, is not valid, treated either as part of the costs to be paid by defendant or as a penalty, since it would deprive defendant of the equal protection of the laws. *St. Louis, I. M. & S. R. Co. v. Pritchard*, 32: 179, 133 S. W. 176, — Ark. —.

(Annotated)

12. National banks in a state are not unconstitutionally denied the equal protection of the laws by a state statute permitting state banks to contribute to a guaranty fund for the security of depositors. *Abilene Nat. Bank v. Dolley*, 32: 1065, 179 Fed. 461, 102 C. C. A. 607.

13. Exempting professional baseball

players from the operation of the Sunday laws, while leaving them applicable to persons engaged in other occupations, does not grant them an unconstitutional privilege or immunity, since the possibility of benefit to the populace which may witness the games is sufficient to indicate an absence of purely arbitrary action in the classification. *Carr v. State*, 32: 1190, 93 N. E. 1071, — Ind. —. (Annotated)

14. The abrogation of the fellow-servant rule as to railway employees, made by Miss. Code 1892, § 3559, does not offend against the equal protection of the laws clause of the Federal Constitution, because construed as applying to the foreman of a section crew charged with keeping the track in repair. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 32: 226, 55 L. ed. —, 31 Sup. Ct. Rep. 136, 219 U. S. 35. Due process; right to life, liberty, and property.

15. A constitutional provision forbidding the deprivation or taking of property without due process of law and without just compensation extends to property held by corporations, as natural persons are the beneficial owners of the property though it be held and used by a corporate entity. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

16. A statute subjecting to a penalty a railroad company which operates any locomotive on a main line after dark without an electric headlight of a specified character is not unconstitutional as depriving it of its property without due process of law because it makes no exception in case of emergencies such as are likely to occur. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

17. A statute requiring railroad companies to place electric headlights of a certain size and power on their locomotives does not deprive them of their property without due process of law because it will require a destruction of all in present use not of that character, and deprives the companies of the right to make contracts and manage their own business. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

18. The state cannot limit the transaction of ordinary banking business to corporations, where the Constitution protects liberty and the acquisition and protection of property, and provides that no person shall be deprived of them without due process of law. *Marymont v. Nevada State Bkg. Board*, 32: 477, 111 Pac. 295, — Nev. —.

19. An arbitrary and unreasonable regulation is not within the authority of a railroad commission, and if the action of a state through its railroad commission is not a legally authorized regulation of a public service, or if the authorized regulation is arbitrary and unreasonable, and in effect deprives the beneficial owner of property used in rendering the public service, of the property rights, in a manner or to an extent contemplated by law as a limitation upon the rights of those devoting their

property to a public use, such action, though under the form of regulation, is in law a deprivation of property without due process of law. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

20. An attempt to deprive one accused of crime of the defense of insanity is ineffectual under constitutional provisions guarantying due process of law and trial by jury. *State v. Strasburg*, 32: 1216, 110 Pac. 1020, — Wash. —.

21. Neither the equal protection of the laws nor due process of law is denied by Miss. Code 1906, § 1985, under which, in actions against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 32: 226, 55 L. ed. —, 31 Sup. Ct. Rep. 136, 219 U. S. 35. (Annotated) Police power.

22. The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law. *Noble State Bank v. Haskell*, 32: 1062, 31 Sup. Ct. Rep. 186, 219 U. S. 104, 55 L. ed. —.

23. The police power of a state extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe. *Noble State Bank v. Haskell*, 32: 1062, 31 Sup. Ct. Rep. 186, 219 U. S. 104, 55 L. ed. —.

Freedom of speech, press, and worship.

24. No unconstitutional interference with freedom of speech is effected by enjoining the placing by a labor union of the name of a concern on its "We Don't Patronize" list, in furtherance of a boycott against it. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

Impairing obligation of contracts.

See also supra, 2.

25. Contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case it or any other bank existing under the state laws becomes insolvent, unless such statute deprives the bank of liberty or property without due process of law. *Noble State Bank v. Haskell*, 32: 1062, 31 Sup. Ct. Rep. 186, 219 U. S. 104, 55 L. ed. —.

CONSTRUCTION.

Of contracts, see Contracts, 7.

CONTINUING NUISANCE.

See Trespass.

CONTINUING TRESPASS.

See Trespass.

CONTRACTORS.

Liability of, for negligence, see Master and Servant, 8-11.

For public improvements, city's liability to, see Public Improvements, 2.

CONTRACTS.

Impairing obligation of, see Constitutional Law, 2, 25.

Of corporation, see Corporations, 6-9.

Injunction to protect rights in, see Injunction, 3.

Of sale, see Sale.

Specific performance of, see Specific Performance.

Consideration.

1. One who contracts to construct a house in a workmanlike manner, according to specifications which call for a cellar wall properly laid, is bound to provide a concrete foundation, if the excavation shows that it will be necessary to support the building, although the parties did not contemplate the necessity of so doing when they made the contract; and an agreement by the owner to pay him extra compensation for such service is without consideration, and cannot be enforced. Creamery Package Mfg. Co. v. Russell, 32: 135, 78 Atl. 718, — Vt. —.

Definiteness.

2. An agreement between a water company and a municipal corporation which it undertakes to supply with water, that the contract shall be renewed at the expiration of a certain time upon such terms as are mutually agreed upon at that time, is not so indefinite as to be invalid, since it will be interpreted as providing for a renewal on reasonable terms. Slade v. Lexington, 32: 207, 132 S. W. 404, — Ky. —.

(Annotated)

Statute of frauds.

3. A parol promise of an assignee of the equity of redemption, to the mortgagee, to pay the mortgage debt in consideration of forbearance of foreclosure, is not invalid under the statute of frauds, as one to pay the debt of another, since it is supported by a sufficient consideration to the promisor. Manning v. Anthony, 32: 1179, 94 N. E. 466, — Mass. —.

4. If the main purpose of an oral promise by one person to pay a sum of money for which another is liable or may become liable is to secure a direct, personal, and pecuniary benefit to the promisor, the promise is original, and not within the statute of frauds, though such third person remain liable for the debt. Hurst Hardware Co. v. Goodman, 32: 598, 69 S. E. 898, — W. Va. —.

5. If property be delivered or services rendered to one person upon an oral prom-

ise of payment by another, and charged only to the person to whom the delivery was so made or for whom services were so rendered, and an effort made to collect the purchase money or compensation from the person against whom the charge was made, such promise is collateral, and, if not in writing, void. Hurst Hardware Co. v. Goodman, 32: 598, 69 S. E. 898, — W. Va. —.

(Annotated)

6. The oral promise of an officer and stockholder of a corporation, who is liable as an indorser on its paper and for debts or obligations assumed by the corporation, to pay for goods sold and delivered to it, is collateral and within the statute; the benefit accruing to him from such sale and delivery being remote and indirect. Hurst Hardware Co. v. Goodman, 32: 598, 69 S. E. 898, — W. Va. —.

Construction.

Parol evidence as to meaning of parties to contract, see Evidence, 14, 15.

7. One who contracts to construct a house in a workmanlike manner, according to specifications showing the dimensions and manner of laying the cellar wall, may, in case, at the direction of the owner, he enlarges the wall, lays it in cement, and lines the underpinning with brick, in view of conditions of soil disclosed by the excavation, hold the owner liable for the extra work, and may therefore recover on his promise to pay extra compensation, although a wall laid in mortar, as called for by the specifications, would not have held the building. Creamery Package Mfg. Co. v. Russell, 32: 135, 78 Atl. 718, — Vt. —.

Validity; public policy.

8. A contract to install a telephone exchange in a hotel and furnish connections with the system of the contracting party is not rendered void in its entirety by the invalidity of a provision that the right to furnish connections with the hotel shall be exclusive. Central New York Teleph. & Teleg. Co. v. Averill, 32: 494, 92 N. E. 206, 199 N. Y. 128.

9. A contract giving a telephone company the exclusive right to furnish connections with a hotel for a term of years, although only in partial restraint of trade, is against public policy and void, since it injuriously affects the public interests. Central New York Teleph. & Teleg. Co. v. Averill, 32: 494, 92 N. E. 206, 199 N. Y. 128.

(Annotated)

CONVERSION.

See Trover.

CORPORATIONS.

Right of attorney general to appear in proceeding to test right of corporation to practise law, see Attorney General.

Limiting transaction of banking business to, see Banks, 2; Constitutional Law, 18.

Right to claim protection of constitutional provision as to taking of property without due process of law, see Constitutional Law, 15.

Oral promise of officer of, to pay for goods delivered to corporation, see Contracts, 6.

1. A corporation for the practice of law is not authorized by a statute permitting the organization of a corporation for any lawful business, since the practice of the law is not a lawful business except for members of the bar, who have complied with all the conditions required by statute and the rules of the courts; and a corporation cannot perform the conditions. *Re Co-operative Law Co.* 32: 55, 92 N. E. 15, 198 N. Y. 479. (Annotated)

Transfer of assets.

2. A creditor of a corporation which transfers all of its assets to another corporation, in consideration for stock issued to its president individually, is not bound to pursue the stock in the hands of the president, rather than the assets in the hands of the purchaser. *Luedecke v. Des Moines Cabinet Co.* 32: 616, 118 N. W. 456, 140 Iowa, 223.

3. A corporation which purchases the entire assets of another corporation, and issues therefor its own stock to the president of the latter individually, thereby enabling him to use it for his private ends, is not a bona fide purchaser so as to be able to protect the assets from the claims of creditors of the selling corporation, which were in suit when the transfer was made. *Luedecke v. Des Moines Cabinet Co.* 32: 616, 118 N. W. 456, 140 Iowa, 223.

4. To entitle the creditor of a corporation to a personal judgment against another corporation which purchases all the assets of the former, it must have agreed to assume the seller's debts, there must have been a consolidation of the two corporations, the purchasing company must have been a mere continuation of the seller, or the transaction must have been fraudulent in fact. *Luedecke v. Des Moines Cabinet Co.* 32: 616, 118 N. W. 456, 140 Iowa, 223. (Annotated)

Rights and powers generally.

5. A railroad company, in purchasing its right of way, may bind itself by a condition to complete the road within a specified time. *Oregon R. & Nav. Co. v. McDonald*, 32: 117, 112 Pac. 413. — Or. —.

Contracts; ultra vires.

Presumption as to stockholder's intent in reselling stock to corporation, see Evidence, 7.

6. A corporation may bind itself by a contract from the time of filing its articles of incorporation, under statutes requiring them to be filed, and providing that no corporation shall, until such articles are left for record, have legal existence, and that no corporation shall transact business with any other than its members until a certain portion of its stock is subscribed and paid in, and depriving it of any right of action upon 32 L.R.A. (N.S.)

any obligation contracted in violation of the statute, but rendering its existing stockholders personally liable thereon. *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.* 32: 436, 128 N. W. 861, 144 Wis. 224.

7. As a general rule unless plainly prohibited by statute or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith pursuant to authorization by its governing body, and its officers, acting in like good faith, may do so as to stockholders actually or impliedly consenting and as to past or future creditors. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 32: 137, 123 N. W. 106, 141 Wis. 377.

8. As a general rule, in case a corporation purchases its own stock, paying therefor by corporate assets, subsequent creditors cannot be regarded, judicially, as prejudicially affected. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 32: 137, 123 N. W. 106, 141 Wis. 377.

9. Although a guaranty by a national bank of repayment of a loan made by a stranger to its debtor, which is larger in amount than he owes it, out of the proceeds of which it is to receive its claim, is *ultra vires*, it is liable to the lender for the sum which it receives by reason of such guaranty. *Appleton v. Citizens' Central Nat. Bank*, 32: 543, 83 N. E. 470, 190 N. Y. 417. (Annotated)

Officers; meetings.

Bank officers, see Banks, 3.

10. Less than a quorum of a corporation has no power to adjourn a regularly called meeting to another date, so as to make transactions at a meeting on such date valid. *Cheney v. Canfield*, 32: 16, 111 Pac. 92, 158 Cal. 342.

11. A statute providing that whenever any act of a secular nature is appointed by law or contract to be performed on a particular day which falls on a holiday, it may be performed on the next business day, does not justify the holding of a corporation meeting on such succeeding day when the day appointed by the by-laws falls on a holiday, and no provision is made for such contingency by the by-laws. *Cheney v. Canfield*, 32: 16, 111 Pac. 92, 158 Cal. 342.

Rights of shareholders; actions.

12. A statute limiting the time for bringing actions to recover corporate stock sold for a delinquent assessment upon the ground of irregularity of the assessment has no application to void assessments. *Cheney v. Canfield*, 32: 16, 111 Pac. 92, 158 Cal. 342.

Liability of stockholders.

Estoppel to deny liability as stockholder, see Estoppel, 5.

13. An assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board, or at a special meeting thereof, regularly called. *Cheney v. Canfield*, 32: 16, 111 Pac. 92, 158 Cal. 342.

Dissolution; insolvency.

14. The attempt by stockholders to defend a suit against a corporation after its

dissolution by expiration of the charter will not authorize a judgment against it as a corporation either *de facto* or by estoppel. *Venable Bros. v. Southern Granite Co.* 32: 446, 69 S. E. 822, 135 Ga. 508.

(Annotated)

15. A writ of error sued out against a corporation which was dissolved by expiration of its charter pending the trial must be dismissed, as there is no party to be made defendant therein. *Venable Bros. v. Southern Granite Co.* 32: 446, 69 S. E. 822, 135 Ga. 508.

COTENANCY.

Adverse possession by grantee of cotenant, see Adverse Possession, 2.

A tenant in common in possession of mortgaged real estate, with the acquiescence of the other cotenants, and in the absence of any contract to pay rent, owes a duty to the other cotenants to pay the interest maturing on the mortgage and taxes accruing on the land. *Ellis v. Snyder*, 32: 253, 112 Pac. 594, — Kan. —.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COURTS.

The court will not examine the legislative journals or other records to determine whether or not a statute properly authenticated and duly enrolled and deposited by the secretary of state received the requisite number of votes, or was subject to any irregularity which would invalidate it. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

COVENANTS AND CONDITIONS.

Power of railroad, in purchasing right of way, to bind itself by condition to complete road, see Corporations, 5.

Retention of jurisdiction in suit to enjoin interference with enjoyment of property because of breach of conditions subsequent, see Equity, 5.

Estoppel to enforce, see Estoppel, 4.

Estoppel by covenant of warranty, see Estoppel, 2.

In wills, see Wills.

1. A condition which must be complied with to hold the property is created by a grant of a right of way to a railroad company "on condition" that the line will be completed within a specified time. *Oregon R. & Nav. Co. v. McDonald*, 32: 117, 112 Pac. 413, — Or. —.

(Annotated)

2. A levee legally erected and maintained by public authorities across a tract of land, and which a purchaser of the land sees or has an opportunity to see at the time of his purchase, is not, although it renders several acres unfit for cultivation by holding back surface water thereon, a breach of the usual covenants of warranty in the deed. *Ireton v. Thomas*, 32: 737, 113 Pac. 306, — Kan. —.

(Annotated)

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CRIMINAL LAW.

Who may complain of error on appeal, see Appeal and Error, 5.

Presumption on appeal, see Appeal and Error, 7.

Right to consider on appeal question whether convict was given too light a sentence, see Appeal and Error, 5.

Attempt to deprive accused of defense as denial of due process, see Constitutional Law, 20.

Attempt to deprive accused of defense of insanity, see Constitutional Law, 20.

Effect of conviction of crime on right to vote, see Elections, 1.

Judicial notice of prior conviction, see Evidence, 1.

Relevancy of evidence, generally, see Evidence, 26, 28.

Evidence admissible under pleading, see Evidence, 36.

Habeas corpus, see Habeas Corpus.

As to requisites and sufficiency of indictment, information and complaint, see Indictment, etc.

Reception of evidence, see Trial, 2.

Communication by court with jury, see Trial, 1.

Instructions in criminal prosecutions, see Trial, 14.

Various particular crimes, see Breach of Peace; Carriers, 1, 2; False Pretenses; Food; Forgery; Homicide; Infants; Intoxicating Liquors, 6; 7; Kidnapping; Larceny; Perjury.

Intent.

1. Ignorance on the part of a waiter at a lunch counter that material furnished by him as butter is in fact oleomargarine will not absolve him from liability to punishment under a statute providing for punishment of anyone who furnishes oleomargarine for butter without first informing the customer of the fact. *State v. Welch*, 32: 746, 129 N. W. 556, — Wis. —.

(Annotated)

Crimination of self.

2. Written prescriptions of practising physicians on which a licensed druggist has made sales of intoxicating liquors are quasi public documents, and the constitutional privilege against self-incrimination is not violated by compelling a druggist who stands indicted for unlawfully selling spirituous liquors to produce them in court in order that they may be used as evidence against him on his trial, where his keeping them was a condition of his right to sell generally. *West Virginia v. Davis*, 32: 501, 69 S. E. 639, — W. Va. —.

3. The written prescriptions of practising physicians on which a licensed druggist has made sales of intoxicating liquors, and which he has preserved in his possession, as the statute directs, are not his "private papers and documents" within the meaning of the constitutional guaranty against compulsory self-incrimination. *State v. Davis*, 32: 501, 69 S. E. 639, — W. Va. —.

4. The admission of evidence showing that one charged with murder produced from a hiding place a revolver similar to that with which the homicide was known to have been committed does not violate the rule that a defendant cannot be compelled to be a witness against himself, although such production was induced by intimidation. *State v. Turner*, 32: 772, 109 Pac. 654, 82 Kan. 787. (Annotated)

Waiver of rights.

5. One on trial for felony waives his right to be present when the verdict is received, by absenting himself on bail for a period of eighteen hours so that he cannot be found after the court has exhausted all reasonable means to secure his presence in court. *State v. Norman*, 32: 306, 129 N. W. 589, — Minn. —. (Annotated)

Validity of conviction.

6. The acquittal of part of several town officers jointly indicted for larceny in making false town orders, and securing and appropriating to their own use the cash upon them, will not render void a conviction of one who is shown to have cashed and received the money upon orders fraudulently issued as charged. *Vought v. State*, 32: 234, 114 N. W. 518, 135 Wis. 6.

CRIMINATION OF SELF.

See Criminal Law, 2-4.

CROPS.

Exemption of crops grown on homestead, see Homestead.

CROSS BILL.

See Pleading.

CROSS-EXAMINATION.

Of witness, see Witnesses.

CROSSINGS.

Injury at railroad crossing, see Railroads, 3-6.

CROWDING.

Injury to passenger by, see Carriers, 10, 15, 17; Evidence, 25.

DAMAGES.

Prejudicial error as to measure of, see Appeal and Error, 22.

Right to damages in injunction suit, see Injunction, 11.

Counterclaim for damages in suit for replevin, see Set-off and Counterclaim, 1.

Prospective operation of statute as to, see Statutes, 9.

Sales of personalty.

1. The measure of damages for failure to deliver lumber which, to the knowledge of the vendor, was purchased for resale, where the vendee, using reasonable care and diligence, purchased the best substitute obtainable in order to fulfil his subcontract of sale, is the difference between the contract

price and the price paid for the substitute, plus the cost of shipment to the place of delivery, where there was no market at the time and place of delivery and the vendee in purchasing the substitute resorted to the nearest available market. *Hardwood Lumber Co. v. Adam*, 32: 192, 68 S. E. 725, 134 Ga. 821.

Personal injuries; death.

2. While there should be some similarity in the awards of damages for like injuries, still there is no exact rule for the measurement of damages, and the facts of each case must be the basis on which the amount in each case is predicated. *McMahon v. New Orleans R. & L. Co.* 32: 346, 53 So. 857, 127 La. 544.

3. Two hundred dollars is not excessive to award against a carrier for failure to protect an elderly clergyman from the assaults of a drunken fellow passenger, although he was not seriously or permanently injured, where the conductor refused to interfere, and left him at the mercy of his assailant, who seemed to think the discomfiture of his victim a joke, and continued his assault for the entertainment of his fellow passengers. *Jansen v. Minneapolis & St. L. R. Co.* 32: 1206, 128 N. W. 826, — Minn. —.

4. Ten thousand dollars is not excessive to allow for the negligent killing of a strong, healthy man with a life expectancy of twenty-two years, who was earning \$90 per month, which he contributed to the support of his family, he being of good habits, kind, and affectionate, and taking a great interest in the training of his children. *Pulaski Gas Light Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

Eminent domain cases.

5. The damages for a railroad right of way may include compensation for the burden imposed upon the landowner of furnishing lateral support to the road, with the tracks laid, and with any traffic and any speed which may be used thereon, to the full width. *Manning v. New Jersey Short Line R. Co.* (N. J. Err. & App.) 32: 155, 78 Atl. 200, — N. J. —.

Mental anguish.

6. The damages to be allowed against a carrier for failing to protect a passenger from assault by a fellow passenger may include compensation, not only for the bodily pain, but for the mental suffering, anxiety, suspense, and sense of wrong from insult, connected therewith. *Jansen v. Minneapolis & St. L. R. Co.* 32: 1206, 128 N. W. 826, — Minn. —.

DAMS.

Loss of right to flow lands by abandonment or nonuser, see Eminent Domain, 3.

Sufficiency of proof of abandonment of right to flow lands by, see Evidence, 34.

Injunction against reconstruction of, see Injunction, 10.

As nuisance, see Nuisances, 1.

Pleading in action for negligence as to, see Pleading, 3.
 Abandonment of right to maintain as question for jury, see Trial, 12.
 Prescriptive right to flow land by, see Waters, 1.

To render the owner of a milldam immune from liability for injury to lower riparian property by its giving way, it must have been constructed sufficiently strong to resist not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated. *City Water Power Co. v. Fergus Falls*, 32: 59, 128 N. W. 817, — Minn. —.

DATE.

Alteration of date in note, see Alteration of Instruments, 4.

DEATH.

Joinder of action to recover for, with action to recover for suffering prior thereto, see Action or Suit.
 Measure of damages for, see Damages, 4.

Proximate cause of, see Proximate Cause, 1.

Prospective operation of statute as to recovery for negligent death, see Statutes, 9.

The legal liability of a father and husband to contribute to the support of his wife and minor child may be the basis of assessing damages against one who has negligently caused his death, although he had deserted the wife and child, and they did not know his whereabouts and were being supported by the wife's father. *Ingersoll v. Detroit & M. R. Co.* 32: 362, 128 N. W. 227, 163 Mich. 268. (Annotated)

DEBTOR AND CREDITOR.

Rights of creditor of corporation as against one to whom assets are transferred, see Corporations, 2-4.

Right of creditor to subject alimony to payment of debts, see Divorce and Separation, 5.

Purpose of applying property on debt as affecting offense of obtaining property by false pretenses, see False Pretenses.

Conveyances fraudulent as to creditors, see Fraudulent Conveyances.

As to exemptions, see Homestead.

Enforcement by creditor of taxing district, of tax lien, see Taxes, 4, 5.

DECLARATION OR COMPLAINT.

In pleadings, see Pleadings, 3, 4.

DECOYING.

Of child, see Kidnapping.

DEDICATION.

Conveyance by metes and bounds of lots on a street dedicated by plat to public use but vacated by the public before the conveyance is made does not carry title 32 L.R.A. (N.S.)

to the street, but the title thereto remains in the grantor and may be conveyed to another. *White v. Jefferson*, 32: 778, 124 N. W. 373, 110 Minn. 276. (Annotated)

DEEDS.

Acknowledgment of, see Acknowledgment.

Alteration of, see Alteration of Instruments, 3.

Cancellation of, see Cancellation of Instruments.

Breach of warranty in, see Covenants and Conditions, 2.

Distinction between covenant and condition, see Covenants and Conditions, 1.

Effect of conveyance of lots with respect to plat showing street which is afterwards abandoned, see Dedication.

Estoppel by, see Estoppel, 1, 2.

Patrol evidence to show that deed was intended as a mortgage, see Evidence, 14.

Record of, see Records and Recording Laws.

Reformation of, see Reformation of Instruments.

1. A deed for land which, with the consent of the grantors, has been altered after delivery so as to make it describe a larger boundary, to be effective as a deed of the larger tract must be redelivered. *Waldron v. Waller*, 32: 284, 64 S. E. 964, 65 W. Va. 605.

2. The unauthorized alteration of a deed by the grantee so as to make it describe land not conveyed thereby does not effect its operation as to an executed contract, or disturb the title vested by it, but the grantee is thereby deprived of all future benefits of an executory nature or obligation which he might have derived thereunder. *Waldron v. Waller*, 32: 284, 64 S. E. 964, 65 W. Va. 605. (Annotated)

DEEDS OF TRUST.

See Mortgage.

DE FACTO OFFICERS.

Right of, to compensation, see Officers, 3.

DEFENSE.

Due process as to, see Constitutional Law, 20.

To action for divorce, see Divorce and Separation, 3.

Burden of establishing, see Evidence, 5.

Interposition of equitable defense in action on judgment, see Justice of the Peace, 2.

In action for slander, see Libel and Slander, 3.

DEFINITENESS.

Of contract, see Contracts, 2.

DEFINITIONS.

Boycott, see Conspiracy, 1.

DELAY.

In delivery by carrier, see Carriers, 31.
Of carrier in forwarding loaded cars, see Carriers, 32, 33; Constitutional Law, 7.
In delivery of telegrams, see Telegraphs.

DELEGATION OF POWER.

Constitutionality of, see Constitutional Law, 3-6.

DEMAND.

Interest on money payable on demand, see Interest.
Time within which demand for money payable on demand must be made, see Limitation of Actions, 1, 2.
When limitation begins to run as to money payable upon demand, see Limitation of Actions, 7.

DEMURRER.

See Pleading, 6, 7.

DEPARTURE.

From pleading, see Pleading, 1.

DEPOTS.

Condition of, see Carriers, 21, 22.

DERAILMENT.

Presumption of negligence in case of, see Evidence, 9.
Proof of, as showing negligence, see Evidence, 33.

DESCENT AND DISTRIBUTION.

Payment as affecting running of limitations in favor of heirs, see Limitation of Actions, 8.

DETAINDER.

Forcible detainer, see Forcible Entry and Detainer.

DETECTIVES.

Power of municipality to employ, see Municipal Corporations, 1.

DISCRETION.

Review of, on appeal, see Appeal and Error, 8, 9.
In granting license for sale of liquor, see Intoxicating Liquor, 4, 5.
Mandamus to control, see Mandamus, 2, 3.

DISCRIMINATION.

By railroad between transfer companies, see Carriers, 34.
By carrier between passengers, see Carriers, 35, 36.

DISORDERLY HOUSES.

Libel in charging misconduct by occupants of dwelling, see Libel and Slander, 1.

DISSOLUTION.

Of corporation, see Corporations, 14, 15.

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DISTINGUISHING MARKS.

On ballot, see Elections, 3, 4.

DIVORCE AND SEPARATION.

Remarriage of divorced persons, see Marriage.
Cross bill for, see Pleading, 5.
Who may question constitutionality of statute as to residence of plaintiff, see Statutes, 2.
Partial invalidity of statute as to residence of plaintiff, see Statutes, 4.

1. A state is not prevented by the Federal Constitution from fixing the time of residence of one coming into it before he can commence an action for divorce in its courts. *Pugh v. Pugh*, 32: 954, 124 N. W. 959, — S. D. —
Grounds.

2. The refusal of a man to permit his wife actively to control his business is no ground for granting her a divorce, although it results in bickerings and inability to live harmoniously together. *Root v. Root*, 32: 837, 130 N. W. 194, — Mich. —
Defenses.

3. Prior acts of cruelty are condoned by the dismissal by a wife of a suit for divorce on that ground, and her resumption of marital relations, so that they cannot be considered in a subsequent petition for divorce. *Root v. Root*, 32: 837, 130 N. W. 194, — Mich. —

Alimony.

4. "Alimony" is not due and payable as debt, damages, or penalty; but is an award by the court upon considerations of equity and public policy, and is founded upon the obligation, which grows out of the marriage relation, that the husband must support his wife, which obligation continues after legal separation without her fault. *Fickel v. Granger*, 32: 270, 93 N. E. 527, — Ohio St. —

5. Alimony cannot, either before or after payment thereof, be subjected to the payment of debts of the wife which existed prior to the allowance thereof. *Fickel v. Granger*, 32: 270, 93 N. E. 527, — Ohio St. — (Annotated)
Custody and support of children.

6. A divorced mother does not show her unfitness, because of breach of good morals or violation of public policy, to have the custody of her child, by going into another state to avoid the operation of a statute forbidding her remarriage, contracting such marriage, and immediately returning to the state of her domicile. *Dudley v. Dudley*, 32: 1170, 130 N. W. 785, — Iowa, —

DOCUMENTARY EVIDENCE.

See Evidence, 12, 13.

DOWER.

A release of dower cannot be enforced after the instrument embodying it, which was given to secure the debt of the husband alone, has been set aside in a bankruptcy proceeding against him, as a

voidable preference under the bankruptcy act. *Re Lingafelter*, 32: 103, 181 Fed. 24, 104 C. C. A. 38. (Annotated)

DRAINS AND SEWERS.

Municipal liability for injury by, see Municipal Corporations, 9-12.

Joint liability for nuisance created by sewage plant, see Nuisance, 3.

DRUGS AND DRUGGISTS.

Compelling druggist indicted for illegal sale of liquor to produce prescriptions of physicians on which sales were made, see Criminal Law, 2, 3.

Unlawful sale of liquors by, see Evidence, 8; Intoxicating Liquors, 7.

DUE PROCESS OF LAW.

See Constitutional Law, 15-21.

EARTHQUAKE.

As cause of fall of insured building, see Insurance, 7.

EASEMENTS.

Estoppel to claim, see Estoppel, 1.

Presumption of intention to grant, see Evidence, 6.

EJECTION.

Of trespasser from train, see Carriers, 20.

ELECTIONS.

Two-thirds vote as to issuance of municipal bonds, see Bonds.

1. A citizen who has been convicted of bribery in an election and has undergone the punishment fixed by the judgment is a qualified voter, where the Constitution makes all male citizens voters except those under conviction of certain offenses including such bribery. *Osborne v. Kanawha County Court*, 32: 478, 69 S. E. 470, — W. Va. —. (Annotated)

2. The legislature cannot provide for numbering ballots where the constitution provides that the ballots shall be secret. *McGrane v. Nez Percé County*, 32: 730, 112 Pac. 312, 18 Idaho, 714.

3. Violation by election officers of the statute forbidding them to furnish ballots containing distinguishing marks, will not render the election void in the absence of any provision to that effect in the statute. *McGrane v. Nez Percé County*, 32: 730, 112 Pac. 312, 18 Idaho, 714.

4. Where, contrary to the constitutional provision for secrecy, the election officers numbered the ballots without the knowledge or authority of the voters, who had no opportunity to correct the error, an election held with the use of such ballots will not be declared void either as an invasion of the constitutional provision for secrecy or on the ground that the ballots contained distinguishing marks. *McGrane v. Nez Percé County*, 32: 730, 112 Pac. 312, 18 Idaho, 714. (Annotated)
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ELECTRICAL USES AND APPLIANCES.

See Electricity.

ELECTRICITY.

Presumption of negligence from breaking of wire, see Evidence, 10.

Negligence as question for jury, see Trial, 11.

1. Injury by electricity to a consumer by taking hold of a lamp to turn on the light, in the same manner that he had been accustomed to do without injury is evidence of negligence on the part of the company, which had contracted to furnish the electricity for the lights at a certain voltage, where the fixtures are in good condition and the voltage contracted for is not likely to produce harmful results if proper care is observed in its transmission. *Turner v. Southern Power Co.* 32: 848, 69 S. E. 767, 154 S. C. 131.

2. One who, in furnishing electricity to light a building, has done all that the highest degree of care could reasonably require in reference to the conditions, maintenance, and inspection of his wires and appliances, is not responsible for injury to a consumer by electricity escaping from a lamp while he is attempting to turn it on. *Turner v. Southern Power Co.* 32: 848, 69 S. E. 767, 154 S. C. 131.

ELEVATORS.

Duty of water company to supply water for running of, see Waters, 3, 4.

Evidence in action for injuries received from operation of, see Evidence, 12.

Liability of master for negligence of independent contractor in running, see Master and Servant, 4.

EMINENT DOMAIN.

Effect of long-continued possession following institution of *ad quod damnum* proceedings, see Adverse Possession, 1.

Amount of recovery, see Damages, 5.

Consequential injuries as element of damages, see Damages, 5.

1. The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is for a public use, although, judged from the proximate effect of the taking, the use seems to be a private one. *Noble State Bank v. Haskell*, 32: 1062, 31 Sup. Ct. Rep. 186, 219 U. S. 104, 55 L. ed. —.

2. One through whose property a railway right of way is condemned is bound to furnish lateral support for it with the tracks laid, and a traffic of any amount, at any practicable speed, to its entire width. *Manning v. New Jersey Short Line R. Co.* (N. J. Err. & App.) 32: 155, 78 Atl. 200, — N. J. —. (Annotated)

3. A petitioner in *ad quod damnum* pro-

ceedings who owns the land on each side of a water course at the point where he proposes to construct and maintain a dam does not, by a judgment in his favor and payment of the damages assessed, acquire the right in perpetuity to flow the lands of upper riparian owners, but secures a privilege which may be lost by abandonment or nonuser for an unreasonable length of time. *Gross v. Jones*, 32: 47, 122 N. W. 681, 85 Neb. 77. (Annotated)

ENGINE.

Fright of horse by, see Negligence, 1.

ENTICING.

Of child, see Kidnapping.

ENTRY.

Forcible entry, see Forcible Entry and Detainer.

EQUALITY.

Of immunities, privileges, and protection, see Constitutional Law, 7-14.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 7-14.

EQUITY.

Enforcement by, of tax lien in favor of private party, see Taxes, 4, 5.
See also Injunction.

1. Partnership is a relation of trust and confidence, and upon dissolution of the partnership, without an adjustment by the partners of their rights in the good will of the business and in the premises which they hold under lease, it is the province of a court of equity to adjust such differences. *Knapp v. Reed*, 32: 869, 130 N. W. 430, — Neb. —.

Cases of fraud; mistake; conspiracy.

2. That the proofs of loss upon an insurance policy have placed a fraudulently excessive valuation on the property destroyed will not give equity jurisdiction of a suit to enjoin the assured from maintaining an action at law and to secure an adjustment of the loss. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 32: 940, 173 Fed. 888, 97 C. C. A. 400.

3. That the mistake was one of law will not prevent equity from relieving one of several trustees of a trust fund, who was also a beneficiary, from an agreement between them which all thought to be valid, that, in order to conserve the fund, they would give him a promissory note instead of cash for his share of the estate, in consideration of his releasing them and the estate from other liability, which they had no authority to do, and which was therefore void, where rescission of the agreement will result in no loss to the estate or other beneficiaries, while refusal to rescind will enable the other beneficiaries to enrich themselves at his expense. *Reggio v. Warren*, 32: 340, 93 N. E. 805, 207 Mass. 525. 32 L.R.A. (N.S.)

To avoid multiplicity of suits.

4. Several insurance companies having policies providing for proportional liability on property in which a loss has occurred cannot join in a bill in equity to enjoin the assured from maintaining actions at law, and to adjust the amount of their respective losses in one suit, on the theory that they will thereby save a multiplicity of suit. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 32: 940, 173 Fed. 888, 97 C. C. A. 400. (Annotated)

Retaining jurisdiction.

5. Equity may, in a suit by a railroad company to enjoin one from whom it has purchased a right of way from interfering with its enjoyment thereof, after it has forfeited it because of breach of condition subsequent, assess the damages and transfer the title to the railroad company as in an eminent domain proceeding, if, under protection of a temporary injunction, the road has been completed and put in operation so that refusal of the injunction will interfere with public convenience. *Oregon R. & Nav. Co. v. McDonald*, 32: 117, 112 Pac. 413, — Or. —.

6. One seeking the aid of a court of equity to secure the cancelation of notes alleged to have been misappropriated cannot question the jurisdiction of the court to enter upon a cross bill a money judgment against him for the amount due on the notes. *Zollman v. Jackson Trust & Sav. Bank*, 32: 858, 87 N. E. 297, 238 Ill. 290.
Equity principles.

7. That a beneficiary of a trust who released the estate from other liability upon receiving a note for the amount due him from the trustees, which was void for lack of authority, receives a small amount of cash, does not prevent his maintaining a bill to rescind for mutual mistake, and he is not required to return the amount so received before relief will be granted, where he was absolutely entitled to the cash, and the trustees would have to pay it back at once were it returned to them. *Reggio v. Warren*, 32: 340, 93 N. E. 805, 207 Mass. 525.

ESTOPPEL.**By deed.**

1. A purchaser of a tract of land cut off from a highway by remaining land of the grantor and that of strangers, who accepts a deed reciting that the grant is bounded on one side by land of the grantee, and executes a purchase money mortgage containing the same recital, is estopped, as against a subsequent grantee of the remainder of the grantor's tract, from claiming that the recital was a mistake, and that he had no access to the highway, and therefore was entitled to a way of necessity. *Doten v. Bartlett*, 32: 1075, 78 Atl. 456, — Me. —.

2. An administrator who executes a deed purporting to convey testator's real estate, in which he has a private interest as heir, is estopped to claim that such interest did not pass, although the deed is void

on its face,—especially where he warrants the title as fully as by law he is authorized to do, and the statute requires no covenant in an administrator's deed. *Bliss v. Tidrick*, 32: 854, 127 N. W. 852, — S. D. —
By conduct, request, or admissions generally.

3. A purchaser of a set of books to be delivered one at a time and paid for as delivered is estopped to insist on continued performance by the seller, where, after he has failed to pay for several books delivered, and has been notified that the contract has been rescinded, he pays no attention to demands for payment for the volumes received, and makes no demand for future deliveries, for more than two years, until the price of the books has been advanced; and it is immaterial that payment for the volumes received is subsequently paid by one to whom the contract had been assigned. *Quarton v. American Law Book Co.* 32: 1, 121 N. W. 1009, 143 Iowa, 517.

(Annotated)

By laches, silence, or acquiescence.

4. One who has granted a right of way to a railroad company on condition that it complete its road within a specified time is not estopped from enforcing the condition by permitting the railroad company to enter and construct its grade, if that is done within the time specified. *Oregon R. & Nav. Co. v. McDonald*, 32: 117, 112 Pac. 413, — Or. —

By negligence or fraud.

5. A stockholder of a corporation who renders it insolvent by transferring to it his stock for its assets is estopped from claiming that he thereby ceased to be a stockholder to avoid the statutory stockholder's liability to future creditors. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 32: 137, 123 N. W. 106, 141 Wis. 377.
By receiving benefits.

6. The facts that the cashier of a bank induced a stranger to lend money to one to whom the bank had made a loan in excess of the statutory limit, upon a guaranty by the bank of repayment of the loan in order to secure payment of a portion of its claim and relieve him from liability for making the excessive loan, and that the bank received a large portion of the money so secured, does not estop it from setting up the invalidity of the guaranty. *First Nat. Bank v. Monroe*, 32: 550, 69 S. E. 1123, 135 Ga. 614.

Who affected.

7. An attaching creditor of an administrator is bound by an estoppel upon him to contest the validity, as against his own interest, of a deed given by him as administrator which is void on its face, but which purports to convey real estate in which he has an interest as heir. *Bliss v. Tidrick*, 32: 854, 127 N. W. 852, — S. D. —

EVIDENCE.

Prejudicial error as to, see Appeal and Error, 11-13.

Compelling accused to furnish, see Criminal Law, 2-4.

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Conformity of judgment to proof, see Judgment, 1.

Reception of, on trial, see Trial, 2.

Judicial notice.

1. An increased penalty authorized by statute for a second conviction for unlawfully selling intoxicating liquor cannot be based on a court's judicial knowledge of the first conviction, but such conviction must be alleged and proven. *State v. Davis*, 32: 501, 69 S. E. 639, — W. Va. —

2. The courts will take judicial notice of the fact that some injury must result from substance-laden smoke pervading the atmosphere in which persons and property necessarily remain. *Rochester v. Macaulay-Fien Milling Co.* 32: 554, 92 N. E. 641, 199 N. Y. 207.

3. The court takes judicial notice of the fact that publications of advertisements were on Sunday, in an action on *quantum meruit* to recover the value thereof, where the dates of publication appear and those dates fall on Sunday. *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.* 32: 435, 128 N. W. 861, 144 Wis. 224.

4. The court may take judicial notice that a particular railroad company is engaged in interstate commerce. *Dingman v. Duluth, S. S. & A. R. Co.* 32: 1181, 130 N. W. 24, — Mich. —

Presumptions and burden of proof.

Validity of statute as to, see Constitutional Law, 21.

5. The burden of showing a license from a former owner is upon one sued for maintaining a portion of the foundation wall of his building, which was projected into the soil of the adjoining property owner, to enable him to avoid liability for the continuing trespass upon that ground. *Milton v. Puffer*, 32: 1010, 93 N. E. 634, 207 Mass. 416.

6. The presumption of intention to include in a grant a right of access to a highway, which arises when the land granted is cut off from a highway by remaining land of the grantor or that of strangers, is overcome where one boundary of the land granted is stated by the deed to be upon other land of the grantee, which has access to a highway. *Doten v. Bartlett*, 32: 1075, 78 Atl. 456, — Me. — (Annotated)

7. If a stockholder of a corporation, by agreement with it or any of its officers, sells his stock to the organization in exchange for corporate assets, knowing, actually or constructively, that the result will be to render the corporation insolvent, all parties to the transaction contemplating that it will continue in business and incur indebtedness as before, the creditors relying upon appearance of the previous solvent condition continuing, the result to them must be presumed to have been mutually intended, supplying the element of bad faith essential to condemn the transfer. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 32: 137, 123 N. W. 106, 141 Wis. 377.

8. When a sale of intoxicating liquors is proven to have been made by a licensed

druggist, it is presumed to have been unlawfully made, and the burden is then cast upon him to rebut such presumption. *State v. Davis*, 32: 501, 69 S. E. 639, — W. Va. —.

9. Where by statute a carrier is liable for injury to a gratuitous passenger through its failure to exercise ordinary care, proof of derailment of a train, to the injury of such passenger, raises the presumption that it occurred through ordinary negligence and places upon the carrier the burden of showing that it occurred notwithstanding its exercise of ordinary care. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

10. An electric railway company cannot be held liable for injury to a person on the street by the breaking of its trolley wire, on the ground that there is no other apparent cause for the break than the negligence of the company. *Lanning v. Pittsburg Railways Co.* 32: 1043, 79 Atl. 136, 229 Pa. 575.

(Annotated)

11. No presumption of negligence on the part of the driver of an automobile arises from the mere fact that he runs down and injures a pedestrian on a public street. *Millspaugh v. Brogdon*, 32: 1177, 134 S. W. 632, — Ark. —.

(Annotated)

11a. Where a boiler-room has been maintained under a public alley for more than fifteen years under authority of a municipal ordinance and is safely and sufficiently covered, it will be presumed that the ordinance was complied with and that the work was done with the approval of the municipality. *Tiernan v. Lincoln*, 32: 1034, 130 S. W. 280, — Neb. —.

Documentary evidence.

12. A lease obligating the landlord to furnish elevator service to his tenants is admissible in evidence in an action by a servant of the lessee against the landlord, to recover for injury received by the operation of the elevator. *Sciolaro v. Asch*, 32: 945, 91 N. E. 263, 198 N. Y. 77.

13. Upon the question of the ownership of insured property claimed by retail merchants to have been bought by them from wholesalers on credit, a statement of the latter to their banker, showing the gross amount of accounts receivable owned by them, is not admissible in evidence, where it contains nothing to contradict the positive testimony of insured that they owned the property, while the amount named in the statement might well have included what insured owed on the property. *Clute v. Clintonville Mut. F. Ins. Co.* 32: 240, 129 N. W. 661, 144 Wis. 638.

Parol.

14. Parol evidence is admissible as against a second vendee, even in the absence of a charge of fraud, to show what the original act, which purported to be an act of sale with right of redemption, was intended by the parties thereto as a mortgage to secure a specific debt, since the rule excluding parol testimony to vary a written instrument applies only to the language used by the parties, and therefore does not forbid an inquiry into the object of the par-

ties in executing and receiving the instrument. *Jolivet v. Chavis*, 32: 1046, 52 So. 99, 125 La. 923.

15. Parol evidence is admissible to show that the term "as per your conversation," as used in the writing "as per your conversation . . . to supply ice at the rate of thirty cents per ton (30), we herewith send you the following orders to be shipped at once," to various points "via" specified railroads, none of which reached the contemplated loading place, referred to the fact that such price for the ice was made on condition of its being shipped out over a specified railroad whose track reached the loading place, so as to prevent defendant receiving credit, when sued for the contract price of the ice, for the difference between what the freight charges would have been had the ice been shipped as requested in the writing and what they were over the road agreed upon in the conversation by which it was shipped. *Klueter v. Joseph Schlitz Brewing Co.* 32: 383, 128 N. W. 43, 143 Wis. 347.

(Annotated)

Opinions and conclusions.

Presumption of facts to save error in refusing to admit opinion evidence, see Appeal and Error, 6.

Review of discretion in ruling upon competency of experts, see Appeal and Error, 9.

Weight of opinion evidence, see *infra*, 32.

16. Upon the question of the liability of an insurance company upon a policy containing an exemption in case of the fall of a building except as a result of the fire, a witness cannot be permitted to give his opinion as to whether or not the building fell as the result of the fire. *Davis v. Connecticut F. Ins. Co.* 32: 604, 112 Pac. 549, 158 Cal. 766.

17. A nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversations, or conduct which to some extent indicate sanity. *Auld v. Cathro*, 32: 71, 128 N. W. 1025, 20 N. D. 461.

18. One who disclaims familiarity with the price of property cannot give an opinion as to its value. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

19. A witness familiar with the conditions may be permitted to state his opinion as to whether or not odors from a sewage purification plant could be smelled at the residence of a complaining property owner, although he could not give such evidence as an expert, because the subject was within the knowledge of all men of common observation and experience. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

Confessions; evidence wrongfully obtained.

20. The admission of evidence showing that one charged with murder produced from a hiding place a revolver similar to that with which the homicide was known to have been committed does not violate the rule excluding proof of an involuntary confession, although such production was in-

duced by intimidation. *State v. Turner*, 32: 772, 109 Pac. 654, 82 Kan. 787.

(Annotated)

Hearsay; declarations; res gestæ.

21. The physician of a testator is not permitted to give his opinion in a will contest, upon testator's mental capacity, which is based upon statements by testator to the physician, or the latter's observation of the patient while visiting him professionally for the purpose of giving him treatment. *Auld v. Cathro*, 32: 71, 128 N. W. 1025, 20 N. D. 461.

(Annotated)

22. Evidence of declarations of an alleged donor is admissible as corroborative of evidence of the gift. *Garrison v. Union Trust Co.* 32: 219, 129 N. W. 691, — Mich. —.

Relevancy and materiality.

Presumption of facts to save error in rejecting evidence, see Appeal and Error, 6.

Prejudicial error in admitting, see Appeal and Error, 11-13.

23. Evidence that thirteen days before a wagon wheel had caught in a street car switch, to the injury of the driver, a similar accident had happened, is admissible, where the evidence shows that a defective condition existed at the time of the accident complained of, as tending to show the existence of the defective condition for such a length of time that defendant with due diligence should have discovered and rectified it. *Alcott v. Public Service Corp.* (N. J. Err. & App.) 32: 1084, 74 Atl. 499, 78 N. J. L. 482.

24. Evidence that thirteen days before and three days after a wagon wheel had caught in a street car switch, to the injury of the driver, similar accidents have happened to others, is admissible in corroboration of evidence that a defective condition existed at the time of the injury complained of. *Alcott v. Public Service Corp.* (N. J. Err. & App.) 32: 1084, 74 Atl. 499, 78 N. J. L. 482.

(Annotated)

25. Upon the question of the negligence of a street car company in permitting people to crowd into a car at a terminal, to the injury of a passenger seeking to alight, evidence is admissible of the condition and character of the crowds which had been at that terminal on similar days and at similar times on previous years. *Glennen v. Boston Elevated R. Co.* 32: 470, 93 N. E. 700, 207 Mass. 497.

26. Upon prosecution for an assault with attempt to commit sodomy, evidence is admissible of an attempt by accused to commit a similar act upon another person present at the time, immediately after making the attempt for which he is on trial. *State v. McDowell*, 32: 414, 112 Pac. 521, — Wash. —.

27. In determining the reasonableness of the conduct of one who upon his vendor's failure to make delivery of goods which, to the knowledge of his vendor, he has purchased for resale, goes into the open market and purchases a substitute in order to fill his subcontract of sale, and of the time of

his purchase, the conduct of the original vendor in asking delay after the failure to deliver and his promise to make delivery may be considered in an action brought by the original vendee to recover damages caused by the failure of his vendor to make delivery. *Hardwood Lumber Co. v. Adam*, 32: 192, 68 S. E. 725, 134 Ga. 821.

(Annotated)

28. In a prosecution for perjury alleged to have been committed in the trial of a certain criminal case in testifying in behalf of the defendant therein, it is ordinarily not competent for the state to prove that such trial resulted in a conviction. *Gray v. State*, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. —.

29. Evidence of the spreading of the solid matter from a sewage purification plant over the adjoining ground is admissible under a complaint for operating the plant in such a manner as to constitute a nuisance to neighboring property, where such use of it is part of the common purpose of those operating the plant, and it is immaterial that the owner of the plant, which was in possession of a lessee, reserved the right to change or enlarge it at any time it saw fit. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

Weight, effect, and sufficiency.

Review of facts on appeal, see Appeal and Error, 10.

Sufficiency of evidence to go to jury, see Trial, 4.

Sufficiency of evidence to displace doctrine of *res ipsa loquitur*, see Trial, 11.

30. The jury may find that the contents of a building were set on fire between the beginning and ending of an earthquake which lasted forty-five seconds, from evidence that from four to five minutes after the shock the contents were burning with a good body of fire, and that there were live electric wires running into the building. *Davis v. Connecticut F. Ins. Co.* 32: 604, 112 Pac. 549, 158 Cal. 766.

31. The good faith of a newspaper in publishing defamatory matter may be established by showing that it was furnished by a reliable reporter of long experience, and was accepted and published as a news item in reliance upon its truth. *Courier-Journal Co. v. Phillips*, 32: 309, 134 S. W. 446, — Ky. —.

32. The opinion of the owner of a mill that there was danger of fire being set by the smokestack, expressed in a letter urging the owner of neighboring property to protect his roofs, is not of much probative weight upon the question of his negligence in maintaining the stack, as against the fact that the plant was constructed on approved plans, and, for a period of seventeen years, no live spark had been known to escape from the chimney nor any fire to be set by it. *American Ice Co. v. South Gardner Lumber Co.* 32: 1003, 79 Atl. 6 — Me. —.

33. Mere proof of derailment of a train, to the injury of a gratuitous passenger,

without anything to show the circumstances under which it took place, is not sufficient to show gross negligence sufficient to charge the carrier of such passenger with liability for his injury on that ground. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

34. Abandonment of a right to flow lands for a millpond may be found from evidence that the principal mill had been dismantled and removed from the mill site ten years before the controversy as to the right to continue it arose, that for eight of those years occasionally grists of grain had been ground by an old building on the premises, that the public had not been served by operation of the mill, that the pond had been used principally to produce ice, and that for two years the dam was permitted to remain in a demolished condition. *Gross v. Jones*, 32: 47, 122 N. W. 681, 85 Neb. 77. (Annotated)

35. Evidence tending to show that a provision limiting liability was a part of a contract of guaranty when delivered, and that it had been added to the contract at the request of the guarantor, accompanied by the unexplained fact that such provision had been cross marked when offered in evidence by the one guaranteed, in whose possession it had been, is sufficient to sustain a finding that the markings were placed on the instrument after delivery, without the consent of the guarantor and with the intention of canceling the clause limiting liability. *O. N. Bull Remedy Co. v. Clark*, 32: 519, 124 N. W. 20, 109 Minn. 396. Admissibility under pleadings.

36. Under a count for simple larceny, it is admissible to prove that the property was obtained by false pretense with intent to defraud. *State v. Williams*, 32: 420, 69 S. E. 474, — W. Va. —. Variance.

Presumption on appeal as to variance, see Appeal and Error, 7.

37. An action against a carrier for loss of a carload of goods because of its failure to remove it promptly when loaded, as required by contract, cannot be sustained merely by proof of usage or custom to remove cars under such circumstances, where knowledge of it is not shown to have been brought home to the officers of either the shipper or the carrier who were clothed with authority to make a contract. *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* 32: 323, 134 S. W. 613, — Tenn. —.

38. A complaint charging a gas company with liability in damages for injuries due to negligence in failing to repair its pipes will authorize a recovery in case the negligence is with respect to pipes which, in the operation of its business, it uses and assumes the duty of repairing, although they may belong to another. *Consolidated Gas Co. v. Connor*, 32: 809, 78 Atl. 725, — Md. —.

EXCEPTIONS.

See Appeal and Error, 3; Trial, 3.
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EXCLUSIVE PRIVILEGE.

Grant of, by carrier to transfer companies, see Carriers, 34.

In general, see Constitutional Law, 7-14.

EXECUTORS AND ADMINISTRATORS.

Estoppel by administrator's deed, see Estoppel, 2.

Attaching creditor of administrator as bound by estoppel upon him, see Estoppel, 7.

Right of administrator to claim proceeds of insurance on life, see Insurance, 8.

Effect of appointment by mortgagee of mortgagor as executor of estate on priority of mortgage, see Mortgage.

Inheritance tax for money lost through misappropriation of, by executor, see Taxes, 6.

EXEMPTION.

Homestead exemptions, see Homestead.

EXHIBITIONS.

See Amusements.

EXPLOSIONS AND EXPLOSIVES.

As to explosion of gas, see Gas.

Negligence as question for jury, see Trial, 10.

FACTS.

Review of, on appeal, see Appeal and Error, 10.

FAITH AND CREDIT.

To be given judgment of other states, see Judgment, 3.

FALSE IMPRISONMENT.

A railroad company is not responsible for the act of its station agent in using its telegraph line and his official position as agent, to secure the arrest of a person who was eloping with the daughter of a friend, under a false charge that he had stolen property which had been committed to the charge of the agent, since it is not within the express or implied authority of a station agent to secure arrests for such causes. *Mayfield v. St. Louis, I. M. & S. R. Co.* 32: 525, 133 S. W. 168, — Ark. —.

FALSE PRETENSES.

Admissibility of evidence to prove, see Evidence, 36.

1. One who obtains possession of property upon the pretense of buying it for cash, at an agreed price, for the purpose of the payment of a just debt then due by the owner, equal to, or greater in amount than, the price of the property, is not guilty of a statutory crime. *State v. Williams*, 32: 420, 69 S. E. 474, — W. Va. —. (Annotated)

2. The procuring of the payment of a

just debt already due, by false pretenses, is not an indictable offense. *State v. Williams*, 32: 420, 69 S. E. 474, — W. Va. —.

FAMILY EXPENSES.

See Husband and Wife.

FARE.

Of passenger, see Carriers, 24-27.

FINES.

Who may maintain action to recover, see Parties, 1.

FIREMEN.

Injury to fireman on running board of street car, see Carriers, 18.

FIRES.

Sufficiency of proof of origin of fire, see Evidence, 30.

Weight of opinion evidence as to danger of, see Evidence, 32.

Set by independent contractor, see Master and Servant, 5-7.

1. The owner of a smokestack is not liable for fire set by a spark from it unless he is shown to have failed to exercise ordinary care in the construction, maintenance, or operation of the plant, in view of the conditions of the surrounding property. *American Ice Co. v. South Gardiner Lumber Co.* 32:1003, 79 Atl. 6, — Me. —.

(Annotated)

2. The owner of a lumber yard cannot be held negligent in the construction of a smokestack of a certain height without a spark arrester, so as to be liable for fire set by a spark from it, where the stack and furnace were constructed on approved plans, and, for a period of seventeen years, no live spark was known to have come from, or fire to have been set by, it, although it was surrounded by a large amount of highly inflammable material, and in the opinion of an expert, it should have been higher and had a spark arrester. *American Ice Co. v. South Gardiner Lumber Co.* 32:1003, 79 Atl. 6, — Me. —.

FOOD.

Criminal liability for furnishing oleomargarine in place of butter, see Criminal Law, 1.

A waiter in charge of a lunch counter who makes requisition for supplies needed, and fills the orders of patrons from materials received, furnishes such material to them within the meaning of a statute providing for the punishment of one who furnishes oleomargarine instead of butter. *State v. Welch*, 32: 746, 129 N. W. 656, — Wis. —.

FORCIBLE ENTRY AND DETAINER.

Jurisdiction of justice of the peace in action of, see Justice of the Peace, 1.

1. The right to recover possession of real estate by an action of forcible entry 32 L.R.A. (N.S.)

and detainer is not necessarily limited to cases in which the relation of landlord and tenant exists. *Knapp v. Reed*, 32: 869, 130 N. W. 430, — Neb. —.

2. If partners have been conducting a general real estate, brokerage, and insurance business as copartners in leased premises, and one of the partners secures a renewal of the lease in his own name without the consent of the other, he cannot maintain an action of forcible entry and detainer to put the other partner out of the premises. *Knapp v. Reed*, 32: 869, 130 N. W. 430, — Neb. —.

3. Mere occupancy or personal presence of the complainant upon the ground does not of itself constitute such possession as will sustain an action of forcible entry. *Schwinn v. Perkins* (N. J. Err. & App.) 32: 51, 78 Atl. 19, — N. J. —.

4. Where the rightful owner gains possession of lands by a forcible entry, he may, as punishment for his violence, be deprived of it by the statutory proceeding in favor of one in actual peaceable possession, although not rightfully entitled thereto. *Schwinn v. Perkins* (N. J. Err. & App.) 32: 51, 78 Atl. 19, — N. J. —. (Annotated)

5. A mere trespasser cannot by the very act of trespass, immediately and without excuse, give himself what the law understands by "possession" against the person whom he ejects, so as to be entitled to the aid of the law in protecting his possession. *Schwinn v. Perkins* (N. J. Err. & App.) 32: 51, 78 Atl. 19, — N. J. —.

FOREIGN JUDGMENT.

See Judgment, 3.

FORFEITURE.

Of insurance policy, see Insurance, 5.

FORGERY.

Presumptions on appeal in prosecution for, see Appeal and Error, 7.

Of check, see Banks, 11-13.

1. An order upon a merchant purporting to be signed by one having credit with him, requesting the filing of an order to a certain amount, is the subject of forgery, and one who, without authority, signs the customer's name to such instrument, and presents it, and receives goods upon it, will be guilty of that offense, although it is not made payable to bearer, and does not in terms obligate the customer to pay for the goods. *Forcy v. State*, 32: 327, 131 S. W. 585, — Tex. Crim. Rep. —.

(Annotated)

2. One who knowingly presents to the carrier a forged order for intoxicating liquor which had been ordered in the name of the one whose name is signed to the order is guilty of uttering a forged instrument both with respect to the carrier, who is induced to make a wrong delivery of the property, and to the consignee, where, had the order been genuine, he might have been subjected to a penalty for violation of the law regulating dealings in intoxicating li-

quors. *State v. Webster*, 32: 337, 70 S. E. 422, — S. C. —. (Annotated)

FRAUD AND DECEIT.

Of savings bank in paying deposit to wrong person, see Banks, 12.

Cancellation of deed because of, see Cancellation of Instruments.

Power of equity in case of, see Equity, 2.

Estoppel by, see Estoppel, 5.

As to fraudulent conveyances, see Fraudulent Conveyances.

Cancellation of insurance policy for, see Insurance, 1, 2.

In padding inventory in proofs of loss, see Insurance, 5.

In judgment obtained in sister state, see Judgment, 3.

Defense of fraud in action upon judgment, see Justice of the Peace, 2.

FRAUDULENT CONVEYANCES.

Where a transaction involving a transfer of property is void as to creditors of the transferor, and equity jurisdiction is not necessary to remove a cloud on title or for some other relief within the peculiar field of equity jurisdiction, the creditors may proceed at law, treating such transaction as if it never occurred, it being void as to them, and the bringing of an action inconsistent with the validity of the transfer being a sufficient election. *Atlanta & W. Butter & Cheese Asso. v. Smith*, 32: 137, 123 N. W. 106, 141 Wis. 377.

FREEDOM OF SPEECH.

See Constitutional Law, 24.

FREIGHT CARRIERS.

See Carriers.

FRIGHT.

Of horse on highway, see Highways, 2; Negligence, 1; Railroads, 4, 6.

Liability for manslaughter of one causing death by, see Homicide.

FULL FAITH AND CREDIT.

To judgment of other states, see Judgment, 3.

GAMES.

On Sunday, see Sunday, 1.

GAS.

Variance between pleading and proof in action for injuries, see Evidence, 38.

Duty of municipality to care for service pipe, see Municipal Corporations, 6.

Proximate cause of death by asphyxiation, see Proximate Cause, 1.

Negligence as question for jury, see Trial, 10.

1. A gas company which has assumed the duty of keeping in repair the service pipes through which it supplies gas to

street lamps belonging to the municipality cannot avoid liability for injuries to third persons from gas escaping through its neglect of duty, because the pipes actually belonged to the municipality. *Consolidated Gas Co. v. Connor*, 32: 809, 78 Atl. 725, — Md. —.

2. That death was caused by inhalation of gas by one disconnecting service pipes will not relieve from liability for his death a gas company which had negligently left them in a condition indicating that they were dead, when they in fact conveyed gas, unless it was done voluntarily. *Pulaski Gaslight Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

3. A gas company is negligent in running without request from, or notice to, the occupants of the property, a new service pipe from its main to a house in which the use of gas has long been discontinued, and from which the meter has been removed, leaving the old pipe cut, and partly exposed by a change of street grade, and apparently dead, and making underground connection with the riser leading to the meter cock, the position of which is undisturbed, thereby indicating that it is still a part of the dead pipe, and that no gas reaches the meter cock. *Pulaski Gaslight Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

4. The turning by a gas company of gas into pipes which it has failed to keep in repair, as required by its undertaking with the municipality, as its agent in the supplying of gas for street lighting, is a misfeasance, and not merely a nonfeasance of its duty to repair, and therefore it is liable for injuries thereby caused to strangers to the undertaking. *Consolidated Gas Co. v. Connor*, 32: 809, 78 Atl. 725, — Md. —. (Annotated)

GASOLENE.

Presence of, on insured property, see Insurance, 3.

GIFT.

Evidence of declarations of alleged donor, see Evidence, 22.

A gift of a ring, completed by delivery and acceptance, is not affected by the fact that it is lent by the recipient to the donor, and retained in his possession until his death. *Garrison v. Union Trust Co.* 32: 219, 129 N. W. 691, — Mich. —. (Annotated)

GOOD FAITH.

Sufficiency of evidence to establish, see Evidence, 31.

GOOD WILL.

Jurisdiction of justice of the peace to determine rights of partners as to, upon dissolution, see Justice of the Peace, 1.

Rights of partners as to, see Partnership, 2.

1. A member of a partnership is not,

by voluntarily selling its good will for a valuable consideration, estopped from dealing with old customers of the partnership whose patronage, apart from that of the general public, he does not solicit, nor with persons mentioned in a trade list which had been compiled by the old firm and abstracted by him. *Von Bremen v. MacMonnies*, 32: 293, 93 N. E. 186, 200 N. Y. 41.

2. A member of a partnership who voluntarily conveys the good will of the business for a valuable consideration cannot, upon establishing a competing business, solicit trade from old customers of the partnership. *Von Bremen v. MacMonnies*, 32: 293, 93 N. E. 186, 200 N. Y. 41.

3. A sale of good will by members of a partnership must be deemed to be voluntary, where they were free to sell or not at their discretion, although it occurred within a few weeks of the termination of the partnership agreement, to avoid liquidation. *Von Bremen v. MacMonnies*, 32: 293, 93 N. E. 186, 200 N. Y. 41.

GOVERNOR.

Mandamus to, see Mandamus, 1.

GRAND JURY.

Libel by charges in proceedings before, see Libel and Slander, 2.

Qualifications of commissioners selecting, see Officers, 1.

GROSS NEGLIGENCE.

Sufficiency of proof of, see Evidence, 33.

GUARANTY.

By bank, see Banks, 10; Corporations, 9; Estoppel, 6.

Depositors' guaranty fund, see Banks, 1; Constitutional Law, 12, 22; Eminent Domain, 1.

Sufficiency of proof as to wrongful alteration of, see Evidence, 35.

Question for jury as to whether alteration of, was without consent of other party, see Trial, 6.

GUILT.

Presumption of, see Evidence, 7.

HABEAS CORPUS.

Habeas corpus lies to secure the release of one in custody under a conviction upon a complaint which charged no offense under the laws of the state because no law existed making the acts committed by accused an offense, although he did not pursue his remedy by appeal. *Ex parte Roque-more*, 32: 1186, 131 S. W. 1101, — Tex. Crim. Rep. —.

HEARSAY.

Evidence of, see Evidence, 21, 22.

HIGHWAYS.

Regulation of poles in street as interference with interstate commerce, see Commerce, 1.

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Selling lots with respect to plat showing street which has been abandoned, see Dedication.

Right of access to, see Estoppel, 1; Evidence, 6.

Presumption of compliance with ordinance in making excavation, see Evidence, 11a.

Running of limitations against right to recover for injury to bridge, see Limitation of Actions, 6.

Municipal regulations as to, see Municipal Corporations, 3-5.

1. Under charter authority to remove obstructions from sidewalk and to regulate the building of bulkheads, cellars, and basement ways and other structures projecting upon and over adjoining excavations through and under the sidewalks of the city, a municipal corporation has power to grant the right to a lot owner to excavate a room under an alley adjacent to his lot, to be used as a boiler and coal room, under suitable regulation protecting the public in the free, safe, and unobstructed use of the alley. *Tiernan v. Lincoln*, 32: 1034, 130 N. W. 280, — Neb. —.

Liability for injuries on.

Presumption of negligence from fall of electric wire, see Evidence, 10.

Evidence in action for injury, see Evidence, 23, 24.

Injury by trains at crossing, see Railroads, 3, 5, 6.

Question for jury as to negligence, see Trial, 8.

1a. A municipal corporation is not liable for an injury to a pedestrian caused by a wagon used for removing refuse from the streets, by the fact that to move it from one place to another it was attached to the back of a sprinkling cart, although there might have been a safer or better way of doing the work. *Louisville v. Carter*, 32: 637, 134 S. W. 468, — Ky. —.

2. A municipal corporation is not liable for injuries caused by frightening a horse through the negligent handling of a steam roller while engaged in repairing its streets. *Danville v. Fox*, 32: 636, 134 S. W. 883, — Ky. —.

3. The duty of a municipal corporation to keep its streets in safe condition extends to the use of the street by its employees engaged in the care of the streets, and therefore it is liable for injury to a pedestrian who is run down by the negligent operation of an automobile driven by its street superintendent while he is engaged in the performance of his duty as such superintendent. *Hewitt v. Seattle*, 32: 632, 113 Pac. 1084, — Wash. —.

4. The mere fact that a cart owned and used by a municipal corporation for the purpose of sprinkling its streets is not in actual use for that purpose at the time it causes injury to a pedestrian, but is being taken through the streets for another purpose, does not render the municipality liable for the injury. *Louisville v. Carter*, 32: 637, 134 S. W. 468, — Ky. —.

5. Permitting trees to remain along a street in such a way as to interrupt at places the light from the street lamps, casting shadows in which a traveler cannot see his way, does not constitute a nuisance which will render the municipality liable for injuries to a traveler through an accident while in such shadow, which might have been avoided had he been able to see. *Blain v. Montezuma*, 32: 542, 129 N. W. 808, — Iowa, —.

6. A municipal corporation which has undertaken to exercise its charter power to light its streets cannot be held liable on the ground of negligence for an accident to a traveler on the street, because the lighting system is not as efficient as it might have been. *Blain v. Montezuma*, 32: 542, 129 N. W. 808, — Iowa, —.

7. One from whose building an awning falls, to the injury of a passer-by on the highway, must, to avoid liability for the injury, prove that all proper and reasonable care had been employed in the construction and maintenance of the awning. *Potter v. Rorabaugh-Wiley Dry Goods Co.* 32: 45, 112 Pac. 613, — Kan. —.

8. It is the duty of one who projects or maintains an awning over a street to keep it from becoming dangerous to pedestrians lawfully upon the street. *Potter v. Rorabaugh-Wiley Dry Goods Co.* 32: 45, 112 Pac. 613, — Kan. —.

9. That one injured by a defect in a city street is rendered mentally and physically incompetent by the injury does not excuse his failure to give the notice to the city which the statute makes a prerequisite to the maintenance of an action against it. *Touhey v. Decatur*, 32: 350, 93 N. E. 540, — Ind. —. (Annotated)

10. Municipal authorities cannot waive the notice required by statute to be given in case of injury on a city street before action can be brought against the city to hold it liable therefor. *Touhey v. Decatur*, 32: 350, 93 N. E. 540, — Ind. —.

11. No constitutional right of one injured by a defect in a city street is impaired by a statutory requirement that before he can maintain an action against the municipality for the injury, he must have given it notice of the time, place, cause, and nature of the injury. *Touhey v. Decatur*, 32: 350, 93 N. E. 540, — Ind. —.

12. Notice to city officers of an accident on its streets through reading a newspaper description if it does not comply with a statutory requirement that before action can be brought against the city to hold it liable for the injuries written notice must be given to it of the time, place, cause, and nature of the injury. *Touhey v. Decatur*, 32: 350, 93 N. E. 540, — Ind. —.

HOLIDAY.

Holding of corporate meeting on, see Corporations, 11.
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HOMESTEAD.

The crops grown on a homestead are exempt from execution where the constitutional provision for homestead exemptions declares that it shall be liberally construed. *Neblett v. Shackleton*, 32: 577, 69 S. E. 946, 111 Va. 707. (Annotated)

HOMICIDE.

Self-crimination of one charged with, see Criminal Law, 4.

Evidence of involuntary confession, see Evidence, 20.

One who in making an unlawful assault upon another so terrorizes his relative that death ensues from fright, fear, or nervous shock, is guilty of involuntary manslaughter, under a statute defining that offense to be the unlawful killing of a human being in the commission of an unlawful act not amounting to felony. *Ex parte Heigho*, 32: 877, 110 Pac. 1029, 18 Idaho, 566.

HOSPITAL.

Provision for bipartisan commission to have charge of, see Constitutional Law, 8.

HUSBAND AND WIFE.

Effect of husband's abandonment on right to recover for his death, see Death.

As to divorce, see Divorce and Separation.

Injunction against business competition by wife, see Injunction, 1.

As to marriage, see Marriage.

A buggy purchased by a man for the use of his family is within a statute making the husband and wife liable for family expenses, although upon one occasion he refused to permit her to use it, and they separated a short time after its purchase. *Houck v. La Junta Hardware Co.* 32: 939, 114 Pac. 645, — Colo. —. (Annotated)

ILLNESS.

Failure of carrier promptly to transport medicine for sick person, see Carriers, 31.

IMMATURITY.

Effect of, on right to set-off, see Set-off and counterclaim, 2.

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 2, 25.

IMPROVEMENTS.

Public improvements, see Public Improvements.

IMPUTED NEGLIGENCE.

See Negligence, 6.

INCOMPETENT PERSON.

Review of discretion as to competency of experts to testify as to mental capacity, see Appeal and Error, 9.

Attempt to deprive one accused of crime of defense of insanity, see Constitutional Law, 20.

Opinion evidence upon issue of sanity, see Evidence, 17.

Mental incapacity as excuse for failure to give notice of injury required as condition of municipal liability, see Highways, 9.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Master and Servant, 4-7.

Liability of, for injury, see Master and Servant, 8-11.

INDICTMENT, INFORMATION, AND COMPLAINT.

1. An allegation in an information for perjury that the clerk of the court before whom the false oath was alleged to have been taken had authority to administer it is a sufficient averment that the court had jurisdiction of the cause in which the perjury was charged to have been committed, where the statute merely requires that the indictment shall set forth the court or person before whom the oath was taken, and that the court or person had authority to administer it. *Gray v. State*, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. (Annotated)

2. An information for perjury which alleges that the defendant wilfully, corruptly, and falsely testified to a certain stated fact; that said statement was not then and there true, but false; and was not then and there believed by the defendant to be true, but was by the defendant believed to be false,—sufficiently negatives the truth of the alleged false testimony, without setting out the true facts by way of antithesis. *Gray v. State*, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. —

INFANTS.

Kidnapping of, see Kidnapping.

Master's liability for injury to, by servant, see Master and Servant, 3.

Negligence toward, see Negligence, 4, 5.

Imputing to parents negligence of custodian of infant, see Negligence, 6.

Negligence of, at railway crossings, see Railroads, 5.

Condition for support of, attached to bequest, see Wills.

One is not within the operation of a statute providing for the punishment of a father who refuses or neglects to furnish necessary food, clothing, and lodging to his infant child, if the child is being supplied therewith as far as is necessary by the wife's parents, to whose house she had taken the child upon separating from her husband, the child's father. *State v. Thornton*, 32: 841, 134 S. W. 519, — Mo. — (Annotated)

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INFLAMMABLE SUBSTANCES.

Effect of use of, on insurance, see Insurance, 3.

INFRINGEMENT.

Of trade mark, see Trade Marks, 2.

INHERITANCE TAX.

See Taxes, 6.

INJUNCTION.

Against unincorporated association, see Associations.

Effect of laches on right to, see Limitation of Actions, 3.

Liability of municipality for suing out of, see Municipal Corporations, 7, 8.

Cross bill for divorce in suit to enjoin wife from competing in business with husband, see Pleading, 5.

Sufficiency of service of process, see Writ and Process.

1. A man is entitled to prevent his wife from entering into business competition with him, where he is able and willing to support her. *Root v. Root*, 32: 837, 130 N. W. 194, — Mich. — (Annotated)

Inconvenience or injury to defendant.

2. A telegraph company which has permitted wires belonging to a municipal corporation to remain for ten years on its poles, as required as a condition to its receiving a franchise to place the poles in the streets, may, although the corporation exceeded its authority in making the requirement, be denied an injunction to compel their removal, where that would cause expense and public inconvenience, and compensation in damages may be made. *Postal Teleg.-Cable Co. v. Chicopee*, 32: 997, 83 N. E. 927, 207 Mass. 341.

Contract rights.

3. Although a telephone company which has contracted for the right to place an exchange in a hotel and furnish exclusive connections with the hotel for a term of years cannot enjoin the placing of a rival exchange in the hotel, it may enjoin the discontinuance of its own service until the expiration of the contract period. *Central New York Teleph. & Teleg. Co. v. Averill*, 32: 494, 92 N. E. 206, 199 N. Y. 128.

Illegal or tortious acts.

Interference with freedom of speech by injunction against placing of name in unfair list by labor union, see Constitutional Law, 24.

4. The executive officers of the American Federation of Labor, who indorse a local boycott and place the name of the boycotted concern on their "We Don't Patronize" list, knowing that the result will be the actual maintenance of a boycott by the members of the union throughout the country, cannot defeat the issuance of an in-

junction against themselves on the theory that they are not connected with, or responsible for, the acts done under the boycott. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

5. The publication and circulation of a newspaper cannot be enjoined merely because it contains the "Unfair" list of a labor union, which is published in furtherance of a boycott. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

6. A labor union and its members may be enjoined from placing the name of a concern on its "Unfair" or "We Don't Patronize" list, if their sole intention in doing so is, and the result will be, to coerce its customers to refrain from dealing with it, although the remote object sought is a benefit to its own members, and no physical coercion is practised. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

(Annotated)

7. Injunction will lie against the bearing of a placard through the streets announcing the pendency of a strike against a business man long after the strike has ended by the installation of a new set of employees and the old ones finding other employment, since the only object of it must be to injure the one against whom the strike was declared. *M. Steinert & Sons Co. v. Tagen*, 32: 1013, 93 N. E. 584, 207 Mass. 394.

(Annotated)

Against legal proceedings.

See also Equity, 2.

8. Equity has no jurisdiction on the ground of the necessity of an accounting, of a suit by several insurers having policies on the same property, each of which provides for a liability proportional to the loss, to enjoin the insured from proceeding at law upon the policies, and to ascertain the amount of loss and fix the sum which each complainant should contribute thereto, although if the actions were tried separately by different juries the amount of loss might be fixed differently so that some policies would have to pay a greater proportion of their face value than others. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 32: 940, 173 Fed. 888, 97 C. C. A. 400.

Unfair competition.

9. A manufacturer of wine who has put up his product under a name composed of the common Italian word "Tipo," signifying type, and another word signifying the kind of the wine, cannot enjoin, on the ground of unfair competition, the use of such word by another manufacturer, in connection with words signifying other kinds of wine, where the packages and labels are entirely different, although his wine has become known to the trade as Tipo White and Tipo Red, according to its color. *Italian Swiss Colony v. Italian Vineyard Co.* 32: 439, 110 Pac. 913, 168 Cal. 252.

(Annotated)

Preliminary and interlocutory injunction.

Right to appeal from order dismissing bill seeking injunction after refusing to enlarge preliminary injunction, see Appeal and Error, 1.

10. One who has abandoned his right to maintain a mill pond, but who has a right to reconstruct it by the exercise of *ad quod damnum* proceedings, should not be enjoined permanently from taking steps to reconstruct the dam, but only until he has secured the right to do so by proper proceedings. *Gross v. Jones*, 32: 47, 122 N. W. 681, 85 Neb. 77.

Bond; damages.

Liability of municipality for damages, see Municipal Corporations, 7, 8.

11. Where no bond or undertaking is required on the issuance of an injunction there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously, and without probable cause. *Doyle v. Sandpoint*, 32: 34, 112 Pac. 204, 18 Idaho, 654. Decree.

Inconvenience as ground for refusing injunction, see *supra*, 2.

12. An injunction against a boycott should be limited to acts of commission. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.

INSOLVENCY.

As effect in set-off, see Set-Off and Counterclaim, 2.

INSPECTION.

Question for jury as to negligence in, see Trial, 8.

INSTRUCTIONS.

See Trial, 13-17.

INSULT.

To passenger, see Carriers, 4, 5.

INSURANCE.

Fraud in proofs of loss as basis of equity jurisdiction, see Equity, 2.

Enjoining action on policy to avoid multiplicity of suits, see Equity, 4.

Parol evidence in action on insurance policy, see Evidence, 13.

Opinion evidence in action on policy, see Evidence, 16.

Weight and effect of evidence in action on policy, see Evidence, 30.

Injunction against suit on policy, see Injunction, 8.

Amendment of pleadings in action on policy, see Pleading, 2.

Right to question constitutionality of statute in action on policy, see Statutes, 1.

Statute depriving company of defense of suicide, see Statutes, 1.

Instructions in action on policy, see Trial, 17.

Cancellation.

See also *infra*, 6.

1. A beneficiary in a life insurance policy who secures its issuance by means of false representations as to the age of insured and as to his rejection by other companies cannot avoid a cancellation of the policy on the ground that the company took premiums after having the means of knowing the falsity of the statement, if the means of knowledge came from information furnished by one not the agent of the company, but who was aiding the beneficiary in securing the insurance. *Metropolitan L. Ins. Co. v. Freedman*, 32: 298, 123 N. W. 547, 159 Mich. 114.

2. That an ignorant applicant for life insurance did not actually know of false statements in the application as to his age and rejection by other companies will not prevent a cancellation of the policy for fraud, if the application is made a part of the contract and the statements therein are warranted, while the policy goes into his possession and is retained by him, since it is his duty to know that the representations in the application are true. *Metropolitan L. Ins. Co. v. Freedman*, 32: 298, 123 N. W. 547, 159 Mich. 114.

Use and care of property.

3. A clause in an insurance policy making it void if gasoline is kept or allowed on the premises is not violated by the delivery in the building of a five-gallon can, ordered for use elsewhere by one of the insured, who was absent when it arrived, where it was set outside upon his return, a few moments afterwards, and taken away by him within an hour. *Clute v. Clintonville Mut. F. Ins. Co.* 32: 240, 129 N. W. 661, 144 Wis. 638. (Annotated)

Warranties and representations in life policies.

4. Rejection by a life insurance company is not within the scope of a question in an application for a health and accident policy, as to whether or not any company, society, or association ever rejected applicant's application, canceled his policy, or declined to renew the same, or refused compensation for disability, and therefore a false statement with reference thereto will not avoid accident policy. *Wright v. Fraternities Health & Acci. Asso.* 32: 461, 78 Atl. 475, — Me. — (Annotated)

Forfeiture.

5. The "padding" of an inventory of merchandise by false entries of articles not on hand will work a forfeiture of a fire insurance policy, when such entries cannot be explained on any reasonable theory of honest mistake. *Alfred Hiller Co. v. Insurance Co. of N. A.* 32: 453, 52 So. 104, 126 La. 938. (Annotated)

Premiums and assessments.

6. To entitle an insurance company to cancellation of a policy because of fraudulent statements in the application, it must return the premiums paid, although the contract provides that in case of such statement all payments shall be forfeited. *Met-32 L.R.A. (N.S.)*

ropolitan L. Ins. Co. v. Freedman, 32: 298, 123 N. W. 547, 159 Mich. 114.

(Annotated)

Risks and causes of loss, injury, and death.

Opinion as to cause of fall of building, see Evidence, 16.

Sufficiency of proof of cause of loss, see Evidence, 30.

7. An insurer is liable for the entire loss caused by the burning of goods in a building, the walls of which fell from an earthquake shock, where they began to burn before the walls fell, although after the shock had begun, and the walls fell before the fire had done any material damage, under a policy providing that if a building or any part thereof fall except as the result of fire, the insurance on the building or its contents shall immediately cease. *Davis v. Connecticut F. Ins. Co.* 32: 604, 112 Pac. 549, 168 Cal. 766. (Annotated)

Interest in proceeds.

8. Under a mutual benefit certificate made payable to the wife of the holder, or, in case of her death, to his legal representatives, his administrator, and not his children, is entitled to the proceeds of the policy in case of the wife's death before that of the member. *Hunt v. Remsburg*, 32: 246, 112 Pac. 590, — Kan. — (Annotated)

INTENT.

Presumption and burden of proof as to, see Evidence, 6, 7.

As element of crime generally, see Criminal Law, 1.

Parol evidence as to, see Evidence, 14, 15.

INTEREST.

Duty of tenant in common in possession to pay, see Cotenancy.

Simple interest should be allowed upon a deposit of money which is payable on demand in fact where the circumstances of the transaction justify the inference that the parties contracted therefor. *Re Fallon*, 32: 486, 124 N. W. 994, 110 Minn. 213.

INTERSTATE COMMERCE.

See Commerce.

INTERURBAN RAILWAYS.

Duty as to protection of passenger, see Carriers, 14.

INTOXICATING LIQUOR.

Prohibition and regulation.

1. Refusal to permit one to engage in the business of selling intoxicating liquors deprives him of no constitutional right. *Smyth v. Butters*, 32: 393, 112 Pac. 809, — Utah. —

2. A statute permitting the electors of counties to determine whether or not intoxicating liquors shall be sold within their limits is a general law within the meaning of a constitutional provision limiting the

power of municipal corporations to make regulations in conflict with general laws, and therefore a municipality having special charter authority to license the sale of intoxicating liquor cannot do so after the county has voted to prohibit it. *Mix v. Board of County Comrs.* 32: 534, 112 Pac. 215, 18 Idaho, 695. (Annotated) Licenses.

Provisions as to, in ordinance, see *supra*, 2.

Mandamus to compel issuance of license, see *Mandamus*, 2, 3.

3. Where by statute the right to sell intoxicating liquors is denied to one who has made sales without license, the license of a manufacturer will not be renewed where he has made retail sales which he had no authority to make. *Re Metz Bros. Brewing Co.* 32: 622, 129 N. W. 443, — Neb.

4. Officers having authority to refuse for good cause to issue a license to sell intoxicating liquors may refuse a license to one who is shown to have repeatedly violated the statute by selling on Sunday and permitting gambling to be carried on on the premises. *Smyth v. Butters*, 32: 393, 112 Pac. 809, — Utah, —.

5. The mere meeting, by an applicant for a license to sell intoxicating liquors, of the conditions on which the legislature has authorized the granting of a license, does not entitle him to compel its issuance, where authority to issue licenses is conferred on certain officers, who are expressly empowered, in their discretion, to refuse an application for good cause. *Smyth v. Butters*, 32: 393, 112 Pac. 809, — Utah, —. Unlawful sales.

Compelling druggist indicted for illegal sale of liquor to produce prescriptions of physicians on which sales were made, see *Criminal Law*, 2, 3.

Presumption as to unlawfulness of sale, see *Evidence*, 8.

6. A manufacturer of liquor violates the statute forbidding him to make retail sales, by selling in case lots to consumers who have no license to sell liquor at retail. *Re Metz Bros. Brewing Co.* 32: 622, 129 N. W. 443, — Neb. —. (Annotated)

7. A written order addressed to a licensed druggist and signed by a practising physician, in the following words, *viz.*: "Send me OJ spts. whisky and oblige. 12-12-09," — is not a lawful prescription for intoxicating liquor, and a sale made thereon is unlawful, where, by statute, the prescription must state the name of the person for whom the prescription was made, the kind and quantity of liquor, that it is absolutely necessary as a medicine for such purpose, and that it is not to be used as a beverage. *State v. Davis*, 32: 501, 69 S. E. 939, — W. Va. —.

JOINDER.

Of causes of action, see *Action or Suit*.

JOINT CREDITORS AND DEBTORS.

Joint liability for family expenses, see *Husband and Wife*.

Joint liability for nuisance, see *Nuisances*, 3.

JOINT TORT FEASORS.

See *Joint Creditors and Debtors*.

JOINT.

Causing injury to passenger, see *Carriers*, 13.

JUDGMENT.

On appeal, see *Appeal and Error*, 24.
Denial of equal protection by statute imposing tax upon every judgment entered in court of record, see *Constitutional Law*, 11.

In injunction suit, see *Injunction*, 12.
Jurisdiction of justice in action upon judgment to permit equitable defense to, see *Justice of the Peace*, 2.

Deficiency judgment on foreclosure of mechanic's lien, see *Mechanics' Liens*, 1.

Enforcement of tax lien by judgment creditor of taxing district, see *Taxes*, 4, 5.

1. One who brings suit on a note purporting to have been made by an ordinary partnership but after its dissolution, through one of the former members, upon which the other former members are not liable because they did not authorize it, cannot, in the same action, recover upon the open account or overdraft in settlement of which the note purported to have been given, which account had been admitted in evidence over the defendant's objection. *Bank of Monroe v. Drew*, 32: 255, 53 So. 129, 126 La. 1028.

2. The right to a mechanics' lien, or to an equitable remedy to enforce it, is not barred by a recovery of a personal judgment against the debtor in a suit at law. *Ericson v. Russ*, 32: 1072, 129 N. W. 1025, — N. D. —. (Annotated)

3. The requirements of a Federal Constitution that full faith and credit shall be given in one state to judgments obtained in another will not prevent the courts of the former, in which legal and equitable rights and remedies are administered in one court and in one form of action, from permitting an equitable defense against a judgment obtained by fraud in the latter, where the courts of the state where the judgment was rendered would enjoin its enforcement if obtained by fraud. *Levin v. Gladstein*, 32: 905, 55 S. E. 371, 142 N. C. 482. (Annotated)

INVENTORY.

Padding of inventory in proofs of loss, see *Insurance*, 5.

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JUDICIAL NOTICE.

See *Evidence*, 1-4.

JUDICIAL SALE.

Right to appeal from order dismissing bill seeking injunction against, see Appeal and Error, 1.
By trustee, see Trusts.

JURY.

Prejudicial error in matters as to, see Appeal and Error, 19, 20.
Guaranty of impartial jury by 6th Amendment of Federal Constitution, see Constitutional Law, 1.
Attempt to deprive one accused of crime of defense of insanity as denial of trial by jury, see Constitutional Law, 20.
New trial because of prejudice of juror, see New Trial.
Communication by court with jury in absence of accused, see Trial, 1.

1. No constitutional right to a jury trial is violated by the imposition by an administrative commission of a penalty or fine prescribed by law for the penal violation of rules regulating common carriers of intrastate freight and passengers, where the fine or penalty is recoverable only by an action at law in a jury trial, where any defense the carrier has may be interposed in such action. *State v. Atlantic C. L. R. Co.*, 32: 639, 47 So. 969, 56 Fla. 617.

2. Requiring jurors in a criminal case to be taxpayers does not violate the constitutional provision that the right of trial by jury shall remain inviolate. *State v. McDowell*, 32: 414, 112 Pac. 521, — Wash. — (Annotated)

JURY COMMISSIONERS.

Qualifications of, see Officers, 1.

JUSTICE OF THE PEACE.

1. A justice of the peace has no jurisdiction in an action of forcible entry and detainer to determine the rights of partners, upon discontinuing the partnership, in the leases which they hold or in the good will of the partnership business. *Knapp v. Reed*, 32: 869, 130 N. W. 430, — Neb. —.

2. A justice's court has jurisdiction, in an action upon a former judgment, to permit the interposition of the equitable defense of fraud in obtaining it. *Levin v. Gladstein*, 32: 905, 55 S. E. 371, 142 N. C. 482.

KIDNAPPING.

Statutory liability for enticing or decoying a child from its parent cannot be avoided on the ground that accused acted as agent for the other parent, where the two were living apart, whatever might have been the freedom from liability on the part of such parent had he or she acted in person. *State v. Brandenburg*, 32: 845, 134 S. W. 529, — Mo. — (Annotated)

KNOWLEDGE.

As element of crime, see Criminal Law, 1.

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LABORERS.

In general, see Master and Servant.

LABOR ORGANIZATIONS.

Boycott by, see Conspiracy, 2-4.
Injunction against boycott by, see Constitutional Law, 24; Injunction, 4-6.

LACHES.

See Limitation of Actions, 1-5.

LANDLORD AND TENANT.

Possession of lessee as possession of lessor for adversary possession, see Adverse Possession, 4.
Assumpsit against tenant by landlord to recover taxes paid by latter, see Assumpsit.
Admissibility of lease in evidence, see Evidence, 12.
Evidence in action against landlord to recover for injuries, see Evidence 12.
Liability for injury caused by negligence of independent contractor, see Master and Servant, 4.
Rights of partner as to lease, see Justice of the Peace, 1; Partnership, 2.
Payment by tenant as affecting running of limitations against landlord, see Limitation of Actions, 8.
Right of partner to obtain renewal of lease in his own name without consent of others, see Partnership, 2.
Right of partner after renewal of lease in his own name to put other partner out of premises, see Forcible Entry and Detainer, 2.
Who must pay taxes on improvements removable by tenant at end of term, see Taxes, 3.

LARCENY.

Admissibility under count for simple larceny of evidence that property was obtained by false pretenses, see Evidence, 36.

1. A prosecution for stealing town orders cannot be defeated on the theory that they were fraudulently issued, and therefore of no value, where they were regular on their face, and there was nothing on the records to cast suspicion upon their validity. *Vought v. State*, 32: 234, 114 N. W. 518, 135 Wis. 6. (Annotated)

2. An officer of a town who converts to his own use property of the town in his possession cannot avoid liability for larceny on the theory that, having possession of the property, the element of trespass or nonconsent was lacking, since his possession was for a lawful, and not an unlawful, purpose,—at least, where the statute makes embezzlement larceny. *Vought v. State*, 32: 234, 114 N. W. 518, 135 Wis. 6.

LATERAL SUPPORT.

Right to, of one condemning property for railway, see Eminent Domain, 2.

LAW.

Right of corporation to practise, see Attorney General.
As to statute, see Statutes.

LEASE.

Admissibility in evidence, see Evidence, 12.

LEGAL PROCEEDINGS.

Injunction against, see Injunction, 8.

LEGAL TENDER.

Refusal of pennies in payment of street car fare, see Carriers, 24.

LEVEES.

Construction and maintenance of, as breach of covenant of warranty, see Covenants and Conditions, 2.

LEVY AND SEIZURE

That a vessel which escapes from the custody of a sheriff who has taken it under an attachment process passes beyond the confines of the state does not relieve him of his statutory duty to repossess himself of it. *Phillips v. Eggert*, 32: 132, 129 N. W. 654, — Wis. —. (Annotated)

LIBEL AND SLANDER.

Sufficiency of evidence to show good faith, see Evidence, 31.

Malice as question for jury, see Trial, 5.

Excessive character of privileged publication, as question for jury, see trial, 5.

1. A petition presented to a police magistrate, charging misconduct on the part of occupants of a dwelling and asking that they be required to move therefrom, is, if the charges are pertinent, material, and positive, absolutely privileged, although it cannot properly be called a pleading in a case. *Flynn v. Boglarsky*, 32: 740, 129 N. W. 674, — Mich. —. (Annotated)

2. A special grand jury summoned to investigate charges that a railroad company failed to maintain order on its trains exceeds its authority in making a long recital of facts tending to bring the complaining witness into contempt and disgrace, and charging him with malice and improper conduct, without any presentment against him for perjury; and such charge is therefore not privileged, but one who publishes it in a public newspaper is answerable for libel. *Poston v. Washington, A. & M. V. R. Co.* 32: 785, — App. D. C. —. (Annotated)

3. No recovery can be had for publication in good faith of defamatory matter, if the publication is substantially true. *Courier-Journal Co. v. Phillips*, 32: 309, 134 S. W. 446, — Ky. —.

LICENSE.

For sale of liquor, see Intoxicating Liquors, 3-6.

Mandamus to compel issue of, see Mandamus, 2, 3.

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Negligence as to licensees, see Negligence, 2, 3.

LIENS.

As to mechanics' liens, see Mechanics' Liens.

Of tax, see Taxes, 4, 5.

LIGHTS.

Regulation of character of headlights used by railroad, see Commerce, 2; Constitutional Law, 9, 10, 16, 17; Railroads, 1, 2.

On highway, see Highways, 5, 6.

LIMITATION OF ACTIONS.

Limitation of time for bringing action to recover corporate stock sold for delinquent assessment, see Corporations, 12.

Laches.

Estoppel by laches, see Estoppel, 3, 4.
As ground for refusing injunction, see Injunction, 2.

1. The statutory period for the bringing of an action is not controlling as to the question of reasonable time within which a demand for money payable on demand must be made, where the parties contemplated a delay in making the demand to some indefinite time in the future. *Re Fallon*, 32: 486, 124 N. W. 994, 110 Minn. 213.

2. One who deposits money with another to be returned upon demand is not chargeable with laches by reason of failure to demand repayment of the money before the death of the depositary, which occurred twenty-three years after the last deposit, where at the time of the agreement the parties contemplated an indefinite delay in the making of such demand. *Re Fallon* 32: 486, 124 N. W. 994, 110 Minn. 213.

3. A suit to enjoin future infringements of a trademark cannot be barred by laches. *Layton Pure Food Co. v. Church & Dwight Co.* 32: 274, 182 Fed. 35, 104 C. C. A. 475.

4. To a suit for an accounting for profits secured by an infringement of a trademark, the general rule of laches applies, that suits will be stayed under ordinary circumstances after, and will not be stayed before, the time fixed by the analogous statute of limitations at law, but that if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of the suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the court will determine the extraordinary case in accordance with the equities which condition it. *Layton Pure Food Co. v. Church & Dwight Co.* 32: 274, 182 Fed. 35, 104 C. C. A. 475.

5. One who delays for nine years to bring a suit for infringement of a trademark cannot have an accounting of profits for any time prior to the commencement of his action. *Layton Pure Food Co. v. Church & Dwight Co.* 32: 274, 182 Fed. 35, 104 C. C. A. 475.

By and against whom available.

6. The statute of limitations will run against the right of a municipal corporation to recover for injury to a bridge which it is bound to maintain and keep in repair as part of its highway system, although it is held in trust for the public. *Chicago v. Dunham Towing & Wrecking Co.* 32: 245, 92 N. E. 566, 246 Ill. 29.

(Annotated)

When statute runs.

7. The statute of limitations as to a sum of money deposited with a relative for an indefinite time, and payable only upon actual demand therefor, does not begin to run until an actual demand for the payment is made. *Re Fallon*, 32: 486, 124 N. W. 994, 110 Minn. 213.

(Annotated)

Interruption of statute; removal of bar.

8. Payments on a mortgage which had been executed by a man and wife upon property the title to which became vested in her, by her tenant, from the income of the property, with her authority, and after her death by acquiescence of her heirs, will prevent the running of the statute of limitations in favor of the heirs. *Ellis v. Snyder*, 32: 253, 112 Pac. 594, — Kan. —.

LOAN.

Of gift to donor, see Gift.

LOCAL IMPROVEMENTS.

See Public Improvements.

LOGGING RAILROAD.

Liability for fires set by independent contractor, see Master and Servant, 5-7.

MAGISTRATE.

See Justice of the Peace.

MALICE.

Liability of municipality for malicious act of officers, see Municipal Corporations, 7.

MANDAMUS.

Who may maintain, see Parties, 2.

1. Mandamus will not lie to compel the governor of a state to pay over money which has been placed in his hands by the Federal government to be paid to officers and men who served under the Federal government in a war. *Rice v. Draper*, 32: 355, 93 N. E. 821, 207 Mass. 577.

(Annotated)

2. Mandamus will not lie to compel the issuance of a license to sell intoxicating liquors by officers who are vested with discretionary powers in the matter, if they have rejected an application after examination, consideration, and inquiry. *Smyth v. Butters*, 32: 393, 112 Pac. 809, — Utah, —.

3. The court cannot, upon a petition for a writ of mandamus to compel the issuance of a license to sell intoxicating liquors, which the officials had refused after hearing, remand the case to them, for a rehearing of the facts as to whether or not the ap-

plicant was entitled to a license. *Smyth v. Butters*, 32: 393, 112 Pac. 809, — Utah, —.

MANSLAUGHTER.

Homicide resulting from fright caused by unlawful assault on other person, see Homicide.

MARKED BALLOTS.

See Elections, 2-4.

MARRIAGE.

Conflict of laws as to, see Conflict of Laws.

That a divorced person, to avoid the effect of a local statute prohibiting his remarriage, went into another state and contracted a marriage, and immediately returned and took up his residence in the state where the divorce was granted, does not render the marriage void; and it is immaterial that a similar statute exists in the state where the marriage contract is entered into. *Dudley v. Dudley*, 32: 1179, 130 N. W. 785, — Iowa, —.

MASTER AND SERVANT.

Denial of equal protection of laws by abrogation of fellow servant rule as to railway employees, see Constitutional Law, 14.

Master's right as to injury to servant.

1. A master cannot recover damages for negligent injury to his apprentice, by which he claims to have lost the future services of the apprentice, whose place cannot be filled, which will result in large loss of profits to him. *Cain v. Vollmer*, 32: 38, 112 Pac. 686, — Idaho, —. (Annotated)

Master's liability for acts of servant or independent contractor.

Liability of carrier for acts of servant, see Carriers.

Liability of charitable institution for negligence as servant, see Charities.

Liability for false imprisonment, see False Imprisonment.

Liability of municipality for negligence of employees as to streets, see Highways, 2, 3.

Nuisance created by acts of employee, see Nuisances, 2.

2. A master may be guilty of negligence which will render him liable for injury to an occupant of adjoining property by a missile thrown from his factory windows by his employee, if, with knowledge of the habit of his employees to throw such missiles from the windows, he fails to exercise reasonable care to prevent the practice. *Hogle v. H. H. Franklin Mfg. Co.* 32: 1038, 92 N. E. 794, 199 N. Y. 388. (Annotated)

3. A servant's setting in motion in the line of his duties machinery drawing a car by means of a wire cable, with knowledge that a trespassing child is so near the cable that its clothing will likely be caught by its frayed strands, will render his master liable for injury to the child, caused by

its being so caught and drawn into the machinery. *Walsh v. Pittsburg Railways Co.* 32: 559, 70 Atl. 826, 221 Pa. 463.

4. The owner of a building the floors of which are leased to different tenants cannot relieve himself from responsibility to employees of the tenants for the unsafe operation of the elevator by letting such operation to an independent contractor. *Sciolaro v. Asch*, 32: 945, 91 N. E. 263, 198 N. Y. 77. (Annotated)

5. The owner of a logging railroad is not relieved from liability for injury to adjoining property through fire set out on its right of way, which has been permitted to become covered with inflammable materials, by the fact that the cutting, logging, and hauling of the timber, including the operation of the trains, was being done by an independent contractor. *Thomas v. Hammer Lumber Co.* 32: 584, 69 S. E. 275, 153 N. C. 351.

6. The owner of a logging railway is not answerable for fire set out by employees of an independent contractor independently of any apparatus used in the operation of the road. *Thomas v. Hammer Lumber Co.* 32: 584, 69 S. E. 275, 153 N. C. 351.

7. The owner of a logging railroad is liable for injury to adjoining property from fire set out by a spark from a defectively equipped engine which was being operated by an independent contractor for hauling logs over the road. *Thomas v. Hammer Lumber Co.* 32: 584, 69 S. E. 275, 153 N. C. 351.

Liability of servants or contractors.

8. Technical omissions in the manner of the acceptance of a public building by state officers will not continue the liability of the contractor for defects in the plan which injure strangers, if, at the time of the injury, the state is in fact in possession and control of the building, and the injured persons are upon the premises by invitation of the state alone. *Thornton v. Dow*, 32: 968, 111 Pac. 899, — Wash. —.

(Annotated)

9. That a railing protecting the gallery of an armory is so insufficient to withstand the pressure of the crowd that may be in the gallery and lean over it to see transactions on the floor below that it may constitute a nuisance does not render the contractor who erects the building liable for an injury due to its giving way, if, without negligence on his part, he follows the plans given him, and turns the building over to, and it is accepted by, the proper authorities. *Thornton v. Dow*, 32: 968, 111 Pac. 899, — Wash. —.

10. One building a bridge under contract for a county, who constructs the foundation and piers with such poor material and improper methods of use that he could not have avoided knowing that the bridge was practically certain to collapse, to the injury of anyone thereon at the time, is liable to a traveler, a stranger to the contract, injured after its acceptance, while crossing it, by its collapse due to the defects in con-

struction of which neither he nor the commissioners knew because of their being concealed by water and iron castings. *O'Brien v. American Bridge Co.* 32: 980, 125 N. W. 1012, 110 Minn. 364.

11. A traveler injured by the fall of a bridge erected under a contract to which he was not a party may recover damages from the contractor who erected the bridge, on a showing of negligence, without showing actionable fraud. *O'Brien v. American Bridge Co.* 32: 980, 125 N. W. 1012, 110 Minn. 364.

MATERIALITY.

Of evidence, see Evidence, 23-29.

MAXIMS.

As to equity principles, generally, see Equity.

1. An act done by me against my will is not my act. *State v. Strasburg*, 32: 1216, 110 Pac. 1020, — Wash. —.

2. Fiat justitia ruat cælum. *Terrell v. Chesapeake & O. R. Co.* 32: 371, 66 S. E. 55, 110 Va. 340.

3. He who seeks equity must do equity. *Metropolitan L. Ins. Co. v. Freedman*, 32: 298, 123 N. W. 547, 159 Mich. 114.

4. In fictione juris semper aequitas existit. *Stewart v. Hurd*, 32: 671, 78 Atl. 838, — Me. —.

5. Res ipsa loquitur. *Potter v. Rorabaugh-Wiley Dry Goods Co.* 32: 45, 112 Pac. 613, — Kan. —; *City Water Power Co. v. Fergus Falls*, 32: 59, 128 N. W. 817, — Minn. —; *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18; *Turner v. Southern Power Co.* 32: 848, 69 S. E. 767, — N. C. —; *Lanning v. Pittsburg Railways Co.* 32: 1043, 79 Atl. 136, 229 Pa. 576.

6. Sic utere tuo ut alienum non lædas. *Hogle v. H. H. Franklin Mfg. Co.* 32: 1078, 92 N. E. 794, 199 N. Y. 388.

MEANING.

Parol evidence as to, see Evidence, 14, 15.

MECHANICS' LIENS.

Personal judgment against debtor as bar of right to lien, see Judgment, 2.

1. A provision in a statute governing the foreclosure of a mechanics' lien, to the effect that judgment may be entered for a deficiency in like manner and with like effect as in an action for the foreclosure of mortgages, does not make the whole procedure subject to the provisions of the statute applicable in case of mortgage foreclosures. *Erickson v. Russ*, 32: 1072, 129 N. W. 1025, — N. D. —.

2. In the absence of statutory requirement one entitled to a mechanics' lien is not required to exhaust his remedy at law before resorting to the security of his lien. *Erickson v. Russ*, 32: 1072, 129 N. W. 1025, — N. D. —.

MEETING.

Of corporate officers, see Corporations, 10, 11.

MENTAL ANGUISH.

Damages for, see Damages, 6.

MENTAL CONDITION.

Opinion evidence as to, see Evidence, 17.

MILL POND.

Injunction against reconstruction of dams, see Injunction, 10.

MINES.

Adverse possession of, see Adverse Possession, 4.

1. Land more valuable for the building sand it contains than for agricultural purposes is subject to placer location, and is mineral, within the meaning of the United States mining statutes. *Loney v. Scott*, 32: 466, 112 Pac. 172, — Or. —

2. Although an entry in mineral land made during the time that it is withdrawn from settlement for irrigation purposes may be ineffectual, yet a subsequent patentee of the land for railroad purposes, after its restoration to the public domain, acquires no right to the possession as against a mining claimant in possession, where he knows of the mineral claim and that it is supported by actual deposits of mineral. *Loney v. Scott*, 32: 466, 112 Pac. 172, — Or. —

MINORS.

See Infants.

MISSILE.

Liability for injury by missile thrown by servant, see Master and Servant, 2; Nuisances, 2.

MISTAKE.

In name signed to chattel mortgage, see Chattel Mortgage.

Mistake of law as basis of equity jurisdiction, see Equity, 3.

Refusal of specific performance because of, see Specific Performance, 1.

MORTGAGE.

Application to note of rule that deed of trust cannot be assigned so as to vest title free from defenses as against original grantee, see Assignment.

As to chattel mortgage, see Chattel Mortgage.

Parol promise of assignee of equity of redemption, to mortgagee, to pay mortgage debt, see Contracts, 3.

Duty of tenant in common in possession to pay interest on, see Co-tenancy.

Estoppel by recitals in purchase money mortgage, see Estoppel, 1.

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Parol evidence to show that conveyance was intended as a mortgage, see Evidence, 14.

Applicability of statute governing foreclosure to foreclosure of mechanic's lien, see Mechanics' Liens, 1.

Pledge of, see Pledge and Collateral Security, 1.

Record as deed of instrument intended as a mortgage, see Records and Recording Laws, 2.

The appointment by a mortgagee of his mortgagor, executor of his estate, and his qualification, and charging himself with the amount of the mortgage debt as assets, do not operate to discharge the mortgage, and make the debt a personal one of the executor and the sureties on his bond, so as to advance and give priority to a subsequent mortgage on the property. *Stewart v. Hurd*, 32: 671, 78 Atl. 838, — Me. —

MULTIPLICITY OF SUITS.

As ground for relief in equity, see Equity, 4.

MUNICIPAL BONDS.

See Bonds.

MUNICIPAL CORPORATIONS.

Prejudicial error in action to recover for negligent injuries inflicted by agent, see Appeal and Error, 13.

Retrospective effect of constitutional provisions as to manner of entering into contract, see Constitutional Law, 2.

Delegation of power to tax, see Constitutional Law, 3.

Definiteness of contract, see Contracts, 2.

Running of limitations against, see Limitation of Actions, 6.

Liability of property of, to public improvement assessments, see Public Improvement, 3.

1. Power to employ private detectives to ascertain whether or not the criminal laws have been violated in a village is not conferred by charter authority to establish ordinances for the government and maintenance of good order of the village, the suppression of crime, and to appoint policemen and prescribe their duties. *Flannagan v. Buxton*, 32: 391, 129 N. W. 642, — Wis. — (Annotated)

Ordinances.

Review on appeal of question of reasonableness of, see Appeal and Error, 10.

Imposition of burden on telegraph company as interference with interstate commerce, see Commerce, 1.

Presumption of compliance with ordinance, see Evidence, 11a.

2. A special charter giving a municipality power to grant licenses, but forbidding it to authorize any act contrary to the law of the land, embraces in such phrase the general laws of the state. *Mix v. Board*

of County Comrs. 32: 534, 112 Pac. 215, 18 Idaho, 695.

3. Requiring a telegraph company, as a condition to receiving a license to place poles on a city street, to permit the municipality to use them to carry its fire alarm and electric light wires without compensation, is not unreasonable, where the benefit to the municipality does not exceed the cost of inspecting the poles to keep them safe from travelers, and the risk it runs of being held liable to them for injuries because of the presence of the poles in the street; and it is immaterial that the high current of the light wires renders greater care necessary on the part of employees at work upon the poles, and makes possible inductive disturbance on the telephone line, which may require its owner to maintain a higher voltage than it otherwise would. *Postal Teleg. Cable Co. v. Chicopee*, 32: 997, 93 N. E. 927, 207 Mass. 341.

(Annotated.)

3a. After an excavation under a public alley to be used as a boiler-room has been maintained and used with the consent of the municipality for more than fifteen years, the city authorities cannot summarily declare it to be a nuisance and destroy and remove it as such. *Tiernan v. Lincoln*, 32: 1034, 130 S. W. 280, — Neb. —.

4. An ordinance prescribing the density of smoke which shall be allowed to issue from stationary stacks within the limits of a city is within statutory authority to enact ordinances for the preservation of health, for the safety and welfare of the inhabitants, and for the protection and security of their property. *Rochester v. Macauley-Fien Milling Co.* 32: 554, 92 N. E. 641, 199 N. Y. 207.

5. An ordinance forbidding stationary stacks in a city to emit smoke for more than five minutes at a time once in four consecutive hours, except between the hours of 5 and 7:30 A. M., which is darker than a scale prepared by covering a dead white surface with dead black lines one twenty-fourth of an inch in width drawn at right angles one fourth of an inch from centers and viewed from a distance of not less than 100 feet in the open air, is not unreasonable as matter of law. *Rochester v. Macauley-Fien Milling Co.* 32: 554, 92 N. E. 641, 199 N. Y. 207.

(Annotated.)

Liability for damages.

Liability for defects or obstructions in street, see Highways.

Liability for public improvements, see Public Improvements, 2.

6. An ordinance charging municipal authorities with the care of city lamps and lamp pillars does not include the service pipes which convey the gas from the mains to the lamps, and which the gas company has undertaken to keep in repair. *Consolidated Gas Co. v. Connor*, 32: 809, 78 Atl. 725, — Md. —.

7. A municipal corporation cannot be held for the malicious suing out of a writ of injunction without probable cause, for the reason that such an act would be *ultra* 32 L.R.A. (N.S.)

vires and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting. *Doyle v. Sandpoint*, 32: 34, 112 Pac. 204, 18 Idaho, 654.

(Annotated.)

8. Where the statute expressly exempts a municipal corporation from the duty of giving bond on securing an injunction, it is not liable for damages caused by the service of such writ. *Doyle v. Sandpoint*, 32: 34, 112 Pac. 204, 18 Idaho, 654.

9. That the connections with an outlet of a sewer are on private property does not absolve the municipality from liability for permitting the outlet to become a nuisance, on the theory that it cannot abate it without trespassing on private property, since the right to care for the sewer must be presumed to accompany the right to maintain it, or, if not, the nuisance might be abated by exercising the power of eminent domain, or its use might be forbidden. *Hines v. Nevada*, 32: 797, 130 N. W. 181, — Iowa, —.

10. A municipal corporation which contracts to maintain a sewer outlet, which is permitted to become a nuisance, is liable in damages to the owner of neighboring property which is injured thereby. *Hines v. Nevada*, 32: 797, 130 N. W. 181, — Iowa, —.

11. A municipal corporation which, by its officers, undertakes the construction of a sewer, and prescribes the conditions under which it may be used, cannot escape liability in case it is allowed to become a nuisance, on the theory that it is a partnership affairs, although the county and certain individual citizens aid in its construction. *Hines v. Nevada*, 32: 797, 130 N. W. 181, — Iowa, —.

12. A municipal corporation is not relieved from liability for permitting its sewer outlet to become a nuisance, by the fact that owners of property connecting with it violate the condition upon which permission to make the connections was granted, by turning into it foul matter of a prohibited kind. *Hines v. Nevada*, 32: 797, 130 N. W. 181, — Iowa, —.

NAME.

Mistake in name signed to chattel mortgage, see Chattel Mortgage.

NATIONAL BANKS.

In general, see Banks.

NEGLIGENCE.

Prejudicial error as to measure of damages, see Appeal and Error, 22.

Liability for, of one giving exhibition, see Amusements.

Of person injured by automobile, see Automobiles.

Of bank in payment of check, see Banks.

Of savings bank in paying out deposit, see Banks, 12.

Of bank in collecting commercial paper, see Banks, 5-9.

Toward passenger, see Carriers.
Liability of charitable institution for, see Charities.

Measure of damages for negligence causing personal injury or death, see Damages, 2-4.

As to dams, see Dams.

As to electricity, see Electricity.

Weight of evidence in action for loss caused by, see Evidence, 32.

Presumption and burden of proof as to, see Evidence, 9-11.

Sufficiency of proof of, see Evidence, 33.

Variance between pleading and proof in action for, see Evidence, 37, 38.

As to fires, see Fires.

As to gas, see Gas.

Of master or servant, see Master and Servant.

Of independent contractor, see Master and Servant, 4-7.

Independent contractor's liability, see Master and Servant, 8-11.

Of municipal corporations, see Municipal Corporations.

Pleading as to, see Pleading, 3.

Proximate cause of injury by, see Proximate Cause.

Of railroads, see Railroads.

Of street railways, see Railways.

As to telegrams, see Telegraphs.

Question for jury as to, see Trial, 7-11.

1. The owner of property who uses thereon, for legitimate purposes, a portable engine in a depression which an adjacent highway crosses on a bridge, is not liable for injury caused to a traveler by the fright of his horse at smoke issuing from the stack in the ordinary operation of the engine, although the stack rises only a short distance above the level of the bridge and is likely to frighten horses, where the engine has been in operation for a considerable time without interference with the convenient and safe use of the bridge. *Cook v. Rice Lake Milling & Power Co.* 32: 1225, 130 N. W. 953, — Wis. —.

Dangerous premises.

Liability of charitable institution, see Charities.

2. A railroad company is liable to a mere licensee who is injured by falling into a steam pit which it maintains under a wooden pathway which the public is accustomed to use, where it permits a hole to remain in the covering, through which users are likely to fall, which is obscured from general observation by the steam emerging through the cracks. *Brinilson v. Chicago & N. W. R. Co.* 32: 359, 129 N. W. 664, 144 Wis. 614.

3. A railroad company is negligent in failing for two or three months to discover a hole in the covering of a steam pit which it maintains under a plank walk which the public is accustomed to use as licensees, through which a person using the walk would be likely to fall, to his death. *Brinilson v. Chicago & N. W. R. Co.* 32: 359, 129 N. W. 664, 144 Wis. 614.

4. A railroad company cannot avoid liability for injury to a boy falling into its 32 L.R.A. (N.S.)

hot-water pit on the theory that he was a trespasser, where the pit was located under a plank walk or pathway which covered the top of a breakwater which it had constructed to protect its property from the waters of a lake, where to its knowledge boys were accustomed to resort to the walk to play, and it was used by the public as a footpath for walking along the edge of the lake. *Brinilson v. Chicago & N. W. R. Co.* 32: 359, 129 N. W. 664, 144 Wis. 614.

5. The duty of a property owner to exercise active care to keep trespassers off the property, or to protect them after they have entered thereon from injury which might result from the condition of the property, is the same whether the trespasser is an adult or a child. *Walsh v. Pittsburg Railways Co.* 32: 559, 70 Atl. 826, 221 Pa. 463. (Annotated.)

6. Parents who commit a child of tender years to the custody of their older child are affected by the latter's negligence so that, in case the former is killed through negligence to which the latter contributes, the parent cannot hold the other negligent party liable for the death. *Gress v. Philadelphia & R. R. Co.* 32: 409, 77 Atl. 810, 228 Pa. 482.

NEGOTIABILITY.

Of note, see Bills and Notes, 1.

NEGROES.

Duty of carrier to provide separate accommodations for, see Carriers, 1, 2.

Applying term "negro" to white person as an insult, see Carriers, 5.

Mistake or abuse of discretion by carrier in assigning person to compartment for colored passengers, see Carriers, 9.

Specific performance of contract to sell lot to, see Specific Performance, 1.

NEWSPAPER.

Enjoining publication of, because containing unfair list of labor union, see Injunction, 5.

Libel by, see Libel and Slander.

NEW TRIAL.

A new trial should not be granted one convicted of crime, on the ground that one of the trial jurors was prejudiced and had, previous to the trial, declared his belief that the accused was guilty and should be convicted, where the accused, testifying in his own behalf, admitted his guilt, and there was abundant corroborating evidence. *Stewart v. State*, 32: 505, 109 Pac. 243, — Okla. Crim. Rep. —.

NOISE.

As nuisance, see Nuisances, 6.

NOTICE.

Of injuries by defective street, see Highways, 9-12.

To one who has warranted title to personalty to appear and defend suit against vendee, see Sale, 6.

NUISANCES.

Judicial notice of harmful effects of smoke, see Evidence, 2.

Opinion evidence as to, see Evidence, 19.

Evidence in action for, see Evidence, 29.

Power of municipality as to, see Municipal Corporations, 3a.

Allegations as to, see Pleading, 4.

Proximate cause of, see Proximate Cause, 2.

Who may maintain action for continuing nuisance, see Trespass.

What are.

1. The erection and maintenance of a dam across a natural water course for the purpose of utilizing a water power is not a nuisance, nor is the owner thereof an insurer of safety, but he is bound to exercise in the premises a degree of care proportionate to the injuries likely to result to others if it proves insufficient. *City Water Power Co. v. Fergus Falls*, 32: 59, 128 N. W. 817, — Minn. —.

2. The owner of a factory is guilty of maintaining a nuisance which will render him liable for injuries thereby caused to an occupant of adjoining property, if, with knowledge of its existence, he fails to suppress a practice on the part of his employees of throwing missiles from the windows onto the adjoining property and at persons seen there. *Hogle v. H. H. Franklin Mfg. Co.* 32: 1038, 92 N. E. 794, 199 N. Y. 388. Who liable.

Liability of municipality, see Highways, 5; Municipal Corporations, 9-12.

Liability of independent contractor for, see Master and Servant, 9.

3. One who has contracted for the output of a sewage purification plant, in consideration of his furnishing the money to construct and operate it, is liable as a joint tortfeasor in case the plant is operated so as to constitute a nuisance to neighboring property, and he actually participates in such operation, and it is immaterial that the public authorities retain control of such manner of operation. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —. (Annotated)

4. One who strings a barbed wire some distance from his boundary line to prevent the use of his property as a driveway is not liable for injury thereby caused to the runaway horse of one who had gone upon the property on business with the then owner, after he had sold and delivered possession of the property to another, although in stringing the wire he violated the provisions of a municipal ordinance, and the act was so negligent that he would have been liable for injuries occurring while he owned the property, to persons entering it by his invitation, express or implied. 32 L.R.A. (N.S.)

Upp v. Darnier, 32: 743, 130 N. W. 409, — Iowa, —.

5. The maintenance by a railroad company of a yard for the storing, blowing out, cleaning, and firing of engines is done in its private, and not its public, capacity, so that it will be liable in damages if it maintains it in such manner as to constitute a nuisance to neighboring property. *Terrell v. Chesapeake & O. R. Co.* 32: 371, 66 S. E. 55, 110 Va. 340. (Annotated) Abatement.

6. An owner of property in a residence section may enjoin the operation of a coal yard and planing mill on adjoining property, which causes noise, vibration, and dust, to the injury of the health of members of his family and the depreciation of the value of his property. *First Avenue Coal & Lumber Co. v. Johnson*, 32: 522, 54 So. 598, — Ala. —. (Annotated)

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 3.

In general, see Trial, 3.

OFFICERS.

Validity of provision for bipartisan board, see Constitutional Law, 8.

Of corporation, see Corporations, 10, 11.

Conversion of property by, as larceny, see Larceny, 2.

Duty of sheriff to pursue property which escapes from custody, see Levy and Seizure.

Mandamus to, see Mandamus.

Liability of municipality for acts of, see Municipal Corporations, 7, 8.

1. Requiring the commissioners who are to select the grand jury to be freeholders of the county is not unconstitutional. *Vought v. State*, 32: 234, 114 N. W. 518, 135 Wis. 6.

2. Requiring an officer to be a resident of the municipality in which he is to be elected for three years to be eligible to the office is not a test within the meaning of a constitutional provision that no other oath, declaration, or test than a prescribed oath shall be required as a qualification for an office. *Kuhn v. MacDonald*, 32: 835, 129 N. W. 1056, — Mich. —. (Annotated)

3. A *de facto* officer who has in good faith performed the duties pertaining to the office may, in the absence of a *de jure* claimant, enforce payment by the public of the compensation to which an incumbent of the office is entitled. *Peterson v. Benson*, 32: 949, 112 Pac. 801, — Utah, —. (Annotated)

4. A statutory provision that the compensation of a public officer shall not be increased to take effect during the time for which he is elected does not apply to deprive of the increased compensation one who, having been elected for a term of two years and until his successor is elected and qualified, holds over after the expiration of the term, at which time the office was

by statute changed from an elective to an appointive one and an increase of salary provided for, since he cannot be said to be holding under his former election. *Peterson v. Benson*, 32: 949, 112 Pac. 801, — Utah, —.

OFFSETS.

See Set-off and Counter-claim.

OLEOMARGARINE.

Criminal liability for supplying, instead of butter, see Criminal Law, 1; Food.

OPINIONS.

As evidence, see Evidence, 16-19.

ORDER.

For goods as subject of forgery, see Forgery.

ORDINANCES.

In general, see Municipal Corporations.

OUSTER.

By cotenant, see Adverse Possession, 2.

PARENT AND CHILD.

Effect of father's abandonment on right to recover for his death, see Death.

Matters as to infants, generally, see Infants.

PARK COMMISSIONERS.

Delegation of power to, see Constitutional Law, 3.

Improvement of streets by, for park purposes, see Public Improvements, 1.

Construction of statute conferring upon commissioners power to levy for street improvements, see Statutes, 8.

PARKS.

Liability of, to special assessment, see Public Improvements, 3.

PAROL CONTRACTS.

See Contracts.

PAROL EVIDENCE.

See Evidence, 14, 15.

PARTIAL INVALIDITY.

Of contract, see Contracts, 8.

PARTIAL PAYMENTS.

Accord and satisfaction by, see Accord and Satisfaction.

As affecting limitation of actions, see Limitation of Actions, 8.

PARTIES.

Action by attorney general, see Attorney General.

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Right of sick person to recover from carrier for delay in transporting medicine where order was given without his knowledge or approval, see Carriers, 31.

Who may maintain action for forcible entry and detainer, see Forcible Entry and Detainer.

Liability of independent contractor to third persons, see Master and Servant, 8-11.

Who may question validity of statute, see Statutes, 1, 2.

Who may enforce tax lien, see Taxes, 4, 5.

1. Neither a state nor its railroad commission can maintain an action for a fine imposed by such a commission for acts or omissions that are not penal violations of a statute creating the commission, or of the rule for a violation of which the penalty was imposed, since the shipper, and not the public, is the party aggrieved. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

2. A resident of a city may, in his own name, maintain mandamus against an incorporated water company to compel it to furnish him water as required by its franchise from the city to construct and operate its works in the city. *State ex rel. McClagherty v. Bluefield Waterworks & Improv. Co.* 32: 229, 68 S. E. 28, 67 W. Va. 285.

PARTNERSHIP.

Action of forcible entry and detainer to put partner out of premises, see Forcible Entry and Detainer, 2.

Sale of good will of, see Good Will.

Jurisdiction of justice of the peace to determine rights of partners, see Justice of the Peace, 1.

1. An ordinary partnership the object of which is the purchase and sale of land and standing timber is not changed into a commercial one by the incidental preparation and sale in the market of trees cut from its lands, especially where such commercial act occurred but once during the several years' existence of the partnership. *Bank of Monroe v. Drew*, 32: 255, 53 So. 129, 126 La. 1028.

2. When a partnership is carrying on business in premises which it holds under a lease, neither partner can, without the consent of the other, take a renewal of the lease in his own name and so exclude the other partner and secure the good will of the business for himself. *Knapp v. Reed*, 32: 869, 130 N. W. 430, — Neb. —.

(Annotated)

3. One member of a partnership created for the buying and selling of land and standing timber which has been dissolved by consent, who, with another member, has been authorized to liquidate the partnership affairs by selling the firm property and applying the proceeds to the payment of its debts, cannot, as a liquidator and

without the consent of his former partners, bind them by giving a note in the firm name in settlement of an old firm debt. *Bank of Monroe v. Drew*, 32: 255, 53 So. 129, 126 La. 1028. (Annotated)

PASS.

See Carriers, 23, 35, 36.

PASSENGER CARRIERS.

See Carriers.

PAYMENT.

Accord and satisfaction by part payment, see Accord and Satisfaction.

By savings bank to wrong person, see Banks, 12, 13.

As affecting limitation of actions, see Limitation of Actions, 8.

Mandamus to Compel, see Mandamus, 1.

PENALTIES.

Imposition of, on carrier for detaining loaded cars, see Carriers, 32, 33.

Imposition of, by administrative commission as denial of right to jury trial, see Jury, 1.

Who may maintain action to recover, see Parties, 1.

PERJURY.

Relevancy of evidence in prosecution for, see Evidence, 28.

Sufficiency of indictment for, see Indictment, etc.

Instruction in prosecution for, see Trial, 14.

Sending out of the state a child charged with delinquency, in order to enable it to avoid the publicity of a trial, is not a contribution to the delinquency, unless made so by statute, so as to render one guilty of subornation of perjury in procuring a witness to swear falsely at the trial of an information charging such offense, that accused was not the one who aided the escape of the child, in the absence of anything to show that the perjured testimony was otherwise material to the issues in the prosecution. *McClelland v. People*, 32: 1069, 113 Pac. 640, — Colo. —.

PERSONAL INJURIES.

Measure of damages for, see Damages, 2-4.

PERSONAL PROPERTY.

Mortgage on, see Chattel Mortgage.

Sale of, see Sale.

PETITION.

Libel by petition to police magistrate, see Libel and Slander, 1.

Of plaintiff, see Pleading, 3, 4.

PHYSICIANS AND SURGEONS.

Privileged communications to, see Evidence, 21.

PLAINTIFFS.

Parties plaintiff, see Parties.

PLAINING MILL.

As nuisance, see Nuisances, 6.

PLATFORM.

Duty to protect passenger riding on, see Carriers, 13, 14, 19.

Negligence of passenger in riding on, see Carriers, 19.

PLEADING.

Variance between pleading and proof, see Appeal and Error, 7; Evidence, 37, 38.

Evidence admissible under, see Evidence 36.

Defamatory matter in, see Libel and Slander, 1.

Relief under pleadings.

Conformity of judgment to pleading, see Judgment, 1.

1. A recovery against a railroad company for injury to a person on its train will not be refused because the complaint was based on the theory that he was a passenger for hire, while the trial court held that he was a gratuitous passenger, and submitted to the jury the question of the liability of the carrier to him as such, if a recovery was proper under the circumstances of the case, even though he was a gratuitous passenger. *John v. Northern P. R. Co.* 32: 85, 111 Pac. 632, 42 Mont. 18.

Amendment.

Appellate court treating pleadings as amended, see Appeal and Error, 4.

2. It is not error to permit an amendment of a complaint for the amount due on a fire insurance policy, which claimed the amount fixed by adjusters, which deducted salvage, so as to make claim for a total loss, as shown by the evidence, where there is nothing to show that the insurers were thereby put to a disadvantage. *Clute v. Clintonville Mut. F. Ins. Co.* 32: 240, 129 N. W. 661, 144 Wis. 638.

Declaration or complaint.

3. Although the application of the maxim *res ipsa loquitur* to the giving way of a milldam does not dispense with the necessity of alleging negligence in order to hold the owner liable for injuries caused thereby, yet it is sufficient to allege negligence generally without specifying in what it exists. *City Water Power Co. v. Fergus Falls*, 32: 59, 128 N. W. 817, — Minn. —.

4. The absence of a categorical averment in an action to recover damages for maintenance of a nuisance, that the nuisance was maintained by defendant, is not fatal if the Code contains forms of pleading in which such averments are not found, and the pleading could be construed as intended to state a cause of action against the persons sued. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

Cross bill.

Jurisdiction of equity upon cross bill, see Equity, 6.

5. A cross bill for divorce is proper in a suit by a man to enjoin his wife from competing in business with him, which is based on the theory that he is entitled to her society and services, and that her competing business is injurious to his own enterprises. *Root v. Root*, 32: 837, 130 N. W. 194, — Mich. —.

Demurrer.

6. A bill to rescind, on the ground of mutual mistake, an arrangement between trustees by which, instead of converting the estate into cash, and giving one of the number, who was a beneficiary under the trust, a share of the money, they undertook to conserve the estate and give him a promissory note to represent his share, which they had no authority to do, is not subject to demurrer because it shows that complainant made no attempt to ascertain his rights, but unjustifiably relied upon representations of his cotrustees, where there is nothing to show that his neglect will or can result in any injury to the trust estate or the other beneficiaries. *Reggio v. Warren*, 32: 340, 93 N. E. 805, 207 Mass. 525.

7. That a complaint is framed on a wrong theory will not render it demurrable if it states all the facts necessary to entitle plaintiff to relief upon some theory. *Appleton v. Citizens' Central Nat. Bank*, 32: 543, 83 N. E. 470, 190 N. Y. 417.

PLEDGE AND COLLATERAL SECURITY.

Pledgee as bona fide purchaser, see Bills and Notes, 3.

1. One who, with knowledge of the facts, purchases a note and mortgage held by a bank as collateral for a note of less amount executed by one of the makers of the mortgage, at a sale by it in accordance with the contract, upon default in payment of its note at maturity, can enforce the collateral note and mortgage securing it only to the extent of the amount due on the obligation for which it stood as collateral. *Peacock v. Phillips*, 32: 42, 93 N. E. 415, 247 Ill. 467. (Annotated)

2. One whose promissory note has been pledged by the payee to a bank as collateral for his indebtedness to it cannot complain, in an action to settle his rights against the bank, that he has been injured by compromises which the bank made in regard to other collateral held as security for the same debt, if all the collateral held by the bank was not sufficient to satisfy its claim in full. *Zollman v. Jackson Trust & Sav. Bank*, 32: 858, 87 N. E. 297, 238 Ill. 290.

POLICE POWER.

See Constitutional Law, 22, 23.

PONDS.

Acquiring right to flow land for mill pond, see Adverse Possession, 1.
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Sufficiency of proof of abandonment of right to flow lands for mill pond, see Evidence, 34.

Injunction against reconstruction of dams, see Injunction, 10.

Abandonment of right to maintain as question for jury, see Trial, 12.

POSSESSION.

Retention of, by donor as affecting gift, see Gift.

PREFERENCES.

Avoidance of release of dower as, see Dower.

PREJUDICIAL ERROR.

See Appeal and Error, 11-23.

PRELIMINARY INJUNCTION.

See Injunction, 10.

PREMIUMS.

For insurance, see Insurance, 6.

PRESCRIPTION.

Title by, see Adverse Possession, 1.

PRESENTMENT.

Of commercial paper, see Bills and Notes, 2.

PRESUMPTIONS.

On appeal, see Appeal and Error 6, 7.
In general, see Evidence, 5-13.

PRINCIPAL AND SURETY.

As to guaranty, see Guaranty.

PRIORITY.

Between mortgages, see Mortgage.

PRIVILEGED COMMUNICATIONS.

Evidence of, see Evidence, 21.

PROCESS.

See Writ and Process.

PROFITS.

Right to accounting for profits in case of infringement of trademark, see Limitation of Actions, 4, 5.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

Guaranty of right to, see Constitutional Law.

PROSPECTIVE LEGISLATION.

In general, see Statutes, 9.

PROXIMATE CAUSE.

1. The negligence of a gas company in using the old riser designed to carry the gas from the pipe attached to the street main to the meter in a house where the use of gas has long been discontinued and the meter removed, and the flow of gas shut off by the meter cock, when running a new connecting pipe without request from, or

notice to, the property owner, to conform to a changed street grade, and leaving the old pipe cut off, dead, and partly exposed, and not the act of the property owner in disconnecting the riser to enable him to pull out the dead pipe, may be found to be the proximate cause of his death by asphyxiation by gas rushing out of the broken connection. *Pulaski Gas Light Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

2. The proximate cause of a nuisance to neighboring property, caused by the manner of operation of a sewerage purification plant, is such manner of operation, and not the construction of the plant and turning the sewerage into it. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

Of loss or injury by carrier or railroad company.

3. The act of the employee of a shipper in overturning an oil stove and setting fire to a warehouse in front of which is situated a carload of merchandise ready for shipment, but which had not yet been delivered to the carrier, which fire communicates to and consumes the car, and not the negligence of the railroad company promptly to move the car when it was loaded, is the proximate cause of the loss of the goods in the car. *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* 32: 323, 134 S. W. 613, — Tenn. —.

4. The negligence of a railroad company in misleading a passenger into entering the wrong train is not the proximate cause of his injury in attempting, without direction or encouragement on the part of the carrier, to alight from the train after it is in motion and he has discovered the mistake. *Chesapeake & O. R. Co. v. Wills*, 32: 280, 68 S. E. 395, 111 Va. 32.

(Annotated)

5. The act of a baggage master on a train in lending his pistol to a passenger, without knowledge of the use which he intends to make of it, is not the proximate cause of injury to another passenger, from a stray bullet from a pistol in the hands of a third person who was induced to fire because of an assault which the borrower attempted to make upon him after he had left the train. *Penny v. Atlantic C. L. R. Co.* 32: 1209, 69 S. E. 238, 153 N. C. 296.

PUBLIC IMPROVEMENTS.

Adoption of former law as to necessity of confirmation of assessments, see Statutes, 8.

1. An attempt by park commissioners with statutory authority to improve streets, conduct parks, and assess the cost of a first improvement on abutting property, to tear up payments, curbs, sidewalks, and gutters which had been constructed at the expense of abutting owners, and which are adequate to ordinary traffic, and replace them by others at the expense of such owners, merely to secure greater uniformity and better adapt the street to the purposes of a pleasure driveway, is unreasonable, and will not be enforced. *South Park* 32 L.R.A. (N.S.)

Comrs. v. Pearce, 32: 1056, 94 N. E. 33, 248 Ill. 578. (Annotated)

2. A municipal corporation which entered into a valid contract for the construction of a sidewalk to be paid for by a special assessment on the lots abutting the improvement, by failing and neglecting to collect the assessment levied on such lots after the construction of the walk, and by entering into an agreement with the lot owners attempting to release them from the lien of the special assessment and causing same to be canceled of record, renders itself liable for the contract price of the improvement, notwithstanding a statute providing that the special assessment, together with any interest and penalty collected thereon, shall in each case be full compensation to the contractor for any work done under his contract. *Ward v. Lincoln*, 32: 163, 128 N. W. 24, 87 Neb. 661. (Annotated)

3. A municipal park is not exempt from assessment for paving an adjoining street, where the statute constitutes as the assessment district the parcels of land situated on the street, and directs the cost of paving to be assessed according to frontage. *Newberry v. Detroit*, 32: 303, 129 N. W. 699, — Mich. —. (Annotated)

PUBLIC LANDS.

Mines on, see Mines.

To entitle one in possession of public land, the patent to which has been awarded to another, to a decree adjudging the latter to hold in trust for him, he must show that he himself is entitled to it, or that, by the law properly administered, the title should have been awarded to him. *Loney v. Scott*, 32: 466, 112 Pac. 172, — Or. —.

PUBLIC POLICY.

As affecting contract, see Contracts, 9.

PUBLIC PROPERTY.

Liability for local improvement assessment, see Public Improvements, 3.

QUALIFICATIONS.

Of officers, see Officers, 1, 2.

Of jurors, see Jury, 2.

QUANTUM MERUIT.

Recovery on, for publication of advertisements in Sunday paper, see Sunday, 2.

QUESTION FOR JURY.

See Trial.

QUITCLAIM.

Quitclaim deed as color of title, see Adverse Possession, 3.

RAILROAD COMMISSION.

Validity of regulation imposing penalty on carrier for detaining loaded cars, see Carriers, 32, 33.

Delegation of power to, see Constitutional Law, 4-6.

Discrimination in regulations by, see Constitutional Law, 7.

Due process in regulations of, see Constitutional Law, 19.

Party plaintiff in action for fine imposed by railroad commissioner, see Parties, 1.

Partial invalidity of railroad commission statute, see Statutes, 5.

Railroad commissioners, being statutory officers whose powers and duties are limited, can exercise only such authority as is legally conferred by express provision of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred, for the purpose of carrying out and accomplishing the purpose for which the offices were established. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

RAILROADS.

Application of rule as to looking for trains at railroad crossings to one crossing street in front of automobile, see Automobiles.

As carriers, see Carriers.

Requiring use of electric headlights of specific character as interference with interstate commerce, see Commerce, 2.

Statute requiring use of certain kind of headlights as denial of equal protection of laws, see Constitutional Law, 9, 10.

Statute requiring use of certain kind of headlights as deprivation of property without due process, see Constitutional Law, 16, 17.

Denial of equal protection of laws by abrogation of fellow servant rule as to railway employees, see Constitutional Law, 14.

Statute creating presumption of negligence in case of injury by, see Constitutional Law, 21.

Grant of right of way on condition that line is completed within certain time, see Covenants and Conditions, 1.

Power of company in purchasing right of way to bind itself by condition, see Corporations, 5.

Right to lateral support for land condemned for right of way, see Eminent Domain, 2.

Retention of jurisdiction in suit to enjoin interference with enjoyment of right of way, see Equity, 5.

Estoppel to enforce condition attached to grant for right of way, see Estoppel, 4.

Judicial notice as to railroad business, see Evidence, 4.

Fire set by independent contractor, see Master and Servant, 5-7.

Injury resulting from steam pit on property, see Negligence, 2-4.

Liability of, for nuisance, see Nuisances, 5.

1. A statute requiring railroad companies to maintain electric headlights on their locomotives applies to natural persons operating railroads. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

2. Requiring railroads to maintain electric headlights on their locomotives which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter, is not unreasonable. *Atlantic Coast Line R. Co. v. State*, 32: 20, 69 S. E. 725, 135 Ga. 545.

Accidents at crossings.
3. Those in charge of a railroad engine standing close to a street crossing should, upon being notified that its presence renders the crossing dangerous or unsafe for travel, move the engine as far from the crossing as is reasonably necessary to permit the free use of it for travel, and as is compatible with safety to the train and persons on or connected with it. *Cox v. Illinois C. R. Co.* 32: 831, 134 S. W. 911, — Ky. —.

Noises; frightening animals.

4. Those in charge of an engine standing close to a public crossing must prevent unusual or unnecessary noises to be made by the engine, which may have a tendency to frighten horses on the highway, when they are not requisite to the safety of persons or property on the train. *Cox v. Illinois C. R. Co.* 32: 831, 134 S. W. 911, — Ky. —. Contributory negligence.

5. A girl within ten days of being fourteen years old, who is strong, capable beyond her years, and fully acquainted with the *locus in quo*, is negligent as matter of law in passing under closed safety gates at a railroad crossing, and attempting to cross the tracks when a clear view cannot be secured of them; and the railroad company is therefore not liable in case she is killed or injured in the attempt by a passing train. *Gress v. Philadelphia & R. R. Co.* 32: 409, 77 Atl. 810, 228 Pa. 482. (Annotated)

6. One who attempts to drive across a railroad track knowing that an engine stands near the crossing making unusual noises from escaping steam, without notifying those in charge of the engine to stop the noise, is guilty of negligence which will prevent holding the railroad company liable for injuries caused by the fright of his horse in so doing. *Cox v. Illinois C. R. Co.* 32: 831, 134 S. W. 911, — Ky. —.

RATIFICATION.

By bank, of act of cashier, see Banks, 3.

REAL PROPERTY.

Deeds of, see Deeds.

Records of title, see Records and Recording Laws.

Specific performance of contract as to, see Specific Performance, 1.

RECEIVERS.

Set-off against note in hands of, see Set-off and Counterclaim, 2.

RECORDS AND RECORDING LAWS.

On appeal, see Appeal and Error, 2.
Of chattel mortgage, see Chattel Mortgage.

1. A deed void on its face is entitled to record, so as to make the record evidence in judicial proceedings for what it may be worth. *Bliss v. Tidrick*, 32: 854, 127 N. W. 852, — S. D. —.

2. Where an authentic act purporting to be a sale with right of redemption is recorded and the time for redemption has passed without any evidence of record showing an exercise of the right of redemption, the title of one who has purchased from the apparent vendee on the faith of the record will be protected from an attack by the apparent vendor on the ground that the act purporting to be an act of sale with a right of redemption was in fact only an act of mortgage securing a specific debt. *Jolivet v. Chavis*, 32: 1046, 52 So. 99, 125 La. 923. (Annotated)

RECOUPMENT.

See Set-Off and Counterclaim, 1.

REFORMATION OF INSTRUMENTS.

In a suit by a grantor to set aside a deed and be reinvested with the title to the land conveyed, on the ground that the same has been altered without his consent, the grantee therein, on his cross-bill answer, charging that the land covered by the alteration represents the land actually purchased and paid for, and of which possession was given, and on which valuable improvements have been made, with the knowledge and consent of the grantor, may have specific execution of the original contract, and the grantor decreed to make a new deed correcting the mistake in the original deed. *Waldron v. Waller*, 32: 284, 64 S. E. 964, 65 W. Va. 605.

RELEASE.

Right to dower after avoidance of release as against creditors, see Dower.

Of collateral, see Pledge and Collateral Security, 2.

RELEVANCY.

Of evidence, see Evidence, 23-29.

REPLEVIN.

Counterclaim for damages in action of, see Set-Off and Counterclaim, 1.

RESCISSION.

Of sale, see Sale, 8.

RESIDENCE.

Of plaintiff in divorce suit, see Divorce and Separation, 1.

As qualification to office, see Officers, 2.

RES IPSA LOQUITUR.

Effect on pleadings of application of maxim, see Pleading, 3.

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RESTORATION.

Of premiums on cancelation of insurance contract, see Insurance, 6.

RESTRAINT OF TRADE.

See Contracts, 9.

RETAINING JURISDICTION.

See Equity, 5, 6.

RETROSPECTIVE LAWS.

Constitutionality of, see Constitutional Law, 2.

As to when laws are retrospective, see Statutes, 9.

REVERSIBLE ERROR.

See Appeal and Error, 11-23.

REVIEW.

Of order or judgment, see Appeal and Error.

RULES.

Of carriers, see Carriers, 19.

Of water company, see Waters, 2, 3.

RUNNING BOARD.

Injury to passenger on running board of street car, see Carriers, 18.

SALARY.

Of public officer, see Officers, 3, 4.

SALE.

Damages for breach of contract of, see Damages, 1.

Of good will, see Good Will.

Specific performance of contract, see Specific Performance, 2.

Power of trustee to sell, see Trusts.

Warranty.

Rights and remedies on breach, see infra, 5-8.

1. A sale of the property itself, and not merely of his interest, is effected by a conditional vendee of personalty who grants, bargains, sells, and conveys all his interest in the property, subject to the lien of the vendor and certain other claims, agreeing to warrant and defend the sale, which will render him liable on his warranty in case his vendee is ousted by paramount title subordinate to that of the conditional vendor. *Bevan v. Muir*, 32: 588, 101 Pac. 485, 53 Wash. 54. (Annotated)

2. That a horse is unmanageable while being shod does not breach a warranty that he is sound. *Andrews v. Peck*, 32: 181, 78 Atl. 445, — Conn. —. (Annotated)

Rights and remedies of parties.

Prejudicial error in permitting recovery on wrong theory, see Appeal and Error, 23.

Effect of mistake in name in recording chattel mortgage as against subsequent bona fide purchasers, see Chattel Mortgage.

Corporation purchasing entire assets of other corporation as bona fide purchaser, see Corporations, 3.

- Damages for failure to complete contract, see Damages, 1.
- Estoppel of purchaser to insist on performance by seller, see Estoppel, 3.
- Evidence in action for breach of contract, see Evidence, 27.
- Counterclaim for damages in action by vendor to recover possession see Set-off and Counterclaim, 1.
- Right of assignee to specific performance of contract after assignor has been notified of rescission, see Specific Performance, 2.
3. One who orders an article similar to one which he had previously purchased cannot repudiate the transaction after the order is filled and refuse to pay a reasonable price for it, because he intended that the price should be the same as the former one, while the price charged is higher, where no mention of the price was made in the negotiations. *S. F. Bowser & Co. v. Marks*, 32: 429, 131 S. W. 334, — Ark. —. (Annotated)
4. If the seller of goods fails to deliver them according to the contract, and thereafter the purchaser urges delivery, and the seller promises to make it but fails to do so, that fact alone does not work such an extension of the contract as will prevent the purchaser from recovering damages on the basis of the original contract. *Hardwood Lumber Co. v. Adam*, 32: 192, 68 S. E. 725, 134 Ga. 821.
5. A purchaser from a conditional vendee of personality, who has warranted title except as to the rights of the conditional vendor whose debt the purchaser assumes and agrees to pay, is not entitled in case he is ousted by a paramount title subordinate to that of the conditional vendor, to a return by his vendor of payments, which he had made to the conditional vendor. *Bevan v. Muir*, 32: 588, 101 Pac. 485, 53 Wash. 54.
6. A notice to one who has warranted title to personality to appear and defend an adverse suit against the vendee for its possession is sufficiently definite as to the court in which the suit is pending, which states that the vendee has been ordered to appear before a specified judge at a specified time to show cause why the adverse claimant should not be let into possession. *Bevan v. Muir*, 32: 588, 101 Pac. 485, 53 Wash. 54.
7. A provision in a contract for sale of an engine, that in case it does not work as warranted the seller may substitute what shall fill the warranty, does not require the purchaser to postpone indefinitely the right to return the machine in case it is not made to work. *J. I. Case Threshing Mach. Co. v. Huber*, 32: 212, 125 N. W. 66, 160 Mich. 92.
8. A provision in a sale of machinery giving the purchaser a right to rescind in case the machine does not work as warranted, if he returns it "to the place where received," does not require him to place it upon the property of the railroad company through which it was delivered to him. *J. 32 L.R.A. (N.S.)*

I. Case Threshing Mach. Co. v. Huber, 32: 212, 125 N. W. 66, 160 Mich. 92.
(Annotated)

SANITY.

Opinion evidence as to, see Evidence, 17.

SAVINGS BANKS.

See Banks, 11-13.

SECRECY.

Of ballot, see Elections, 2, 4.

SEIZURE.

See Levy and Seizure.

SELF-CRIMINATION.

See Criminal Law, 2-4.

SERVICE.

Of process, see Writ and Process.

SET-OFF AND COUNTERCLAIM.

Equities and offsets resulting from assignment, see Assignment.

1. Where the distinction between actions at law and suits in equity is maintained, a counterclaim for damages for breach of contract in the sale and shipment of machinery cannot be set up in an action by the vendor to recover possession, in accordance with the terms of the contract for failure to pay the purchase price, if the amount of the counterclaim does not equal the amount unpaid, so that the right of possession is in the vendor. *Zimmerman, Wells-Brown Co. v. Sunset Lumber Co.* 32: 123, 111 Pac. 690, — Or. —.

2. A depositor may set off his deposit account against his note in the hands of the bank's receiver, although the note had not matured when the insolvency occurred, notwithstanding a statute forbidding preferences by insolvents. *Steelman v. Atchley*, 32: 1060, 135 S. W. 902, — Ark. —.

SEWERAGE.

Evidence as to nuisance caused by, see Evidence, 19, 29.

Joint liability for nuisance created by, see Nuisance, 3.

Proximate cause of nuisance created by, see Proximate Cause, 2.

SHERIFF.

Duty of sheriff to pursue property which escapes from custody, see Levy and Seizure.

SLANDER.

See Libel and Slander.

SLEEPING CAR.

Liability of railroad hauling sleeping cars not provided with separate compartments for colored persons, see Carriers, 1, 2.

SMOKE.

Judicial notice of harmful effects of, see Evidence, 2.

Ordinance as to, see Municipal Corporations, 4, 5.
Fright of horse by, see Negligence, 1.

SMOKESTACK.

Setting of fire by spark from, see Fires.

SPARK ARRESTERS.

Negligence in failing to maintain, on smokestacks, see Fires, 2.

SPECIAL LEGISLATION.

See Statutes, 7.

SPECIFIC PERFORMANCE.

1. Specific performance of a contract to sell a lot in a tract of high-class residence property will not, in the absence of fraud, be refused on the ground of mistake, merely because, unknown to the vendor, the purchaser was a negro, and his ownership of the lot will depreciate the value of the tract as residence property and result in material loss to the vendor. *Cole v. Hunter Tract Improv. Co.* 32: 125, 112 Pac. 368, — Wash. — (Annotated)

2. The assignee of a contract for the purchase of books will not be granted specific performance where they were to be delivered one at a time and paid for as delivered, and his assignor, after neglecting to pay for several volumes, was notified that the contract was rescinded, and took no steps to enforce performance of it for more than two years, until the price of the books had advanced. *Quarton v. American Law Book Co.* 32: 1, 121 N. W. 1009, 143 Iowa, 517.

SPEED.

Of street car in rounding curve, see Carriers, 13.

SPORTS.

On Sunday, see Sunday, 1.

SPRINKLING CART.

Negligence in use of, on highways, see Highways, 4.

STATE.

State as party plaintiff, see Parties, 1.

STATUTE OF FRAUDS.

See Contracts, 3-6.

STATUTES.

Review of, by court, see Courts.
Validity of retrospective laws, see Constitutional Law, 2.

Who may question validity.

1. An insurance company has no right to raise, so as to invoke the aid of a court whose jurisdiction depends upon the presence of a constitutional question in the case, the question of the constitutionality of a provision in a statute depriving it of the defense of suicide in an action on the policy, in favor of a citizen of the state, on the theory that an unconstitutional discrimination is thereby made against persons not citizens. *Ordelleide v. Modern* 32 L.R.A. (N.S.)

Brotherhood of A. 32: 965, 125 S. W. 1105, 226 Mo. 203.

2. A nonresident coming into a state cannot attack the constitutionality, under provisions of either the state or Federal Constitution against the granting of special privileges or immunities, of a statute which requires him to be a resident for a certain time before he can commence an action for divorce in the state courts, because it contains exceptions permitting persons who were married and continued thereafter to reside in the state to bring the action immediately after the cause arose, since the unconstitutionality, if any, being in the exception, he, not being affected by it, cannot question its validity. *Pugh v. Pugh*, 32: 954, 124 N. W. 959, — S. D. — (Annotated)

Ambiguity.

3. A statute providing that "every person who wilfully and wrongly commits any act . . . which grossly disturbs the public peace or health, . . . although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor," is not void for uncertainty in that the legislature failed to enumerate the particular acts constituting the offense, since, where the legislature creates without defining an offense which was a crime under the common law, the common-law definition thereof will be adopted, although there are no common-law crimes in the state. *Stewart v. State*, 32: 505, 109 Pac. 243, — Okla. Crim. Rep. —

Partial invalidity.

4. A statute requiring a residence of a certain time within the state before one can begin a proceeding for divorce in the state courts will be upheld against a nonresident coming into the state, although it contains unconstitutional provisions permitting residents to maintain such suits immediately after the cause arises, since the latter provisions may be eliminated without affecting the other provisions of the statute. *Pugh v. Pugh*, 32: 954, 124 N. W. 959, — S. D. —

5. The provision contained in a railroad commission statute relative to the disposition of the proceeds of fines or penalties imposed for violation of its rules and regulations, and for the suspension and remission thereof, if in conflict with constitutional provisions therefor, may be eliminated without impairing the usefulness of the valid operation of the law. *State v. Atlantic C. L. R. Co.* 32: 639, 47 So. 969, 56 Fla. 617.

Local or special legislation.

6. A general law is one framed in general terms, restricted to no locality, and operating upon all alike. *Mix v. Board of County Comrs.* 32: 534, 112 Pac. 215, 18 Idaho, 695.

7. A special law is one that applies only to a special locality, or to an individual or a number of individuals selected out of a class to which they belong. *Mix v. Board of County Comrs.* 32: 534, 112 Pac. 215, 18 Idaho, 695.

Adopted or re-enacted statutes.

8. A provision in a statute conferring power upon park commissioners to levy assessments for street improvement in the manner in which they are empowered by law to assess and collect special taxes adopts a provision of a former law, that the assessment shall be confirmed by a designated court, although the former law related to matters other than street improvements. *South Park Comrs. v. Pearce*, 32: 1056, 94 N. E. 33, 248 Ill. 578.

Prospective or retrospective legislation.

Constitutionality of retrospective laws, see Constitutional Law, 2.

9. No recovery can be had for the suffering of one whose death was caused by another's negligence, where such damages were not allowed by the statute in force when the injury was caused and the death occurred, although a change in the statute before action brought provides for them. *Ingersoll v. Detroit & M. R. Co.* 32: 362, 128 N. W. 227, 163 Mich. 268.

STEAM ROLLER.

Fright of horse by, see Highways, 2.

STREET RAILWAYS.

As carriers, see Carriers.

Presumption of negligence from breaking of trolley wire, see Evidence, 10.

Evidence in action for injuries resulting from condition of tracks, see Evidence, 23, 24.

Question for jury as to whether track had been properly inspected, see Trial, 8.

One driving opposite a trolley street car track with a vehicle so loaded that he cannot see behind or on either side of his load is negligent in turning across the track without taking measures to learn whether or not a car is approaching which is likely to hit his outfit before he can get across. *Hackney v. West Jersey & S. R. Co.* (N. J. Err. & App.) 32: 266, 78 Atl. 747, 78 N. J. L. 454. (Annotated)

STRIKES.

Injunction against bearing of placard through streets announcing strike which has already ended, see Injunction, 7.

SUBORNATION OF PERJURY.

See Perjury.

SUCCESSION TAX.

See Taxes, 6.

SUNDAY.

Equal protection and privileges as to, see Constitutional Law, 13.

Judicial notice that advertisements were published on Sunday, see Evidence, 3.

Refusal of liquor license to one violating Sunday law, see Intoxicating Liquors, 4.

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1. Baseball playing is not within a statute imposing a fine upon the proprietor of any place of public amusement who shall permit it to be opened for public amusements on Sunday, where the statute defines the terms "place of public amusement" to mean circuses, theaters, variety shows, and such other amusements as are exhibited, and for which an admission fee is charged. *Ex parte Roquemore*, 32: 1186, 131 S. W. 1101, — Tex. Crim. Rep. —.

(Annotated)

2. No recovery can be had on *quantum meruit* for the publication of advertisements in a Sunday paper, where the statute prohibits labor, business, or work on that day except only works of necessity or charity. *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.* 32: 436, 128 N. W. 861, 144 Wis. 224.

SUPPORT.

Of infants, generally, see Infants.

Condition for, in will, see Wills.

TAXES.

Delegation of power to tax, see Constitutional Law, 3.

Tax on judgments entered in courts of record, see Constitutional Law, 11.

Assessments for public improvements, see Public Improvements.

1. The collection of a tax can be effected only in the manner prescribed by the legislature. *Preston v. Sturgis Milling Co.* 32: 1020, 183 Fed. 1, — C. C. A. —.

2. In assessing any tract of lot of real property, the value of all structures and improvements thereon must be determined separately; but for the purpose of taxation the structures and improvements are considered a part of the realty, and are assessed as such. *La Paul v. Heywood*, 32: 368, 129 N. W. 763, — Minn. —.

Who must pay.

Assumpsit against tenant by landlord to recover taxes paid by latter, see Assumpsit.

Duty of tenant in common in possession to pay, see Cotenancy.

3. Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. *La Paul v. Heywood*, 32: 368, 129 N. W. 763, — Minn. —. (Annotated)

4. A court of equity will not enforce payment of a tax duly levied on real estate in favor of a judgment creditor of the taxing district, in the absence of statutory authority, where the statute makes provision for the collection of the tax by certain designated officers, although it makes the tax a lien on the property, and the officers designated by the statute to make the collection have refused or been unable, by reason of the opposition of the taxpayers, to do so. *Preston v. Sturgis Milling Co.* 32: 1020, 183 Fed. 1, — C. C. A. —. (Annotated)

5. A provision in a statute authorizing the issuance of bonds in aid of railroad construction, that taxes levied under the act shall be a lien on the real estate of the person taxed, does not indicate an intention that the lien shall be enforced by a court of equity at the suit of a bondholder who has recovered judgment against the taxing district, and been unable to collect it, where the statute provides for the collection of the tax through certain designated officers. *Preston v. Sturgis Milling Co.* 32: 1020, 183 Fed. 1, — C. C. A. —
Succession tax.

6. Money lost to the estate through misappropriation by the executor must be included in computing the inheritance tax on residuary legatees, where they are claiming under the will and some property is left to go into their possession. *Re Hite*, 32: 1167, 113 Pac. 1072, — Cal. —
 (Annotated)

TELEGRAPHS.

Imposition by municipality of burden on telegraph company as interference with interstate commerce, see Commerce, 1.

Injunction to compel removal of municipal wires from telegraph poles, see Injunction, 2.

Regulation of rights of telegraph company in streets, see Municipal Corporations, 3.

A telegraph company is liable for failure to deliver a message which it receives for transmission after regular office hours, unless the sender is notified that it cannot be promptly delivered, although when accepting it the operator agrees to send it "if there is nothing the matter at the other end of the line," and the receiving office is found to have no means for prompt delivery. *Carwell v. Western U. Tele. Co.* 32: 611, 69 S. E. 782, 154 N. C. 112.

TELEPHONES.

Contract giving exclusive right to furnish connection with hotel, see Contracts, 8, 9.

Injunction against placing of rival exchange in hotel, see Injunction, 3.

TENANCY IN COMMON.

See Cotenancy.

TENDER.

Of goods for shipment, see Carriers, 29, 30.

TIMBER.

Partnership for purchase and sale of, see Partnership, 1.

TIME.

To present note for payment, see Bills and Notes, 2.

Of delivery by carrier, see Carriers, 31.
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For action to recover stock sold for delinquent assessment, see Corporations, 12.

For objection to question, see Trial, 3.

TORTS.

Injunction against tortious acts, see Injunction, 4-7.

Matters as to negligence, generally, see Negligence.

TOWNS.

Municipal corporations, generally, see Municipal Corporations.

TRADE.

Validity of agreement in restraint of, see Contracts, 9.

TRADEMARK.

Effect of laches on right in case of infringement, see Limitation of Actions, 3-5.

1. The ordinary Italian word "Tipo," signifying type or kind, cannot be adopted as a trademark in connection with other words merely designating the type or kind. *Italian Swiss Colony v. Italian Vineyard Co.* 32: 439, 110 Pac. 913, 158 Cal. 252.

2. One cannot acquire for one member of a class of goods a trademark which another has applied to another member of the class, as baking powder and baking soda, and an attempt to make such application will constitute an infringement of the prior right. *Layton Pure Food Co. v. Church & Dwight Co.* 32: 274, 182 Fed. 35, 104 C. C. A. 475.

TRADE NAMES.

Injunction against infringement, see Injunction, 9.

TRANSFER.

Of corporate assets, see Corporation, 2-4.

On street cars, see Carriers, 27.

TRANSFER COMPANY.

Grant by carrier of exclusive privilege to, see Carriers, 34.

TRANSFER TAX.

See Taxes, 6.

TREES.

Negligence in permitting obstruction of light on highway by, see Highways, 5.

TRESPASS.

Burden of establishing defense, see Evidence, 5.

The maintenance of the portion of the foundation wall of the building, which had without right been projected over the boundary line into the soil of the adjoining owner, is a continuing trespass or nuisance and for the injury inflicted by it up-

on him, one succeeding to the title of the adjoining property may maintain an action against the wrongdoer. *Milton v. Puffer*, 32: 1010, 93 N. E. 634, 207 Mass. 416.

(Annotated)

TRESPASSER.

Negligence as to, see Negligence, 4, 5.

TRIAL.

Right to trial by jury, see Jury.

1. The court does not unlawfully communicate with the jury in the absence of accused and counsel where, upon the jury's returning into court with their verdict, after accused has left the court room on bail and cannot be found, the court requests the jury to be patient until the accused arrives. *State v. Gorman*, 32: 306, 129 N. W. 589, — Minn. —.

Reception of evidence.

Presumption on appeal to save error in refusing to admit, see Appeal and Error, 6.

2. The testimony for giving which one is charged with perjury cannot, although read to the jury, be considered at his request, upon his failure to take the stand, as his testimony in the pending proceeding. *Gray v. State*, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. —.

Objections and exceptions.

3. If the answer to a question is made so soon after the question is propounded that there is no fair opportunity to state an objection before it is given, the court should entertain an objection afterwards, if it is promptly made. *Adler v. Pruitt*, 32: 889, 53 So. 315, — Ala. —.

Sufficiency of evidence to go to jury.

4. An issue as to whether or not a will was secured by the exercise of undue influence will not be submitted to the jury in the absence of evidence to support it. *Auld v. Cathro*, 32: 71, 128 N. W. 1025, 20 N. D. 461.

Questions of law and fact.

Prejudicial error in refusing to submit special question to jury, see Appeal and Error, 20.

5. The court cannot take from the jury the consideration of the excessive character of the publication, or malice in the circulation about the community, and publication in the public press of a petition designed for presentation to a police magistrate, containing charges of misconduct of a libelous character against the occupants of a dwelling and asking that they be required to remove therefrom. *Flynn v. Boglarsky*, 32: 740, 129 N. W. 674, — Mich. —.

6. Whether or not the cross-marking by plaintiff after execution of a written contract of guaranty, of a clause therein limiting the defendants' liability, was done without the consent of the defendants and with the intention of canceling or erasing it, is for the jury in an action to enforce such guaranty, where the evidence tends to show that such provision was added to the

contract at the request of the guarantor and that it was a part thereof when delivered, and it appears that when the contract was introduced in evidence by the one guaranteed, in whose possession it had been, it bore such unexplained markings. *O. N. Bull Remedy Co. v. Clark*, 32: 519, 124 N. W. 20, 109 Minn. 396.

7. The questions of the negligence of a street car company and a passenger attempting to enter the car, who is injured by insufficiency of the plank placed to facilitate entrance to the car, is ordinarily for the jury. *Messenger v. Valley City Street & I. R. Co.* 32: 881, 128 N. W. 1023, — N. D. —.

8. Whether or not a street car switching device in which a wagon wheel caught, to the injury of the driver, had been properly inspected, is for the jury where the evidence tends to show that the tire of the wheel, which was about $\frac{1}{4}$ of an inch thick, caught under the "mate," which when in proper order could not raise more than $\frac{1}{2}$ inch, that the pavement next the rail was in bad order, and that the switch had been out of order for some days prior to the accident, notwithstanding evidence on the part of the defendant that inspections were regularly made and that the switch was found in good condition at the time of such inspections. *Alcott v. Public Service Corp.* (N. J. Err. & App.) 32: 1084, 74 Atl. 490, 78 N. J. L. 484.

9. The jury must determine whether or not a property owner is negligent in disconnecting the riser leading from the pipe conveying gas from a street main to a house in which the use of gas has long been discontinued, where he is attempting to remove from the premises the old service pipe, which has been cut and partly exposed because of a change in street grade, and is apparently dead, and is asphyxiated by gas because, unknown to him, the riser had been connected with a new service pipe laid deeper in the ground. *Pulaaki Gas Light Co. v. McClintock*, 32: 825, 134 S. W. 1189, — Ark. —.

10. The question of the negligence of a gas company in failing to find a leak in a gas pipe when it delegates inspectors to discover it, upon complaint of its existence, is for the jury, where the inspectors merely visit the place and detect no odor of gas, but, after an injury has been caused by it, an examination beneath the surface of the ground discloses the leak. *Consolidated Gas Co. v. Connor*, 32: 809, 78 Atl. 725, — Md. —.

11. Mere introduction of evidence of due care on the part of one who is furnishing electricity to light a building will not displace the doctrine of *res ipsa loquitur* in case a consumer is injured by attempting to turn on a light in the usual manner, when the fixtures are in good condition and no injury would have happened in the absence of negligence on the part of the one supplying the electricity; but the determination of the question is upon all the evidence for the jury. *Turner v. Southern*

Power Co. 32: 848, 69 S. E. 767, 154 N. C. 131. (Annotated)

12. Whether or not there has been a nonuser of a privilege to flow land for a mill pond acquired by condemnation proceedings for such time as to amount to an abandonment of the right is one of fact to be decided on the evidence in the case, in a contest between the mill owner and the upper riparian owners over the right to reconstruct a dam which has been washed away. Gross v. Jones, 32: 47, 122 N. W. 681, 85 Neb. 77.

Instructions.

Necessity of bringing instructions into record on appeal by bill of exceptions, see Appeal and Error, 2.

Effect of exception to part of charge to bring up entire charge, see Appeal and Error, 3.

Prejudicial error in instructions, see Appeal and Error, 12, 14-16.

Verdict disregarding erroneous instruction as ground for reversal, see Appeal and Error, 21.

13. It is not error to refuse a requested instruction which has been covered by a general charge. O. N. Bull Remedy Co. v. Clark, 32: 519, 124 N. W. 20, 109 Minn. 396.

14. The court need not, in the absence of a request, instruct the jury that evidence of conviction of one in whose favor a person on trial for perjury testified cannot be considered as proof of the falsity of the testimony. Gray v. State, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. —.

15. The court is not, in charging on the legal right of one to make a will, bound to give the law as to an unnatural disposition being evidence of undue influence, if there is no evidence of undue influence in the case. Auld v. Cathro, 32: 71, 128 N. W. 1025, 20 N. D. 461.

16. An instruction must be considered as a whole; and when so considered if it properly and intelligibly states the law, mere verbal inaccuracies will not vitiate it. Gray v. State, 32: 142, 111 Pac. 825, — Okla. Crim. Rep. —.

17. An instruction that, to render effective a clause in an insurance policy terminating it if the building or any part thereof falls except as a result of fire, such portion must fall as will destroy "its distinctive character as a building," is too vague to be a safe guide for the jury. Davis v. Connecticut F. Ins. Co. 32: 604, 112 Pac. 549, 158 Cal. 766.

TROVER.

A carrier is guilty of conversion which refuses to deliver goods to the consignee, who tenders the freight due according to the weight of the property transported, which is the correct manner of ascertaining it, although a larger amount is called for by the waybill, and it holds the property to secure correction by a connecting carrier. Brown v. Philadelphia, B. & W. R. Co. 32: 189, — App. D. C. —.

(Annotated)

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TRUSTS.

Restitution of cash received as condition of relief to beneficiary of trust from contract, see Equity.

Mistake as ground for relief in equity from invalid agreement between trustees, see Equity, 3.

Demurrer to bill to rescind contract between trustees and beneficiary, see Pleading, 6.

1. A power of sale is implied from a provision of a will vesting real estate in trustees with power to "invest and manage the same," unless a contrary intent can be found in the will taken as a whole. Robinson v. Robinson, 32: 675, 72 Atl. 883, 105 Me. 68. (Annotated)

2. Unproductive real estate conveyed to trustees by a residuary clause of a will may be sold by them where express power is given for the sale of productive real estate, the proceeds of which shall go into the residue, and no provision is made for the care of such unproductive estate, while the trustees are directed, upon death of one of the *cestuis que trustent*, to pay a portion of the principal of the residuary estate to his descendants. Robinson v. Robinson, 32: 675, 72 Atl. 883, 105 Me. 68.

TRUTH.

As defense to libel, see Libel and Slander, 3.

ULTRA VIRES.

Ultra vires, acts by corporation, see Corporations, 6-9.

UNDUE INFLUENCE.

As question for jury, see Trial, 4.

UNFAIR COMPETITION.

Injunction against, see Injunction, 9.

VALIDITY.

Of contract, see Contracts, 8, 9.

VALUE.

Opinion evidence as to, see Evidence, 18.

VARIANCE.

Between pleading and proof, see Evidence, 37, 38.

VAULT.

Under highway, see Evidence, 11a; Highways, 1; Municipal Corporations, 3a.

VENDOR AND PURCHASER.

Alteration of deed, see Alteration of Instruments, 3.

Cancellation of deed, see Cancellation of Instruments.

Corporation purchasing entire assets of other corporation as bona fide purchaser, see Corporations, 3.

Breach of covenant in deed, see Covenants and Conditions, 2.

Deeds, see Deeds.

Estoppel by deed, see Estoppel, 1, 2.
 Parol evidence to show that deed was intended as a mortgage, see Evidence, 14.

Specific performance of contract, see Specific Performance, 1.

VERDICT.

Right of accused to be present: when verdict is received, see Criminal Law, 5.

VIBRATIONS.

As nuisance, see Nuisances, 6.

VILLAGE.

As to municipalities, generally, see Municipal Corporations.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Of rights by accused, see Criminal Law, 5.

Of notice of injuries by defective street, see Highways, 10.

WARRANTY.

Covenant of, see Covenants and Conditions, 2.

On sale of personality, see Sale, 1, 2, 5-8.

WATERS.

Effect of long-continued possession to give right to overflow land, see Adverse Possession, 1.

Loss of right to flow lands by abandonment or nonuser, see Eminent Domain, 3.

Sufficiency of proof of abandonment of right to flow lands for mill pond, see Evidence, 34.

Injunction against reconstruction of dams, see Injunction, 10.

Abandonment of right as question for jury, see Trial, 12.

Adverse use; prescription.

1. A right to flow land by a milldam may be secured by interrupted continuous adverse possession and user. *Gross v. Jones*, 32: 47, 122 N. W. 681, 85 Neb. 77.
 Public water supply.

Definiteness of contract between water company and municipality, see Contracts, 2.

Right of private person to maintain mandamus to compel furnishing of water, see Parties, 2.

2. A rule of a water corporation requiring a consumer of water to repair service pipes leading from its main pipe in a street to the property of the consumer, assented to by him, and made a part of the contract between him and the corporation, is valid, the franchise giving power to make such rule. *State ex rel. McLaugherty v. Bluefield Waterworks & Improv. Co.* 32: 229, 68 S. E. 28, 67 W. Va. 285. (Annotated)

3. A water company may require one desiring to take water from its mains to 32 L.R.A. (N.S.)

run an elevator, to install a tank from which the water may be supplied to the machinery, rather than to take it directly from the mains, where the latter method would menace the safety, stability, and usefulness of the water system, and injuriously affect the service to other consumers in the vicinity. *Kimball v. Northeast Harbor Water Co.* 32: 805, 78 Atl. 865, — Me. —.

4. A corporation chartered for the purpose of supplying water for domestic purposes may be compelled to furnish a supply for the running of an elevator in an hotel. *Kimball v. Northeast Harbor Water Co.* 32: 805, 78 Atl. 865, — Me. —.

(Annotated)

WATER SUPPLY.

See Waters, 2-4.

WATERWORKS.

See Waters, 2-4.

WILLS.

Review of discretion as to competency of witness to testify as to mental capacity of testator, see Appeal and Error, 9.

Tax on gift by, see Taxes, 6.

Sufficiency of evidence to take question of undue influence to jury, see Trial, 4.

Instruction as to undue influence, see Trial, 15.

Creation of trust by, see Trusts.

1. The insanity of the child, and its removal to an asylum, will not defeat a bequest of the income of an estate to an institution for the support of the child, with remainder of the property to it after the child's death, if the support is furnished up to the time of the insanity, and from the whole will it is apparent that the support was not intended to be a condition precedent to the vesting of the property in the legatee, although the will states that the bequest is on condition precedent of support. *Winn v. Tabernacle Infirmary*, 32: 512, 69 S. E. 557, 135 Ga. 380.

2. A bequest of income of property to an institution for the support of a child, with remainder to it after the child's death, will be construed to be a condition subsequent, or merely to place a charge on income, according to the intention of testator as gathered from the whole will, although it is stated in the will to be a condition precedent. *Winn v. Tabernacle Infirmary*, 32: 512, 69 S. E. 557, 135 Ga. 380.

WITNESSES.

Discretion as to competency of expert witness, see Appeal and Error, 9.

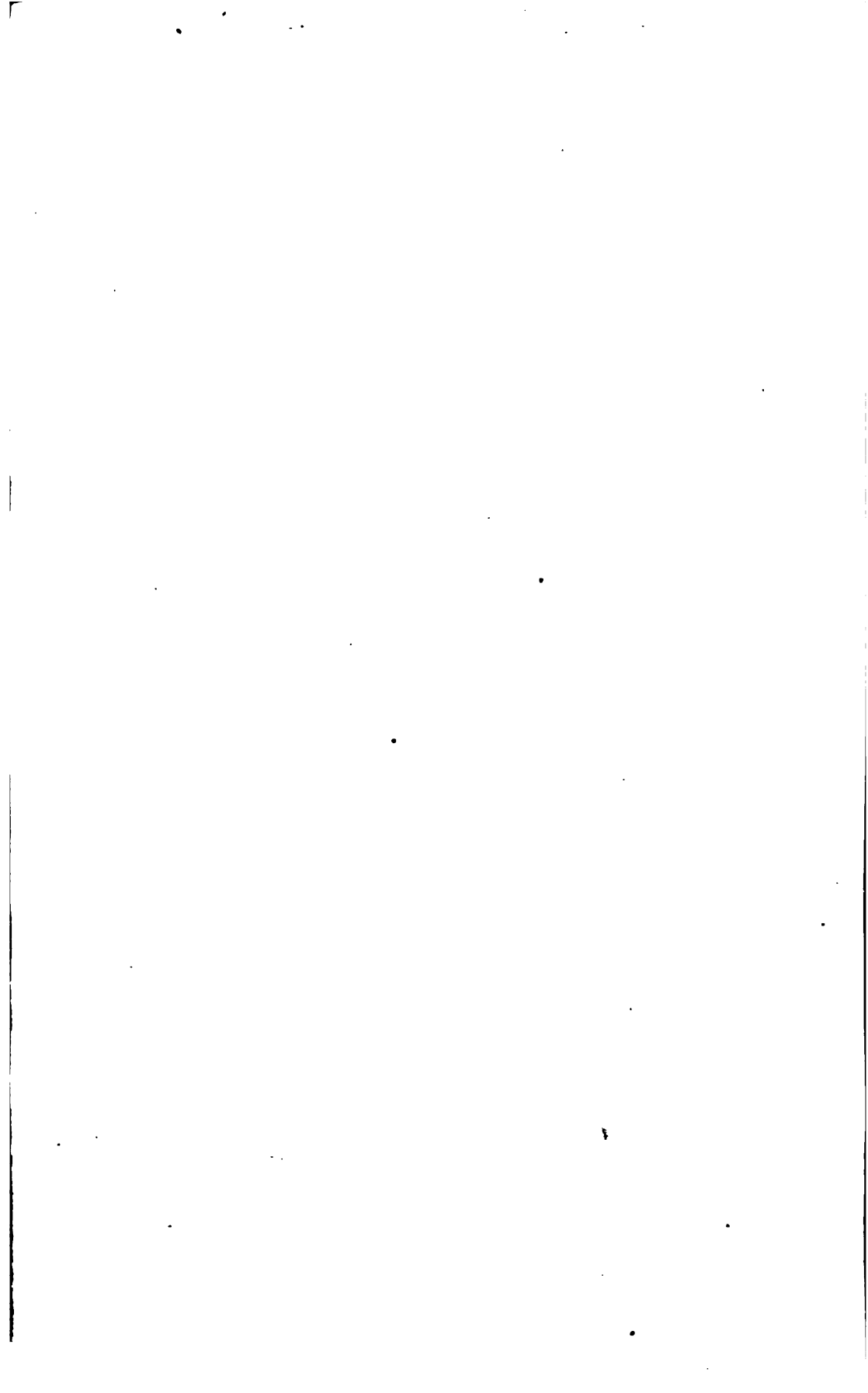
Reversible error in remarks of judge in overruling objection that questions are leading, see Appeal and Error, 18.

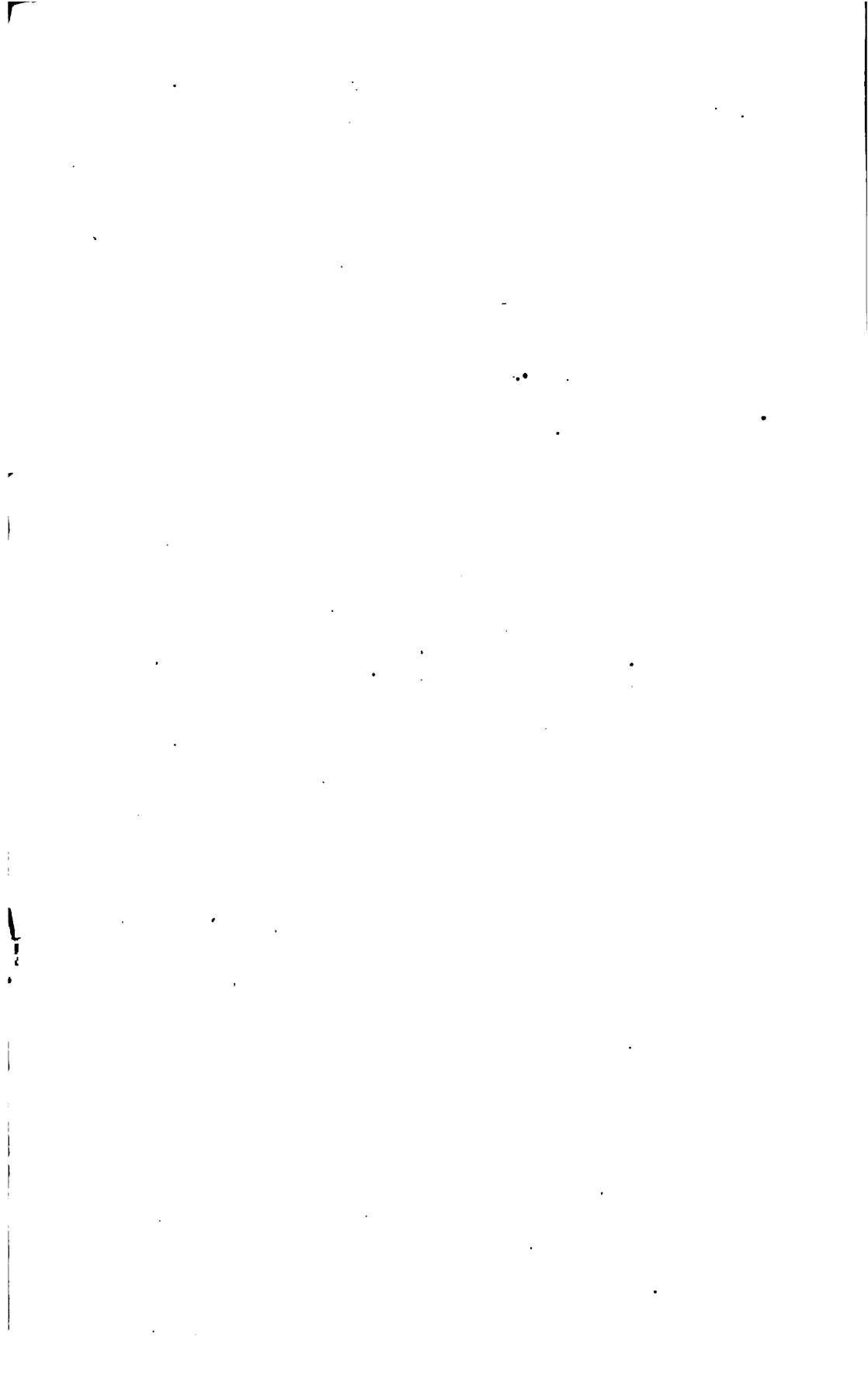
Reversible error in remarks of trial judge as to witness, see Appeal and Error, 18.

In a prosecution for perjury alleged to have been committed in the trial of a certain criminal case, it is not error for the state to ask the defendant's witness if he, too, is not under indictment for perjury committed in the trial of that same criminal case. *Gray v. State*, 32: 142, 111 Pac. 325,— Okla. Crim. Rep. —, 32 L.R.A. (N.S.)

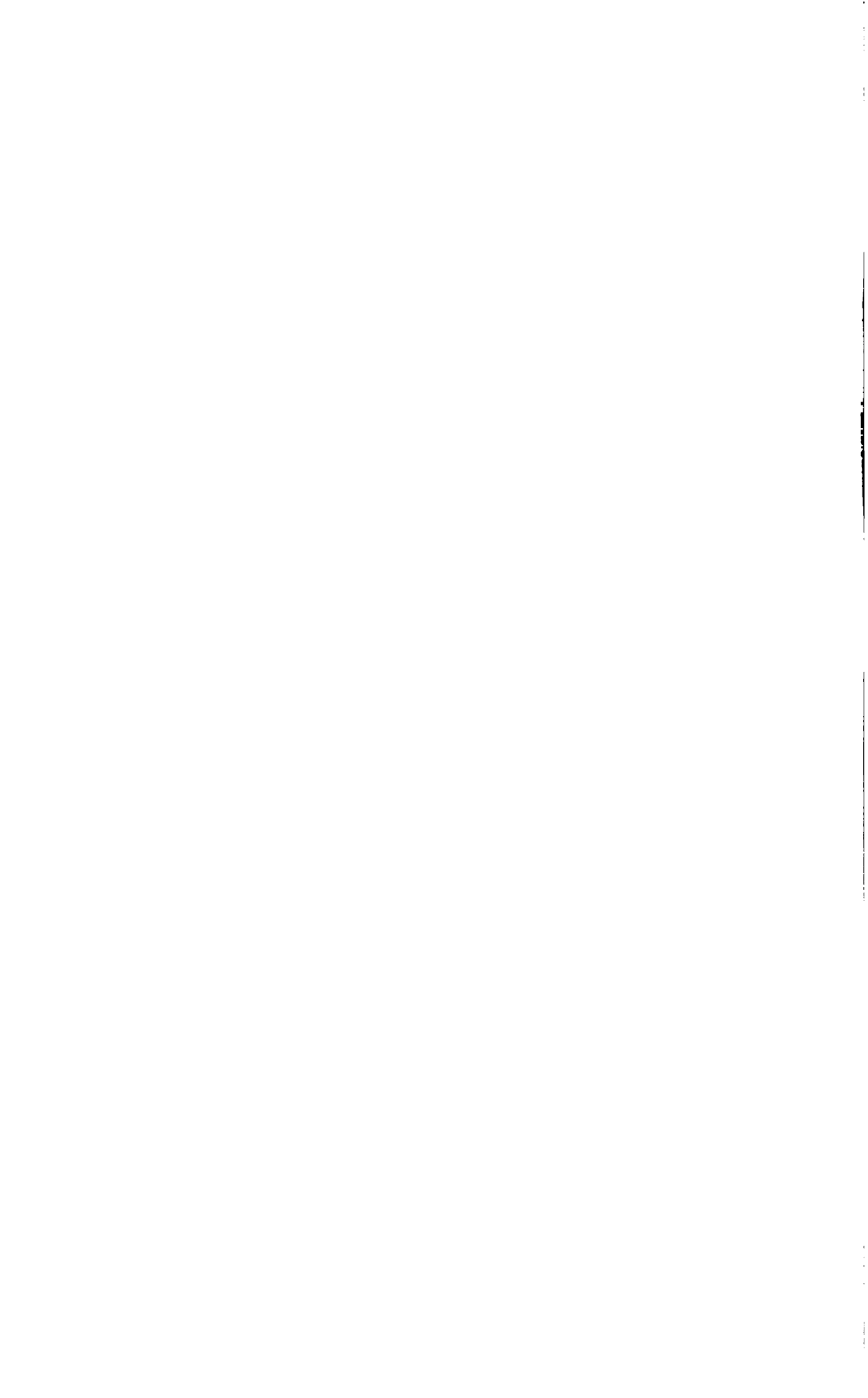
WRIT AND PROCESS.

Jurisdiction to restrain the members of an unincorporated association of workmen from the prosecution of a boycott may be secured by service of process upon its executive officers, where they fairly represent its membership. *American Federation of Labor v. Buck's Stove & Range Co.* 32: 748, 33 App. D. C. 83.



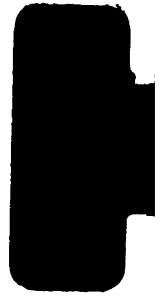








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